

A Deeper Dive Into the nbC Pond, Part 2

by [Joseph DeMaio](#), ©2023

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 in 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 aforesaid, without the consent of the legislature of the state, in which such person was proscribed.

How children shall obtain citizenship through their parents.

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passed the twenty-sixth day of March, one thousand seven hundred and ninety, be, and the same is hereby repealed.

Former act repealed.
1790, ch. 8.

APPROVED, January 20, 1795.

(Jun. 27, 2023) — [Please see *Part 1 of this series* [here](#). – The “CKA” work referenced throughout is [here](#). – Ed.]

The Clement/Katyal Article

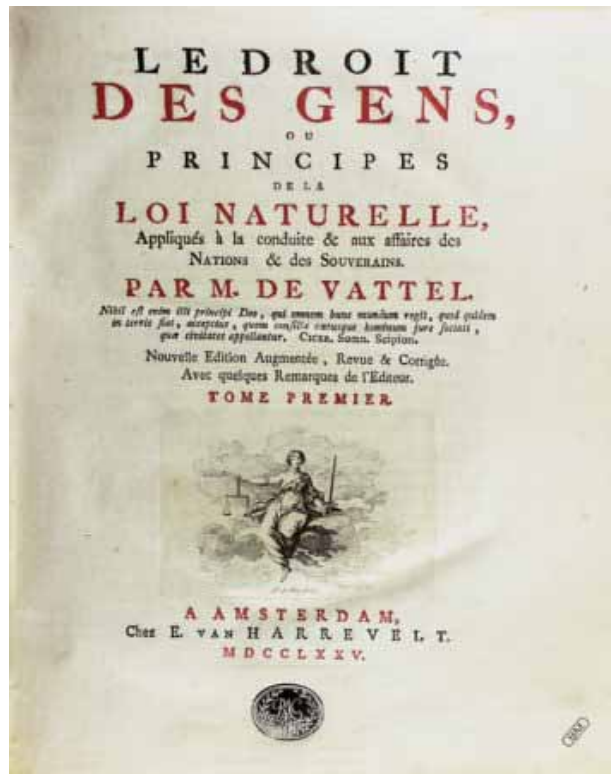
The Clement/Katyal article – hereafter, for the sake of brevity, “CKA” – sets out, in some thirteen loosely-related contentions spread over four pages, the proposition that, if one is merely a “citizen at birth” or a “citizen by birth,” with no need for any later naturalization proceedings, and regardless of whether one parent is a foreign citizen or the birth takes place abroad or at sea, that person is eligible to the presidency or vice-presidency as a “natural born Citizen.” Respectfully, your humble servant differs.

1. “Spurious Arguments”

At the outset, the authors end the very first paragraph of the article by asserting that voters should be able to choose from all constitutionally eligible candidates, “free from the spurious arguments that a U.S. citizen at birth is somehow not constitutionally eligible to serve as President simply because he was delivered at a hospital abroad.”

Where to start..., where to start?

First, the peremptory – and faintly presumptuous – characterization of a contrary argument as being “spurious” is intellectually dishonest, as it presupposes at the outset that the issue has been “settled” and that any subsequent differing opinion is disfavored and worthy of being disregarded. The adjective “[spurious](#)” is defined as “outwardly similar or corresponding to something without having its genuine qualities: false.” Stated otherwise, the initial paragraph of the article telegraphs the targeted end result that any contention differing from the conclusions set out in the rest of the piece are baseless and should be rejected. One should save one’s time in reading the whole document and go about pursuing other, purportedly better tasks. Hardly scholarly.



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Second, there is *abundant* historical evidence that the Founders – as opposed to 21st Century pontificators on the meaning of terms in the Constitution – referenced, relied upon and adopted the principles and definitions of persons who constituted a “natural born citizen” as set out in a 1758 treatise on international law. That treatise was (and even today, remains) “*Le Droit des Gens*” or “*The Law of Nations*,” by Swiss attorney, jurist and legal scholar Emer de Vattel. In Book I, Ch. 19, § 212 of that tome (hereafter, “§ 212”), the [definition](#) of a “natural born citizen” is set out as being “those born in the country, of parents who are citizens.” The phrase “in the country” does not mean “beyond the country” or “beyond sea,” and the term “parents” is expressed in the plural, not the singular.

