

A Critique of “On the Meaning of ‘Natural Born Citizen,’” Part II

by [Joseph DeMaio](#), ©2024



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(Apr. 4, 2024) — [*Editor’s Note: Please see [Part I](#) of the author’s in-depth analysis of the captioned article, published in 2015 in the [Harvard Law Review Forum](#) by former Solicitors General Neal Katyal and Paul Clement. For additional background, see the author’s previous columns on the subject article [here](#).]*

Author's Note: The following original words of the subject C&K article being reviewed remain in Times New Roman font, 12-point black. Footnotes remain where they appear in the article but are reformatted and relocated as endnotes at the conclusion of the article and this post. In order to differentiate your servant's "deep dive" comments on various statements from the C&K article, they are generally indented, bracketed, left-margin justified only and appear in **Calibri font, 12-point bold**. Page breaks in the original article are signaled thusly: "[161 // 162]"

Deep Dive Part 2



Paul Clement, [public domain](#)

“As to the British practice, laws in force in the 1700s recognized that children born outside of the British Empire to subjects of the Crown were subjects themselves and explicitly used “natural born” to en- [161 // 162] compass such children.⁵ These statutes provided that children born abroad to subjects of the British Empire were “natural-born Subjects . . . to all Intents, Constructions, and Purposes whatsoever.”⁶ The Framers, of course, would have been intimately familiar with these statutes and the way they used terms like “natural born,” since the statutes were binding law in the colonies before the Revolutionary War. They were also well documented in Blackstone’s Commentaries,⁷ a

text widely circulated and read by the Framers and routinely invoked in interpreting the Constitution.

[Problematically, regarding the “binding law in the colonies” assertion, and as noted above, the C&K article omits any discussion whatsoever of the conclusion of Sir William Blackstone himself stating that “the common law of England...” had no direct application here. That omission is regrettable.]

“No doubt informed by this longstanding tradition, just three years after the drafting of the Constitution, the First Congress established that children born abroad to U.S. citizens were U.S. citizens at birth, and explicitly recognized that such children were “natural born Citizens.”

[As for the claim that the enactments of the First Congress should determine and guide the analysis here at issue, the C&K assertion that Congress “established that children born abroad to U.S. citizens were U.S. citizens at birth, and *explicitly recognized that such children were* ‘natural born Citizens’” (emphasis added)... is demonstrably in error.

[First, the 1790 “Naturalization” Act, 1 Stat. 103, stated *only* that such children were to be “considered” as “natural born citizens,” which is *not* the same thing as stating that they *are* natural born. The term “considered” has as a synonym the word “deemed,” meaning “assumed for the sake of argument, but not proven.”

[Moreover, the article is completely silent regarding the fact that 1 Stat. 103, by its own terms and title, is a *naturalization* law, and *not* a law purporting to create “natural born” status in anyone. A “natural born Citizen” arises as a consequence of natural law regarding birth and parentage *alone*, without the assistance or influence of statutory positive law enactments.

[As such, reliance today on either the terms or the rationale of 1 Stat. 103 to support a claim of nbC status in anyone is a manifest *non sequitur*. Even C&K concede that, “for better or worse, a naturalized citizen cannot serve as president (or, under the 12th Amendment, as vice-president.)” Because 1 Stat. 103 is a naturalization law, just as is the 14th Amendment, neither one can be properly cited as authority for “defining” what constitutes an nbC. Recall that under a Venn diagram analysis, all nbC’s are “native-born citizens,” but not all native-born citizens are nbC’s.

[In addition, subsequent to John Jay’s July 25, 1787 “hint” letter to George Washington, on August 22, 1787, it was [proposed](#) at the Constitutional Convention that the presidential qualifications would include that the chief executive be restricted to a person who was merely a “citizen of the United States.”

[Upon objection to so broad a definition, the language was referred back to the Committee on Postponed Matters – chaired by New Jersey convention delegate David Brearley, as discussed [here](#) – where, under Brearley’s guidance, the eligibility

clause was *fortified* to read “natural born Citizen.” It was then [reported](#) out of his Committee on September 4, 1787, and thereafter adopted in the final Constitution as executed September 17, 1787.

