THE "ORIGINAL" THIRTEENTH AMENDMENT: THE MISUNDERSTOOD TITLES OF NOBILITY AMENDMENT

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This Article provides one of the first truly comprehensive accounts of the "Titles of Nobility Amendment." The Titles of Nobility Amendment is one of only a handful of proposed amendments to the Constitution that were passed by Congress, but then not ratified by a sufficient number of states. The Amendment would have revoked the citizenship of any individual who accepted a "title of nobility or honor" or who accepted any "present, pension, office, or emolument" from any foreign state without congressional permission.

Despite its failure during the ratification process, the Amendment was printed in the 1815 version of the Statutes at Large as the Thirteenth Amendment, and the Amendment was widely believed to be part of the Constitution well into the late nineteenth century. In recent years, right-wing radicals have seized upon the Amendment, claiming that it was ratified and suppressed in a wide-ranging conspiracy and that it would bar lawyers from citizenship due to their use of the term "esquire." Although a handful of recent articles have addressed these patently false claims, these articles have also misunderstood the Amendment, dismissing it as the product of xenophobia and petty politics.

This Article sets out to address these misconceptions by closely studying the Amendment's historical context. In reality, the Amendment is an interesting hybrid of the rising fears during the decade preceding the War of 1812 that the United States would be recaptured and marginalized by European powers and of the long tradition of opposition to hereditary privilege in the United States. During the first decade of the nineteenth century, the United States was increasingly buffeted and threatened by the major European powers, particularly by Britain and France. Under great foreign pressure, individuals on both sides of the political spectrum became increasingly suspicious of each other's loyalties and both parties

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regularly accused the other of secret collusion and cooperation with foreign states. A response to this perceived foreign threat, the Amendment was intended to prevent the recruitment of American officials and citizens by foreign states with titles, such as the Legion of Honor, or other attractive presents and offices. Today these fears seem far-fetched, but at the time there was a very real worry that the American experiment would be rotted from the inside-out through secret conspiracy and subversion by European powers itching to reestablish their dominance in the Americas. Although long misunderstood, the Amendment is an interesting piece of history and is one of the most intriguing near-Amendments to our Constitution.

I. INTRODUCTION

On December 31, 1817, Representative Weldon Nathaniel Edwards, a Democrat-Republican from North Carolina, introduced a motion in Congress requesting that President Monroe investigate the Thirteenth Amendment to the Constitution.[1] The version of the Constitution that Edwards—along with every other member of Congress—was provided contained a Thirteenth Amendment reading:

1. 31 ANNALS OF CONG. 530–31 (1817).

> If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honor, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.[2]

Obviously, this Thirteenth Amendment is nothing like the Thirteenth Amendment that has been part of our Constitution since 1865.[3] However, unlike a modern individual, who would be utterly shocked to find this strange Thirteenth Amendment printed in his or her Constitution, Edwards was not surprised at all—quite the contrary actually. The official Statutes at Large, many official state codes, and a growing number of school textbooks recorded this Amendment, modernly called the Titles of Nobility Amendment (ToNA),[4] as the

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2. 2 Stat. 613 (1810); *see also* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION, 1786–1870, at 452–53 (Washington, Dept. of State 1894) (reprinting the version of the Titles of Nobility Amendment that was transmitted to the states and certified by both houses of Congress); 1 LAWS OF THE UNITED STATES OF AMERICA, 1789–1815, at 74 (photo. reprint 1989) (1815).

3. *Compare supra* note 2 and accompanying text, *with* U.S. CONST. amend. XIII.

4. The scholarship on the ToNA has been rather limited. The most serious and sustained account of the Amendment is an article by Jol A. Silversmith in the Southern California Interdisciplinary Law Journal. Although this Article often argues that some of the claims made by Silversmith are incorrect, the importance of his work in dispelling the claims made by right-wing extremists about the ToNA cannot be understated. *See* Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense and Titles of Nobility*, 8 S. CAL. INTERDISC. L.J. 577, 579 (1999). However, a number of other sources have also addressed or mentioned the ToNA, at varying length. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION 457 (2005) (mentioning briefly the ToNA); HERMAN AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES 186–89 (Burt Franklin 1970) (1896); RICHARD B. BERNSTEIN WITH JEROME AGEL, AMENDING AMERICA 177–78 (1993); CONSTITUTIONAL AMENDMENTS 594 (Kris E. Palmer ed., 2000); ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 29 n.56 (2d prtg. 1979); DAVID KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 117 (1996); THOMAS JAMES NORTON, THE CONSTITUTION OF THE UNITED STATES 90 (1922); 2 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 331–33 (1901) (offering a brief mention of the proposal); Curt E. Conklin, *The Case of the Phantom Thirteenth Amendment: A Historical and Bibliographic Nightmare*, 88 LAW LIBR. J. 121, 121–27 (1996); W.H. Earle, *The Phantom Amendment & the Duchess of Baltimore*, AM. HIST. ILLUSTRATED, Nov. 1987, at 32, 32–33; Ewen Cameron Mac Veagh, *The Other Rejected Amendments*, 222 N. AM. REV. 274, 278–81 (1925).

Thirteenth Amendment to the Constitution.[5] Edwards, however, questioned whether the ToNA had actually been ratified by enough states to be the Thirteenth Amendment.[6] In response to his motion, which was approved unanimously by the House of Representatives, a Presidential inquiry revealed that the ToNA was *not* the Thirteenth Amendment. As Edwards suspected, it had not been ratified by a sufficient number of states during the previous decade.[7] Even though this inquiry answered Edward's question, confusion over the status of this Amendment continued for several decades. The ToNA was included as the Thirteenth Amendment in the 1815 version of the Statutes at Large;[8] as a result, it was mistakenly reprinted by most states and territories as the Thirteenth Amendment in their official laws, and the ToNA was widely believed to be the Thirteenth Amendment for some time.[9]

This interesting Amendment was proposed in Congress by Senator Philip Reed, a Democrat-Republican from Maryland, in 1810.[10] Several months later, the ToNA very easily passed both the Senate and the House of Representatives. Indeed, the Amendment faced almost no organized resistance.[11] The proposed Amendment would revoke the citizenship of any individual who accepted a "title of nobility or honor" or who accepted any "present, pension, office or emolument . . . from any emperor, King, Prince or foreign Power."[12]

The Amendment was similar to the existing Nobility Clauses in the Constitution—which limit the acceptance of titles of nobility and also prevent the state and federal governments from issuing such titles—[13] but this proposal went much further. Specifically, first, the ToNA prevented *all* citizens from accepting titles of nobility and presents or offices without Congressional consent.[14] Second, the Amendment prevented Congress from ever consenting to a citizen's acceptance of a title of nobility, because that acceptance would result in complete

5. *See infra* Part IV.A.

6. *See infra* Part IV.A.

7. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A LETTER FROM THE GOV. OF SOUTH CAROLINA 129(Wash., E. Dc Krafft 1818).

8. 1 LAWS OF THE UNITED STATES OF AMERICA, *supra* note 2, at ix, 74.

9. *See infra* Part IV.A.

10. 20 ANNALS OF CONG. 530 (1810).

11. *See* 21 ANNALS OF CONG. 2050–51 (1810); 20 ANNALS OF CONG. 672 (1810).

12. 21 ANNALS OF CONG. 2050 (1810).

13. U.S. CONST. art. I, § 9, cl. 8, § 10, cl. 1.

14. The existing Nobility Clauses only prevented office holders from accepting any "present, Emolument, Office or Title" from a foreign state without Congressional consent. *Id.*

revocation of citizenship.

Upon Congressional approval, the ToNA was submitted to the states—thirteen of which were needed to approve the Amendment in 1810 for it to become part of the Constitution. The ToNA was quickly ratified by ten states, but by 1812 the pace of ratifications had slowed. Although the Amendment stood two states short of becoming part of the Constitution on two separate occasions during 1812,[15] it would not be ratified by any other states and it was, practically speaking, rejected by the end of 1814.[16] Most likely, the end of the War of 1812 and the fall of Napoleon lessened the perceived need for the ToNA, thereby reducing support in the states that had yet to vote upon it.

Even though the ToNA was clearly not approved by a sufficient number of states, right-wing conspiracy theorists have seized upon it in recent years, claiming that it was ratified by enough states and then later suppressed by a wide-ranging conspiracy of lawyers and bankers. These individuals also claim that the Amendment was intended to bar lawyers from citizenship due to their use of the honorary title "esquire."[17] Although patently spurious on both accounts, these claims have spawned a not insignificant following on the internet over the past fifteen years and have been recently seized upon by some members of the Tea Party. A handful of recent articles thoroughly and accurately rejected the claims of the right-wing theorists; however, these recent articles also fundamentally misunderstand the Amendment.[18] One notable piece described the ToNA as xenophobic and as a product of partisan politics.[19] Similarly, other pieces compared it to petty measures designed to snub Europe, such as a Kentucky law that barred citation to English case law.[20]

However, the ToNA is a far more complex than these explanations. Previous works are correct in positioning the ToNA within the broader trend of hostility between the United States and Europe during the Napoleonic era, but they have misunderstood the Amendment's exact purpose. During the first decade of the nineteenth century, the United States was increasingly buffeted and threatened by the major European

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15. The Amendment fell two states short on two occasions due to the admission of Louisiana into the union in 1812. *See* GRIMES, *supra* note 4, at 29 n.56; Silversmith, *supra* note 4, at 596.

16. *See infra* Part II.B.

17. *See infra* Part IV.B.

18. *See generally*, Silversmith, *supra* note 4; Conklin, *supra* note 4.

19. *See* Silversmith, *supra* note 4, at 609.

20. *See* AMES, *supra* note 4, at 188 n.1; BERNSTEIN, *supra* note 4, at 178; Conklin, *supra* note 4, at 124; Silversmith, *supra* note 4, at 583, 609–10; Mac Veagh, *supra* note 4, at 280.

powers, particularly by Britain and France. In 1810, when the ToNA was proposed, the United States was only two years away from open war with Britain. Indeed, the United States was in great danger of marginalization, or even European recapture, during the entire Napoleonic period. Responding to this great foreign pressure, individuals on both sides of the political spectrum became increasingly suspicious of each other's loyalties, as both parties regularly accused the other of secret collusion and cooperation with foreign states. Heightening the worry, a number of high-ranking officials recently were implicated in potentially wide-ranging conspiracies. A response to this perceived foreign threat, the ToNA was intended to prevent the recruitment of American officials and citizens by foreign states with titles, such as the Legion of Honor, or other attractive presents and offices. Today these fears seem far-fetched, but at the time there was a very real worry that the American experiment would rot from the inside-out through secret conspiracy and subversion by the European powers who were itching to reestablish their dominance in the Americas.[21]

Further, works on the ToNA have also belittled the Amendment by claiming that it was simply the product of petty partisan politics.[22] To be fair, most legislation is a product of politics on some level—indeed, the Constitution was itself. However, the ToNA, like the Constitution, was also the product of a much deeper belief that hereditary privilege and titles of nobility are incompatible with American republicanism. One of the core tenets of the Revolution—one that is emblazoned prominently in the Declaration of Independence—is that all men are created equal. Consistent with this belief, the founders were strongly opposed to and fearful of the creation of hereditary aristocracy in the United States. This belief expressed itself in the Articles of Confederation, the U.S. Constitution, and in most state constitutions of the era. Rather than merely being a petty political gesture or maneuver, the ToNA can count itself with these more famous provisions that were also designed to preserve and protect a republican form of government in a world dominated by individuals who attained power and privilege through blood, and not through personal merit.[23]

This Article provides some much needed explanation for one of the most curious—and mysterious—near-Amendments to our Constitution, focusing particularly on its relationship to the foreign threats facing

21. *See infra* Part II.B.

22. Earle, *supra* note 4, at 37; Silversmith, *supra* note 4, at 609.

23. *See infra* Part III.C.

United States and the American tradition of anti-nobility sentiment. Section II of this Article will describe and outline the drafting process of the ToNA and will also detail its consideration in the states. Section III will first discuss the politics surrounding the Amendment; second, it will consider the manner by which the ToNA was a serious response to fears that European powers were using gifts and titles to undermine the loyalty of American citizens; and third, it will consider the meaning of the term "titles of nobility and honor" in the context of the opposition to hereditary privilege. Finally, Section IV will consider the confusion spawned by the inclusion of the ToNA in the Bioren Edition of the Statutes at Large and will also briefly address the spurious claims made by right-wing extremists about the Amendment.

II. THE CONSTITUTION AND THE TITLES OF NOBILITY AMENDMENT

A. The Proposal and Passage of the Titles of Nobility Amendment in Congress

The Titles of Nobility Amendment was not the first provision limiting the use of titles of nobility to appear in the United States; rather, these sorts of limitations have a much longer history. For example, both the Articles of Confederation[24] and the Constitution[25] contain provisions limiting the granting and acceptance of titles on nobility. The relevant portion of the Articles of Confederation barred

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24. Article six reads:

> No State, without the consent of the [U]nited [S]tates in [C]ongress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the [U]nited [S]tates, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the [U]nited [S]tates in [C]ongress assembled, or any of them, grant any title of nobility.

ARTICLES OF CONFEDERATION, art. VI.

25. *See* U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."); U.S. CONST. art. I, § 10, cl. 1.

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Id.

any state from granting any title of nobility and it also barred individuals in positions of public trust from accepting any "present, emolument, office or title of any kind" from any foreign state.[26] Likewise, the Constitution contained provisions barring, first, both the federal and state governments from issuing any titles of nobility,[27] and second, the acceptance of "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign state" by individuals holding public office.[28]

Although the Constitution contained these limitations on titles of nobility, almost immediately there were requests for even more stringent restrictions. Before the Constitution was even ratified, several of the state conventions that met during 1788 proposed amendments or declarations of rights to be appended to the Constitution, entirely forbidding the acceptance of titles of nobility by those holding public office.[29] For example, when ratifying the Constitution in February 1788, Massachusetts proposed an amendment overriding part of the Nobility Clause; the proposed amendment read that "Congress shall at no time consent that any person, holding an office of trust or profit under the United States, shall accept of a title of nobility, or any other title or office, from any king, prince, or foreign state."[30] An identical amendment was proposed by the New Hampshire convention in June 1788.[31] The ratifying conventions of both New York and Rhode Island also made similar, and from a drafting standpoint, slightly cleaner, proposals—in both instances the states proposed that the line "without the Consent of the Congress" be struck from the Nobility Clause.[32] Additionally, Virginia and North Carolina's ratifying conventions also proposed similar amendments that barred the granting of special privileges and emoluments by local governments and the creation of state hereditary offices.[33] Although similar in theme, these last two

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26. ARTICLES OF CONFEDERATION, art. VI.

27. U.S. CONST. art. I, § 9, cl. 8, § 10, cl. 1.

28. U.S. CONST. art. I, § 9, cl. 8.

29. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 323 (Massachusetts), 326 (New Hampshire), 331 (New York); 336 (Rhode Island) (Jonathan Elliot ed., Wash. 2d ed. 1836) [hereinafter ELLIOT'S DEBATES]; *see also* AMES, *supra* note 4, at 186 (noting these proposals); Silversmith, *supra* note 4, at 578.

30. 1 ELLIOT'S DEBATES, *supra* note 29, at 323.

31. *Id.* at 326.

32. *Id.* at 331, 336.

33. 3 ELLIOT'S DEBATES 657 (1836) (Virginia); 4 ELLIOT'S DEBATES 243 (1834) (North Carolina). The proposed declaration of rights in both the Virginia and North Carolina conventions read, "That no man or set of men are entitled to exclusive or separate public

proposals differed from those of Massachusetts, New Hampshire, New York, and Rhode Island in that they focused not on foreign titles, but on the creation of a domestic American nobility (or at the least, a hereditarily privileged class).

Even though these proposals were not included in the original slate of James Madison's twelve proposed amendments (ten of which went on to become the Bill of Rights),[34] several similar amendments were proposed that would bar Congress from approving titles of nobility during the First Congress in 1789. The proposals were made in the Senate once[35] and in the House of Representatives twice,[36] and were debated at the same time as the amendments that eventually became the Bill of Rights. However, unlike the first ten amendments to the Constitution, none of these proposals received the requisite two-thirds Congressional vote and were ultimately rejected by Congress.[37]

Following this initial failure, amendments related to titles of nobility and privilege were not discussed again in Congress, or otherwise proposed, for over twenty years.[38] Congress did not again directly consider the topic until January 18, 1810, when Senator Philip Reed, a

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emoluments or privileges from the community, but in consideration of public services, which not being descendible, neither ought the offices of magistrate, legislator, or judge, or any other public office, to be hereditary." 3 ELLIOT'S DEBATES 657, *supra*; 4 ELLIOT'S DEBATES 243, *supra*.

34. U.S. SENATE J., 1st Cong., 1st Sess. 96–97 (1789); *see also* 1 ANNALS OF CONG. 750–800 (Joseph Gales ed., 1789).

35. U.S. SENATE J., 1st Cong., 1st Sess. 73 (1789) ("That Congress shall at no time consent that any person holding an office of trust or profit under the United States, shall accept of a title of nobility, or any other title or office, from any king, prince, or foreign state.").

36. 1 ANNALS OF CONG. 791 (Joseph Gales ed., 1789). The proposal would strike out the words "[w]ithout the consent of Congress" and amend the clause to read:

> [S]hall accept of any present or emolument, or hold any office or title of any kind whatever from any king, prince, or foreign state; provided that this clause shall not be construed to affect the rights of those persons (during their own lives) who are now citizens of the United States, and hold foreign titles.

Id. at 790–91 (proposal by Representative Thomas Tucker of South Carolina). Representative Elbridge Gerry of Massachusetts also offered a proposal. *Id.* at 789 ("Congress shall at no time consent, that any person holding an office of trust or profit under the United States shall accept of a title of nobility, or any other title or office, from any King, Prince, or foreign State.").

37. *See supra* notes 35–36; *see also* U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . .").

38. However, as part of a naturalization bill, which passed Congress in 1795, a provision was included requiring that individuals renounce foreign titles before becoming citizens.

Democrat-Republican from Maryland,[39] introduced the Titles of Nobility Amendment.[40] The original text of the Amendment, as introduced by Senator Reed, read: "If any citizen of the United States shall accept of any title of nobility, from any king, prince, or foreign state, such citizen shall thenceforth be incapable of holding any office of honor or profit under the United States."[41] Unlike the final draft of the ToNA,[42] this first version did not revoke the citizenship of those accepting titles of nobility. Rather, this original draft was very similar in form to those amendments proposed by the state ratifying conventions and during the First Congress in 1789.[43] Reed's first proposal merely made it impossible for a citizen of the United States to accept a title of nobility from a foreign state and then to later hold public office.

The limited nature of the first draft of the Amendment suggests that at least initially the ToNA was intended to fill a perceived hole in the federal naturalization bill passed fifteen years earlier in 1795.[44] As part of a larger naturalization bill, in 1795 Congress sought to exclude "any foreign emigrant from citizenship who had borne a title of nobility in Europe till he had formally renounced it."[45] This portion of the bill,

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39. Senator Reed was born near Chestertown, Maryland in 1760. He served as a Captain in the Continental Army during the Revolutionary War and was seriously wounded at the Battle of Camden. He was elected to Congress in 1806 and served from 1806 to 1813, whereby he resigned to command a regiment of Maryland militia during the War of 1812. Following the war, he served in the House of Representatives for Maryland from 1817 to 1819 and then again from 1822 to 1823. Quite interestingly, considering that he proposed the Titles of Nobility Amendment, Reed was a member of the Society of the Cincinnati and served as the vice president of the Maryland Society. *See* Biographical Directory of the United States Congress, Biography of Philip Reed, http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000125 (last visited Dec. 20, 2010); *see also* 7 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 308 (N.Y., James T. White & Co. 1892).