Third, against the backdrop of this definition, a contention that it is purportedly “spurious” to believe that one must be born “in” the country where one’s parents are already citizens of that country is itself spurious and ill-informed. As documented hereafter, the Founders – again, not to be confused with 21st Century self-proclaimed “authorities” – referenced and relied extensively upon de Vattel and his treatise as they were drafting the Constitution.

Indeed, the Supreme Court has even specifically noted that de Vattel and his treatise were the most frequently cited sources for principles of international law in the 50 years following the American Revolution, plainly including the period when the Constitution was being drafted. *See United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 462, n.12 (1977). Moreover, the contemporary relevance de Vattel and the utility of

The Law of Nations in interpreting the Constitution was recently reaffirmed by the Supreme Court in *Franchise Tax Board of California v. Hyatt*, 587 U.S. ___, 139 S. Ct. 1485, 1493 (2019).

And even more recently – *i.e.*, June 15, 2023 – three Supreme Court Justices of widely differing philosophies and judicial temperaments concurred in *Haaland v. Brackeen*, ___ U.S. ___, ___ S.Ct. ___, 2023 WL 4002951 (2023), that reference today to de Vattel was both prudent and proper. The case involved the interpretation of the Indian Child Welfare Act (“ICWA”) under the Constitution for, among other issues, the proposition that even conquered indigenous nations, including the Indian nations of North America following European colonization, retained their “self-governing” sovereignty over their internal affairs. In his concurrence with the majority opinion holding that the ICWA was not unconstitutional as an invasion of “states’ rights,” Justice Gorsuch, joined by Justices Sotomayor and Jackson, cited de Vattel and *The Law of Nations* for its principles related to the retained self-governing powers of Native American tribal nations.



Emmer de Vattel ([public domain](#))

Underscoring the CKA’s somewhat less than unbiased analysis of the issue, not once in the document did the authors cite to or even acknowledge the existence of de Vattel, even in a dismissive way. Some might argue that this approach more resembles result-oriented propaganda than objective scholarly analysis.

2. “Sources Routinely Used”

The article next asserts that “[a]ll the sources routinely used to interpret the Constitution confirm that the phrase “natural born Citizen” has a specific meaning, namely, someone who was a U.S. citizen at birth with no need to go through a naturalization proceeding at some later time.”

It is far from “spurious” to note that, by omitting any reference *at all* to a source “routinely used” to interpret the Constitution – Emer de Vattel’s treatise, as confirmed in the *U.S. Steel*, *Hyatt* and *Haaland* cases – the CKA falls far short of a complete analysis. The article, composed in 2015, can be excused for not citing the *Hyatt* and *Haaland* cases already discussed, as they were not even decided until 2019 and 2023. A similar excuse, however, cannot be recognized for the article’s failure to cite (and distinguish or dismiss) *U.S. Steel* with its acknowledgment of the continued vitality of de Vattel and the principles articulated in his seminal treatise..., including in § 212 of the tome.

As for the CKA’s assertion that the nbC term has a “specific meaning, namely, someone who was a U.S. citizen at birth with no need to go through a naturalization proceeding at some later time,” while that is true for a legitimate “de Vattel § 212” nbC, the inverse extrapolation is a *non sequitur*. Specifically, recalling that all nbC’s are also native born “citizens,” but that not all “native born citizens” are nbC’s, the article’s “specific meaning, namely” language is meaningless. Or, more simply, although all Corvettes are Chevrolets, not all Chevrolets are Corvettes. The notion that the mere obviation of later “naturalization proceedings” is the equivalent of birth as an nbC is nonsense, and yet that is the core principle residing at the heart of the CKA.

3. “Birthplace Irrelevant”

Next, the article asserts that, subject to some parental residency requirements, “someone born to a U.S. citizen parent generally becomes a U.S. citizen without regard to whether the birth takes place in Canada, the Canal Zone, or the continental United States..,” citing (by footnote) [8 U.S.C. § 1401\(g\)](#). That statute provides that, among others, persons who are declared to be “nationals and citizens of the United States at birth:” include:

“(g) a person born outside the geographical limits of the [United States](#) and its outlying possessions of parents one of whom is an alien the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years....”



