

A “Minor” Clarification

by [Joseph DeMaio](#), ©2022

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Under the power to adopt a uniform system of naturalization Congress, as early as 1790, provided 'that any alien, being a free white person,' might be admitted as a citizen of the United States, and that the children of such persons so naturalized, dwelling within the United States, being under twenty-one years of age at the time of such naturalization, should also be considered citizens of the United States, and that the children of citizens of the United States that might be born beyond the sea, or out of the limits of the United States, should be considered as natural-born citizens.⁸ These provisions thus enacted have, in substance, been retained in all the naturalization laws adopted since. In 1855, however, the last provision was somewhat extended, and all persons theretofore born or thereafter to be born out of the limits of the jurisdiction of the United States, whose fathers were, or should be at the time of their birth, citizens of the United States, were declared to be citizens also.⁹

U.S. Supreme Court Chief Justice Morrison Waite, writing the majority opinion in *Minor v. Happersett* (1875), erroneously stated that Congress’s 1790 inclusion of U.S. citizens born “beyond the sea” as “natural born Citizens” was “retained in all the naturalization laws adopted since.” Twenty-three years later, U.S. Supreme Court Associate Justice Horace Gray would rely on that erroneous finding in his opinion in the landmark case, *United States v. Wong Kim Ark*. (Screenshot: <https://www.law.cornell.edu/supremecourt/text/88/162>)

(Nov. 28, 2022) — Your humble servant has a “minor” clarification to make relating to some of his prior posts here at The P&E. These matters are brought to P&E readers’ attention out of an abundance of caution lest those prior posts leave a confusing or misleading impression regarding the history of two early pieces of congressional legislation. Those two congressional enactments are the 1790 “Act to establish an uniform Rule of Naturalization” (1 Stat. 103) and the act of the same name of 1795 (1 Stat. 414). The clarification is intended to make clear the record of Supreme Court jurisprudence with respect to – yes, Virginia, that pesky perennial issue – the “natural born Citizen” provision (“nbC”) of Art. 2, § 1, Cl. 5 of the Constitution, the “Eligibility Clause.”

While many, if not most people labor under the impression that the question of eligibility to the presidency as an nbC is “settled,” respectfully, your servant posits that it is not yet finally settled and remains unclear. By “unclear,” your servant means that, at least as to a precedential decision “on the merits” by the Supreme Court or a constitutional amendment, no such finality yet exists.

Two opposing, nbC ideological camps exist. One claims that the Founders adopted the meaning of the term as referring to persons born here to two parents who are already U.S. citizens. The other camp contends that mere birth here, regardless of parental citizenship – and on occasion even one born elsewhere if only one parent is a U.S. citizen – satisfies

the criterion. The two Supreme Court decisions most frequently cited by these opposing camps in support of their respective claims are *Minor v. Happersett*, 88 U.S. 162 (1875), *abrogated by the 19th Amendment* (1920) (“*Minor*”) and *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (“*WKA*”).

Without going into the painful and convoluted details, the decision in *Minor* is usually cited for the proposition that, at the time of the inception of the nation, the Founders knew and understood that the term “natural born citizen” meant a person born here to two parents who were already, at the time of birth, U.S. citizens. This principle is consistent with § 212 of the legal treatise by Swiss legal philosopher, attorney and jurist Emmerich de Vattel, *The Law of Nations*, and with which treatise the Founders were familiar and relied upon when drafting the Constitution.

On the other hand, the decision in *WKA* is most often cited by the other camp as “settling” the presidential eligibility question, meaning “no contrary opinions allowed..., move along..., nothing to see here.” The *WKA* decision held, of course, that an ethnic Chinese man born in San Francisco to two permanent resident alien Chinese nationals was, under the 14th Amendment, a “citizen” of the United States. The decision has been interpreted by the Congressional Research Service, lower appellate courts, law professors and others as meaning that if one is a “citizen at birth” or a “citizen by birth,” such would satisfy the Constitution’s nbC requirement.

Your servant disagrees. Since day one he has subscribed to the *Minor* principle and the definitions included in § 212 of the de Vattel tome, *i.e.*, that in order to satisfy the nbC requirement, the Founders intended that an individual needed to be born here to two parents who were already U.S. citizens. Consistent with that position, he has criticized the *WKA* decision as being irrelevant to the determination of the nbC issue under Art. 2, § 1, Cl. 5 of the Constitution. This criticism arises because the sole and exclusive issue before the Court in that case was whether under the 14th Amendment, a person born to alien parents residing in the United States was to be deemed a “citizen.” Accordingly, the verbiage therein about what constitutes an nbC is “dictum, pure and simple.”

The case did *not* hold that such a person would, in addition, be a “natural born Citizen” for presidential eligibility purposes. That “*ipse dixit*” (“it is so because I say it is so”) interpretation has been engrafted onto the decision by others, but not (as yet) by the Supreme Court itself. Many in the opposing camp have made that extrapolating “leap” in reasoning in support of the “birth here alone makes one an nbC.”

