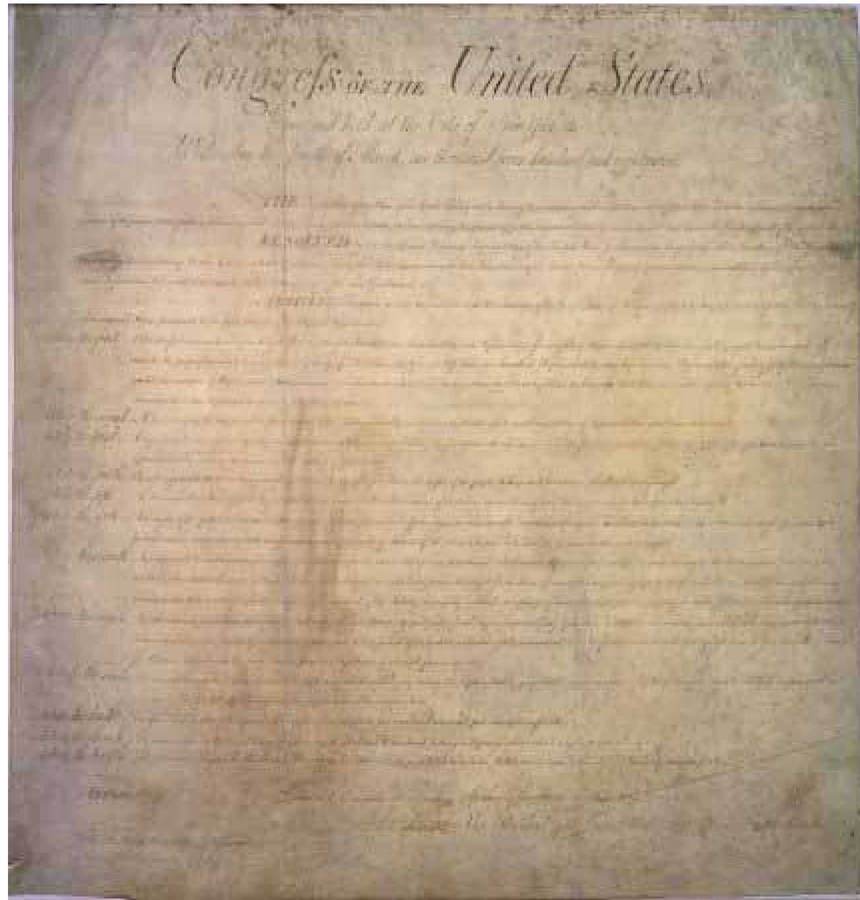
Additional Responses to More nbC Comments

by Joseph DeMaio, ©2022



(Dec. 6, 2022) — True to form, the lively discussions about what the "natural born Citizen" ("nbC") clause in the Constitution means; where it originated; and why it remains important continue. Recent comments here, here and here have generated much back and forth discussion between the two opposing viewpoints on these topics. Is not the First Amendment ***fire***? Fair warning: this offering is long.

Introduction

Rather than respond individually to each commenter in the comment section of the noted posts, since they all refer, generally, to aspects of the same topic, your humble servant has elected to respond to a few of the different ones in a single, separate, free-standing post which seeks to gather them and address them in one place.

In addition, your servant has selected the comments he deems to be worthy of response…, which means, not all of them will be addressed. If that is unacceptable to some, your servant is certain he will hear of it. On the other hand, since he is the author here, he gets to decide.

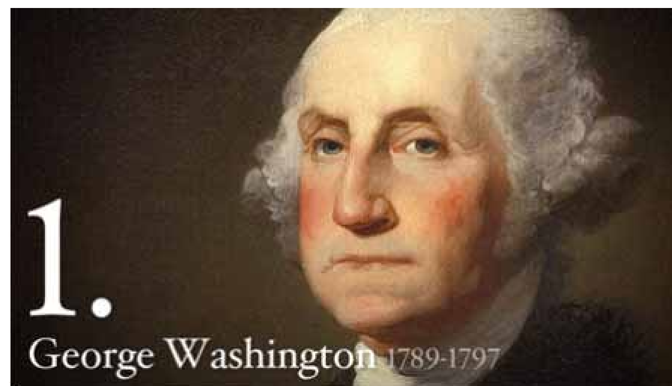
Finally, the following responses will note, in text, the comments to which they are directed. Hopefully, most of the comments strewn across the three posts listed will be more easily reviewed when gathered in one place.