40. 20 ANNALS OF CONG. 530 (1810); U.S. SENATE J., 11th Cong., 2d Sess. 427 (1810).

41. *See supra* note 40.

42. *See* 20 ANNALS OF CONG. 671–72 (1810); 21 ANNALS OF CONG. 2050 (1810); 2 DOCUMENTARY HISTORY, *supra* note 2, at 452–53.

43. *See supra* notes 30–33.

44. *See* 1 Stat. 414 (1795)

> In case the alien applying to be admitted to citizenship shall have borne any hereditary title, or been of any of the orders of nobility, in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility, in the court to which his application shall be made; which renunciation shall be recorded in the said court.

Id.

45. 4 ANNALS OF CONG. 1033 (1795) (statement of Representative William Branch Giles).

which remains codified as law today,[46] was proposed at least partially out of fear that former French nobility fleeing the French Revolution would come to the United States and reestablish themselves as a privileged class unless they "renounced all hereditary titles" that they may possess.[47] However, the naturalization bill left a gap—which was pointed out at the time of its debate—since it did not prevent a former noble from renouncing his title and then simply reclaiming it immediately after becoming a citizen.[48] By proposing a constitutional amendment to correct this statute, Congress was acting in accordance with their previously stated view that this particular hole was one of constitutional magnitude and could not be corrected by statute.[49] Additionally, if the goal of the ToNA was initially only to correct the naturalization law, it would explain why the first draft did not include limitations on gifts, presents, offices, and emoluments (as would the final ToNA).[50] The interaction between the proposed ToNA and the existing naturalization law also explains why this first draft only dealt with the acceptance of titles of nobility and not the retention of such titles.[51] When combined, the first draft of the ToNA and the naturalization statute would serve to force an immigrating nobleman to renounce his title if he sought citizenship and then never reclaim that title (or claim any others) if he hoped to become a public official in the United States.[52]

Two weeks later, on January 24, 1810, the Senate referred to the proposed bill to a committee of three senators,[53] which considered and

46. 8 U.S.C. § 1448(b) (2006).

47. *See* 4 ANNALS OF CONG. 1034–36 (1795).

48. *See* 4 ANNALS OF CONG. 1035–36, 1053–54 (1795).

49. 4 ANNALS OF CONG. 1053 (1795) (statement of Representative Uriah Tracy) ("But, by the Constitution of the United States, any citizen might receive and enjoy a title from a foreign Prince or Sovereignty, and Congress could not prevent it . . . it was clear that Congress had no power respecting this matter, but what was expressly delegated by the Constitution . . . .").

50. *See* 20 ANNALS OF CONG., *supra* note 10, at 671–72; 21 ANNALS OF CONG., *supra* note 11, at 2050; 2 DOCUMENTARY HISTORY, *supra* note 2, at 452–53. This early draft also barred only acceptance of "titles of nobility," rather than acceptance of "titles of nobility or honor" like the final version. In this regard, it more closely follows the language in the Nobility Clauses and the Naturalization Bill of 1795.

51. 20 ANNALS OF CONG. 530 (1810); U.S. SENATE J., 11th Cong., 2d Sess. 427 (1810).

52. *See* 1 Stat. 414 (1795); 20 ANNALS OF CONG. 530 (1810); U.S. SENATE J., 11th Cong., 2d Sess. 427 (1810).

53. *See* 20 ANNALS OF CONG. 547 (1810). This committee was comprised of Senators Philip Reed, Michael Leib (a Democrat-Republican from Pennsylvania), and William Crawford (a Democrat-Republican from Georgia). *Id.*

redrafted the Amendment.[54] In this first revision, the ToNA underwent a major overhaul—it now reached considerably further than did Reed's first draft in a number of respects.[55] First, it now included within its purview not only those individuals who accepted foreign titles of nobility, but also those who held titles through descent (essentially barring foreign nobles from citizenship) and those Americans who married anyone with "blood royal."[56] Second, it also expanded the ban from simply covering titles of nobility to "titles of distinction" as well.[57] Finally, the Amendment shifts its focus from not only revoking the ability to hold public office, but also to revoking all of the "privileges and immunities of a free citizen."[58] Although not yet quite revoking citizenship in full, as the final ToNA proposed to do,[59] this second draft comes quite close. However, like the first draft (and unlike the final ToNA), this second version did not yet discuss the acceptance of presents, pensions, offices, or emoluments by public office holders or by the public at large. Rather, these lesser items would continue to be regulated by the Nobility Clauses in the Constitution.[60]

Soon after, on February 13, 1810, the Amendment in its revised form was again referred to committee for further consideration, this time a larger group of five Senators.[61] The larger committee again redrafted the Amendment; most noticeably, and not surprisingly, excising the bar on American citizens marrying individuals with royal blood.[62] This

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54. *See* 20 ANNALS OF CONG. 549 (1810).

55. *See id.* The second draft of the amendment read:

> If any citizen of the United States shall accept of any title of nobility, or any other title of distinction, from any Emperor, King, Prince, Potentate, or foreign state, or shall hold the same by descent, or shall inter-marry with any descendant of any Emperor, King or Prince, or with any person of the blood royal, such citizen shall thenceforth be incapable of exercising or enjoying any of the rights and immunities of a free citizen of the United States or of the individual States; and shall also be incapable of holding any office of honor, profit, or trust, under them, or either of them.

Id.

56. *Id.*

57. *Id.*

58. *Id.*

59. *See* 20 ANNALS OF CONG. 671–72 (1810); 21 ANNALS OF CONG. 2050 (1810); 2 DOCUMENTARY HISTORY, *supra* note 2, at 452–53.

60. U.S. CONST. art. I, § 9, cl. 8, § 10, cl. 1.

61. 20 ANNALS OF CONG. 571 (1810). In addition to Senators Reed, Leib, and Crawford, this committee now also included Senators William Branch Giles (a Democrat-Republican from Virginia) and Timothy Pickering (a Federalist from Massachusetts). *Id.*

62. 20 ANNALS OF CONG. 572–73 (1810). This third draft now reads:

provision, by providing no "measurement" of foreign blood—so to speak—could potentially have revoked all privileges and immunities of an individual who, for example, unwittingly married a descendant of Charlemagne one thousand years removed. It is doubtful that this was the intended effect of the provision. This version also includes slightly more specific language in describing the "title[s] of distinction" that would fall within the bar, making it clear that any title "above or below that of nobility," issued by any foreign state or ruler, would be included.[63] Many famous European orders, such as the Legion of Honor[64] or the Order of the Garter,[65] would likely fall within the description. This language would also bar titles of monarchy, such as King or Queen, which were above titles of nobility.[66] This draft also merged most of the existing Nobility Clauses of the Constitution into the amendment, and in doing so, removed the ability of Congress to consent to individuals accepting titles. However, it continued to allow consent of Congress to be granted for lesser presents, offices, or emoluments for public office holders, and it did not bar the acceptance of these lesser favors for the public at large at all.[67] This revised version was debated in the Senate on February 20, and it was again returned to committee.[68] Unfortunately, like much of the history surrounding the ToNA, the contents of this first full debate in Congress remain

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> No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of Congress, accept of any present, emolument, office, or title of any kind whatever, from any Emperor, King, Prince, or foreign State. And, if any citizen of the United States shall accept of any title of nobility, or of any other title of distinction, above or below that of nobility, from any Emperor, King, Prince, or foreign State, or shall hold the same by descent, such citizen shall thenceforth be incapable of exercising or enjoying any of the rights and immunities of a free citizen of the United States, or of the individual States; and shall, also be incapable of holding any office of public trust under them, or either of them.

Id.

63. *Id.* at 573.

64. *See infra* notes 275–79 (describing the Legion of Honor).

65. *See generally* GEORGE FREDERICK BELTZ, MEMORIALS OF THE ORDER OF THE GARTER (London, William Pickering 1841) (providing a description of the history of the Order and its state in the nineteenth century).

66. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 190–95, 396 (Thomas Cooley ed., Chicago, Callahan & Co. 3d ed. 1884).

67. *See* 20 ANNALS OF CONG. 572–73 (1810).

68. 20 ANNALS OF CONG. 576 (1810). The members of the committee remained the same, although Senator Michael Leib was replaced by Senator James Bayard (a Federalist from Delaware). The committee considering the ToNA was now truly a bi-partisan affair, with two Federalists and three Democrat-Republicans. *Id.*

unknown.[69]

Senator Reed's proposed Amendment was not considered again by the full Senate until late March, and it remained in committee for additional drafting during the interim. On March 30, the Senate considered an updated draft of the Amendment,[70] and on April 11th and 12th the ToNA was debated before the whole Senate.[71] By this point the ToNA had begun to closely resemble its final form. The primary difference is that the final Amendment, in addition to barring acceptance of titles, also barred the acceptance of "present[s], pension[s], office[s] or emolument[s]" by the public at large,[72] while this stripped down draft merely revoked the citizenship of any citizens accepting foreign titles of "nobility or honor."[73] Again, the contents of these debates remain frustratingly unknown. Although the ToNA ultimately passed Congress much more easily than did many other pieces of legislation proposed during the spring of 1810,[74] there are signs that many senators did not yet whole-heartedly approve of the Amendment. For example, on April 12th, the Amendment narrowly survived being tabled until the next session of Congress.[75]

Following this near freeze (that likely would have killed the Amendment), further debate on the ToNA was postponed for about two weeks.[76] The ToNA was redrafted and it was again debated on April 26;[77] on the next day it passed the Senate by a vote of nineteen to

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69. *Id.*

70. 20 ANNALS OF CONG. 634–35 (1810). The committee also provided the Senate a fourth draft of the Amendment, the contents of which unfortunately remain unknown. *Id.* at 635.

71. 20 ANNALS OF CONG. 650–52 (1810). The fifth draft, submitted to the Senate on the 11th of April read:

> If any citizen of the United States shall accept, claim or hold any title of nobility or honor derived from any emperor, king, prince or other foreign power, such person shall thenceforth cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them or either of them.

Id. See MR. REED'S AMENDMENT (Wash. City, R.C. Weightman 1810).

72. 20 ANNALS OF CONG. 671 (1810).

73. *See* MR. REED'S AMENDMENT, *supra* note 71. Again, the Nobility Clause would continue to place limits on the acceptance of presents, offices, titles, and emoluments by public office holders under this draft. U.S. CONST. art. I, § 9, cl. 8, § 10, cl. 1.

74. For example, the other major bills being considered in the Senate around the same time were the controversial non-intercourse acts, limitations on the military, and the National Bank. *See* 20 ANNALS OF CONG. 532, 665, 673 (1810).

75. *Id.* at 652.

76. *Id.*

77. *Id.* at 669, 671.

five.[78] Following Senate approval, the ToNA was referred to the House of Representatives, where it easily passed on May 1, 1810. The Amendment was approved by a near unanimous vote of eighty-seven to three in the House, without recorded debate or attempted amendment.[79] The only state that did not individually approve of the ToNA in the House of Representatives was Tennessee, with two out of three of its representatives voting against it.[80]

The final version of the Amendment read:

> If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honor, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.[81]

The final version of the ToNA, although one of the simplest versions in its mechanical operation,stretches much further than did many of the earlier drafts. The text of the Amendment creates two categories of prohibitions. First, all citizens would be barred from accepting any "title of nobility or honor"; second, all citizens would be barred from accepting, "without consent of Congress," any "present, pension, office or emolument" from any "emperor, king, prince or foreign power."[82] In the first instance, the acceptance of any title of nobility or honor would result in a complete revocation of citizenship (leaving no room for

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78. *Id.* at 672.

79. 21 ANNALS OF CONG. 2050–51 (1810). The three no votes came from Representatives Pleasant Miller (Democrat-Republican from Tennessee), John Rhea (Democrat-Republican from Tennessee), and Killian Van Rensselaer (a Federalist from New York). *Id.* at 2051.

80. *Id.* However, the state of Tennessee later ratified the Amendment without recorded debate. J. H.R. STATE OF TENN. 83, 278 (1812); J. S. STATE OF TENN. 70, 216 (1812).

81. The House and the Senate actually each passed slightly different versions of the Amendment. The House version did not include "Emperor" in its list and instead included the line "from any person." The Senate version included "Emperor," but did not have the "from any person" line. Additionally, the punctuation was slightly different in the two versions. *Compare* 21 ANNALS OF CONG. 2050 (1810) (House version) *with* 20 ANNALS OF CONG. 671 (1810) (Senate version). The version printed above is the version that was transmitted to the states and promulgated in the 1815 and 1845 Statutes at Large. 2 Stat. 613 (1810); 2 DOCUMENTARY HISTORY, *supra* note 2, at 452–53 (reprinting the version of the ToNA that was transmitted to the states and certified by both houses of Congress).

82. *See supra* note 81 and accompanying text.

Congressional consent),[83] while in the second, only the acceptance of foreign presents or offices without consent of Congress would result in a revocation. The punishment for both of these acts would be revocation of citizenship and a ban from holding any "office of trust or profit" in either the federal or state governments.[84] Unlike earlier drafts of the Amendment, the final form mandates revocation of citizenship if *any* citizen accepts even the most minor of present from a foreign ruler without consent. Under all of the earlier drafts, limitations this severe only applied to public office holders (who presumably could be expected to be aware of these stringent requirements).[85] In addition to the prohibitions in the ToNA, Congress and the states were still barred from granting any titles of nobility under the existing Nobility Clauses of the Constitution.[86] The remainder of both of these clauses would have been rendered largely superfluous by the ToNA.[87] By contrast, most of the earlier drafts left room for significant components of the existing Nobility Clauses to continue to operate.

B. The Ratification Process—Two States Too Short

With its approval by both houses of Congress, the Titles of Nobility Amendment began the second half of its journey to becoming the Thirteenth Amendment to the Constitution—a journey that it ultimately did not survive (although technically, the journey has not yet ended).[88]

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83. Although hereditary titles or honors sponsored by the federal or state governments were already barred in the United States, this portion of the ToNA may actually have expanded prohibition over private domestic hereditary societies, such as the Order of the Cincinnati. *See infra* Section III.C (discussing the application of the ToNA to the Order of the Cincinnati).

84. 20 ANNALS OF CONG. 672 (1810).

85. *See* 20 ANNALS OF CONG. 530, 549, 571–72 (1810); U.S. SENATE J., 1st Cong., 1st Sess. 96–97 (1789); MR. REED'S AMENDMENT, *supra* note 71.

86. U.S. CONST. art. I, § 9, cl. 8, § 10, cl. 1.

87. Technically speaking, the Nobility Clauses would not be entirely superfluous under even the final form of the ToNA. However, functionally speaking, they would be dead letters. For example, Congress could still, in theory, consent to a public official accepting a title of nobility. But acceptance of this title would lead to an automatic revocation of citizenship for the beneficiary. Additionally, although Congress and the states were still barred from issuing titles of nobility under the Nobility Clauses, this prohibition is unnecessary because the ToNA would completely bar the acceptance of these titles and honors. *See* U.S. CONST. art. I, § 9 cl. 8, § 10, cl. 1.

88. *See* CONSTITUTIONAL AMENDMENTS, *supra* note 4, at 594. For example, the Twenty-Seventh Amendment to the Constitution was originally proposed in 1789 at the same time as the Bill of Rights. It was passed by Congress in 1789 and ratified by six states by 1792. However, it was not ratified by any other states until 1873, when Ohio ratified it to protest a forty percent Congressional pay increase. The Twenty-Seventh Amendment slumbered for another 100 years, before it was rediscovered by Gregory Watson, a student in Texas. Upon

To become part of the Constitution, the ToNA needed to be ratified by the legislatures of three-quarters of the states (so, thirteen out of the seventeen states in 1810).[89] The ToNA eventually fell two states short of ratification and never became the Thirteenth Amendment to the Constitution. Instead, the Constitution would wait another half century to be amended, with a Thirteenth Amendment banning slavery in 1865.[90]

Initially, the ratification process went rather smoothly, with states mostly falling into line in favor of the Amendment throughout 1811 and 1812. Even before 1810 had come to a close, the ToNA was already ratified by Maryland,[91] and by February 1811, five more states ratified the amendment.[92] In many states the ToNA was met with great support—Pennsylvania, for example, ratified the Amendment unanimously in both houses of its legislature.[93] This initial wave of ratifications gave the appearance that the ToNA would easily become the Thirteenth Amendment to the Constitution.

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his urging, states began to ratify the Amendment and it became part of the Constitution in 1992. *See* AMAR, *supra* note 4, at 453–57; Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 678 (1993); JoAnne D. Spotts, *The Twenty-Seventh Amendment: A Late Bloomer or a Dead Horse?*, 10 GA. ST. U. L. REV. 337, 337, 342 (1994). The ToNA is still very much a live proposal, and it is actually in much better shape than was the Twenty-Seventh Amendment upon its modern rediscovery.

89. 21 ANNALS OF CONG. 2050 (1810). *See also* U.S. CONST. art. V:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

Id.

90. U.S. CONST. amend. XIII.

91. *See* VOTES AND PROCEEDINGS OF THE S. OF THE STATE OF MD. 47 (1811); VOTES AND PROCEEDINGS OF THE H.D. OF THE STATE OF MD. 111 (1811).

92. *See* J. S. STATE OF DEL. 65 (1811); J. H.R. STATE OF DEL. 77–78 (1811); ACTS PASSED AT THE FIRST SESS. OF THE NINETEENTH GEN. ASSEM. FOR THE COMMONWEALTH OF KY. 160 (1811); VOTES AND PROCEEDINGS OF THE 35TH GEN ASSEM. OF THE STATE OF N.J. 305–06 (1811); J. S. STATE OF OHIO 189–90 (1810); J. H.R. STATE OF OHIO 226 (1811); J. S. COMMONWEALTH OF PA. 180 (1810); J. 21ST H.R. COMMONWEALTH OF PA. 290, 294 (1810).

93. AMES, *supra* note 4, at 188 n.2.

For example, an abridgement to laws of the state of Pennsylvania, published in 1811, already lists the ToNA as the Thirteenth Amendment, with a note reading that "[t]his article has been ratified by the State of Pennsylvania, and by several of the other states, and there is little doubt, but that it has or will become a part of the Constitution."[94] The state legislative records suggest that during these early ratifications little debate occurred, and that the Amendment generally passed rather easily. By the end of 1811, another four states ratified the ToNA—bringing the total to ten.[95] And by the end of 1812, two more states ratified,[96] leaving the ToNA only two states away from the now required fourteen,[97] with four states yet to weigh in.[98]

Although at the end of 1812 the ToNA sat on the brink of becoming the Thirteenth Amendment, three of the remaining states voted against ratification.[99] Upon the rejection of the ToNA by the South Carolina

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94. AN ABRIDGEMENT OF THE LAWS OF PENNSYLVANIA, at xviii (Phila., Farrand, Hopkins, Zantzinger & Co. 1811).

95. *See* ACTS OF THE GEN. ASSEM. STATE OF GA. 198–99 (1811); J. S. AND H. OF COMMONS OF THE GEN. ASSEM. OF N.C. 64 (1812); J. S. STATE OF TENN. 69, 216 (1812); J. H.R. STATE OF TENN. 83, 278 (1812); J. GEN. ASSEM. STATE OF VT. 88 (1811).

96. *See* LAWS OF THE COMMONWEALTH OF MASS., Chap. CXLII 573 (1812) (recording passage on February 27, 1812); J. HONORABLE S. STATE OF N.H. 85–86 (1812); J. H.R. STATE OF N.H. 101 (1812).