That distinguishing matter aside, your servant has also criticized the *WKA* majority opinion of Associate Justice Horace Gray as misstating what Congress did in 1795 when it [repealed](#) certain language from its prior, 1790 “Act to establish an uniform Rule of Naturalization.” Specifically, your servant asserted that Justice Gray was wrong when he stated – in support of his discussion of what the Founders considered to be an nbC – that in 1795, Congress reenacted “in the same words” the nbC language it had previously included in the original 1790 Act. It did no such thing. Instead, it repealed and did *not* reenact that language in 1795.

In your servant's view, that was a major problem undercutting the remainder of Justice Gray's discussion of the nbC issue, quite apart from whether or not that discussion were to be deemed dictum. The opposing camp does not consider it to be dictum or, apparently, a problem and instead contends it is a part of a majority opinion that finally "settles" the nbC issue.

However – and here is the point of clarification for P&E readers – Justice Gray may not have been the first Justice of the Supreme Court to have made that error. Indeed, the error may have actually originated earlier, in the *Minor* unanimous decision authored by then-Chief Justice Morrison Waite. To be clear, while Justice Gray may have only repeated and perpetuated Chief Justice Waite's "mistake," this does not alter the fact that we now know of at least *two* Supreme Court Justices who have articulated the same incorrect claim.

In Chief Justice Waite's *Minor* opinion, after reciting and partially paraphrasing the language of the 1790 Act – which included a reference to children born "beyond sea" to U.S. citizen "parents" as being "considered as natural-born citizens..." – he states: "These provisions thus enacted have, *in substance, been retained in all the naturalization laws adopted since.*" (Emphasis added). Respectfully..., wrong: the 1795 Act did *not* retain the "same" or "in substance" language, but did just the opposite.

SEC. 3. And be it further enacted, that the children of persons duly naturalized, dwelling within the United States, and being under the age of twenty-one years, at the time of such naturalization, and the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States: Provided, That the right of citizenship shall not descend to persons, whose fathers have never been resident of the United States: Provided also, That no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the late war, shall be admitted a citizen as foresaid, without the consent of the legislature of the state, in which such person was proscribed.

SEC. 4. And be it further enacted, That the Act intituled, "An act to establish an uniform rule of naturalization," passed the twenty-sixth day of March, one thousand seven hundred and ninety, be, and the same is hereby repealed.

Screenshot: <https://www.mountvernon.org/education/primary-source-collections/primary-source-collections/article/naturalization-acts-of-1790-and-1795/>

Only five years after enacting 1 Stat. 103, the 1790 Naturalization Act, in 1795, Congress repealed the "considered as natural born citizens" language of the 1790 act, reenacting

only the word “citizens” in 1 Stat. 414. Stated otherwise, after the enactment of the 1795 Act, children of U.S. citizens born to U.S. citizen parents outside of the United States, while recognized as “citizens,” were no longer to be recognized as “natural-born citizens.”

This action was far more than a mere “stylistic” change, as speculated by the Congressional Research Service. Instead, it constituted a substantive repeal following congressional realization that it could not, via 1 Stat. 103, alter the meaning of the Eligibility Clause – requiring birth here in this nation rather than “beyond sea” – by way of a statute. If that meaning was to be changed, a constitutional amendment would be needed.

In composing his majority opinion in *WKA*, Justice Gray had cited the *Minor* decision in support of his theory that principles of the “common law” controlled analyses of the nbC issue. On the assumption, however, that he – or one of his Ivy League law clerks – had actually read the *Minor* opinion but, without further researching what Congress actually did, simply regurgitated the concept if not the exact words of Chief Justice Waite regarding a purported congressional “reenactment” of statutory language it had instead repealed, that would still not change the resulting conclusion: **both** Chief Justice Waite in *Minor* and Associate Justice Gray in *WKA* were wrong. That is the “minor” point sought to be clarified here.

Whether or not and to what extent these anomalies have any direct impact on the nbC analysis today remains a point of contention, at least in your humble servant’s view. Since a Supreme Court opinion directly on point remains elusive – the Court continuing to “evade” the issue and a constitutional amendment being an extremely remote possibility – the likelihood of the “status quo” persisting is high. The *WKA* decision will be defended as “settling” the nbC issue and anyone born here, regardless of parental citizenship, will be deemed eligible to the presidency.

Ask yourself this: is that what the Founders intended when they took John Jay’s hinted [advice](#) to George Washington that it would be “wise & seasonable” in the new Constitution to “declare expressly that the Command in chief of the [A]merican army shall not be given to, nor devolve on, any but a natural *born* Citizen.” (Emphasis and capitalization Jay’s). And if you answered “yes” and subscribe to the *WKA* camp’s theory that a “citizen at birth” or a “citizen by birth” is the same as an nbC, why did the Founders also need to include a “citizen grandfather” clause in Art. 2, § 1, Cl. 5?

Still a *WKA* camp member? Seriously?