Let us proceed.

The Selected Comments

1. "George Washington born in Virginia in 1732 was a natural born Subject of Great Britain until July 4th, 1776 when he became a natural born Citizen of the United States."

(Becker comment here (Saturday, Dec. 3, 2022 at 10:25 PM.)



Wrong…, as in "not correct." Respectfully, from and after July 4, 1776, George Washington – a former "subject" of the King of Great Britain owing to the fact that both of his parents were British "subjects" when he was born – may have indeed become a U.S. "citizen." But that transformation was the result of ***naturalization by law*** – the Declaration of Independence – and ***not*** by birth, whether "native," "natural" or otherwise.

Moreover, the "Citizen of the United States" referenced in the "citizen grandfather clause" of Art. 2, § 1, Cl. 5 was also a "naturalized citizen," not an nbC under a de Vattel § 212 analysis. Naturalization produces "United States citizens," but it does not produce the "natural born Citizen" intended by the Founders to be eligible to the office. And because the 14th Amendment is also a naturalization law, it too produces only "citizens" of the United States, the *ipse dixit* extrapolations of the *Wong Kim Ark* decision by "de Vattel-deniers" aside.

Thus, just as Washington became a naturalized U.S. citizen via the Declaration of Independence, so too did all Colonial British-America "natural born Subjects" who determined to bear sole and undivided allegiance to the new United States of America. Their intent was to sever all prior political ties to Great Britain.

That severance included casting away the former "subject/liege" monarchical relationship or its purported successor doctrine, cosmetically substituting the term "citizen" for "subject." After fighting and winning the Revolutionary War, it is submitted that one of the last things the Founders intended to do was retain the concepts of a subject/liege relationship between the people and their new government. Stated otherwise, the "once-a-Brit-always-a-Brit" relationship was not the Founders' "cup of tea," so to speak…, in Boston or anywhere else.

The only reason why each of Washington, J. Adams, Jefferson, Madison, Monroe, J.Q. Adams and Jackson were able to lawfully serve as President – despite being a "naturalized" citizen via the Declaration of Independence instead of a "natural ***born*** [emphasis Jay's] citizen" – was because someone on the Committee of Eleven had the foresight to include the "citizen grandfather clause" as a time-limited exception to the strict "nbC" criterion in Art. 2, § 1, Cl. 5.

John Jay was smart, but even smart Founders sometimes overlooked the forest for all of the trees in the way. And the citizen-grandfather clause underscores this fact. It is that simple.

- "And still no comment on the 1785/1786 use of the term 'natural born Citizens of the United States' by John Adams and Thomas Jefferson."

(Fremick comment here (Sunday, December 4, 2022 at 8:57 AM)

John Adams, the second President of the United States

It is unclear where Adams discovered the term "natural born Citizen" used in the "agreement" (actually, it is a draft treaty). Perhaps it was the 1760 English translation of the de Vattel treatise, perhaps not. The tome was, after all, available in English from and after 1760.

But while John Adams is generally included in the group of people characterized as the "Founders," he was not a signatory to the Constitution. Thus, his participation (or sidelining) in the later, 1787 inclusion of the "nbC" term in the Constitution is unclear.

But what ***is*** clear is that John Jay (also a "Founder" but not a signer of the Constitution, either), rather than John Adams or Thomas Jefferson directly influenced the insertion of the nbC clause into the document. However, Adams ***is*** credited with being the person who drafted the 1780 Constitution of the State of Massachusetts. A close examination of that document, however,

reveals that it nowhere uses the term “natural born citizen,” but instead uses the words “people,” “citizens” and “subjects” as if they were fungible terms.

In any event, whatever his concept of a “natural born Citizen of the United States” was prior to 1787, and from whence it came, was mooted and supplanted by the John Jay language given in his “hint” letter to George Washington, which he later forwarded to the Committee of Eleven.