97. At the time Congress passed the ToNA in 1810, thirteen out of seventeen states were needed to ratify the ToNA as the Thirteenth Amendment. However, by the end of 1812, when New Hampshire provided the twelfth ratification, Louisiana was admitted to the Union. Upon the admission of Louisiana, in April, 1812, fourteen states were needed to ratify the ToNA to reach the three-quarters mark. Therefore, the ToNA was two states away from ratification in February 1812, when it was ratified by Massachusetts, and it was still two states from ratification in December 1812, when New Hampshire ratified the amendment. This important wrinkle in the ratification process had been missed by prior historians, but was pointed out by Jol Silversmith. *See* Silversmith, *supra* note 4, at 596. There is no record of ratification or consideration in any of the states admitted during the years immediately following the ToNA's proposal. *Id.* at 585, n.52; GRIMES, *supra* note 4, at 29 n.56.

98. The states of Virginia and New York had voted against the ToNA during 1811 and 1812, respectively. *See* J. S. COMMONWEALTH OF VA. 83 (1810) (rejecting the ToNA); J. H.D. COMMONWEALTH OF VA. 91 (1810) (approving the ToNA); *see also View of the Laws*, ALEXANDRIA GAZETTE, Mar. 11, 1811, at 2 (reporting that although the ToNA passed by the House of Delegates, the Virginia Senate rejected the ToNA by a seven to seven vote on the last day of its session); J. S. STATE OF N.Y. 108 (1812) (rejecting the ToNA).

Louisiana, Connecticut, Rhode Island, and South Carolina had yet to ratify or reject the ToNA. The ToNA technically sat one house and one state away from ratification at this point, because the South Carolina Senate approved the amendment in November, 1811. *See* 2 AMERICAN STATE PAPERS, MISCELLANEOUS 477–79 (Walter Lowrie & Walter S. Franklin, Wash., Gales & Seaton eds., 1834) (House of Representatives, 15th Congress, 1st Session).

99. *See* 2 DOCUMENTARY HISTORY, *supra* note 2, at 506 (reprinting the records of the Connecticut General Assembly rejecting the ToNA); U.S. SENATE J., 13th Cong., 1st Sess. 314 (1813) (reporting rejection of the ToNA by the state of Connecticut); AT THE G.A. OF

House of Representatives in December 1814, the ToNA was, for all intents and purposes, rejected.[100] No other states would vote on or ratify the Amendment. Most likely, the need for the ToNA was less pressing in 1814, decreasing support for it. By 1814, the War of 1812 was winding down and Napoleon was recently vanquished by the British. In contrast, when the ToNA was proposed and quickly ratified by a dozen states in 1810–1812, the threat to the United States by foreign powers was much more pressing.[101]

The official ratification tally, as transmitted by Secretary of State John Quincy Adams to the House of Representatives in 1818, showed that twelve states ratified the Amendment and that four states rejected it.[102] Virginia did not respond to this initial inquiry, but the state's own

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THE STATE OF R.I. AND PROVIDENCE PLANTATIONS 7 (Providence, Brown & Wilson, 1814); 2 DOCUMENTARY HISTORY, *supra* note 2, at 512 (recording correspondence reflecting South Carolina's rejection); 2 AMERICAN STATE PAPERS, *supra* note 98, at 478–79 (reporting to President Monroe that the South Carolina Senate had approved the Amendment on November 29, 1811, but the South Carolina House of Representative rejected the Amendment on December 21, 1814). There is no record that Louisiana ever considered the ToNA. *See* Silversmith, *supra* note 4, at 585 n.52.

100. *See, e.g.*, *Constitution of the United States*, NILES' WEEKLY REG., Apr. 25, 1818, at 150 The *Niles Weekly Register* described the report of the state of South Carolina to Congress that the ToNA had been rejected, reading:

> It appears from the communication transmitted by the governor of South Carolina . . . that an amendment to the constitution . . . supposed concurred in by the requisite majority of the states, was not in fact concurred in, but was rejected by the state of South Carolina, who had been supposed to have ratified it . . . .
>
> . . . .
>
> It ought to be generally known, as it is now ascertained, that this amendment was not ratified by three-fourths of the states, and therefore is not a part of the constitution.

Id.; *see also* BALT. PATRIOT & MERCANTILE ADVERTISER, Mar. 9, 1818, at 2; BOSTON INTELLIGENCER, Mar. 14, 1818, at 2; NORWICH COURIER, Mar. 18, 1818, at 3; NEW-HAMPSHIRE GAZETTE, Mar. 24, 1818, at 1 (describing the report from South Carolina).

101. *See infra* Section III.B (describing how the ToNA was a national defense measure to protect against conversion and subversion of citizens and officials at a time when the United States was threatened by both France and Britain).

102. *See* 2 AMERICAN STATE PAPERS, *supra* note 98, at 478.

Ratifications:

Maryland	December 25, 1810
Kentucky	January 31, 1811
Ohio	January 31, 1811
Delaware	February 2, 1811
Pennsylvania	February 6, 1811
New Jersey	February 13, 1811

records show that the Amendment was rejected in 1811 (bringing the rejection total to five).[103] Even though it did not become part of the Constitution, the ToNA holds the dubious distinction, shared with the originally proposed First Amendment, as the proposed amendment that came the closest to becoming part of the Constitution, without actually being approved.[104]

III. THE MEANING OF THE TITLES OF NOBILITY AMENDMENT AND ITS HISTORICAL CONTEXT

The previous discussions of the drafting, legislation, and ratification suggest that the Titles of Nobility Amendment sits shrouded in some mystery. Indeed, almost nothing is known about many very basic points, such as the politics surrounding the Amendment, the contents of the debates in Congress and in the state legislatures, the Amendment's intended effect and exact meaning, and why it was ultimately never ratified by the requisite number of states.[105] Unfortunately, much of the mystery is caused by a surprising dearth of records and parts of the story will, therefore, never be fully known.

However, despite a lack of direct documentary record, this Article seeks to understand the Amendment on a deeper level than previous sources have attempted. Most modern articles on the ToNA focused on

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Vermont	October 24, 1811
Tennessee	November 21, 1811
Georgia	December 13, 1811
North Carolina	December 23, 1811
Massachusetts	February 27, 1812
New Hampshire	December 10, 1812
Rejections:	
New York	March 12, 1812
Connecticut	May 13, 1813
Rhode Island	September 15, 1814
South Carolina	December 21, 1814
No Reply:	
Virginia	

Id. at 478–79.

103. *See supra* note 98.

104. KYVIG, *supra* note 4, at 117. Kyvig actually erroneously asserts that the ToNA came the closest to ratification. However, he, along with other historians and Secretary of State John Quincy Adams, did not consider that the entrance of Louisiana into the union kept the ToNA two states away from ratification. *See* Silversmith, *supra* note 4, at 596. Accordingly, the ToNA is tied with the 1789 proposed amendment to limit congressional district size, which also fell two states short. KYVIG, *supra* note 4, at 117.

105. *See* U.S. SENATE J., 1st Cong., 1st Sess. 96–97 (1789); MR. REED'S AMENDMENT, *supra* note 71; Silversmith, *supra* note 4, at 583, 601–02, 609–10.

either proving or disproving that the Amendment was ratified, and whether it would, therefore, bar lawyers and bankers from participation in citizenship.[106] Although disputing these dubious claims is an important task,[107] none of the articles on the Amendment attempted to understand the ToNA on its own terms.

Accordingly, this Section seeks to fill in some of the missing storyline. First, it will address the politics of the legislative process;[108] second, it will consider various reasons for the Amendment, focusing on the growing European threat to American security in the Napoleonic era;[109] and finally, it will consider the meaning of the term "title of honor or nobility" through a consideration of the long-standing American hostility to hereditary privilege.[110] This discussion will also show that even though the ToNA sought to limit foreign influence in the United States, that the Amendment was not the product of xenophobia or intended to be a petty snub against Europe, as previous pieces have suggested,[111] but rather was birthed out of much deeper notions of republican democracy and a justified fear of European power creeping across the Atlantic to subvert the young American experiment.

A. A Confusing Web of Congressional Politics

The complete absence of debate over the ToNA in both Congress and the state legislatures makes understanding the politics of the Amendment a truly frustrating endeavor. The lack of debate suggests that the reasons for the Amendment were relatively self-evident to those considering it at the time, although they are a bit of a puzzle now.[112] The Congressional voting on the ToNA also does not display many clear partisan or geographic patterns to help understand the

106. Most prominently, see Silversmith, *supra* note 4, at 602–03, 696 (persuasively arguing that the ToNA was not ratified by required number of states and that the Amendment would not bar lawyers from citizenship); David Dodge, *The Missing 13th Amendment: "Titles of Nobility" and "Honor"* (pts. 1 & 2), ANTISHYSTER, 1991, at 115 *available at* http://www.libertyperspective.com/ref/13th-amend.shtml (arguing that the ToNA was ratified as part of the Constitution and later suppressed, and that the ToNA would bar lawyers and judges from citizenship due to their use of honorary terms such as "esquire" or "judge").

107. *See* Silversmith, *supra* note 4, at 602–04; Conklin, *supra* note 4, at 126–27.

108. *See infra* Part III.A.

109. *See infra* Part III.B.

110. *See infra* Part III.C.

111. *See* AMES, *supra* note 4, at 188 n.1; BERNSTEIN, *supra* note 4, at 178; Conklin, *supra* note 4, at 124; Mac Veagh, *supra* note 4, at 280; Silversmith, *supra* note 4, at 583, 609.

112. KYVIG, *supra* note 4, at 117.

politics behind it.[113] For example, although almost all of the votes cast against the Amendment in the Senate were from congressmen representing states in the northeast (two from New York and one apiece from Vermont and New Hampshire), the ToNA also garnered significant support from other northern states, such as Connecticut and Massachusetts.[114] Additionally, even though all but one of the votes cast against the ToNA were by Democrat-Republicans (in the House and Senate combined), the Amendment was originally proposed by a Republican and was it approved by a clear internal Republican majority in both houses of Congress.[115] Likewise, even though it was proposed by the Democrat-Republicans, it garnered nearly unanimous Federalist support at every stage of the legislative process.[116]

The Senate vote to table the Amendment in early April shows a slightly more partisan division than does either of the final votes. A majority of the Democrat-Republic senators who voted on the motion to postpone voted in favor of postponement, and it was only a Democrat-Republican minority voting with a Federalist block that assured its continued consideration.[117] Although this vote suggests that the bill was at least initially opposed by many Republicans, this

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113. The complete record of the Senate vote on the Amendment does not show a strong pattern. 20 ANNALS OF CONG. 672 (1810). Those who voted in favor of the ToNA were: Senators Anderson (Democrat-Republican (DR) – Tennessee), Champlin (Federalist (F) – Rhode Island), Crawford (DR – Georgia), Franklin (DR – North Carolina), Gaillard (DR – South Carolina), Goodrich (F – Connecticut), Gregg (DR – Pennsylvania), Hillhouse (F – Connecticut), Lambert (DR – New Jersey), Leib (DR – Pennsylvania), Lloyd (F – Massachusetts), Mathewson (DR – Rhode Island), Meigs (DR – Ohio), Pickering (F – Massachusetts), Reed (DR – Maryland), Smith (DR – Maryland), Sumter (DR – South Carolina), Tait (DR – Georgia), and Turner (DR – North Carolina). Those who voted against the TONA were: Senators German (DR – New York), Gilman (DR – New Hampshire), Robinson (DR – Vermont), Smith (DR – New York), and Whiteside (DR – Tennessee). *Id.*

114. 20 ANNALS OF CONG. 672 (1810).

115. 20 ANNALS OF CONG. 672 (1810); 21 ANNALS OF CONG. 2050–51 (1810).

116. *See supra* note 115 and accompanying text.

117. Those who voted in favor of postponement were: Senators Anderson (DR – Tennessee), Bradley (DR – Vermont), Campbell (DR – Ohio), Condit (DR – New Jersey), Franklin (DR – North Carolina), Gaillard (DR – South Carolina), German (DR – New York), Giles (DR – Virginia), Gilman (DR – New Hampshire), Gregg (DR – Pennsylvania), Lambert (DR – New Jersey), Mathewson (DR – Rhode Island), Meigs (DR – Ohio), and Robinson (DR – Vermont). Those who voted against postponement were: Senators Brent (DR – Virginia), Champlin (F – Rhode Island), Clay (DR – Kentucky), Crawford (DR – Georgia), Goodrich (F – Connecticut), Hillhouse (F – Connecticut), Horsey (F – Delaware), Leib (DR – Pennsylvania), Lloyd (F – Massachusetts), Pickering (F – Massachusetts), Pope (DR – Kentucky), Reed (DR – Maryland), Smith (DR – Maryland), Smith (DR – New York), Sumter (DR – South Carolina), Tait (DR – Georgia), Turner (DR – North Carolina), and Whiteside (DR – Tennessee). 20 ANNALS OF CONG. 652 (1810).

opposition mysteriously melted away within only two weeks for the final votes. Additionally, complicating the tally, some of the Senators who voted against postponement actually voted against the Amendment two weeks later, suggesting that tactical considerations were at work.[118]

Some of this internal Democrat-Republican division on the ToNA stemmed from greater schisms within the Republican Party itself, which cut much deeper than just the ToNA. Beginning during President Jefferson's second term, internal ideological divisions wracked the Republican Party.[119] One prominent faction that grew within the Party during the late Jefferson and Madison Administrations was a group known as the "Invisibles" or the "Malcontents."[120] This loose group, comprised primarily of Republicans from Maryland, New York, and Pennsylvania, was generally opposed to the Madison Administration and fiercely disliked Madison's Secretary of Treasury, Albert Gallatin.[121] A majority of the votes cast against the ToNA in the final vote in the Senate came from this group.[122] Generally, during the period preceding the War of 1812, the Malcontents advocated zealous foreign policy and were constantly at odds with Madison.[123] Although the group was responsible for the only sustained resistance to the ToNA in Congress, it is not clear why they were opposed to the ToNA in the first place. Beyond simple contrariness, the Malcontent opposition in the Senate is difficult to explain, but accounted for the only sustained Congressional opposition.

One relatively modern attempt to explain the convoluted political origins of the ToNA worth noting states the ToNA was less the product of an easily explainable and lucid legislative goal, and instead was the

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118. *See supra* notes 113 & 117.

119. *See* NORMAN K. RISJORD, THE OLD REPUBLICANS: SOUTHERN CONSERVATISM IN THE AGE OF JEFFERSON 40–41 (1965); Noble E. Cunningham, Jr., *Who Were the Quids?*, 50 MISS. VALLEY HIST. REV. 252, 252, 254 (1963); John S. Pancake, *The "Invisibles": A Chapter in the Opposition to President Madison*, 21 J. S. HIST. 17, 18–19 (1955); J.C.A. Stagg, *James Madison and the "Malcontents": The Political Origins of the War of 1812*, 33 WM. & MARY Q. 557, 564–566 (1976).

120. *See* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 313 (2009) (describing the various Republican factions); Andrew Shankman, *Malcontents and Tertium Quids: The Battle to Define Democracy in Jeffersonian Philadelphia*, 19 J. EARLY REPUBLIC 43, 44 (1999); Stagg, *supra* note 119, at 561.

121. *See* J.C.A. STAGG, MR. MADISON'S WAR: POLITICS, DIPLOMACY, AND WARFARE IN THE EARLY AMERICAN REPUBLIC, 1783–1830, at 50 (1983); Stagg, *supra* note 119, at 561–62.

122. In the Senate, this group post prominently included Senators Smith (Maryland), Giles (Virginia), Smith (New York), German (New York), Mathewson (Rhode Island), Gilman (New Hampshire), and Leib (Pennsylania). STAGG, *supra* note 121, at 54 n.25.

123. *See* STAGG, *supra* note 121, at 54 n.25; Pancake, *supra* note 119, at 37.

result of the complicated back-and-forth political maneuvering.[124] The theory is that the ToNA was proposed by the Democrat-Republicans to dispel criticisms and rumors regarding the supposedly close relationships between the French and Republican leadership, such as Thomas Jefferson, James Madison, and Samuel Smith.[125] Federalists in Congress, slightly outflanked by this proposal, were obliged to support the ToNA or else face criticisms that they themselves were hoping to eventually receive titles of nobility or favors from the British.[126] The posturing of both parties turned the ToNA into a non-partisan measure that both were forced to support to avoid being charged as European-friendly nobilists.[127] This theory makes intuitive sense—it helps to explain the curious lack of debate in Congress and in the partisan press of the time. Unfortunately though, the author who is primarily responsible for this theory gives little indication of what sources he uses.[128]

B. The Growing European Threat in the Napoleonic Era

This previous discussion of the politics behind the ToNA does not fully answer another larger question—what exactly was it that Congress was trying to accomplish by passing this Amendment? Political maneuvering may have been a factor in its surprising bi-partisan support, but the Amendment itself was part of a larger trend of hostility between the United States and Europe and an increased fear of European dominance in the Americas during this time period. The discussion in this Section will briefly describe the foreign threats facing the United States during the first decade of the nineteenth century, and it will then consider the means by which the ToNA was an attempted response.

The entire period immediately following the American Revolution through the War of 1812 was an era when American foreign affairs were

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124. Earle, *supra* note 4, at 37.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* This story is actually quite similar to an account provided by the Niles' Register, in 1847, for the Amendment. However, the 1847 article suggests that the proposal was made in Congress by the Federalists, which is incorrect. *The Presidency, National Conventions: The Government, Executive Power, Constitutional Reforms*, NILES' NAT'L. REG., May 15, 1847, at 166. Earle may simply have flipped the parties in his account, correcting the Niles' Register description but following the same story-line. The account provided in the Niles Register likely accurately reflects a general fear of corrupting foreign influence; however, its inaccuracies suggest that it should not be relied upon as a precise account of the story behind the Amendment.

fraught with particular peril.[129] This became particularly true during the presidencies of John Adams and Thomas Jefferson, during which the United States constantly teetered on the brink of war with various European powers. For example, although France was the savior of the colonies in the Revolution, relations with France deteriorated sharply following Jay's Treaty in 1794, and by 1798 an undeclared naval war was being waged against France. This conflict, often referred to as the Quasi-War, lasted until 1801 and created major disruptions in American shipping.[130]

Similarly, on several occasions during the decade preceding the War of 1812 the United States nearly became entangled in war with Great Britain. Throughout this decade both the French and the British interfered with American shipping as part of their respective war efforts, and most infuriatingly to national pride, the British insisted on impressing British citizens, as well as many Americans, who were found on American ships.[131] The practice of impressment directly led to the *Chesapeake* affair, the closest that the United States and Britain came to war prior to 1812. During the incident, three American sailors were killed and nineteen others were wounded.[132] The USS *Chesapeake* was boarded and four sailors were impressed, three of whom were American citizens.[133] In the explosion of public outcry against this flagrant and much publicized violation of American sovereignty war with Britain was only narrowly avoided.[134]

In addition to these affronts of American honor, American shipping

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129. REGINALD HORSMAN, THE WAR OF 1812, at 1 (1969).

130. *See* DONALD R. HICKEY, THE WAR OF 1812, at 6–7 (1989); HORSMAN, *supra* note 129, at 5; SPENCER C. TUCKER & FRANK T. REUTER, INJURED HONOR: THE *CHESAPEAKE-LEOPARD* AFFAIR 34–36 (1996)

131. *See* HICKEY, *supra* note 130, at 11–12, 14, 16–17; HORSMAN, *supra* note 129, at 9–11; TUCKER, *supra* note 130, at 49–58. It has been estimated that as many as 10,000 Americans were impressed between 1801 and 1812. SCOTT A. SILVERSTONE, DIVIDED UNION: THE POLITICS OF WAR IN THE EARLY AMERICAN REPUBLIC 71 (2004).