[It is thus clear that the Founders wanted the more restrictive scope of citizens who were “natural born Citizens,” rather than merely “citizens,” to be eligible to be President, subject only to the time-limited “Citizen-grandfather” exception.

[Second, in 1 Stat. 103, the First Congress used the term “natural born citizens,” *without* capitalizing the “c” in the word “citizens.” In Art. 2, § 1, Cl. 5 of the Constitution, however, the original document – handwritten in cursive Caslon font by convention penman/engrosser [Jacob Shallus](#) – plainly shows that the Founders intentionally capitalized the “C” when they wrote the term “natural born Citizen” into the restriction. They also capitalized the “C” in the “Citizen grandfather” exception.

[The decision to “upper-case” the “c” in the Constitution is not merely a “stylistic” flair, but likely comes from replicating the “upper-case” “C” found in John Jay’s July 25, 1787 “hint” letter to Constitutional Convention Chairman, George Washington. While this may seem to be a trivial point, when the article asserts that the Founders in 1 Stat. 103 “explicitly recognized” – purportedly – that children born abroad to U.S. citizen parents “were natural born Citizens,” it generates two grammatical anomalies.

[First, 1 Stat. 103 did *not* declare that such children “were,” as the article claims, in factual reality “natural born Citizens,” but instead *only* that they would be “*considered*” as “natural born citizens,” and without upper-casing the “c” in “citizens.”

[Second, by capitalizing the “c” in the article – thereby altering the *actual* language used by Congress in 1 Stat. 103 – the article engages in the same species of quotation manipulation seen in the Congressional Research Service (“CRS”) ellipsis omissions in Supreme Court opinions noted [here](#).

[Bottom line: by changing the capitalization of “citizens” in 1 Stat. 103 to “Citizens” in the C&K offering, – and problematically *without* any signal to the reader (such as an ellipsis or bracket insertion) that a change was taking place – the article makes it seem to the casual observer that the Founders were actually adopting the capitalized “c” version of the “natural born Citizen” verbiage used in the Constitution’s “Eligibility Clause” – Art. 2, § 1, Cl. 5 – when in reality, just the *opposite* is true. While lawyers at the CRS might condone such linguistic alterations, the Founders likely would not.]

... The Naturalization Act of 1790⁸ provided that “the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not

descend to persons whose fathers have never been resident in the United States”⁹
The actions and understandings of the First Congress are particularly persuasive because so many of the Framers of the Constitution were also members of the First Congress. That is particularly true in this instance, as eight of the eleven members of the committee that proposed the natural born eligibility requirement to the Convention served in the First Congress and none objected to a definition of “natural born Citizen” that included persons born abroad to citizen parents.¹⁰

[As for the article’s claim that “none objected to a definition of ‘natural born Citizen’ that included persons born abroad to citizen parents...,” several anomalies exist.

[First, the statement again inaccurately represents what the Congress enacted: the word “citizens” was *not* capitalized in 1 Stat. 103. The capitalization of the “C” appears in the July 25, 1787 “hint” letter by Jay to George Washington and in Art. 2, § 1, Cl. 5 of the Constitution, but *not* in 1 Stat. 103. By capitalizing the “C” in its article, thereby suggesting that the Founders were equating the lower case “considered as citizens” terminology in 1 Stat. 103 with the capitalized “natural born Citizen” term appearing in the Eligibility Clause, the authors misinform readers, albeit subtly and no doubt unintentionally.

[Second, the C&K article does not accurately represent what 1 Stat. 103 did and did *not* do. Specifically, that law did *not* define the nbC term. Instead, it *categorized* certain people as being “considered” as “natural born citizens.” But contrary to the article’s assertion, it did *not* provide a “*definition*” of the term “natural born citizen.”