THE AMERICAN COMMISSIONERS TO THE MARQUIS OF CARMARTHEN, 4 APRIL 1786

The American Commissioners to the Marquis of Carmarthen

My Lord Grosvenor Square April the fourth 1786

Agreably to your Lordships request expressed to one of Us in Conversation, and again communicated to Us through Mr Fraser, We have drawn up the enclosed Project of a Treaty of Commerce, which We do ourselves the Honour to propose to the Consideration of his Majestys Ministers.[1]

We have the Honour to be My lord / your Lordships most obedient and / most humble

https://founders.archives.gov/documents/Adams/06-18-02-0119

As to the April 4, 1786 letter and attached draft treaty sent by Adams and Thomas Jefferson – in their capacities as “American Commissioners to the [British] Marquis of Carmarthen – although it is unclear whether Adams or Jefferson drafted it, it contains a confusing hodgepodge of terms, all randomly seeming to refer to the same ***type*** of “person” or “individual,” albeit not always dependent on the nationality of same.

Specifically, there are references to (1) “The Subjects of his Britannic Majesty;” (2) “natural born Citizens of the United States;” (3) “the Citizens of the United States of America;” (4) “natural born Subjects of Great Britain;” (5) “all Persons;” (6) “the Subjects or Citizens of either of the contracting Parties;” (7) “any Person of their own or any other Nation;” (8) “the Citizens or Subjects;” and (9) “the private Individuals of their Nation.”

With this kind of inconsistent linguistic smorgasbord, it is little wonder that the Treaty was never signed or ratified. Stated otherwise, because Adams and Jefferson seemed to be using these terms generically, it is possible that they meant “all Persons” throughout the draft. Thus, to assert that either categorically recognized in 1786 the existence of someone qualified as an American “natural born Citizen” as defined in § 212 of the de Vattel tome is a bit of a stretch.

But even if that were the case, in any event the 1786 letter predates John Jay’s July 25, 1787 “hint” letter to Washington, articulating, it is posited, the de Vattel § 212 concept of who would – and who would ***not*** – be eligible to the presidency.

Emmerich de Vattel (public domain)

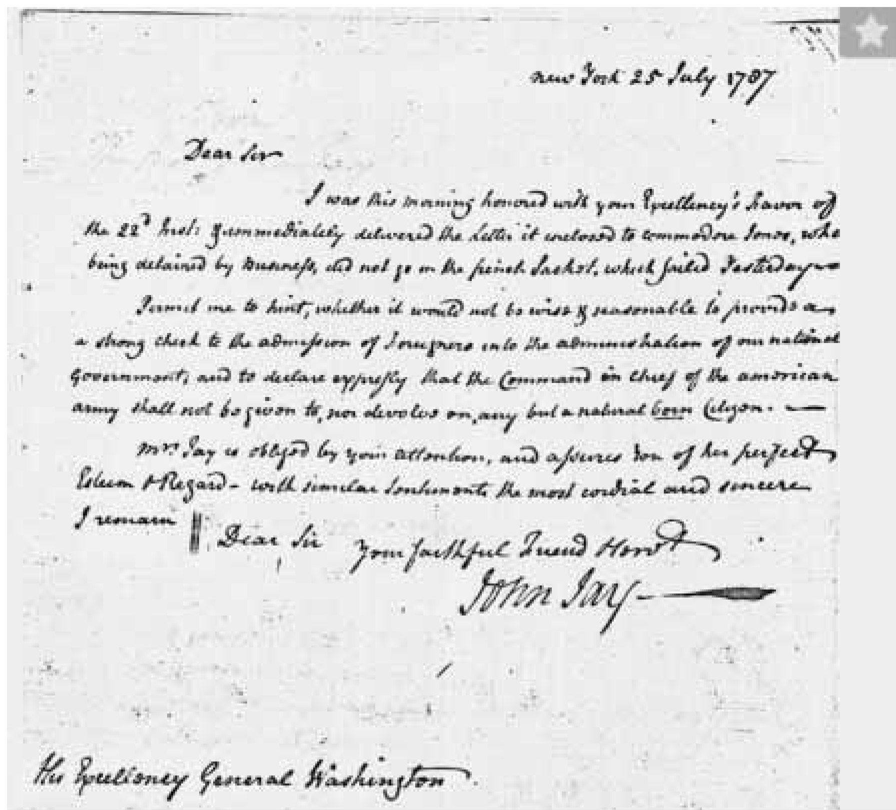
Again, if the "nbC" term meant what the commenter asserts, why was there a need in 1787 for the "citizen grandfather clause" at all? If everyone was a converted "natural born subject" of the Crown with simply a new name – "citizen" – there would have been no need for the exception from the restrictive de Vattel nbC concept most likely adopted by the Founders and most certainly noted by the person on the Committee of Eleven who suggested, and probably drafted, the "citizen grandfather" exception.