132. SILVERSTONE, *supra* note 131, at 74.

133. *Id.*

134. *See* HICKEY, *supra* note 130, at 17; SILVERSTONE, *supra* note 131, at 74–75. Following the *Chesapeake* incident, Jefferson stated that "never since the battle of Lexington have I seen the country in such a state of exasperation." A.J. LANGGUTH, UNION 1812, at 133 (2006). The United States also found itself increasingly at odds with Great Britain due to British Indian policy. Beginning in 1807, but particularly in 1809 and 1810, American settlers in the Great Lakes region were faced with heightened Indian resistance, which culminated in Tecumseh's War. SILVERSTONE, *supra* note 131, at 87–88. Settlers and leaders in Washington accused the British of funding this violence, and it was a major factor in the American declaration of war in 1812. *Id.*

became increasingly interfered with as the French Continental System[135] and the British Orders of Council[136] made it almost impossible for American ships to trade with continental Europe. The American response to the economic warfare of Britain and France (in which the United States was a true third party victim) was a series of disastrous embargos and non-importation acts that were both ineffective and severely damaging to the American economy.[137] Each of these episodes ratcheted up the tension between the United States and Europe and they ultimately resulted in the declaration of war in 1812 against Britain.[138] Although the causes of the War of 1812 are notoriously complex, a universally accepted factor was the twenty years of buffeting that the United States faced, which badly damaged national pride.[139] And the ToNA, emerging near the end of this road to war, is best understood as a part of this greater trend of increasingly strained relations with Europe.

This extremely brief account of the growing tensions between the United States and Europe in the first decade of the nineteenth century frames the foreign relations context of the Amendment. The ToNA itself was a response to this overwhelming foreign pressure; it was enacted to protect the United States from these foreign threats. Specifically, the ToNA was a response to a growing fear that public officials and citizens were being subverted by foreign powers, and as a result were secretly beholden to foreign states and rulers. For example, as an expression of this fear, the political papers of the period increasingly accused opposing party members of secret collusion and cooperation with foreign rulers.[140] Although many of these newspaper

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135. The French Continental System, set forth in the Berlin Decree and reaffirmed in the Milan Decree, barred from ports under French control any vessel that had touched a British port. HICKEY, *supra* note 130, at 18.

136. The Orders of Council, issued in response to Napoleon's continental system, proclaimed a blockade of all ports from which British goods were excluded and required neutrals who wished to trade with these European ports to stop in Britain for the paying of duties. HICKEY, *supra* note 130, at 18.

137. *See* HICKEY, *supra* note 130, at 19–24; HORSMAN, *supra* note 129, at 12–16.

138. HORSMAN, *supra* note 129, at 24; *see* HICKEY, *supra* note 130, at 45–48.

139. *See* HICKEY, *supra* note 130, at 26–28; RISJORD, *supra* note 119, at 96–100; Norman K. Risjord, *1812: Conservatives, War Hawks, and the Nation's Honor*, 18 WM. & MARY Q. 196, 200–04 (1961).

140. For an account of these sorts of beliefs in American politics through history, see Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER'S MAGAZINE, Nov. 1964, at 77, 77–86. Hofstadter discusses the manner by which "heated exaggeration, suspiciousness, and conspiratorial fantasy" have been reoccurring themes in American politics. *Id.* at 77. Accordingly, this behavior—in an era where the United States was particularly threatened—is not surprising.

articles now seem fantastical in their theories of French or British infiltration and conspiracy, Americans in that era were justifiably concerned about European power in the Americas. From a foreign relations standpoint, the first decade of the nineteenth century was a very dangerous time, as the Napoleonic Wars threatened to lead to the marginalization, or even complete dismemberment, of the United States.[141] The ToNA was intended to help prevent the recruitment of American officials and citizens with titles, such as the Legion of Honor, or other attractive presents and offices by foreign states.[142]

One of the most common explanations for the ToNA—the marriage of American Elizabeth Patterson to Jerome Bonaparte—fits into this theme.[143] In 1803, Elizabeth Patterson, an attractive woman from a wealthy family in Baltimore, married Napoleon Bonaparte's youngest brother, Jerome Bonaparte.[144] The two were married from 1803 to 1805, and lived in the United States for a short period together in 1803 and 1804.[145] Unfortunately for Patterson, Napoleon Bonaparte refused to recognize the union and Jerome eventually annulled it to allow for his

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141. For example, Thomas Jefferson stated, following Napoleon's victory at Austerlitz in 1806, "What an awful spectacle does the world exhibit at this instant . . . one man bestriding the continent of Europe like a Colossus, and another roaming unbridled on the ocean." WOOD, *supra* note 120, at 621–22 (quoting DUMAS MALONE, JEFFERSON THE PRESIDENT: THE SECOND TERM, 1805–1809, at 95 (1974)).

142. William Rawle, writing one of the earliest comprehensive accounts of the Constitution, ascribes this exact purpose to the ToNA only fifteen years after its proposal. *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 120 (photo. reprint 2009) (2d ed. 1829). Rawle writes that the Nobility Clauses and the ToNA were crucial for the protection of the United States:

> There cannot be too much jealously in respect to foreign influence. The treasures of Persia were successfully distributed in Athens; and it is now known that in England a profligate prince and many of his venal courtiers were bribed into measures injurious to the nation by the gold of Louis XIV.
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> A salutary Amendment, extending the prohibition to all citizens of the United States, and disenfranchising those who infringe it, has been adopted by some states; but not yet by a sufficient number . . . Disenfranchisement, or a deprivation of all the rights of a citizen, seems the most appropriate punishment that could be applied, since it renders the seduction useless to those who were the authors of it, and disgraceful to the person seduced.

Id.

143. This story appears in nearly every source on the ToNA that attempts to explain why it was proposed. *See* AMES, *supra* note 4, at 187 n.5; Conklin, *supra* note 4, at 124; Earle, *supra* note 4, at 35; Mac Veagh, *supra* note 4, at 280–81; Silversmith, *supra* note 4, at 584.

144. *See* DAVID STACTON, THE BONAPARTES 28–29 (1966).

145. *See* STACTON, *supra* note 144, at 30–31; Earle, *supra* note 4, at 34.

dynastic marriage to Catherine of Württemberg.[146] However, prior to the annulment, the two conceived a son—Jerome Napoleon Bonaparte—who was born in England in 1805, and Patterson spent much of the remainder of her life angling for royal salaries and titles of nobility for both herself and her son.[147] In November 1809, Patterson succeeded in arranging for a sizeable annuity from Napoleon,[148] which was much publicized and often paired with rumors that Patterson was now officially a Duchess and that her son, Jerome Napoleon, was recognized as an imperial prince.[149] The residence of Napoleon's brother in Baltimore, and the formation of an American branch of the world's most dangerous military family, left many Americans understandably nervous and wary, particularly as Napoleon's ambitions became more imperial.[150] For example, one newspaper nervously wrote about the new American wing of the Bonaparte family, saying that "Mrs. Patterson's son *may* be Emperor of France. But he had better be a plain, unambitious American citizen, do nobody harm, and tyrannize over none of his fellow creatures."[151]

In retrospect, it seems unlikely that Napoleon Bonaparte could successfully establish an American empire to go with his short-lived one in Europe. However, in 1810, Napoleon was at the zenith of his power and was indeed considered a serious threat to American security. The fear of Bonaparte influence took hold and the presence in the United States of Jerome Bonaparte, and later his son, a potential heir to the French throne, served only to exacerbate those worries. An article appearing in 1809 claimed that "[t]he Bonaparte Family are extending their limbs and branches over the whole civilized world. A scion is now

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146. *See* STACTON, *supra* note 144, at 31–33; Earle, *supra* note 4, at 34.

147. STACTON, *supra* note 144, at 32; *see* Earle, *supra* note 4, at 36–39.

148. Earle, *supra* note 4, at 37.

149. *See, e.g.*, CONNECTICUT HERALD, Nov. 14, 1809, at 2 (quoting PHILA. FREEMAN'S J.). The *Herald* stated:

> Mrs. Jerome Patterson, of Baltimore . . . has been created a duchess of the house of Napoleon, with a salary of 50,000 crowns per annum. Her son is created a prince of the French empire . . . Baltimore is to be the Imperial and Royal residence for the present?

Id.

150. FREDERICK W. KAGAN, THE END OF THE OLD ORDER: NAPOLEON AND EUROPE, 1801–1805, at 664 (2006) (describing the transition to the *Grande Empire* following the treaties of 1805). *See generally* GREGORY FREMONT-BARNES & TODD FISHER, THE NAPOLEONIC WARS: THE RISE AND FALL OF AN EMPIRE 21–98 (2004) (describing the rise of the Empire).

151. *Madame Jerome Bonaparte*, LOUISVILLE GAZETTE, May 4, 1810, at 4 (italics in original); *see also* NEW-ENGLAND PALLADIUM, Mar. 27, 1810, at 2.

acknowledged to be shooting up in the United States."[152]

Most troubling was Jerome Napoleon; although only a child in 1810, his American citizenship raised the possibility of an American president who could also serve as Emperor of France.[153] The proposition that the ToNA was passed to prevent Jerome Napoleon Bonaparte—or other similarly positioned citizens in the future—from becoming President is supported by a newspaper article published in 1847.[154] The article describes the ToNA as an attempt to keep foreign born Jerome Napoleon from claiming the presidency through unspecified "French Influence."[155]

However, it is unlikely that the ToNA was proposed *solely* due to the marriage of Elizabeth Patterson and the birth of Jerome Napoleon Bonaparte. Instead, the presence of part of the Bonaparte dynasty in Baltimore exacerbated a much deeper fear that the European powers would reach across the Atlantic and corrupt the American republic. This fear found expression in the partisan politics of the era, as both Federalists and Republicans accused each other of sympathy, or even worse, secret collusion with Britain or France.[156]

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152. *From the Philadelphia Democratic Press*, MERRIMACK INTELLIGENCER, Nov. 18, 1809, at 2.

153. Even though Jerome Napoleon Bonaparte was born in England, both he and his mother were United States citizens at the time of his birth. It is not clear, since the term "natural born citizen" is not defined in the Constitution, whether his birth in England would bar him from becoming President. However, the best interpretation seems to be that birth outside of the United States—if a citizen at the time of birth—should not be a bar. *See* U.S. CONST. art. II, § 1, cl. 5; *see also* AMAR, *supra* note 4, at 164 (describing the eligibility requirement as being "a citizen at the time of his birth"); 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, 899 (1988).

154. *The Presidency— National Conventions. The Government— Executive Power— Constitutional Reforms*, NILES' NAT. REG., May 15, 1847, at 166.

155. *Id.* This article is cited by most commentators on the ToNA. *See, e.g.*, AMES, *supra* note 4, at 187 n.5; Conklin, *supra* note 4, at 124; Mac Veagh, *supra* note 4, at 280–81; Silversmith, *supra* note 4, at 584. However, all of these sources claim that the article is in error when it states that the ToNA was intended to prevent Jerome Bonaparte from being elected President, since Jerome Bonaparte could not be elected President. As the brother of Napoleon, Jerome Bonaparte (the father) clearly could not be elected president; however, Jerome Napoleon Bonaparte (the son) arguably could be eligible under Article II of the Constitution. *See supra* note 153. Although not totally clear, it seems more likely that the article is actually about Jerome Napoleon Bonaparte (the son); the article makes a point of specifically stating that the Amendment was brought forward "at the time Jerome Bonaparte lived in this country." Jerome Bonaparte (the father) only lived in the United States in 1803 and 1804, whereas Jerome Napoleon Bonaparte (the son) was famously living in the United States at the time of the Amendment and thereafter. Earle, *supra* note 4, at 35–39.

156. *See, e.g.*, *British Influence, the Poison of Civil Society No. 1*, ANTI-MONARCHIST AND REPUBLICAN WATCHMAN, Sept. 13, 1809, at 1 (claiming that British influence corrupting Federalists and American society); *Extract of a letter from a gentleman at*

Today, most of these accounts, accusing high-ranking American leadership such as Thomas Jefferson or John Adams of conspiracy with Napoleon or other foreign leaders, seem quite far-fetched.[157] However, the fear that American officials would abandon the United States seemed much more realistic in 1810 and these worries of corrupting foreign influence were not entirely idle concerns. For example, consider that less than three years earlier the former Vice President Aaron Burr had been tried for treason due to his involvement in a murky plot to possibly found his own dynasty in Mexico or New Orleans[158] and that Congress, just weeks prior to passing the ToNA, authorized a lengthy inquiry into the dealings of General James Wilkinson—the most senior officer in the United States Army—to determine the extent of his involvement in the 1806 conspiracy against the United States.[159]

Washington to the Editor, AM. MONITOR, May 12, 1810, at 3 (claiming that accusations of French influence were made by Federalist to throw off the "odium" of their own British Influence); *French Influence No. III*, REPORTER (Lexington, Ky.), Oct. 21, 1809, at 2 (accusing the Republican party of secretly doing the will of the French); *French Influence No. III*, REPORTER (Brattleboro, Vt.), Oct. 17, 1809, at 2 (accusing the Republican party of secretly doing the will of the French); *French Influence No. IV*, VA. PATRIOT, Aug. 10, 1810, at 4 (accusing the Republican party of secretly doing the will of the French). Another newspaper claimed that the leaders of the Federalist Party would like to hang Thomas Jefferson and "every man who stands in the way of . . . an alliance with England." RALEIGH REG., AND N.C. WKLY. ADVERTISER, Apr. 5, 1811, at 1.

157. *See* BRIDGEPORT HERALD, Oct. 25, 1805, at 3 (claiming that James Monroe told the French that Jefferson is the "ultimate and confidential friend" of the Napoleon, who "cleave[s] in [his] heart[] to France, and [is] wonderfully in love with that sort of liberty and independence which Bonaparte deals out to the sons of men"); *British Influence*, ESSEX REG., Oct. 13, 1810, at 82 (claiming the John Adams was under the will of Britain and was only prevented from doing further damage on behalf of Britain by Congress); FEDERAL REPUBLICAN & COMMERCIAL GAZETTE, Feb. 15, 1810, at 3 (accusing Jefferson of collusion with Napoleon).

158. *See* BUCKNER F. MELTON, JR., AARON BURR: CONSPIRACY TO TREASON 119–124 (2001). The exact contours of Burr's plot remain unknown. One of the few pieces of actual evidence discovered suggests that Burr, in cooperation with the British, was preparing to either assault Spanish Mexico or the American city of New Orleans to form a personal state. *Id.* Additionally, accusations had been made, as early as 1804, that Burr was a paid British agent. *Id.* at 68, 88. The shady plot in 1806 is somewhat similar to that of William Blount, a Senator from Tennessee, whose own filibustering plot was revealed in 1796. *Id.* at 19. Although the actual facts of Burr's plot were not clear, the press was quick to claim it was a foreign influenced conspiracy. *See, e.g.*, *Burr's Conspiracy*, VERMONT CENTINEL, Jan. 28, 1807, at 2 (linking Burr's conspiracy to secret payments from the Spanish crown); *Politics for Farmers*, REPORTER (Brattleboro), Nov. 21, 1809, at 2 (linking Burr's plot to both Spanish and British machinations); THE BEE, Jan. 13, 1807, at 3 (linking Burr's conspiracy to secret payments and inducements from Britain).

159. 21 ANNALS OF CONG. 1727–28 (1810). The full charge of the commission stated as follows:

> [I]nquire into the conduct of Brigadier James Wilkinson, in relation to his

Although Wilkinson would wiggle out of trouble in 1810 (as he had on several other occasions), after his death it was discovered that he was, as long suspected, a paid agent of the Spanish crown.[160] In this environment—where a former Vice President and the highest ranking general in the Army were credibly suspected of conspiracy with European crowns to dismember the United States—an amendment limiting the ability of foreign states to bribe American citizens and officials with titles and presents seems quite sensible.

Indeed, if these were the types of public figures who were suddenly implicated in foreign treachery, who was to say any individual in the United States was wholly impervious to the enticements of foreign leaders.[161] The ToNA likely gained support from both parties because each suspected the other of sympathy (or treason) with Europe and each could view the Amendment as protecting the nation from the enticements and corrupting influence of the political party and European state they were least inclined to support.[162] In this regard, the

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> having at any time whilst in the service of the United States corruptly received money from the Government of Spain or its agents, or in relation to his having, during the time aforesaid, been an accomplice or in any way concerned with the agents of any foreign Power or with Aaron Burr in a project against the dominions of the King of Spain or to dismember these United States.

Id. at 1728. Newspapers of the era also questioned Wilkinson's patriotism, correctly accusing him of treachery on the part of Spain. *See, e.g.*, THE N.Y. EVENING POST, Dec. 13, 1806, at 3 (setting forth the role of Wilkinson in the conspiracy, along with the "Kentucky Spanish Associates"); SUFFOLK GAZETTE, Mar. 9, 1807, at 3 (questioning role of Wilkinson in the plot as a Spanish pensioner).

160. *See generally* ANDRO LINKLATER, AN ARTIST IN TREASON: THE EXTRAORDINARY DOUBLE LIFE OF GENERAL JAMES WILKINSON (2009). Wilkinson's Spanish service began in 1787, when he signed an expatriation agreement and swore allegiance to the King of Spain. In return for a Mississippi trading monopoly, Wilkinson promised to organize opposition to the Constitution in Kentucky to encourage Kentucky independence and, at the least, an alliance with Spain. *Id.* at 88, 93–96. Although unsuccessful, Wilkinson received a $7,000 payment from Spain. *Id.* at 103. Wilkinson, in 1803, again entered Spanish service, receiving a pension as a Spanish agent. *Id.* at 201–04. Wilkinson was recorded on the Spanish books as "Agent Number 13." LANGGUTH, *supra* note 134, at 115. As governor of the Louisiana Territory, Wilkinson was positioned to do much mischief, and he was implicated in Burr's plot. *See* MELTON, *supra* note 158, at 103–45. It has been theorized that Wilkinson revealed the plot to Jefferson to protect Spain from Burr's planned filibuster. *Id.* at 123. As a result of this conduct, Wilkinson was subject to two Congressional inquiries and a court-martial. *See* LINKLATER, *supra* note 160, at 290–91.

161. *See* Hofstadter, *supra* note 140, at 82 (giving an example of similar fears leading to paranoid-seeming conduct, consider the communist accusations made against Secretary of State George C. Marshall, also on very thin evidence).

162. The level of partisan friction had reached such a pitched level during the first decade of the 19th century that each party could credibly believe that the other would abandon the United States to the enticements of foreign powers. *See* WOOD, *supra* note 120, at 333 (describing the intense partisan nature of the era).

theory that the ToNA was a political measure that both sides supported out of political necessity comes quite close;[163] however, this theory goes one step further and argues that not only was support for the ToNA a political necessity, but that both parties believed that it was a public policy necessity for the defense of the country from foreign subversion.