Article II, Section 1, clause 5 of the U.S. Constitution requires the president and commander-in-chief to be a “natural born Citizen”

So what? Congress has declared such persons to be “nationals” and “citizens... at birth,” but has *not* declared them to be “natural born Citizens” for Art. 2, § 1 Cl. 5 eligibility purposes. Indeed, since the power of the Congress is strictly limited by [Art. 1, § 8, Cl. 4](#) of the Constitution to legislating regarding “uniform Rules of *Naturalization*” (Emphasis added), and not unilaterally amending the Constitution with “end-around runs,” it is less than rocket science to understand that a congressional alteration of the meaning and intent of the Founders set out in the nbC clause of Art. 2, § 1, Cl. 5 is forbidden.

Congress attempted to do just that in 1790 when enacting [1 Stat. 103](#), deeming (using the phrase “shall be considered”) children born abroad to citizen parents – in the plural – to be “natural born citizens.” Realizing its error only five years later, it repealed that statute by [1 Stat. 414](#), thereafter declaring such children to be only “considered as citizens of the United States.” The Congress has never since used the phrase “natural born Citizen” in its statutory enactments.

And as for the CKA’s suggestion that the place of birth is purportedly irrelevant as well – whether “in Canada (Sen. Ted Cruz), the Canal Zone (Sen. John McCain), or the continental United States (ummm..., does this draw into question Barack Obama’s purported birthplace in Honolulu?)” – disregarding the “place of birth” core of the “*jus soli*” or “law of the soil” principle deemed to be the crux of the myriad analyses of the Congressional Research Service (“CRS”) on the matter could be seen as heresy, or, at minimum, inconsistent.

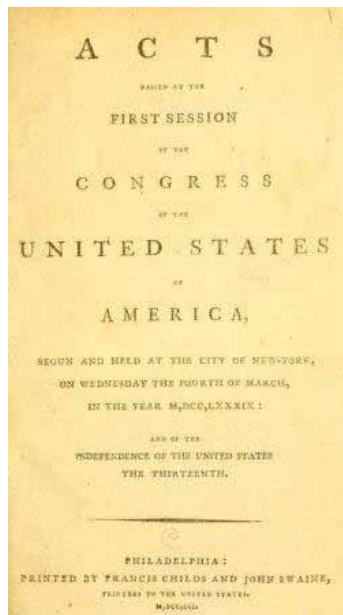
4. “Common Law and Enactments of the First Congress”

The CKA then asserts:

“The Supreme Court has long recognized that two particularly useful sources in understanding constitutional terms are British common law (citing [Smith v. Alabama](#)) and enactments of the First Congress (citing [Wisconsin v. Pelican Ins. Co.](#)). Both confirm that the original meaning of the phrase ‘natural born Citizen’ includes persons born abroad who are citizens from birth based on the citizenship of a parent.”

Once again: even assuming those assertions are correct – a questionable assumption as discussed later – so what? The fact that British “common law” was considered a “useful source” – a phrase appearing only in the CKA, but not in the *Alabama* Supreme Court decision – does not exclude other “useful sources.” As confirmed by the *Haaland* (2023), *Hyatt* (2019) and *U.S. Steel* (1977) Supreme Court decisions already noted, another “useful source” seemingly referenced by both the Founders as well as the Supreme Court was – and even today, *is* – Emer de Vattel’s seminal work, *The Law of Nations...*, although one would not know that from reading the CKA.

Moreover, no doubt inadvertently omitted from the CKA, in the *Alabama* case the Court, after stating the utility of referencing British common law as an exception to the rule that there is no “U.S. common law” when reviewing the constitutionality of state laws, noted that the Alabama statute there under consideration did *not* come within the exception. Thus, in that case, British common law had no application. The CKA’s citation thus seems anomalous.