If your humble servant is wrong about the nonexistence of an American de Vattel "nbC" prior to Martin Van Buren – contrary to John Adams's suggestion that one existed in 1786 – he would not be alone. Moreover, he would willingly trade that error, if it be one, for acknowledgment that the nbC criterion in the Constitution, as ratified by the Supreme Court in *Minor v. Happersett*, mirrors the Founders' intent in adopting the § 212 concept.

- "No one is arguing that naturalized citizens are natural born citizens"

(Lee comment here (Wednesday, November 30, 2022 at 3:14 PM)

As noted above, the Declaration of Independence operated to convert erstwhile Colonial British-America "subjects" into United States "citizens," by operation of law – a ***naturalization*** procedure – but ***not*** by ***"birth."*** Accordingly, those who contend that the first seven Presidents were eligible to the presidency as "natural born citizens" without regard to the "citizen grandfather clause" are, respectfully, wrong. The ***only*** reason they were eligible was by virtue of the time-constrained "citizen grandfather" exception to the strict nbC standard.



New York 25 July 1787

Dear Sir

I was this morning honored with your Excellency's Favor of the 22d Inst: & immediately delivered the letter it enclosed to Commodore Jones, who being detained by Business, did not go in the french Packet, which sailed Yesterday —

Permit me to hint, whether 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 army shall not be given to, nor devolve on, any but a natural born Citizen. —

Mrs. Jay is obliged by your attention, and assures You of her perfect Esteem & Regard — with similar Sentiments the most cordial and sincere I remain Dear Sir Your faithful Friend & Servt

John Jay

His Excellency General Washington

John Jay's July 25, 1787 "hint" letter to Washington contained no reference to a "citizen grandfather" exception. Recognizing that none of them at the time met the strict nbC eligibility requirements, that exception was added by one or more members of the Committee of Eleven ***after*** they had received Jay's letter forwarded to them by Washington.

Accordingly, each of the first seven Presidents was a U.S. "citizen" by naturalization, not birth, but eligible to the office only because of the citizen grandfather clause. Thus, those who contend that § 212 of the de Vattel treatise did not inform the Founders' intent regarding who would be – and, significantly, who would ***not*** be – an nbC, but could nonetheless be "grandfathered" for presidential eligibility purposes as an exception to the otherwise applicable eligibility restriction, are in effect if not plain reality actually arguing that "naturalized citizens are natural born Citizens."

- "The courts don't apply the meaning ascribed to Vattel. Because they've concluded it isn't the law."

(Lee comment here (Saturday, December 3, 2022 at 10:39 PM))

Respectfully, the commenter is correct that no court thus far has specifically said, in so many words: "We hold that the meaning of the term 'natural born Citizen' in the Constitution was adopted by the Founders directly from the concept laid out by Emmerich de Vattel in § 212 of his 1758 treatise, *The Law of Nations*, and as set out in John Jay's July 25, 1787 'hint' letter to George Washington." On the other hand, the Supreme Court has come pretty darn close to saying *exactly* that in *Minor v. Happersett*, discussed below.

Moreover, the claim of "[b]ecause they've concluded it isn't the law…," is misleading and, to boot, a *non sequitur.* It is inaccurate to state that "they" – presumably meaning the "courts" – have already addressed the issue directly and rendered precedential "decisions" on the merits (*i.e.*, one not made on a procedural basis, such as "lack of standing" or "failure to state a claim") which "conclude" that de Vattel's concepts are either irrelevant or "wrong."

On the contrary, the vast majority of cases, state and federal, that have had the nbC issue brought before them have not resulted in "conclusions" manifesting themselves as "decisions." Instead, they have been rejected because of jurisdictional defects or because the plaintiff litigant lacks the requisite "standing" – a particularized "stake on the outcome" as opposed to only a general interest in the outcome – with one notable exception.