Unfortunately for historians, the ToNA was passed with almost no legislative history. However, the little history that does exist suggests, consistent with this theory, that the ToNA was passed by Congress to prevent American citizens from accepting membership to the recently created French Legion of Honor. When Representative Nathaniel Macon, a Democrat-Republican from Georgia, presented the bill to the House for vote, he stated that he "considered the vote on this question as deciding whether or not we were to have members of the Legion of Honor in this country."[164]

The Legion of Honor was initially founded in 1802 as a French national merit-based state honor society; however, by 1810, it had turned into the core of a new French nobility under the tight control of Napoleon.[165] An offer of membership in the Legion of Honor, or other like societies, would have been extremely enticing and there existed a real fear in the United States that Napoleon would grant titles of honor conveying knighthood as a means of converting public officials and gaining support among influential members of the public. For example, a paper criticizing the non-intercourse acts accused the leaders of the Democrat-Republican Party of supporting the French in the hope of being graced with "the cordon of the Legion of Honor" and claimed that many in that Party are "patiently waiting to be invested with the title . . . nor probably waiting in vain."[166] Although clearly a partisan piece, it is reflective of the deeper fears of the public at this time; indeed, it was an era, where, for example, newspapers openly questioned whether the admission of the Orleans Territory was piece of a broader French plot engineered by its "privileged spies" in the Jefferson administration to infiltrate and dominate the United States.[167]

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163. *See supra* notes 122–23.

164. 21 ANNALS OF CONG. 2050–51 (1810).

165. *See infra* pp. 150–51 (discussing the Legion of Honor).

166. VIRGINIA PATRIOT, Nov. 11, 1810, at 2. A slightly more oblique article documented Jefferson' reception of General Turreau, Grand Officer of the Legion of Honour, in 1804, commenting that "[i]t is amusing enough to see our American republicans bedaubling and *betitling* their brother republican from France." GAZETTE OF THE UNITED STATES, Dec. 4, 1804, at 1 (emphasis in original). Another article provocatively asked how Jefferson and other Republicans could constitutionally accept membership in the Legion of Honor. *Nobility*, THE TICKLER, Feb. 1, 1809, at 2.

167. FED. REPUBLICAN, Feb. 27, 1811, at 2.

Another Federalist piece accused Thomas Jefferson of conspiring with Napoleon, "[l]ike his *protege* Wilkinson with Burr," against the "honour, independence and security of his country." [168] A key piece of this supposed plot was the crowning of Jefferson as Prince Regent by Napoleon so to provide the child Jerome Napoleon Bonaparte with the eventual American throne.[169] Very clearly summing up the fears held by many in the public was an article that was widely reprinted during 1810. The article compared the United States to Austria, Spain, and the Low Countries, asking "[w]ho could have believed [a few years ago] that one man could have altered the habits and manners of the world?"[170] The article described Napoleon as an "almost omnipotent power" who will "appoint[] a king to reign over [the United States]."[171] It went on to suggest that Napoleon had "emissaries in every part of the world, who extol his virtues . . .," and claimed to have evidence that these agents had already infiltrated the American government. Most fearfully, the article predicted that "half of the people of this country are already enlisted under his banner" in some form or other and would support Napoleon when the time came.[172]

These claims were not limited to the Federalist press, accusing Republican leaders of secret treachery with France. Rather, leaders of the Federalist Party were the target of suspicions as well, and they were accused of similar cooperation and treachery with Britain.[173] For

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168. FED. REPUBLICAN & COMMERCIAL GAZETTE, Feb. 15, 1810, at 3; *see also Aaron Burr*, LANCASTER J., Dec. 1, 1810, at 2 (claiming that Burr had become an agent of Napoleon and would lead a Republican supported assault on the United States ending in French dominance in the Americas).

169. FED. REPUBLICAN & COMMERCIAL GAZETTE, Feb. 15, 1810, at 3.

170. HAMPSHIRE FEDERALIST, Jul. 19, 1810, at 1; PORTSMOUTH ORACLE, Jul. 21, 1810, at 1; R.I. AM., Jul. 17, 1810, at 1. The Legion of Honor would be the most conspicuous means of enlisting Americans into French loyalty. Another similar piece, designed to stir up anti-French fervor, claimed that French agents had thoroughly penetrated the country, "whose terror so completely operated upon individuals . . . that men who detested Bonaparte in their hearts, were, under this dreadful influence, obligated to . . . devote themselves to his service." VIRGINIA PATRIOT, Nov. 10, 1810, at 4.

171. PORTSMOUTH ORACLE, Jul. 21, 1810, at 1; R.I. AM., Jul. 17, 1810, at 1; *see supra* note 170.

172. PORTSMOUTH ORACLE, Jul. 21, 1810, at 1; R.I. AM., Jul. 17, 1810, at 1; *see supra* note 170.

173. *See, e.g.*, *British Influence: Developed and the Development Supported by Damning Proofs!!*, NEW HAMPSHIRE PATRIOT, Nov. 13, 1810, at 1 (discussing each major policy of the Federalist Party and arguing that each was strong proof of a secret plot by Federalist leaders to support Britain); *French Influence*, OTSEGO HERALD, Feb. 25, 1809, at 3 ("We have but little, if any, reasons to fear either the policy or power of France: — the cry of French influence, is therefore but a pretext for the English party."); N.J. J., Oct. 25, 1808, at 2 (declaring that the many of the Federalist politicians were "under British influence" leading to treacherous support of policies damaging to American interests).

example, an article appearing in 1810 claimed "[t]hat England maintains an extensive influence in this country; that the federal leaders are her instruments . . . [is] established in fact."[174] The article went on to claim that under the provisions of the Jay Treaty "English agents established themselves in all our principal towns, and having assumed the character and privileges of Americans . . . formed a combination which threatens to dissolve the union of the states, overthrow the temple of liberty, and lay low in the dust all our republican institutions."[175]

Another article, from 1806, stated that the Federalist Party had been secretly "endeavoring, by . . . invidious means, to connect us with Great Britain in a permanent alliance, and in that manner to restore us to a state of dependence upon her."[176] A reoccurring theme in these articles was the fear that the American press had been converted by the British through payment and bribery, and the publication of British-friendly articles brainwashed the Federalist leaders to favor the British.[177] In vivid language, one piece accused the Federalists of "imbib[ing] the spirit of a British subject; [Federalists] have so long sucked the effluvia of malignity from those gangrened pools of corruption, that they feel towards England as a spaniel towards his master."[178]

Although these articles were all part of the partisan press of the era, and the specific claims that they made were wildly inaccurate, the deep seeded fears in the public that they needled were not.[179] Responding to the perceived threat of European subversion, the ToNA provided the nation several protections against foreign influence that the existing Nobility Clauses did not. First, the ToNA was broader than the Nobility Clauses in its description of the titles that were barred and the people who were barred from accepting them.[180] By expanding the language to cover all "titles of nobility and honor," the feared Legion of Honor, and

174. *British Influence*, ESSEX REG., Oct. 13, 1810, at 1.

175. *Id.*

176. *Proof Positive of British Influence: Shut Not Your Eyes*, INDEP. CHRON., Mar. 17, 1806, at 3.

177. *See, e.g.*, COLUMBIAN GAZETTE, Jul. 7, 1810, at 3 (stating that the "great body of Federalists in this country would unite with the Republicans on all questions of National importance, were it not for the falsehoods and misrepresentations promulgated by presses in British pay or under British influence"); *No British Influence!!*, OLD COLONY GAZETTE, Oct. 13, 1809, at 3 (stating that the Federalist press was infiltrated and converted by British); *Shadow and Substance: French Influence & British Influence*, REPUBLICAN STAR, Aug. 20, 1811, at 1 ("Hired presses in our seaports defend every act of Britain.").

178. AM. ADVOC., Sept. 27, 1810, at 2.

179. *See generally* Hofstadter, *supra* note 140 (describing the historical adherence to conspiracies in American politics).

180. *See* 20 ANNALS OF CONG. 671 (1810); 21 ANNALS OF CONG. 2050 (1810); 2 DOCUMENTARY HISTORY, *supra* note 2, at 452–53.

other like societies would be unequivocally banned in the United States. No citizen could accept membership to these societies and become beholden to a European state as a result.

Second, by expanding its prohibitions to the entire public at large, the ToNA also provided protection against the election of individuals who were funded by foreign states or who had been converted to foreign allegiance through gifts and titles. Under the Nobility Clauses, an individual could accept funding and membership in the Legion of Honor, and *then* run for election. Under the ToNA, the initial acceptance of the present or title would result in a complete revocation of citizenship. This protection was particularly important in the territories comprising the newly acquired Louisiana Purchase. In these areas, dominated by individuals who were, in the words of Senator William Plumer, "all frenchman,"[181] it was not unrealistic to fear that citizens may try to elect individuals loyal to France or Spain to local office, or even worse, to Congress upon admission to the Union.[182] Similarly, by barring the acceptance of all "present[s], pension[s], office[s], or emolument[s]" by the public at large, a protection was created against the partisan press, which was accused of being financially beholden to and funded by European powers.[183]

Finally, the ToNA prevented Congress from *ever* consenting to the acceptance of "titles of nobility or honor." This was an important limitation if, as was accused in the partisan press, either party ever became dominated by French or British interests. Indeed, the existing Nobility Clauses only provided protection from the enticements of foreign gifts and emoluments if Congress itself remained honest. Here, the immediate revocation of citizenship provided a *constitutional* protection against treachery, which did not depend upon a Congress that could be secretly corrupted. In this regard, the ToNA would serve as an important national defense measure, protecting American liberty from foreign influence into the future.[184]

Previous works on the ToNA were correct in positioning the ToNA

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181. Peter J. Kastor, *"They are All Frenchmen": Background and Nation in an Age of Transformation*, *in* EMPIRES OF THE IMAGINATION: TRANSATLANTIC HISTORIES OF THE LOUISIANA PURCHASE 239, 249 (Peter J. Kastor & François Weil eds., 2009).

182. In February 1810, James Brown, Henry Clay's brother-in-law and future Senator from Louisiana, wrote from New Orleans that he worried about French influence in the newly acquired Louisiana territory. 1 THE PAPERS OF HENRY CLAY 452–55 (James F. Hopkins ed., 1959). He wrote that "agents of the Emperor" discussed the area as though it had already reverted back to French control and that he was worried about the area's loyalty. *Id.*

183. *See supra* notes 177–178 (describing accusations that British agents had taken control over newspapers).

184. *See* RAWLE, *supra* note 142, at 120 (stating this purpose for the ToNA).

within the broader trend of hostility against Europe during the period. However, the works also misunderstood the exact purpose of the Amendment.[185] By comparing the ToNA most repeatedly to petty laws barring the citation of English case law in Kentucky or the use of a mace in the Pennsylvania legislature (which evoked English practice),[186] the works trivialize the Amendment as a simple snub against all things foreign. Similarly, the theory that the ToNA was a direct response to the marriage of Elizabeth Patterson and the birth of her son Jerome Napoleon Bonaparte also makes the Amendment seem rather silly.[187] An Amendment designed to bar a single individual from citizenship is absurd (although under this theory the child Jerome Napoleon nearly became immortalized in the Constitution). Both of these explanations come close to explaining the Amendment, but then trivialize its actual intent.

The ToNA was, in reality, much more than these theories suggest: it was a serious attempt to respond to a perceived threat against the security of the United States. In an era where high ranking officials were increasingly suspected of being paid agents of foreign states, where vice presidents and high ranking generals were implicated in wide-ranging conspiracies against the United States, the ToNA was a real attempt to provide for national safety in a very dangerous world. Regardless of the loyalties of Thomas Jefferson, James Madison, or John Adams, the nation would have had a constitutional protection against an invasion of foreign influence and subversion.

C. The Title of Nobility Amendment in the Broader Republican Context & the Meaning of "Titles of Nobility or Honor"

The reasons previously discussed—general hostility towards the European powers buffeting the United States, reasonable fears of European subversion and conversion of American citizens, and possibly, the presence of a potential heir to Napoleon living in Baltimore—provide much of the back story for why the ToNA was proposed and nearly made part of the Constitution. However, to fully understand the ToNA it is also necessary to understand the history of anti-nobility sentiments in the United States. This tradition helps explain the Amendment more fundamentally, since the ToNA was not a singular

185. *See* AMES, *supra* note 4, at 188 n.1; BERNSTEIN, *supra* note 4, at 178; Conklin, *supra* note 4, at 124; Silversmith, *supra* note 4, at 583, 609–10.

186. AMES, *supra* note 4, at 188 n.1; Conklin, *supra* note 4, at 124; Silversmith, *supra* note 4, at 583.

187. *See* sources cited *supra* note 143.

event. Rather, it was the product of much deeper and long-standing sentiments against nobility, and more broadly, hereditary privilege in the United States. The ToNA was a natural extension of the view that hereditary privilege, broadly construed, is at odds with the foundations of the American republicanism and democracy. Accordingly, this Section first briefly traces the tradition of anti-nobility sentiments in America, arguing that the ToNA was based on a solid foundation of republican ideals, rather than on simple politics.[188] Second, this Section will also attempt to understand the meaning of the term "titles of nobility or honor" in the Amendment in light of this tradition. Neither Congress nor the ToNA define the term, and recent articles have accepted it at face value.[189] However, by considering the meaning of the Nobility Clauses in the Constitution and the Articles of Confederation—the closest cousins to the ToNA—it is possible to more fully understand the extent and nature of the intended prohibition, which to this point have not been fully explored.

Rather than being something entirely new in 1810, the view that nobility and other hereditary privilege is flatly incompatible with American republicanism has a long tradition.[190] In 1722, Benjamin Franklin mocked the British use of titles of distinction, writing:

> In old Time it was no disrespect for Men and Women to be call'd by their own Names: Adam, was never called *Master* Adam; we never read of Noah *Esquire,* Lot *Knight* and *Baronet,* nor the *Right Honourable* Abraham, *Viscount Meopatamia*, *Baron of Carran*; no, no, they were plain Men, honest Country Grasiers, that took Care of their Families and their Flocks. . . . Thou never sawest *Madam* Rebecca in the Bible, my *Lady* Rachel, nor Mary, tho' a Princess of the Blood after the Death of Joseph, call'd the *Princess Dowager of Nazareth*; no, plain Rebecca, Rachel, Mary,

188. *See* BERNSTEIN, *supra* note 4, at 178 (describing the Amendment as "a political maneuver" or a "powerful expression of nativist prejudice"); Silversmith, *supra* note 4, at 609 (describing the Amendment as a product of xenophobia and partisan politics).

189. Modern articles on the ToNA have either not considered the meaning of the terms, implying that their meaning is obvious, or rely mainly on modern definitions from sources such as Black's Law Dictionary or the Oxford English Dictionary. *See, e.g.*, Silversmith, *supra* note 4, at 603–04. Silversmith suggests that the definition in the ToNA is narrower than that in the Nobility Clauses, *id.* at 605, and argues that it only covers actual titles of nobility. *See id.* at 602–09.

190. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 182–83 (1992) (discussing the various founders' hostility to hereditary privilege).

> or the *Widow* Mary, or the like: It was no Incivility then to mention their naked Names as they were expressed.[191]

In less humorous, and far more dramatic fashion, Thomas Paine wrote that a hereditary monarchy "was the most prosperous invention the Devil ever set on foot for the promotion of idolatry,"[192] and added that "[t]o the evil of monarchy we have added that of hereditary succession. . . ."[193] He went on, writing:

> [I]t is not so much the absurdity as the evil of hereditary succession which concerns mankind. . . . it opens a door to the FOOLISH, the WICKED; and the IMPROPER, it hath in it the nature of oppression. Men who look upon themselves born to reign, and others to obey, soon grow insolent; selected from the rest of mankind their minds are early poisoned by importance; and the world they act in differs so materially from the world at large, that they have but little opportunity of knowing its true interests, and when they succeed to the government are frequently the most ignorant and unfit of any throughout the dominions.[194]

Similarly, in 1777, Benjamin Rush wrote, while opining on government of Pennsylvania, that he concurred with all "prejudices against hereditary titles, honour and power" because "[h]istory is little else than a recital of the follies and vices of kings and noblemen."[195] Displaying a recurring fear among the founders, Rush also warned that disparities in wealth and power in America had already sowed the seeds for the creation of nobility in America.[196] Additionally, as an expression of the complete disdain which the founders held hereditary privileges—and of their fear that they would be recreated here in America—a number of Revolutionary-era state constitutions contained prohibitions on the granting or acceptance of titles of nobility or hereditary

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191. BENJAMIN FRANKLIN, *On Titles of Honor*, *in* 1 THE PAPERS OF BENJAMIN FRANKLIN 52 (Leonard W. Labaree ed., 1959); *see also* WILLIAM DOYLE, ARISTOCRACY AND ITS ENEMIES IN THE AGE OF REVOLUTION 86 (2009) (citing this quote to display the hostility to hereditary privilege in colonial America).

192. THOMAS PAINE, COMMON SENSE 11 (Forgotten Books 2008) (1776).

193. *Id.* at 15.

194. *Id.* at 17–18.

195. BENJAMIN RUSH, OBSERVATIONS UPON THE PRESENT GOVERNMENT OF PENNSYLVANIA 8 (Phila., Styner & Cist 1777).

196. *Id.*

privileges.[197]

The tradition of opposition to titles of nobility, and hereditary privilege more broadly, did not end with the Revolutionary War.[198] Rather, the Articles of Confederation,[199] many state constitutions enacted in the 1780s and 1790s,[200] and the Constitution itself[201] contain provisions barring titles of nobility, hereditary privilege, and other markers of distinction. Indeed, a significant number of states

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197. The Declarations of Rights of Virginia and North Carolina limited hereditary privileges. *See* N.C. DECLARATION OF RIGHTS of 1776, art. XXII ("That no hereditary emoluments, privileges, or honours ought to be granted or conferred in this State."); VA. DECLARATION OF RIGHTS of 1776, art. IV ("That no Man, or Set of Men, are entitled to exclusive or separate Emoluments or Privileges from the Community, but in Consideration of public Services; which not being descendible, neither ought the Offices of Magistrate, Legislator, or Judge, to be hereditary."). Maryland explicitly limited the granting of titles of nobility, while Georgia disenfranchised those bearing such titles. *See* MD. DECLARATION OF RIGHTS of 1776, art. XL ("That no title of nobility or hereditary honours ought to be granted in this state."). Georgia's constitution read:

> [N]or shall any person, who holds any title of nobility, be entitled to a vote, or be capable of serving as a representative, or hold any post of honour, profit or trust, in this state, whilst such person claims his title of nobility; but if the person shall give up such distinction, in the manner as may be directed by any future legislation, then, and in such case, he shall be entitled to a vote, and represent, as before directed; and enjoy all the other benefits of a free citizen.

GA. CONST. of 1777, art. XI.

198. For example, Professor Gordon S. Wood writes about the Revolutionary era that "[e]quality was in fact the most radical and most powerful ideological force let loose in the Revolution . . . . Once invoked, the idea of equality could not be stopped, and it tore through American society and culture with awesome power." WOOD, *supra* note 190, at 232.

199. ARTICLES OF CONFEDERATION, art. VI.

200. *See* KY. CONST. of 1792, art. XII, § 26 (enouncing that the state shall not "grant any title of nobility or hereditary distinction"); N.H. CONST. of 1784, art. I, § IX ("No office or place whatsoever in government, shall be hereditary—the abilities and integrity requisite in all, not being transmissible to posterity or relations."); PA. CONST. of 1790, art. IX, § 24 (enouncing that the state shall not "grant any title of nobility or hereditary distinction"); S.C. CONST. of 1790, art. IX, § 5 (enouncing that the state shall not "grant any title of nobility or hereditary distinction"); TENN. CONST. of 1796, art. XI, § 30 ("[N]o hereditary emoluments, privileges, or honors shall ever be granted or conferred in this State."). Massachusetts' constitution read:

> No man, or corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.