[The pseudo-definition composed by the authors – a person coming into being as a “citizen at birth” or a “citizen by birth” as long as only one parent was a U.S. citizen and requiring no subsequent “naturalization” proceedings, and wherever born – is just that: a manufactured definition seemingly created to support a desired narrative differing from the definition of a “natural born citizen” found in § 212 of the de Vattel treatise.

[Third, the citation in the article to the source claimed to support the “none objected” statement (C&K article, footnote 10) is a law review [article](#) by one Christina S. Lohman entitled “*Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*,” published in 36 GONZ. L. REV. 349, 371 (2000/01).

[In that article, Ms. Lohman specifically states with regard to the meaning of “natural born citizen” that “... the common law, at least with regard to foreign-born children, appears to contemplate only children of *two citizen parents*.” (Emphasis added) *See* Lohman, *id.*, at 368. This, of course, was the thrust of 1 Stat. 103, even before its repeal in 1795 by 1 Stat. 414.

[Moreover, throughout the law review article, the author consistently refers to “natural born citizen” children with an immediate coupling of the term to the plural terms “citizen parents” or “American citizens.”

[Unlike the C&K article, nowhere in the Lohman *Gonzaga Law Review* article does the author even suggest, much less assert, that the Founders intended anything other or *fewer than two U.S. citizen parents* being required at the time of birth in order to constitute the *sine qua non* of the foreign-born child of U.S. citizen parents as being properly recognized as an nbC. *See, e.g., id.* at 368, 369, 371, 372, 373.

[And to reiterate, it is illogical to argue that a lesser standard of parental citizenship should be applied to children born to parents within the territorial boundaries of the United States as opposed to such births taking place beyond those boundaries.

[Stated otherwise, the *same* parental birth standard should be applied to both situations: to be a “natural born Citizen” as contemplated by the Founders, and whether born in Brooklyn or “beyond sea,” the person must be born to a mother *and* father who are *both*, at the time of their child’s birth, *already* U.S. citizens. This is true separate and apart from the requirement that the birth take place here in the United States. Otherwise, the potential for split and/or dual allegiances *inconsistent* with the Founders’ goal of “sole and exclusive” allegiance to the United States would arise.

[Significantly, and with respect to the repeal of 1 Stat. 103 by 1 Stat. 414 a mere five years after enactment – which repeal the C&K article recognizes in a perfunctory two-word parenthetical in a footnote that is *devoid* of comment or analysis – Ms. Lohman also notes that “... *one could certainly posit that the [Congress] recognized a possible constitutional conflict and sought to correct it. Further, the omission of ‘natural-born’ makes the statute look more like one devolving citizenship by naturalization.*” (Emphasis and bolding added) *See Lohman*, 38 *Gonz. L. Rev.* at 372-373.

[In reality, the Lohman law review article actually undercuts the C&K article’s conclusion that the British common law, even as understood by the Founders, was invariably followed and adopted by them when drafting the Constitution, including the nbC-restricted eligibility requirement.

[Specifically, in analyzing the language of 1 Stat. 103 – the Naturalization Act of 1790 – the law review author states, 38 *Gonz.L.Rev.* at 371-372: “The 1790 act supports the proposition that the Framers did *not* strictly follow the English common law with regard to birthright citizenship, *but rather followed the rule of jus sanguinis – or citizenship by descent...*” (Emphasis added)

[Accordingly, the conclusion that one’s status as a “natural born Citizen” is a function of whether only one, rather than both, of the parents is a citizen of the United States at the time of the birth is, with due respect, something *far less* than

“refreshingly clear.” That which *is* refreshingly clear is that, a mere five years after enacting 1 Stat. 103, Congress repealed it, including the provision relating to children born “beyond sea” as being even “considered” to be “natural born citizens,” with no “c” capitalization.]

“The proviso in the Naturalization Act of 1790 underscores that while the concept of ‘natural born Citizen’ has remained constant....