> Based upon the language of Article II, Section 1, Clause 4 and the guidance provided by Wong Kim Ark, we conclude that persons born within the borders of the United States are "natural born Citizens" for Article II, Section 1 purposes, regardless of the citizenship of their parents. Just as a person "born within the British dominions [was] a natural-born British subject" at the time of the framing of the U.S. Constitution, so too were those "born in the allegiance of the United States [] natural-born citizens."[15]

Ankeny, page 17

It is submitted that the most recent exception is the Indiana Court of Appeals decision in *Ankeny v. Governor of the State of Indiana*, 916 N.E.2d 678 (App. 2009), and as to which decision no attempt at U.S. Supreme Court review by *certiorari* was even sought. *Tisdale v. Obama* was dismissed for "failure to state a claim," undercutting its value as "precedent."

The decision in *Ankeny* was wrong when it was decided and remains wrong today. And the decisions in other cases denying appellate review by *certiorari* because of a failure to state a claim or a purported lack of "litigant standing" are not decisions "on the merits." While the *Ankeny* decision might be binding precedent as to litigants in Indiana, it enjoys that status nowhere else. And, it is submitted, it is in any event wrongly decided, as discussed here and here.

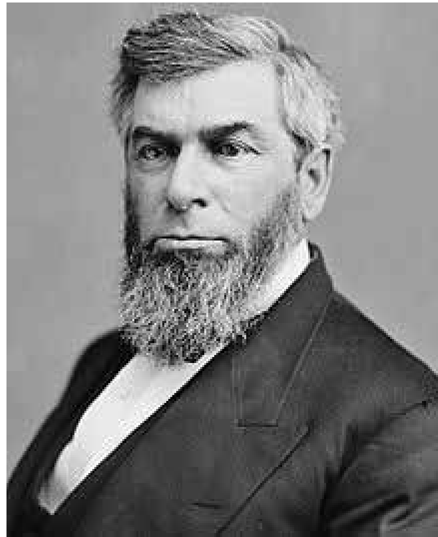
All of the other decisions involving the nbC issue veer off on procedural or "standing" grounds or treat the issues as *obiter dictum.*

- "Minor, in its dicta, does not provide an exclusive definition for natural born citizen. It just says that no one doubts that a person born in the United States to two citizen parent is a natural born citizen because literally no one doubts that."

(Lee comment here (Sunday, Dec. 4, 2022 at 12:39 PM)

The commenter's characterization of Justice Waite's nbC discussion in *Minor* as "dicta" requires a more detailed response. This argument as usually advanced against *Minor* is that Justice Waite's discussion constitutes "*obiter dictum,"* Latin for "by the way" or "said in passing." *Obiter dictum* is distinguished from the "holding" of a decision. The "holding" of a case is that which is precedential and binding on the parties to the case on the legal issue brought before the court and addressed by the opinion constituting its "answer" or ruling. Unsurprisingly, your servant posits that Justice Waite's statement is not *obiter dictum*.

Specifically, the Court's statements in *Minor* on the "no doubts" and "never as to the first" language appearing in the opinion – usually relied upon by those who support the "§ 212 de Vattel" interpretation of the nbC term in the Constitution – are by the commenter characterized as non-binding *dicta*.



U.S. Supreme Court Chief Justice Morrison Waite

Indeed, even Justice Waite states that, as to the "doubts" encumbering the theory that parental citizenship does not matter and that mere birth here renders one an nbC, "[f]or the purposes of this case *it is not necessary to solve these doubts*." (Emphasis added) That statement seems plainly to address the "doubts" that exist regarding a non-de Vattel "parental-citizenship-is-irrelevant" analysis.

Thus, Justice Waite seems clearly to be acknowledging that as to ***that*** issue – the "doubts" issue – it was not before the Court and thus, further discussion of it would constitute dictum. At minimum, it was an issue not to be addressed in reaching the final "holding" in the case.

But on the other hand, in the very next sentence, the opinion states: "It is sufficient for ***everything we have now to consider*** that ***all children born of citizen parents within the jurisdiction are themselves citizens***." (Emphasis added) The "everything we have now to consider" language renders the "born of citizen parents" language part of the case "holding" and removes it from the category of "dictum."