MASS. CONST. of 1780, art. VI

201. U.S. CONST. art. I, § 9, cl. 8, § 10, cl. 1.

immediately called for even tighter protections against titles of nobility in the federal Constitution.[202] Describing the necessity of the provisions limiting titles of nobility in the Constitution, Alexander Hamilton wrote that the prohibition "may truly be the denominated corner stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people."[203] Reinforcing this point, Madison also connected the limits on nobility to republicanism, rhetorically asking, "[c]ould any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments . . ."[204]

This deep aversion to all markers of hereditary privilege did not lessen with time; instead, it remained an important fixture of American politics into the early nineteenth century.[205] For example, an editorial published in 1808 critiqued hereditary privilege in language evoking Thomas Paine,[206] writing that nobles are "a set of men in all the states of Europe, who assume from their infancy a pre-eminence, independent of their moral character" and that they soon learn to "distinguish themselves as a distinct species" to the detriment of the remainder of society.[207]

Indeed, the hostility against hereditary privilege only grew as the United States was increasingly buffeted by the European powers in the first decade of the nineteenth century; accusations of involvement with European nobility or aristocratic aspirations became increasingly common political maneuvers during the presidencies of John Adams

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202. *See supra* note 43 and accompanying text (describing proposals during the state ratifying conventions to revoke the ability of Congress to consent to the acceptance of titles of nobility).

203. THE FEDERALIST NO. 84, at 572 (Alexander Hamilton) (Paul Leicester Ford ed., N.Y., Henry Holt & Co. 1898).

204. THE FEDERALIST NO. 39, at 248 (James Madison) (Paul Leicester Ford ed., N.Y., Henry Holt & Co. 1898).

205. For example, state constitutions of this era continued to regularly bar titles of nobility, hereditary privilege, and other emoluments. *See* ALA. CONST. of 1819, art. I, § 26 ("No title of nobility, or hereditary distinction, privilege, honor, or emolument, shall ever be granted or conferred in this State; nor shall any office be created, the appointment of which shall be for a longer term than during good behaviour."); IND. CONST. of 1816, art. I, § 22 ("That the legislature shall not grant any title of nobility, or hereditary distinctions, nor create any office, the appointment to which shall be for a longer term than good behavior."); OHIO CONST. of 1802, art. VIII, § 24 ("That no hereditary emoluments, privileges or honors shall ever be granted or conferred by this State.").

206. *See supra* notes 192–94 and accompanying text.

207. Obadiah Optic, EYE, June 9, 1808, at 265–67. This editorial went on to question whether office held during "good behavior" were becoming a new quasi-nobility, as it was so unlikely that these individuals would ever be removed from office. *Id.*

and Thomas Jefferson.[208] The ToNA did not suddenly appear in 1810 out of thin air; instead, the Amendment was a natural extension of a tradition against hereditary privilege that existed since the Revolution and which sought to protect and reinforce the foundations of American republicanism.[209] For example, Professor Akhil Reed Amar called the Nobility Clauses an extension of the "republican ethos";[210] in this regard, the ToNA can count itself (at least in spirit) with more storied provisions, such as the Nobility Clauses in the Constitution.

This broader tradition of hostility to aristocracy and nobility in the United States lends some important aid in determining the meaning of the term "titles of honor and nobility" in the ToNA. Because the ToNA was written only approximately twenty years after the Constitution, the meaning ascribed to the term "title of nobility" in the Nobility Clauses in the Constitution—and in Articles of Confederation—provides some useful insight into the intended meaning of the term "titles of nobility or honor" in the ToNA. Indeed, when drafting and passing the ToNA, Congress gave no indication that the term "titles of nobility" was to have a different meaning than in the Nobility Clauses in the Constitution.

The prohibitions against titles in the Articles of Confederation and Constitution—and in the ToNA as well—could be interpreted extremely narrowly as only barring feudal titles, such as Duke or Count, that are conferred directly by a King or Emperor.[211] Indeed, in the most comprehensive work on the ToNA to date, Jol Silversmith approaches the ToNA in this manner, arguing that it primarily covers only actual titles of nobility.[212]

William Blackstone wrote that "titles of honour" used in England to

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208. *See supra* notes 156–57 (describing the accusations by Federalists and Democrat-Republicans of aristocratic aspirations or leanings). *See also* WOOD, *supra* note 120, at 217 (describing criticisms of the Federalists as aristocrats).

209. *See* WOOD, *supra* note 120, at 470 (describing the heart of the American Revolution as "the assumption that people were not born to be what they might become" and the reflection of that ideal in the expansion of public education in the early United States).

210. *See* AMAR, *supra* note 4, at 126. Reinforcing the importance of the Nobility Clauses in the Constitution and the Articles of Confederation, Amar, writes that "[n]owhere else had the Confederation so directly regulated states' internal governance. This early antiaristocracy language thus attests to the depth of the Revolutionary Americans' commitment to maintain a New World order free from the oppressive weight of the Old World order." *Id.* at 125.

211. Modernly, Black's Law Dictionary defines "nobility" as "[p]ersons of social or political preeminence, usu. derived by inheritance or from the sovereign. In English law . . . nobility is generally is created either by a writ of summons to sit in Parliament or by a royal grant through letters patent . . . ." BLACK'S LAW DICTIONARY 1072 (8th ed. 2004).

212. *See* Silversmith, *supra* note 4, at 602–09.

distinguish nobility from commoners during the eighteenth century were limited to five types: the honorary titles of duke, marquess, earl, viscount, and baron.[213] Blackstone also discusses the social ordering of commoners, outlining the ancient *vidames*, the various classes of knights, and the title esquire,[214] but he made clear that although these titles could also be inherited or were tied to lineage to some degree, they were not titles of nobility. Likewise, although some commoners were "greatly superior to others," Blackstone emphasized that commoners "all are in law peers, in respect of their want of nobility."[215] Similarly, titles conferring monarchial status, such as King, were not titles of nobility under the English system.[216] An interpretation of the Nobility Clauses that ties the term "nobility or honor" to very narrow English conceptions of honorary nobility, such as those outlined by Blackstone just several years earlier, would leave the Nobility Clauses in the Constitution and the ToNA with little meaning. For example, it is exceedingly unlikely that the federal or any state government would have ever tried to create an official distinction of nobility in that purest sense, even if the prohibitions in the Nobility Clauses did not exist. Likewise, the most dangerous titles—titles of monarchy—would not be covered, allowing for the creation of a hereditary presidency.

The framers were not nearly so constrained in their conception of the Nobility Clauses and they did not intend the prohibitions in the Constitution to be construed so narrowly.[217] The limitations in the Constitution—repeated and likely expanded in the ToNA—were more broadly focused on preventing the creation of hereditary privilege in American government and society. Although relatively little scholarship has been published on the Nobility Clauses, most of the recent scholarship has taken the position that the Nobility Clauses were meant to prevent the creation of a much broader class of titles and honors that indicated a hereditary cleavage in the social ordering.[218] For

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213. *See* BLACKSTONE, *supra* note 66, at 396–99. *See generally* Edward Manson, *Nobility in England*, 2 J. SOC'Y. COMP. LEGIS. 319 (1900) (describing the historically limited size and nature of the nobility in England); 1 THOMAS ROBSON, THE BRITISH HERALD (Sunderland, Turner & Marwood 1830) (describing the nature and history of the nobility and other classes of distinction in Britain and Ireland).

214. *See* BLACKSTONE, *supra* note 66, at 402–06.

215. BLACKSTONE, *supra* note 66, at 402.

216. *See* BLACKSTONE, *supra* note 66, at 191–95, 396; *see also* WOOD, *supra* note 120, at 23 (describing the English and French nobility).

217. *See* WOOD, *supra* note 120, at 35 (stating that the Nobility Clauses were "now interpreted to mean that no one should be set apart from the body of the people").

218. *See, e.g.*, Richard Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100, 115 (1984)

example, Professor J.L. Balkin wrote:

> Although the Constitution speaks of 'titles' of nobility, the concern was with much more than mere bestowal of titles. Nobility was far more than the right to use a particular name. It was an entire social system of superiority and inferiority, of habits of deference and condescension, of social rank and political, cultural and economic privilege.[219]

Likewise, Professor Akhil Amar wrote that the Nobility Clauses were meant to bar a hereditary aristocracy based on "birth and blood."[220]

One of the earliest and fiercest political debates in the young United States, centering on the Society of the Cincinnati, reinforces this view.[221] The controversy, first, paints a vivid picture of the depths of the tradition against hereditary privilege in the United States, helping to more fully frame the heritage of the ToNA. Second, the controversy also specifically sheds light on the meaning of the Nobility Clause in the Articles of Confederation, which was incorporated into the Constitution and the nearly amended in the ToNA. The controversy supports the view that the Constitution—and the ToNA—prohibits state supported hereditary privileges broadly,[222] rather than just the narrow class of titles

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("Constitutional history indicates that the Framers intended the clauses to forbid the aware of actual titles of nobility, as well as governmental creation of elite classes with unequal material advantages and privileged political access."); Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U. L.R. 1375, 1381, 1401–02, 1408 (2006) (arguing that the Nobility Clause in the Constitution prohibit "hereditary privileges with respect to institutions of the state" and "a prohibition on special privileges with respect to institutions of the state"); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428–29 (1994) (stating the Nobility Clauses are rooted in anti-caste principles).

219. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2350 (1996) (citing WOOD, *supra* note 190, at 41–42).

220. Akhil Reed Amar, *Becoming Lawyers in the Shadow of* Brown, 40 WASHBURN L.J. 1, 4–5 (2000).

221. The society was named after Lucius Quinctius Cincinnatus, a Roman general, who was nominated dictator of Rome. Upon achieving a victory that saved Rome from the Aequi, Cincinnatus stepped down and retired to his farm. *See* MINOR MYERS, JR., LIBERTY WITHOUT ANARCHY: A HISTORY OF THE SOCIETY OF THE CINCINNATI 18 (1983).

222. The manner by which the debate over the Cincinnati shaped conceptions of titles of nobility in the United States has been analyzed previously by Carlton F.W. Larson. *See* Larson, *supra* note 218, at 1386–1400. He considers the history of the society at length and concludes that individuals in the 1780s believed that the Society of Cincinnati *would* have violated the Nobility Clause in the Article of Confederation had it been sanctioned by the government due to its hereditary nature. *See id.* at 1396–98. As the Constitution inherits the

outlined by Blackstone.[223]

The Society of Cincinnati was founded in 1783 by a group of officers who had served in the Continental Army.[224] The Society was divided into separate state chapters, and it was designed to promote cooperation between the former officers of the Continental Army.[225] However, and quite problematically, membership in the society also included several elements that openly smacked of nobility. First, membership in the society included the wearing of distinctive ribbons and medals.[226] In 1783, these practices were extremely reminiscent of European nobility, which commonly wore ribbons and medals as a marker of rank and class privilege.[227] Second, membership in the Society was limited to officers who served in the Continental Army and future membership would primarily be hereditary, passing each generation to the eldest son of a current member.[228] The hereditary and closed nature of the organization reeked of nobility, and, not surprisingly, the public recoiled in shock and outrage at the formation of a hereditarily privileged class on the heels of a Revolution that announced "that all men are created equal."[229]

Nobility Clause in the Articles of Confederation, he persuasively concludes that a similar prohibition exists of the Nobility Clauses in the Constitution. *Id.* at 1402. The idea of analyzing the meaning of the Nobility Clauses through the debates surrounding the Cincinnati owes itself to Larson. Indeed, this Article could simply cite Larson's conclusion that the Nobility Clause in the Articles of Confederation barred hereditary titles generally without delving into a discussion of the Order to make the necessary point that this meaning should be carried through to the term "nobility or honor" in the ToNA. However, the controversy surrounding the Order is discussed here as well for background on the tradition of anti-hereditary sentiment in the United States. An understanding of the Cincinnati controversy helps shed light on the ToNA, as any attempt to bar the Legion of Honor in the United States exists in the shadow of such a similar American organization. I have not cited Larson's article in every place where I discuss the same primary source material. However, we consider many of the same materials and the conclusion that the Nobility Clause in the Articles of Confederation and the Constitution bars all hereditary privileges is entirely his, and I only carry it one step further in analyzing the ToNA.

223. *See supra* notes 218–20. *See generally* BLACKSTONE, *supra* note 66.

224. *See* MYERS, *supra* note 221, at 23–25. The Society seems to have been founded partially in response to the threatened mutiny of the Continental Army in 1783. *Id.* at 1.

225. *See generally id.* at 23–44. One of the major goals of the Society was ensuring that the Continental Army received large amounts of back pay that it was due from the Continental Congress. *See id.* at 23–24.

226. *See* DOYLE, *supra* note 191, at 100. Even worse, a significant portion of the membership would be made up of noble French officers who had fought in the Revolution. *See id.*; *see also* Larson, *supra* note 218, at 1387.

227. *See* DOYLE, *supra* note 191, at 100 (describing European nobles wearing orders and stars).

228. *See id.* Some provision was made for acceptance of worthy individuals in the future. However, the primary means of admission into membership was through hereditary inheritance. *See id.*; Larson, *supra* note 218, at 1388.

229. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

The most influential attack on the Society came from Aedanus Burke, Chief Justice of the South Carolina Supreme Court.[230] Writing under the pseudonym Cassius,[231] Burke called for the Cincinnati to be "crush[ed]" and for the legislature to "immediately enter into spirited resolutions against it."[232] Burke predicted that the Society will create "a race of hereditary Nobles; founded on the military, together with the powerful families . . ." and a separate race of "people or the plebeians, whose only view is not to be oppressed, but whose certain fate it will be to suffer oppression under the institution."[233] He went on to vividly state that the Society would be an "Order of patricians,"[234] whose "next generation will drink as deep of noble blood, and a hereditary peerage be as firmly settled in each potent family, and riveted in our government, as any order of nobility is in the monarchies of Europe."[235] Additionally, and importantly, Burke argued that the Cincinnati was a direct violation of the Nobility Clause in the Articles of Confederation.[236] Although the Order was not sponsored by the federal government, Burke argued that the Cincinnati was a violation of the Articles because it would soon develop exclusive right to both civil and military offices.[237]

Burke's criticisms of this new "nobility" were greeted with widespread public support and opposition to the Cincinnati quickly grew.[238] For example, the state of Rhode Island was rumored to be considering legislation that would disenfranchise members of the Society and bar them from ever holding public office.[239] The North Carolina legislature introduced a bill to exclude members of the Cincinnati from holding office in either chamber of the legislature[240] and Massachusetts conducted an inquiry that ultimately condemned the Society.[241] One newspaper described the organization as like the

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230. *See* MYERS, *supra* note 221, at 49; Larson, *supra* note 218, at 1388.

231. AEDANUS BURKE, CONSIDERATIONS ON THE SOCIETY OF ORDER OF THE CINCINNATI (Hartford, Bavil Webster 1783). Cassius was a conspirator in the plot to assassinate Julius Caesar and was the brother of Marcus Junius Brutus.

232. *Id.* at 21; *accord* Larson, *supra* note 218, at 1389.

233. BURKE, *supra* note 231, at 20.

234. *Id.* at 7.

235. *Id.* at 6.

236. *See id.* at 6–9; *see also* Larson, *supra* note 218, at 1388.

237. *See supra* note 236.

238. *See* AMAR, *supra* note 4, at 125–26; DOYLE, *supra* note 191, at 105–06; MYERS, *supra* note 221, at 49–57; Larson, *supra* note 218, at 1389–90.

239. MYERS, *supra* note 221, at 52; DOYLE, *supra* note 191, at 105.

240. DOYLE, *supra* note 191, at 128.

241. MYERS, *supra* note 221, at 51; Larson, *supra* note 218, at 1390.

"nobility in monarchial and aristocratical governments" complete with "honors and privileges . . . entailed to their male heirs forever."[242]

Although many of the members of the Society were among the most highly regarded heroes of the Revolution, such as Baron Von Steuben, Henry Knox, Horatio Gates, Alexander Hamilton, and George Washington,[243] the public response to the first meetings of Cincinnati was "violent and formidable," largely due to the hereditary nature of the organization.[244] On that point, Samuel Adams wrote that the Society was "disgustful[] to Common Feeling" and that the country would not "patiently bear to see Individuals stalking with their assumed honorary Badges . . . proudly boasting 'These are the Distinctions of *our* Blood.'"[245] Indeed, the public outcry did not dissipate until the Society pledged to eliminate the provisions providing for hereditary succession,[246] a promise that was made upon the flat request of George Washington at the Society's first general meeting in May 1784.[247]

The deep and immediate opposition to the hereditary privilege of the Cincinnati was not limited to the general public; many of the founding fathers opposed the society because it so obviously laid the seed for an American nobility. Thomas Jefferson claimed that he was an "enemy of this institution from the first moment of its conception"[248] and upon request for advice,[249] he encouraged George Washington to distance himself from the Society.[250] Jefferson also wrote that Congress was unfriendly to Cincinnati and that only an abolition of the hereditary nature of the Society could make it unobjectionable.[251] Although often politically at odds with Jefferson, John Adams concurred when it came to the Cincinnati. He wrote in 1798 that "[a]ll that we can say in America is, that legal distinctions, titles, powers, and privileges, are not hereditary . . . . If these gentlemen had been of opinion that titles and

242. Larson, *supra* note 218, at 1392 (citing NORWICH PACKET, Apr. 1, 1784, at 2).

243. MYERS, *supra* note 221, at 120–142.

244. THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 333 (Theodore J. Crackel ed., Digital ed. 2008); *see also* Larson, *supra* note 218, at 1397.

245. 4 THE WRITINGS OF SAMUEL ADAMS 298 (Harry Alonzo Cushing ed., 1908) (emphasis in original).

246. DOYLE, *supra* note 191, at 118; Larson, *supra* note 218, at 1399.

247. DOYLE, *supra* note 191, at 115. Although the Cincinnati promised to abandon its hereditary nature, it actually did not do so in most states, a fact that most members of the public did not realize. *Id.* at 136; *see also* Larson, *supra* note 218, at 1399.

248. 10 THE PAPERS OF THOMAS JEFFERSON 52–53 (Barbara B. Oberg & J. Jefferson Looney eds., Digital ed. 2008).

249. *See* 10 JEFFERSON, *supra* note 248, at 88.

250. *See id.* at 105–10; Larson, *supra* note 218, at 1394.

251. *See* sources cited *supra* note 250.

ribbons were necessary in society, to have been consistent, they should have taken measures for calling conventions of the people, where it should have been determined . . . whether any such distinction should be introduced."[252]

Even though the Cincinnati may not have been strictly violative of the Nobility Clause in the Articles of Confederation due to its private nature, many were opposed to it, such as Adams, on the grounds that it ran counter to even deeper notions of American republicanism.[253] Further, there was little doubt among contemporaries that if the Cincinnati had been sponsored by the government it would have violated the Articles of Confederation.[254] The federal Constitution directly inherited the provisions limiting titles of nobility from the Articles of Confederation;[255] accordingly, the interpretation that the relevant provision in the Articles of Confederation was directed at hereditary privilege broadly should be applied to the Nobility Clauses in the Constitution as well.[256]

A commentary on the Federalist Papers, published in 1810, wrote about the Nobility Clauses that "[h]ereditary and titular distinctions are, no doubt, indispensable for a monarchy, but obviously incompatible

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252. 5 THE WORKS OF JOHN ADAMS 488–89 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1856). Earlier Adams had strongly condemned the Order, calling it an "order of chivalry" that was "against our confederation, and against the constitutions of several States, as it appears to me. It is against the spirit of our governments and the genius of our people." 8 THE WORKS OF JOHN ADAMS 192 (Charles Francis Adams ed., Boston, Little Brown & Co. 1853).

253. Although private, many individuals viewed the Cincinnati as tacitly connected to the Washington administration. *See* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY 60 (2005); WOOD, *supra* note 120, at 108.