With regard to the *Pelican* case, the proposition for which the CKA cites it – the gravitas of the First Congress’s enactments *vis à vis* the Constitution – relied, in turn, on an earlier Supreme Court case, [Ames v. Kansas](#). Commenting on the “contemporaneous and weighty evidence” of the true meaning of the Constitution by examining legislation

passed by the First Congress, the Court in *Ames*, reviewing a law passed by Congress, the Judiciary Act of 1875, 18 Stat. 470, stated:

“It thus appears that the [F]irst Congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the states, and with the objections urged against it, did not understand that the original jurisdiction vested in the Supreme Court was necessarily exclusive.” (Emphasis added)

In other words, Congress is not infallible and sometimes goofs in its enactments. And when it discovers those errors, it sometimes, unlike in *Ames*, corrects them without the need for judicial intervention. It is posited that this is exactly what happened in 1795, when Congress repealed 1 Stat. 103 and replaced it with 1 Stat. 414 after recognizing that it could not “slant” amend Art. 2, § 1, Cl. 5 of the Constitution by unilaterally enacting a contrary or conflicting statute. As discussed, *post*, Founder James Madison may have been the one who realized the error and participated in the effort to correct it.

5. “nbC Phrase Intended to Include Persons Born Abroad if ‘A’ Parent was a Citizen”

The CKA next asserts that both British common law and the “weighty” enactments of the First Congress “confirm that the original meaning of the phrase ‘natural born Citizen’ includes persons born abroad who are citizens from birth based on the citizenship of *a* parent.” (Emphasis added) This contention merits closer examination.

To begin with, the use of the term “includes” suggests a present tense, present day applicability. That suggestion, of course, collides with the reality that the repeal of 1 Stat. 103 by 1 Stat. 414 – eliminating the “Considered as natural born citizens” language of the repealed statute and replacing it with “considered as citizens of the United States” – eradicated, from and after 1795 until the present date, any and all claims that the “children” in question were anything *other* than just “citizens of the United States,” but still, only if born to “U.S. citizen *parents*.” They did not become as a consequence of 1 Stat. 414 a “natural born Citizen” but were to be accorded only the rights of a “citizen of the United States” again, if born to citizen parents..., in the plural.

The CKA intimation that, despite the repeal of the “natural born” modifier of 1 Stat. 103 by 1 Stat. 414 a mere five years after it was originally mistakenly enacted, somehow its “ghost” lives on to this day is nonsense. The “original meaning” of the phrase, it is posited, required under a § 212 analysis birth in the United States to parents *both* of whom were already U.S. citizens.

The CKA notion that only one parent need be a citizen directly contravenes the intent of the Founders that *zero* potential for the insinuation of foreign influence into the presidency be allowed. If the CKA “citizen at/by birth” interpretation were to be accepted, the result would be the construction of a dual-allegiance/split-fidelity “pathway to the presidency” for aliens and foreigners instead of the “foreign influence barrier” the Founders intended to erect.

The highly restrictive definition in § 212 – and, it is posited, the one the Founders finally adopted – eliminates the potential for competing citizenship and allegiance claims of multiple countries, some adhering to *jus soli* principles (law of the soil and place of birth) and others adopting the protocols of *jus sanguinis* (law of the bloodline). The Founders sought to eliminate the potential for *all* such claims, not just some of them: § 212 does precisely that while the CKA approach does exactly the opposite.



Furthermore, the ineffective [renunciation](#) by Sen. Ted Cruz of his Canadian/American “dual citizenship” did nothing to alter his status when he entered this world on Dec. 22, 1970 in Calgary, Alberta, Canada to a mother (claimed to be a U.S. citizen) and a father acknowledged to be a citizen of Cuba.

If there is a 21st Century desire to allow presidential eligibility for aliens, foreigners and/or naturalized citizens, the option is to amend the Constitution or persuade the Supreme Court to so rule. The alternative of cobbling together words and concepts that are directly opposed to the Founders’ original intent in 1787 should not be an option.

6. “Natural Born Subjects”

The next argument offered up by the CKA is that, under British “judge-made” common law (as well as statutory law):

“children born outside of the British Empire to subjects of the Crown were subjects themselves and explicitly used ‘natural born’ to encompass such children. These statutes provided that children born abroad to subjects of the British Empire were “natural-born Subjects . . . to all Intents, Constructions, and Purposes whatsoever.”



“Battle of Guilford Court House,” painted in 1781 by H. Charles McBarron ([public domain](#))

The purpose of this contention, of course, was seemingly to advance the argument that, since the Founders were familiar with those “British Subject” laws which were “binding law in the colonies before the Revolutionary War...,” they would “naturally” want to adopt the same principles and definitions of the foreign nation that has just been soundly defeated by George Washington and a bunch of patriots who had simply “had enough” of the British boot on their necks. Seriously..., why would anyone think differently?