Stated otherwise, Justice Waite acknowledges that there are "doubts" which burden the theory that status as an nbC exists regardless of parental citizenship if a person was merely a "citizen by

birth" or a "citizen at birth." That was an issue not before the Court. However, as to the issue which ***was*** actually before the Court – the citizen status of Virginia Minor – Justice Waite says: "It is sufficient for ***everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens.*" (Emphasis added)

That would include Virginia Louisa Minor and must be seen as part of the holding that, notwithstanding her status as a "citizen," the Missouri Constitution could deny her the right to vote without violating the 14th Amendment. The record in the case confirmed that she was "a native born, free, white citizen of the United States, and of the State of Missouri…." That recognition, coupled with Justice Waite's statement that "all children born of citizen parents within the jurisdiction are themselves citizens…" compels three conclusions.

Virginia Minor (public domain)

First, the conclusion is compelled that Virginia Minor was not only a "citizen," but also a natural born citizen. Again, think Euler diagrams.

Second, the conclusion is compelled that Justice Waite's statement that "all children born of citizen parents within the jurisdiction are themselves citizens" must be seen as part of the case "holding." In this regard, even if it be characterized as "*dictum*," it would not be, technically speaking, "*obiter dictum*." Instead, it is more properly seen – even ***if*** viewed for the sake of argument to be dictum at all – to be "judicial dictum,' a different species of "side comment" which can (and in this case should) be accorded precedential weight.

"Judicial dictum" has been described thusly:

"Judicial dictum" is a statement the court expressly uses to guide parties in their future conduct. As a general rule, such an expression of opinion on a point involved in a case, argued by counsel and deliberately mentioned by the court, although not essential to the disposition of the case, is

distinguished from mere *obiter dictum*, and ***it becomes authoritative when it is expressly declared by the court as a guide for future conduct. Thus, a judicial dictum should receive dispositive weight in a lower court***. Conversely, a court is not bound to follow dicta in a prior case that did not fully debate the point currently at issue." *See* Buccieri, Buchwalter, Gore, and Griffith, "*Judicial Dicta*," 21 C.J.S. Courts 226 (2020). (Emphasis added)

Whether or not Justice Waite's statements in *Minor* would be accorded the "authoritative" or "dispositive" weight so described remains to be seen, as the definition speaks of future "conduct" rather than "constitutional interpretation." On the other hand, interpreting the Constitution is nonetheless "conduct," albeit largely "cerebral conduct." Still, because he included the statement in the context of analyzing Virginia Minor's status as a "citizen," the statement is not properly disregarded as mere *obiter dictum*.

Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. This is apparent from the Constitution itself, for it provides† that "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President,"‡ and that Congress shall have power "to establish a uniform rule of naturalization." Thus new citizens may be born or they may be created by naturalization.

The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their

* Articles of Confederation, § 3, 1 Stat. at Large, 4.
† Article 2, § 1. ‡ Article 1, § 8.

Third, while not specifically citing de Vattel or § 212 of his treatise, by noting that one must "look elsewhere" than the Constitution itself to ascertain the meaning of the term "natural born citizen," it is far less than a fevered intellectual leap to recognize de Vattel and § 212 – with its "sont ceux qui sont nés dans le pays, ***de Parens Citoyens***" (emphasis added) language – as being the most likely source "elsewhere" as informing the definition embedded in Waite's language.

Accordingly, while *Minor* recognizes that "doubts" remain regarding the characterization of a person merely born in the United States, regardless of parental citizenship, as nonetheless being, purportedly, an nbC, ***zero*** doubts remain – except in the minds of de Vattel deniers – as to the nbC status of a person born here to parents who are already U.S. citizens. That is not dictum. Instead, it is a necessary part of the "holding" in *Minor*. More to the point, beyond your humble servant, these points have received critical legal analysis here.