254. *See* Larson, *supra* note 218, at 1395–96 (citing OBSERVATIONS ON A LATE PAMPHLET ENTITLED CONSIDERATIONS ON THE SOCIETY OR ORDER OF THE CINCINNATI, 18, 21 (Phila., Robert Bell 1783)) (noting that even the main public defense mustered for the Cincinnati implicitly conceded that if the Society had been connected to the government that it would violate the Articles' prohibition on titles of nobility). Shedding some additional light on, and further supporting this point, is the related issue of the Knights of the Order of Divine Providence. This order, with its origins in Warsaw, approached George Washington in 1783 and offered to make thirty-six senior American officers knights of the order, complete with star and badge insignia to wear upon their uniforms. The order was very similar to the Cincinnati: it was privately formed brotherhood that gathered funds to support its members in old age. Washington referred this invitation to Congress, which in 1784 found that membership in the order would not be consistent "with the principles of the Confederation." MYERS, *supra* note 221, at 53; *accord* DOYLE, *supra* note 191, at 107.

255. U.S. CONST. art. I, § 9 cl. 8, § 10 cl. 1; THE FEDERALIST NO. 44, at 297 (James Madison) (Paul Leicester Ford ed., N.Y., Henry Holt & Co. 1898). James Madison wrote that the Nobility Clauses in the Constitution were "copied from the articles of Confederation, and need[] no comment." *Id.*

256. *See* Larson, *supra* note 218, at 1401–02.

both with the forms and spirit of a republic."[257] This commentary indicates that in 1810—when the ToNA was written and passed—the Nobility Clauses in the Constitution were interpreted to broadly include all hereditary distinctions and titles.[258] As no different meaning is suggested in the ToNA, the term "title of nobility" in the ToNA should also be interpreted as covering privileges of a hereditary nature as well, rather than just a narrow class of official titles of nobility.[259] Earlier drafts of the ToNA support this view. For example, the third draft not only proposed to bar "titles of nobility," but also proposed to bar all titles of distinction "above or below that of nobility."[260] This prohibition would bar titles of distinction, such as the Legion of Honor, that were not technically titles of nobility, and would also bar titles such as King or Prince, that were above nobility. The broad range of titles included in this intermediary draft lends support to the argument that the term "titles of nobility or honor" in the final draft was meant to reach above and below pure titles of nobility (in the technical sense) to reach all of these various hereditary titles.

However, slightly complicating the meaning of the prohibition in the ToNA is the fact that it bars not just "titles of nobility," but all "titles of nobility or honor."[261] It is not clear if Congress meant to give the terms "title of nobility" and "title of honor" separate meanings. Although it is impossible to know for certain, the best approach is to treat the prohibition as a single term. This reads the ToNA as a flat prohibition on "titles of nobility or honor," rather than on "titles of nobility" and "titles of honor" (distinct from one another). There are several reasons why treating the terms as a single unit is the best reading.

First, even though almost all previous studies of the amendment attempt to separate the terms[262] and generally treat "honor" as the lower

257. *The Works of Alexander Hamilton*, AM. REV. OF HIST. & POL., July 1811, at 28 (revieing ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON (N.Y., Williams & Whiting, 1810)).

258. This source commented on Hamilton's statements in Federalist No. 84, where Hamilton justified and explained the Nobility Clauses. *See* THE FEDERALIST NO. 84, *supra* note 203, at 571–72.

259. *See* RAWLE, *supra* note 142, at 119 (describing the Nobility Clauses as banning "hereditary distinctions," and discussing the ToNA as though it was meant to have the same meaning). *But see* Silversmith, *supra* note 4, at 605 (stating the ToNA has a narrower meaning than the Nobility Clauses).

260. 20 ANNALS OF CONG. 572–73 (1810).

261. *See* 2 Stat. 613 (1810); 20 ANNALS OF CONG. 671–72 (1810); 21 ANNALS OF CONG. 2050 (1810); 2 DOCUMENTARY HISTORY, *supra* note 2, at 452–53.

262. *See, e.g.*, Dodge, *supra* note 106 ("The missing Amendment is referred to as the 'title of nobility' Amendment, but the second prohibition against 'honour' (honor), may be more significant."); Silversmith, *supra* note 4, at 602 (analyzing the two terms separately).

of the two ranks,[263] separating and ranking them this way is impossible. For example, William Blackstone refers to the highest titles of nobility in England in the 18th century as "titles of honour."[264] The types of lower ranks, such as esquire, that writers—David Dodge in particular—attempt to call titles of honor,[265] were, according to Blackstone, not titles of honor conferring noble status at all.[266] Similarly, in 1759, the French court created a title, called an "Honour[] of Court," which was reserved for only the most ancient of the French nobility.[267] This distinction, above normal noble status, entitled the bearers to additional interactions with the King.[268] The term "honor" in the ToNA refers, more likely, to the entire notion of separating society of into classes of individuals that are intrinsically higher or lower than one another, which was at the very heart of European class system.[269] Somehow neatly cleaving the two nouns at issue in the ToNA into higher and lower distinctions is impossible and misguided, because the two are drive at the same thing.

The initial drafts of the ToNA, not seriously considered in previous works, also suggest that the term "titles of nobility and honor" should be considered as a unit. In the first draft of the ToNA, the term honor did not appear at all. Rather, the term "nobility" appeared by itself.[270]

In the second and third drafts, the term "nobility" was paired with the term "titles of distinction" (rather than the term "honor").[271] In both of these drafts, the terms "nobility" and "distinction" were separated from each other grammatically (for example: "shall accept of any title of nobility, or any other title of distinction").[272] However, in the fifth and final drafts of the ToNA, the term "distinction" was removed and replaced with the term "honor," and importantly, the terms "nobility" and "honor" were combined into a single unit.[273] This drafting process suggests that Congress made a conscious decision to combine the terms

263. *See* sources cited *supra* note 262.

264. BLACKSTONE, *supra* note 66, at 396.

265. Dodge, *supra* note 106.

266. BLACKSTONE, *supra* note 66, at 404–06.

267. DOYLE, *supra* note 191, at 11. To bear this distinction, a French nobleman needed to trace his noble lineage to at least 1400. By 1790, 462 families had qualified for this special title of honor. *Id.*

268. *Id.*

269. *See id.* at 18; *see also* Balkin, *supra* note 219, at 2350 (arguing the same point with regards to the Nobility Clauses).

270. *See* sources cited *supra* note 40.

271. *See* 20 ANNALS OF CONG. 549, 572–73 (1810).

272. *Id.*

273. *See* sources cited *supra* note 261.

after experimenting with their separation.

The very limited legislative history, so to speak, on the ToNA supports this interpretation of the Amendment. As discussed earlier, when the ToNA was brought before the House of Representatives for vote, Representative Nathaniel Macon, a Democrat-Republican from Georgia, stated that he "considered the vote on this question as deciding whether or not we were to have members of the Legion of Honor in this country."[274] Quite similar to the Cincinnati, the Legion was initially designed in 1802 as a national honor society, bestowing lifetime privilege and the right to wear an identifying chivalric cross and red ribbon.[275] In 1802, already, the Legion was condemned as the seed of a new French nobility;[276] by 1807 it had truly turned into something very similar to that. In 1807, France recreated a titled hierarchy, complete with hereditary estates called *majorats*.[277] Within this hierarchy, the members of the Legion of Honor now bore the chivalric title of knight, a privilege that could become hereditary upon sufficient showing of wealth.[278] Although not automatically a hereditary distinction, the members of the Legion were a state chosen aristocracy, firmly connected to state privileges and office. Indeed, this was exactly what the American public feared the Cincinnati would become if left unchecked. The dangers of the Cincinnati may have been averted, but in 1810 many feared that an even more dangerous hereditary order would spread across the Atlantic to subvert American population if it was not opposed.[279]

As the only clearly stated purpose of the ToNA was to bar the spread of the Legion of Honor into the United States, the ToNA should be interpreted as attempting to bar the creation of hereditary government offices, such as the Legion of Honor or others of its ilk. Even further, unlike under the existing Nobility Clauses, a private hereditary organization, such as the Cincinnati, may have been barred under the text of the ToNA as the Amendment does not explicitly

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274. 21 ANNALS OF CONG. 2050 (1810).

275. DOYLE, *supra* note 191, at 315. The cross and red ribbon evoked the Order of St. Louis, which had become defunct during the Revolution. *Id.*

276. *See id.* For example, in 1804, a newspaper article flatly called the Legion of Honor "the new French nobility." *French Nobility*, OTSEGO HERALD, Aug. 27, 1804, at 2.

277. DOYLE, *supra* note 191, at 320. This new hierarchy of titles was very reminiscent of that banned in just the previous decade in France, and it included Duke, Count, Baron, Marquis, and Knight. *Id.*

278. *Id.* Later, the title of Knight was made hereditary only if it was borne by three successive generations. *Id.* at 323.

279. *See supra* Part III.B (describing fear the foreign governments would use honorary titles or other presents to bribe Americans).

require that the title be connected to a government or state.[280] In the end, what most clearly mattered under the ToNA was whether the title conferred a hereditarily privileged status on an individual that the rest of society did not share. Although this definition would not bar lawyers using the term esquire from citizenship (since this is not a hereditary title),[281] it would have barred an enormous variety of nineteenth century titles that marked divisions in social ordering that very deeply conflicted with American republicanism.

IV. THE CURIOUS HISTORY OF THE TITLES OF NOBILITY AMENDMENT

Any piece on the Titles of Nobility Amendment would be ignoring one of the most interesting and curious chapters in the ToNA's story if the account stopped in December 1814, when, in retrospect, it became clear that the ToNA would not be ratified by enough states to become the Thirteenth Amendment. Unlike most other proposed amendments that were rejected by Congress or the states, the ToNA still managed to become part of the Constitution. Obviously, the ToNA was never an *official* amendment. But, due to an administrative misjudgment, it appeared as the "official" Thirteenth Amendment to the Constitution in the 1815 version of the Statutes at Large. This single misjudgment created 200 years of confusion about the status of the ToNA. The initial confusion was of the innocent sort—Congress believed that the ToNA was the Thirteenth Amendment until an inquiry suggested otherwise in 1818, and the Constitution was reprinted throughout the country bearing this Amendment during the nineteenth century. More recently, right-wing extremists have seized upon the Amendment, claiming that it was ratified and then later suppressed by a conspiracy of Jewish bankers and lawyers. These sorts of claims are without merit and have been thoroughly rejected, although they still persist today on a number of websites and right-wing blogs. The shrouded past of the ToNA makes the Amendment interesting to historians, if only to figure out why it was proposed in 1810; the resulting 200 years of confusion and pseudo-history that it has spawned makes the Amendment an exceedingly

280. It is unlikely the intended effect was to actually bar the Order of the Cincinnati, even though the literal language of ToNA seems to demand that outcome. First, early Americans were most concerned with hereditary privileges connected to the government in some form, which the Cincinnati was technically not. Second, Senator Philip Reed, who originally proposed the Amendment, was actually a member of the Cincinnati. *See supra* note 39.

281. *See infra* Part IV.B (describing the modern claims of David Dodge and other right-wing radicals).

unique Constitutional curiosity.

A. The Nineteenth Century Confusion

As previously discussed, the ToNA was not ratified by three-quarters of the states, which is required by Article V before a proposed amendment can become part of the Constitution.[282] Rather, the ToNA stood two states short on two separate occasions.[283] However, the confusion surrounding the ToNA's status began almost immediately after it was passed by Congress. Even during the ratification process itself there was already confusion about the status of the Amendment in the various states. For example, in 1812, it was reported that South Carolina had ratified the Amendment,[284] when in fact the state would not definitively weigh in until December 1814.[285] Likewise, the Governor of Virginia was not entirely sure whether the Amendment had been approved or rejected by Virginia in 1814,[286] and as late as 1817, Secretary of State John Quincy Adams wrote to Charles N. Buck to warn him that accepting the position as Consul General in the United States of the Imperial City of Hamburg would strip him of his citizenship.[287] Additionally, by 1812, versions of the Constitutions were already printed erroneously containing the ToNA as the official Thirteenth Amendment, when it was not yet even close to approval.[288]

Much of the confusion surrounding the ToNA was caused by its inclusion as the official Thirteenth Amendment in the 1815 version of

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282. *See supra* Part II.B.

283. *See* Silversmith, *supra* note 4, at 596.

284. *Domestic Intelligence*, NORWICH COURIER, May 27, 1812, at 2.

285. *See* Silversmith, *supra* note 4, at 585 & n.52.

286. *See* Silversmith, *supra* note 4, at 586 n.53 (citing J. H.D. COMMONWEALTH OF VA. 145 (1814). Governor Barbour wrote:

> I have received a letter from the Secretary of State, [James Monroe] requesting to be advised whether the Legislature of Virginia had agreed to, or rejected, an amendment proposed to the Constitution of the United States . . . . Upon reference to the archives of this Department, no official document can be found which justifies a reply affirmatively or negatively.

Id. This inquiry by Secretary of State Monroe was likely in reference to inquiries related to the Bioren edition of the Constitution. *See infra* note 289 and accompanying text.

287. *See* Silversmith, *supra* note 4, at 587 n. 62; *see also* CHARLES N. BUCK, MEMOIRS OF CHARLES N. BUCK 161–62 (1941) (describing the correspondence regarding the ToNA with John Quincy Adams). Initially, Adams stated that the ToNA would prevent Buck from accepting this post, but corrected his response following his own inquiry into the ToNA in 1818.

288. *See, e.g.*, CONSTITUTION OF THE UNITED STATES OF AMERICA 23 (Windsor, Thomas Pomroy 1812); *see also* AN ABRIDGEMENT OF THE LAWS OF PENNSYLVANIA, *supra* note 94.

the U.S. Statutes at Large. In 1814, Congress authorized the publication of a new edition of the Statutes at Large to replace the old 1796 edition, and Secretary of State James Monroe appointed John B. Colvin editor.[289] Unable to determine whether the Amendment had been ratified by the required number of states, Colvin decided to include it as the Thirteenth Amendment. Colvin included a prefatory note, explaining his decision to prevent future confusion:

> There has been some difficulty in ascertaining whether the amendment proposed, which is stated as the thirteenth . . . has, or has not, been adopted by a sufficient number of state legislatures to authorize its insertion as part of the constitution? The secretary of state very readily lent every suitable aid to produce full information on the question; but the evidence to be found in the office of that department is still defective. It has been considered best, however, to publish the proposed amendment in its proper place, as if it had been adopted, with this explanation to prevent misconception.[290]

However, unfortunately for Colvin, although trying to prevent "misconception" regarding the Amendment, his decision to include the ToNA in the Statutes at Large led to 200 years of the misconception about the ToNA's constitutional status.[291] The Bioren Edition of the Statutes at Large remained the sole official compilation of the federal statutes until 1845,[292] providing state and local governments, private individuals, and school textbooks ample opportunity to mistakenly recopy the ToNA as the official Thirteenth Amendment.[293]

On December 31, 1817, Representative Weldon Nathaniel Edwards,[294] a Democrat-Republican from North Carolina, noticed that

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289. 3 Stat. 129 (1814). This edition of the Statutes at Large is commonly referred to as the "Bioren Edition," after one of its editors. The previous edition of the Statutes at Large was published in 1796, and is commonly known as the "Folwell Edition," after its publisher Richard Folwell. *See* Conklin, *supra* note 4, at 122.

290. 1 LAWS OF THE UNITED STATES OF AMERICA, *supra* note 2, at ix.

291. *See* 1 LAWS OF THE UNITED STATES OF AMERICA, *supra* note 2, at 74. The actual text of the Amendment contains no indication that the status of the ToNA was unclear, and the resulting confusion is understandable, if not quite predictable.

292. *See* Conklin, *supra* note 4, at 126 (stating that the 1845 edition corrected the erroneous inclusion of the ToNA). *See generally* 1 Stat. (1845).

293. *See infra* sources cited in notes 303–16.

294. Conklin incorrectly identifies the Congressman who moved for the ToNA inquiry as Representative Samuel Edwards of Pennsylvania. *See* Conklin, *supra* note 4, at 125.

the official version of the Constitution provided to the House of Representatives included the ToNA.[295] Doubtful as to whether this Amendment had in fact been ratified by a sufficient number of states, Edwards introduced a motion, approved without dissent, requesting that President Monroe conduct an inquiry regarding the number of states that had ratified the ToNA.[296] This motion set off an investigation conducted by Secretary of State John Quincy Adams. Adams sent two responses to President Monroe, both of which were forwarded to the House of Representatives.

The first report, printed on February 6, 1818, reported that twelve states ratified the ToNA and that two states rejected it.[297] However, the report also stated that inquiries sent to the states of South Carolina and Virginia remained unanswered, leaving the fate of the ToNA hanging in the balance.[298] In a second report, published by Congress on March 2, 1818, Adams enclosed information from the Governor of South Carolina, showing that the ToNA was ratified by the state's Senate in 1811, but that it was rejected by the state House of Representatives in 1814.[299] This report, however, still did not include information from the state of Virginia, which did not respond to the requests from Adams.[300]

Although sources on the Amendment suggest that this inquiry closed the door on the ToNA, in reality, the Monroe-Adams investigation did not definitively answer Representative Edwards's question.[301] Indeed, with the states of Virginia, and by then, Louisiana,

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However, this particular Edwards did not assume his position in Congress until 1819, during the Sixteenth Congress. Biographical Directory of the United States Congress, Biography of Samuel Edwards, http://bioguide.congress.gov/scripts/biodisplay.pl?index =E000080. The motion was made in 1817, during the Fifteenth Congress. 31 ANNALS OF CONG. 530–31 (1817). The only Edwards serving in the House at that time was Weldon Nathaniel Edwards of North Carolina. *See* Biographical Directory of the United States Congress, Biography of Weldon Nathaniel Edwards, http://bioguide.congress.gov/scripts/biodisplay.pl?index= E000083.

295. 31 ANNALS OF CONG. 530–31 (1817).

296. *Id.* at 530. Charles N. Buck, in his memoirs, actually claims credit for the Congressional inquiry into the status of the ToNA. However, Buck's petition could not have led to the inquiry, since the inquiry into the ratification of ToNA had already begun a month before Buck submitted his petition to Congress for permission to accept a position as Consul General of the Imperial City of Hamburg. *See* BUCK, *supra* note 287, at 161–62.

297. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING INFORMATION OF THE NUMBER OF STATES WHICH HAVE RATIFIED THE THIRTEENTH ARTICLE OF THE AMENDMENTS 5 (Wash., E. De Krafft 1818).

298. *Id.* at 5–6.

299. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A LETTER FROM THE GOV. OF SOUTH CAROLINA (Washington, E. De Krafft, 1818).

300. *Id.*

301. AMES, *supra* note 4, at 188–89; Conklin, *supra* note 4, at 125; Silversmith, *supra*

Indiana, and Mississippi admitted into the union and not responding (or for the latter three, not even asked), Monroe and Adams could not for certain say that the ToNA had not been made part of the Constitution (although their error proved harmless, as none of these states ratified the ToNA).

Although the ToNA was then presumably excised from the copies of the Constitution provided for Congress, it remained in the Statutes at Large until 1845, and was reprinted in a number of different sources throughout the country. For example, the ToNA was printed in the official laws of a large number of states and territories, including Virginia,[302] Indiana,[303] Connecticut,[304] Ohio,[305] Michigan,[306] Nebraska,[307] Missouri,[308] Iowa,[309] Illinois,[310] Mississippi,[311] Wyoming,[312] and Kansas.[313] Most likely, the Amendment was simply recopied in error from the Bioren Edition of the Statutes at Large, or from the official codes of other states that had already mistakenly included the ToNA in their laws.[314] Similarly, the ToNA was reported as a ratified amendment in a

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note 4, at 587.