[Respectfully, this assertion is plainly in error: the fact that Congress entirely repealed 1 Stat. 103 only five years after enacting it, likely realizing that, among other changes it desired, it could not by a statute purport to amend the nbC Eligibility Clause of the Constitution, confirms that the “concept” erroneously stated in 1 Stat. 103 has plainly *not* “remained constant.”

[Again, the error committed by Congress in 1 Stat. 103 was corrected in 1795 when 1 Stat. 414 repealed 1 Stat. 103 and enacted language allowing children born to parents outside the boundaries of the United States to be “considered” to be U.S. “citizens,” but no longer as “natural born citizens.” This has been carried forward to the present by 8 U.S. C. § 1401. The C&K authors gloss over the repeal as if it did not even exist, a lamentable fact.

[Moreover, the article seems to adopt the false conclusion of Justice Gray in the *Wong Kim Ark* (“WKA”) case. There, Justice Gray “erroneously” pontificated that in 1795, Congress “reenacted, *in the same words...*” the language of the 1790 act, 1 Stat. 103, regarding the “considered” nbC status of such children. That blunder is discussed and analyzed [here](#). Justice Gray’s statement is categorically in error..., if not altogether false. That said, it is possible that Justice Gray’s erroneous assertion was the source for the claim that “the concept of ‘natural born Citizen’ has remained constant.”]

.... and plainly includes someone who is a citizen from birth by descent without the need to undergo naturalization proceedings, the details of which individuals born abroad to a citizen parent qualify as citizens from birth have changed. The pre-Revolution British statutes sometimes focused on paternity such that only children of citizen fathers were granted citizenship at birth.¹¹ The Naturalization Act of 1790 expanded the class of citizens at birth to include children born abroad of citizen mothers as long as the father had at least been resident in the United States at some point. But Congress eliminated that differential [162 // 163] treatment of citizen mothers and fathers before any of the potential candidates in the current presidential election were born. Thus, in the relevant time period, and subject to certain residency requirements, children born abroad of a citizen parent were citizens from the moment of birth, and thus are “natural born Citizens.”

[Words are important, so it is lamentable that the article oftentimes deploys them carelessly. First, the use of the term “thus” suggests that the preceding antecedent

terms trigger support for a “therefore” conclusion. That is both fallacious and misleading.

[Second, the only “relevant time period” was between the effective date of 1 Stat. 103 (March 26, 1790) and the effective date of the law repealing it, 1 Stat. 414 (Jan. 29, 1795). Only during that 58-month (plus three-day) period, when 1 Stat. 103 was the (defective) “law” in effect, could the claim be made that a person born abroad to two U.S. citizen parents be “considered” to be a “natural born citizen.”

[Adding to the article’s linguistic anomalies, it claims that during the “relevant” *past* period, (*i.e.*, between March 26, 1790 and Jan. 29, 1795), such children, purportedly, “*were*” citizens from the moment of birth....” But then it blurs the distinction between the past tense and the present tense by claiming that such children “*thus are* natural born Citizens.” (Emphasis added)

[The use of the present tense “*are*,” coupled with the use of a capitalized “C” in the word “Citizens,” improperly suggests that because, purportedly, between March 26, 1790 and January 29, 1795, such children *were* then considered to be nbC’s, persons born *thereafter*, under similar circumstances today, are *presently* nbC’s, *despite* the repeal of 1 Stat. 103 over 200 years ago. In so manipulating the language, the article not only compounds its blurring of history, it underscores its grammatical anomalies.]

“The original meaning of ‘natural born Citizen’ also comports with what we know of the Framers’ purpose in including this language in the Constitution. The phrase first appeared in the draft Constitution shortly after George Washington received a letter from John Jay, the future first Chief Justice of the United States, suggesting:

[W]hether it would not be wise & seasonable to provide a . . . strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the american [*sic*] army shall not be given to, nor devolve on, any but a natural born Citizen.¹²

“As recounted by Justice Joseph Story in his famous Commentaries on the Constitution, the purpose of the natural born Citizen clause was thus to “cut[] off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interpose[] a barrier against those corrupt interferences of foreign governments in executive elections.”¹³ The Framers did not fear such machinations from those who were U.S. citizens from birth just because of the happenstance of a foreign birthplace. Indeed, John Jay’s own children were born abroad while he served on diplomatic assignments, and it would be absurd to conclude that Jay proposed to exclude his own children, as foreigners of dubious loyalty, from presidential eligibility.¹⁴

[As for the assertion Jay’s children were “born abroad,” that claim is at minimum partially wrong. Jay and his wife, Sarah, together had six children: Peter Augustus; Susan; Maria; Ann; William; and Sarah Louisa.