Your servant also recognizes that Justice Waite's statement about defining an nbC, while mirroring the language and concept of § 212, does not automatically exclude the possible

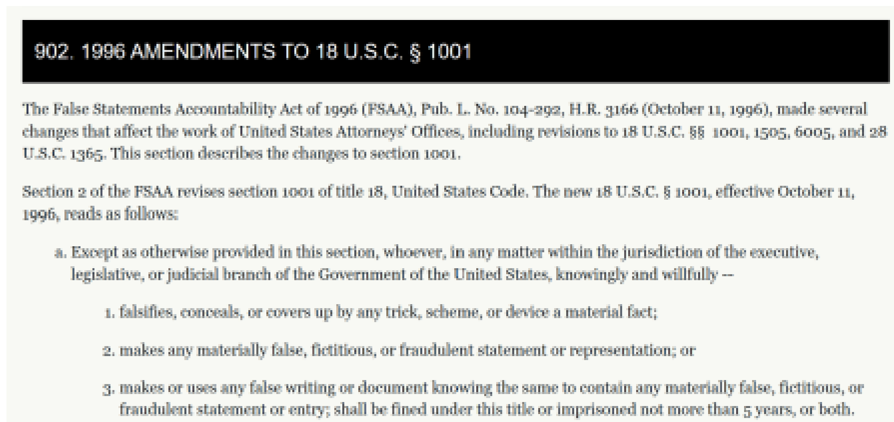
interpretation that other definitions might apply. You humble servant has found none. And the notion that the Founders – after having just fought and won the Revolutionary War as a consequence of needing to "dissolve the political bands which have connected them with another…" – would knowingly select Great Britain's "natural born Subject" theory to define an American nbC when § 212 was available and free for the taking, is also something of a stretch.

Finally, the fact that the underlying conclusion in *Minor* – that the 14th Amendment did not render Virginia Minor eligible to vote in Missouri – was abrogated 45 years later by the 19th Amendment is immaterial. The Court has not itself "overruled" its decision. Instead, the people "abrogated" the decision on the suffrage issue alone, leaving undisturbed the holding that "all children born of citizen parents within the jurisdiction are themselves citizens."

- "The U.S. Constitution contradicts Vattel's beliefs on various points, so the Framers did not wholesale adopt it."

(Lee Comment here (Sunday, December 4, 2022 at 12:07 PM)

It has never been argued that the de Vattel treatise was the sole and exclusive document to which the Founders turned for a purported, but commenter-imagined, "wholesale adoption" while drafting the Constitution. Clearly, many other sources were consulted. Nonetheless, the Supreme Court has confirmed that de Vattel and his treatise were the most frequently cited, and thus relied-upon sources during the 50 years between 1776 and 1826, clearly spanning the period when the Constitution was being drafted, finalized and ratified. To deny this fact is to deny reality and history.


902. 1996 AMENDMENTS TO 18 U.S.C. § 1001

The False Statements Accountability Act of 1996 (FSAA), Pub. L. No. 104-292, H.R. 3166 (October 11, 1996), made several changes that affect the work of United States Attorneys' Offices, including revisions to 18 U.S.C. §§ 1001, 1505, 6005, and 28 U.S.C. 1365. This section describes the changes to section 1001.

Section 2 of the FSAA revises section 1001 of title 18, United States Code. The new 18 U.S.C. § 1001, effective October 11, 1996, reads as follows:

a. Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully --

1. falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
2. makes any materially false, fictitious, or fraudulent statement or representation; or
3. makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

The False Statements Act was amended by Congress in 1996

Moreover, to portray de Vattel as merely a "Swiss legal philosopher" and his tome as a garden-variety "philosophical treatise" as has the Congressional Research Service (*see* CRS Report R42097 at 22) is fatuous. This from the repository of the "nation's best thinking," the same outfit that saw no problem in altering via ellipsis omission the words of a Supreme Court opinion (*Perkins v. Elg*) in a report before disseminating it to Congress, then, years later after Monsieur Obama was out of office, erasing the prior ellipsis and restoring the original Supreme Court language…, like it never happened. Shameful…, and likely illegal (under 18 U.S.C. § 1001, the federal False Statements Act.

And the fact that the Constitution – and thus the Founders who drafted it – differed with de Vattel on various points set out in the tome does nothing to erode, much less negate, the conclusion that one of the principles upon which the Founders seemingly absolutely agreed was that of the definition of an nbC set out in § 212 of the document.

This conclusion finds clear support in the statement by Justice Waite in *Minor*. That statement, of course, is that although the Constitution itself does not in so many words define what is meant by the words "natural born Citizen" – that term, parenthetically, appearing ***only*** in the Eligibility Clause – there was never any "doubt" in the Founders' minds that at minimum, in order to qualify, the individual had to be **"***born of citizen parents within the jurisdiction*…." (Emphasis added).