302. 1 THE REVISED CODE OF THE LAWS OF VA. 30 (1819). This particular version of the laws of Virginia is the center-point of the claims of David Dodge and his right-wing friends who claim that Virginia ratified the ToNA. *See infra* Section IV.B. However, clearly, erroneously reprinting the Amendment (likely from the Bioren Edition of the Statutes at Large) does not ratify an amendment already rejected by the State Senate. In its revised codes of 1849, Virginia did not include the ToNA, noting that its inclusion in the earlier version was in error. *See* Silversmith, *supra* note 4, at 595 nn. 115–16 (citing THE REVISED CODE OF VIRGINIA, WITH THE DECLARATION OF INDEPENDENCE AND CONSTITUTION OF THE UNITED STATES AND THE DECLARATION OF RIGHTS AND CONSTITUTION OF VIRGINIA 30 (Richmond, William F. Ritchie 1849)).

303. REV. LAWS IND. 20 (1831).

304. PUB. STATUTE LAWS STATE OF CONN. 19 (1821); PUB. STAT. LAWS STATE OF CONN. 23 (1839).

305. 1 STAT. OHIO AND N.W. TERRITORY 61 (1833); ACTS OF A GEN. NATURE STATE OF OHIO 14 (1831).

306. LAWS TERRITORY OF MICH. 22 (1833).

307. LAWS, JOINT RESOLUTIONS, AND MEMORIALS PASSED AT THE SEVENTH SESSION LEGIS. ASSEM. TERRITORY OF NEB. 17–18 (1861).

308. REV. STAT. STATE OF MO. 12–13 (1835).

309. STAT. LAWS TERRITORY OF IOWA 23 (1839).

310. REV. STAT. STATE OF ILL. 26 (1845); PUB. AND GEN. STAT. LAWS STATE OF ILL. 24 (1839); REV. LAWS OF ILL. 33 (1833).

311. DIGEST OF THE LAWS OF MISS. 19 (1839).

312. COMPILED LAWS OF WYO., at xxix (1876) (including the actual Thirteenth and Fourteenth Amendments as the Fourteenth and Fifteenth Amendments).

313. *See* 1 GEN. STAT. STATE OF KAN. 30 (1897) (explaining the erroneous inclusion in a number of previous editions of their statutes at large).

314. Indeed, the text some of the misprinted amendments include a note describing the proposal of the ToNA in Congress that is identical to the note appearing in the Bioren Edition. *See, e.g.*, REV. STAT. STATE OF MO. 12–13 (1835); *see also* Silversmith, *supra* note 4,

variety of different textbooks or other reference sources throughout the nineteenth century.[315] However, by the end of the nineteenth century, it was commonly recognized that the ToNA was not part of the Constitution,[316] and the ToNA faded from memory.

B. The Modern Rediscovery and Accompanying Nonsense

Although seemingly lost to history by the twentieth century, the ToNA was rediscovered in 1983 by an amateur researcher named David Dodge, who noticed that an 1825 edition of the Constitution included the ToNA as the official Thirteenth Amendment.[317] In August 1991, a series of articles written by David Dodge appeared in an extremist magazine called *AntiShyster*, claiming that the ToNA was ratified by the required number of states and that it was later suppressed.[318] Dodge and his supporters assert that the ToNA was originally intended to "prohibit

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at 592 (describing the process by which errors were transcribed from territory to territory).

315. *See* AMES, *supra* note 4, at 189 n.2 (citing CONSTITUTION OF THE UNITED STATES OF AMERICA (N. Y., Francis Hart & Co. n.d.); JOHN FROST, A HISTORY OF THE UNITED STATES FOR THE USE OF SCHOOLS AND ACADEMIES 416 (Phila., Thomas Cowperthwait 2d ed. 1843); B.J. OLNEY, A HISTORY OF THE UNITED STATES 287 (New Haven, Durrie & Peck 1836); EMMA WILLARD, HISTORY OF THE UNITED STATES (N.Y. 1829)); Silversmith, *supra* note 4, at 588 n.70 (citing JOSEPH COE, THE TRUE AMERICAN 25 (Concord, I.S. Boyd 1841); EDWARD CURRIER, THE POLITICAL TEXT BOOK 129 (Holliston, W. Blake 1841); JOHN S. HART, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 100 (Phila., W.H. Butler & Co. 1850); 2 SAMUEL MAUNDER, THE HISTORY OF THE WORLD 462 (N.Y., Henry Bill 1850); BENJAMIN OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 89 (Boston, Marsh, Capen, & Lyon 1832); HENRY POTTER, OFFICE AND DUTY OF A JUSTICE OF THE PEACE 418 (Raleigh, J. Gales & Son 1816); M. SEARS, THE AMERICAN POLITICIAN 27 (Boston, E. Leland and W.J. Whiting 1842)); *see also* TRUEMAN CROSS, MILITARY LAWS OF THE UNITED STATES 16 (Wash., Edward De Krafft 1825); THE CONSTITUTION OF THE UNITED STATES TOGETHER WITH WASHINGTON'S FAREWELL ADDRESS 30 (Phila., United States' Gazette 1815) (included as the Fifteenth Amendment); A.W. BELL, THE STATE REGISTER: COMPRISING AN HISTORICAL AND STATISTICAL ACCOUNT OF LOUISIANA 16 (Baton Rouge, T.B.R. Hatch & Co. 1855); ECHOES FROM THE CABINET 38 (N.Y., Dayton & Wentworth 1855); THE CONSTITUTION OF THE STATE OF MAINE AND THAT OF THE UNITED STATES 45 (Portland, Todd & Smith 1825); THE AMERICAN CITIZEN'S MANUAL OF REFERENCE 18 (N.Y., W. Hobart Hadley 1840); JOHN HAYWOOD, A MANUAL OF THE LAWS OF NORTH CAROLINA 151 (Raleigh, J. Gales 1819); JONATHAN FRENCH, THE TRUE REPUBLICAN app. 20 (Philadelphia, W.A. Leary 1846).

316. *See* AMES, *supra* note 4, at 188–89; Silversmith, *supra* note 4, at 593; *see also* 2 DOCUMENTARY HISTORY, *supra* note 2, at 452. A number of state codes actually contained a note, describing the nature of the confusion surrounding the ToNA, and in some cases, blaming it on the Bioren Edition of the Statutes at Large. *See, e.g.*, COMPILED LAWS STATE OF CAL. 22 (1853); DIGEST LAWS STATE OF GA. 902 (1837); REV. STAT. KY. 18 (1852); 1 DIGEST STAT. LAWS OF KY. 39 (1834); REV. STAT. STATE OF MICH. 16 (1846); 1 REV. STAT. STATE OF N.Y. 22–23 (1829); REV. STAT. STATE OF WIS. 18 (1849).

317. *See* Dodge, *supra* note 106.

318. *See* Silversmith, *supra* note 4, at 580.

lawyers from serving in government"[319] and that it since was suppressed by a conspiracy of bankers, lawyers, and Jews.[320] Dodge and other supporters also claim that the ToNA was part of the Constitution until the Civil War, when, in 1865, the ToNA was replaced by an amendment "surrendering states [sic] rights" by abolishing slavery.[321] Under their theory, the ToNA remains the law today and would "compel the entire government to operate under the same laws as the citizens of this nation. . . . [J]udges and I.R.S. agents would be unable to abuse common citizens without fear of legal liability."[322] These claims garnered support from a number of right-wing sources, and even a brief search on the internet today will turn up a number of websites repeating Dodge's arguments regarding the supposed ratification and meaning of the ToNA.[323] The tenor of the claims—opposition to lawyers, I.R.S. agents, the government generally, and thinly veiled racism—are of the type that could potentially continue to have particular resonance with today's Tea Party movement.[324]

Dodge and his supporters began a campaign in the early 1990s for the recognition of the ToNA in its "rightful" place as the Thirteenth

319. Dodge, *supra* note 106; *see also* The Pen, *Missing 13th Amendment to the United States Constitution*, OREGON OBSERVER, Apr. 1997 *available at* http://www.uhuh.com/constitution/am13-pen.htm (last visited Dec. 22, 2010) ("The only organization that certified lawyers was the International Bar Association, chartered by the King of England, headquartered in London, and closely associated with the international banking system. Lawyers admitted to the IBA received the rank of 'Esquire,' a 'title of nobility.'").

320. GYLORGOS CERLS HATONN, THE BEAST AT WORK 88 (1993) (claiming the ToNA was suppressed by a conspiracy of Jewish lawyers and judges as part of a broader Zionist plot); Dodge, *supra* note 106. The Pen, *supra* note 319 (stating that the ToNA "was secretly removed from documents by a group of lawyers and bankers. In its place was entered the slave Amendment, which was the 14th amendment, which was changed to the 13th Amendment. All of this occurred during the turmoil of the [C]ivil [W]ar.").

321. Dodge, *supra* note 106. This portion of Dodge's article also identifies Abraham Lincoln as the President who "had signed the proposed Amendment that would have allowed slavery and states [sic] rights," rather than as the president who signed the Emancipation Proclamation (or some other more appropriate descriptor). *Id.*

322. Dodge, *supra* note 106.

323. *See, e.g.*, PetitionOnline.com, Titles of Nobility Amendment Petition, http:// www.petitiononline.com/tona2009/petition.html (last visited Dec. 22, 2010); The Pen, *supra* note 319.

324. For a description of the right-wing movement arguing that the ToNA was ratified and bars lawyers from government, see William C. Smith, *The Law According to Barefoot Bob*, A.B.A. J., Nov. 1996, at 112 and Jerry Adler, *Why Some Republicans Want to 'Restore' the 13th Amendment*, NEWSWEEK.COM, July 27, 2010, http://www.newsweek.com/ 2010/07/27/why-some-republicans-want-to-restore-the-13th-amendment.html# (discussing the proposal of the Republican Party of Iowa to reintroduce and ratify the ToNA as means of criticizing President Obama's acceptance of the Nobel Prize).

Amendment.[325] For example, in 1993, Dodge contacted Christoper Runkel, acting General Counsel for the National Archives, requesting that the archives certify the ToNA as part of the Constitution.[326] This claim was rejected on the grounds that the National Archives does not have the authority to make this determination.[327] Similarly, he and his supporters have contacted Senator George Mitchell,[328] Representative Steven Schiff,[329] and other members of Congress,[330] communications which resulted in the publication of a report from the Congressional Research Service in 1994 refuting the right-wing claims.[331]

The center point of the arguments of Dodge and his supporters is that the ToNA was ratified by the state of Virginia in 1819 through the state's publication of the Virginia Code, which erroneously contained the ToNA as the Thirteenth Amendment.[332] This claim is clearly false, because the Virginia Senate rejected the Amendment in 1811.[333] Accidentally reprinting the ToNA does not make it part of the Constitution—or specifically ratify the Amendment for the state of Virginia—any more than would have printing other un-ratified amendments.[334]

Additionally, the claim that Virginia provided the final ratification

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325. For a more complete account of the various claims made by Dodge and his followers, see Silversmith, *supra* note 4, at 580–81.

326. Memorandum from Christopher Runkel, Acting Gen. Counsel of the Nat'l Archives to David Dodge, et. al. (May 17, 1994) (on file with author).

327. *Id.*

328. Letter from Senator George Mitchell, United States Senator, to David Dodge (Feb. 13, 1991) (on file with author) (responding to inquiry by stating that the ToNA was printed in Constitutions in error); Letter from Senator George Mitchell, United States Senator, to David Dodge (Mar. 20, 1991) (on file with author) (stating that a ratification by Virginia in 1819 would be insufficient since additional states had been admitted to the Union by that time); Letter from Senator George Mitchell, United States Senator, to Russ Christensen (Jan. 3, 1992) (on file with author) (disputing that Virginia ratified the ToNA); Letter from Senator George Mitchell, United States Senator, to David Dodge (Feb. 14, 1992) (on file with author) (disputing claim that members of Congress each receive $2 million in payment to suppress the Amendment).

329. Letter from Representative Stephen Schiff, House of Representatives, to Brian March (Apr. 6, 1994) (on file with author) (providing a copy of the Congressional Research Service report prepared in response to an early letter about the ToNA).

330. Letter from Representative Lamar Smith, House of Representatives, to Dr. Trudy Peterson, National Archives (Feb. 16, 1994) (on file with author) (stating that he had been contacted by constituents in reference to the ToNA).

331. Letter from Jack Maskell, Legislative Attorney, Congressional Research Service, American Law Division, to Representative Stephen Schiff, House of Representatives (Mar. 21, 1994) (on file with author).

332. Dodge, *supra* note 106.

333. *See supra* note 98.

334. *See* Silversmith, *supra* note 4, at 593.

need for the ToNA to become law in 1819 ignores the fact that five more states had been admitted into the union by the end of the 1819, and approval by three-quarters of the states now required ratification by seventeen—not thirteen—states.[335] Similarly, supporters of the movement point to the multiple state codes and other 19th century sources that contain the ToNA as proof that it was ratified and later suppressed.[336] However, again, simply printing an amendment does not make it law if the amendment has not been ratified by the required number of states, or in the case of the state code, constitute ratification by a state. Indeed, imagine the jumbled Constitution that we would now have if adding an amendment were that easy.

The claims of Dodge and other extremists have been clearly and accurately refuted by reputable works, such as that issued by the Congressional Research Service or published by Jol Silversmith, and a lengthy refutation of the claim that the ToNA is part of the Constitution is not justified here.[337] Similarly, a refutation of the claim that lawyers

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335. *See* U.S. CONST. art. V; Silversmith, *supra* note 4, at 596.

336. Dodge, *supra* note 106.

337. *See* Silversmith, *supra* note 4 at 590–91; Letter from Jack Maskell, *supra* note 331. Misguided litigants have also presented the ToNA to federal courts on a handful of occasions in recent years. All of the courts have summarily rejected these arguments. *See* Sibley v. Culliver, 243 F. Supp. 2d 1278, 1283 (M.D. Ala. 2003) (rejecting a *habeas corpus* petition based, in part, on the ToNA). The court stated:

> These documents allege in great detail a complex conspiracy by an illegal monopoly, the American Bar Association, which resulted in a take-over of the judicial systems of this country, both federal and state, by the ABA and its related entities .... It is then alleged that the ABA-controlled system is illegal and in violation of what is referred to as the 'missing Thirteenth Amendment,' ... which Amendment was ratified but subsequently hidden or excised from the law.

Id. Later courts have rejected and corrected similar arguments:

> Additionally, the Court will correct any misunderstanding Plaintiff has concerning the text of the Thirteenth Amendment to the United States Constitution. In his Complaint, Plaintiff includes a certified copy of the Thirteenth Amendment from the Colorado State Archives which was published in 1861. As included in that compilation, the Thirteenth Amendment would strip an individual of United States citizenship if they accept any title of nobility or honor. However, this is not the Thirteenth Amendment.... Although some people claim that state publication of the erroneous Thirteenth Amendment makes it valid, Article V of the Constitution does not so provide.

Campion v. Towns, No. CV-04-1516PHX ROS, 2005 U.S. Dist. LEXIS 32650, at *2 n.1 (D. Ariz. 2005) (rejecting a ToNA defense to tax evasion); *see* Andersen v. United States, No. 97 C 2805, 1998 WL 246153, at *3 (N.D. Ill. 1998); *see also* Afroyim v. Rusk, 387 U.S. 253, 277–78 (1967) (briefly mentioning the ToNA in the context of an analysis of repatriation law under

and bar associations are banned by the Amendment is so far-fetched that it also deserves little rebuttal. However, a short discussion is warranted because that claim touches so closely to some of the topics discussed earlier in this Article.

Dodge claims, for example, that lawyers are barred from citizenship or participation in government due to their use of the term esquire and because of the legal field's state regulated licensing scheme.[338] However, this argument would logically lead to similar arguments against other fields that involve mandatory government licensing or special titles, such as doctors, nurses, ministers, accountants, professors, or teachers. This sort of claim is patently absurd. Instead, a study of the history of anti-nobility movements in the United States shows that the Congress and the founding fathers—at the time of the Revolution, at the time of the Constitution, and at the time of the ToNA—were most concerned about titles or honors of a hereditary sort.[339] The Society of Cincinnati would not have caused a violent public outcry if it had not been a hereditary society. In fact, upon pledging to remove all hereditary aspects, the public sentiment towards the Cincinnati calmed.[340] A claim that the Congress meant to bar individuals from citizenship who acquire an informal title through education, or who pass licensing requirements to enter a particular field, is entirely disconnected from history and reality. As previously discussed, the ToNA was a response to rising threats that the European powers would infiltrate and overwhelm the fledgling United States, as expressed through the tradition of hostility to

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the Fourteenth Amendment).

338. *See* Dodge, *supra* note 106 ("By prohibiting 'honors,' the missing Amendment prohibits any advantage or privilege that would grant some citizens an unequal opportunity."); The Pen, *supra* note 319. The Pen went on to state:

> Historically, the British peerage system referred to knights as 'Esquires' and those who bore the knight's shields as 'Esquires.' As physical violence gave way to civilized means of theft, the pen grew mightier and more profitable. So those bankers and lawyers came to hold 'titles of nobility.' The most common title was 'Esquire' as is used today by lawyers.
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> . . . .
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> The archaic definition of 'honor,' as used in the 13 Amendment, meant anyone obtaining or having an advantage or privilege over another.[] A contemporary example of 'honor' granted to only a few Americans is the privilege of being a judge. Lawyers can be judges and exercise the attendant privileges and powers non-lawyers can not.

Id.

339. *See supra* Part III.C.

340. *See supra* p. 352.

hereditary privilege.[341] It was not an Amendment opposed to individuals who gained non-hereditary privileges or power through personal merit or achievement; rather, it was Amendment that was opposed to the creation of a society where individuals could obtain these privileges and titles through birth or blood.[342]

V. CONCLUSION

The Titles of Nobility Amendment is one of the more curious chapters in the history of the Constitution. Although never ratified by three-quarters of the states, the ToNA was included in dozens of editions of the Constitution for over a half century as the official Thirteenth Amendment. Despite this engaging history, the ToNA has largely been ignored by scholars. Instead, it has been seized upon by right-wing radicals who claim that it was ratified and suppressed by a conspiracy of lawyers, and who now demand the exclusion of lawyers from citizenship. Similarly, the responses of scholars to these erroneous positions correctly and deftly refute the right-wing claims, but then also misunderstand and mischaracterize the ToNA as xenophobic or as simply as a petty product of partisan politics.[343]

However, the ToNA is a far more complex and substantial creature. More accurately, it is an interesting hybrid of the rising fears during the decade preceding the War of 1812 that the United States would be recaptured and marginalized by European powers and the long tradition of opposition to hereditary privilege in the United States—the former being a realistic gauge of American power in the age of Napoleon and the latter being a proud defense of the republican ideals that are the foundation the of American Revolution. Clearly, more research and consideration is needed to fully position the ToNA in the political landscape of the early 1800s. However, hopefully, this Article begins the process of better understanding one of the most mysterious near-amendments to our Constitution.

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341. *See supra* Parts III.B & III.C.

342. For example, in 1776, Thomas Jefferson proposed a bill in the Virginia House of Delegates to enable individuals to convey land in fee simple, as opposed to in fee tail, to foster the creation of an "aristocracy of virtue and talent" as opposed to one of "wealth." 1 JEFFERSON, *supra* note 248, at 561; *see also* WOOD, *supra* note 190, at 183.

343. *See generally* Conklin, *supra* note 4; Silversmith, *supra* note 4.