[While *some* of Jay's children may have been born abroad, contrary to what C&K suggest in the article, [Peter Augustus Jay](#) was born in 1776 in New York City), and [William Jay](#) was born in 1789, also in New York City. Clearly, New York City is in the United States and is *not* situated "abroad."

[Moreover, while there is nothing in the Constitution or its Amendments to suggest that females are not allowed to be president – and today, quite the contrary dominates the body politic – in 1787, when the Constitution's Eligibility Clause was drafted and inserted into the final document, even John Jay would have had doubts if any of his four daughters – despite having been possibly born abroad (the record is unclear) and tainted with an appearance of, as the C&K article implies, "dubious loyalty" – could have become president.

[The birthplaces of his daughters, insofar as concerns the nbC eligibility issue and with regard to the article's contention that Jay's "own children were born abroad," are immaterial, even if the daughters *were* born abroad. Thus, that leaves only Peter Augustus and William as Jay's sons who, according to C&K, would have been purportedly rendered ineligible because they were "born abroad." They were *not* born abroad, but instead were born in New York City.

[Accordingly, the C&K "happenstance" label prefacing their remarks that Jay purportedly would not have proposed to "exclude his own children, as foreigners of dubious loyalty, from presidential eligibility..." is without empirical foundation.

[Moreover, the article's use of the term "happenstance" seemingly seeks to trivialize and marginalize the Founders' goal that *only* if a person were born according to the circumstances set out in § 212 would that person be an nbC otherwise satisfying the eligibility criteria as they intended. Birth "in" the country is a requirement under § 212, not an optional "happenstance."

[To reiterate, the definition of a "natural born citizen" articulated in § 212 was a person born *in* the country where *both* of the parents were *already* its citizens. That which the article labels as merely a "happenstance" of birthplace was in the Founders' opinion an essential and critical component of a higher, rather than a lower, barrier to the potential for the insinuation of "foreign influence" into the presidency and as admonished by Alexander Hamilton in Federalist 68.

[This conclusion is also fortified by referencing the change by the Founders from the term "citizen" in the original proposed text of the Eligibility Clause to the term thereafter recommended by the Committee on Postponed Matters, *i.e.*, "natural born Citizen" as it now appears in the Constitution.

[Finally, it is fatuous to conclude that John Jay considered the requirement that an nbC be born in the United States to be merely an optional requirement which could be without consequence discarded and ignored because a "happenstance" existed is, at minimum, a *non sequitur*.]

FOOTNOTES:

5 *See* United States v. Wong Kim Ark, 169 U.S. 649, 655–72 (1898).

6 7 Ann., c. 5, § 3 (1708); see also British Nationality Act, 1730, 4 Geo. 2, c. 21.

7 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *354–63.

8 Ch. 3, 1 Stat. 103 (repealed 1795).

9 *Id.* at 104 (emphasis omitted).

10 *See* Christina S. Lohman, Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause, 36 GONZ. L. REV. 349, 371 (2000/01).

11 *See, e.g.,* British Nationality Act, 1730, 4 Geo. 2, c. 21. 2015] ON THE MEANING OF “NATURAL BORN CITIZEN”

12 Letter from John Jay to George Washington (July 25, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 61 (Max Farrand ed., 1911).

13 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1473, at 333 (1833).

14 *See* Michael Nelson, Constitutional Qualifications for President, 17 PRESIDENTIAL STUD. Q. 383, 396 (1987).

See Part III [here](#).