Quite apart from where Justice Waite may have taken that language – one obvious source would be § 212 – your humble servant posits that his holding on the "of citizen parents" issue articulates a precedential decision of the U.S. Supreme Court.

- "Cruz is a natural born citizen because his mother was a U.S. [citizen] at the time of his birth. That is sufficient."

(Lee comment here (Saturday, December 3, 2022 at 9:06 PM))

Respectfully, the commenter's assertion is a summary paraphrasing of the Harvard Law Review Forum magazine (not the formal bound law school review) article by former U.S. Solicitor General Paul Clement and former Acting Solicitor General Neal Katyal here.

Your *humble* servant disagrees with the analysis and conclusions of Messrs. Clement and Katyal, as discussed here. However, he underscores the term "humble" because the two authors of the article are seasoned attorneys and really smart people, so out of deference to their gravitas, your servant recognizes their stature in the legal community. But we still disagree.

What did the Framers mean by the term "natural born Citizen?"

The commenter's assertion, which mirrors that of the Clement-Katyal article, posits that if a person comes into the world as a "citizen at birth" or a "citizen by birth," that alone is "sufficient" to make the person eligible to the presidency as a "natural born Citizen" as contemplated by the Founders. This contention requires closer examination.

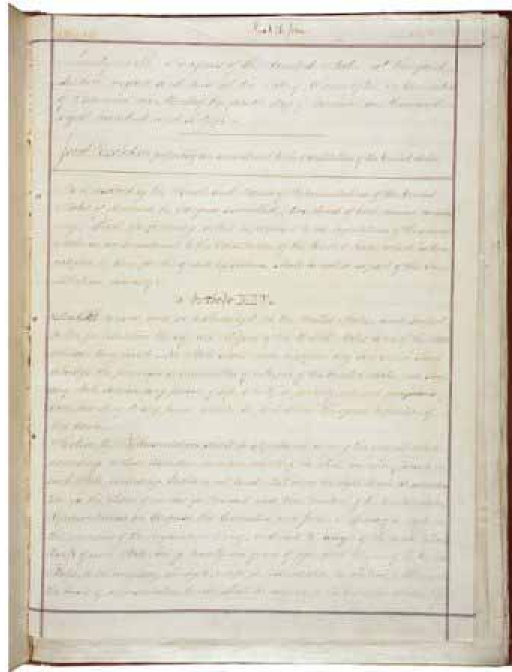
For purposes of constitutional nbC analysis, it is, respectfully, an intellectual leap to contend that, simply because a "citizen at birth" or a "citizen by birth" has not been required to go through the "naturalization" process, this circumstance *ipso facto* automatically renders that person a "natural born Citizen" under Art. 2, § 1, Cl. 5 as opposed to only a 14th Amendment U.S. "citizen." In fact, the "citizen at birth" or "citizen by birth" itself confirms that is it a naturalization process.

Specifically, regarding the "citizen" part of "citizen at birth" or "citizen by birth" concept – as, for example, gaining derivative citizenship from one's mother – that derivative status arises as a result of a congressionally-enacted ***statute***…, making the process one of naturalization, not birth.

Quite apart from the conceptual definition set out in § 212 of the de Vattel tome, an essential part of the substantive decision in *Minor* – holding that "all children born of citizen parents within the jurisdiction are themselves citizens" – dictates that, in addition to birth here, parental citizenship must be taken into account.

This is corroborated through recognition that when Justice Waite made his statement in *Minor*, he had just confirmed earlier in the same paragraph that "[T]hese were natives, or natural-born citizens…." The only logical conclusion to be drawn is that Justice Waite was coupling birth ***here*** to parents who were already citizens ***here.***

The Clement-Katyal article concludes that, because Senator Cruz's mother was a U.S. citizen when the senator was born, it does not matter that the birth took place in Calgary, Alberta, Canada as opposed to ***here*** within the geographic boundaries of the United States.



Manuscript of the 14th Amendment (National Archives)

Respectfully, even the 14th Amendment – the basis for the specious argument that mere birth ***here*** alone, regardless of parental citizenship, suffices to make one an nbC, the core holding in *Wong Kim Ark* – requires birth or naturalization ***here***. It states, in relevant part: "All persons born or naturalized ***in the United States***, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." (Emphasis added)

For Eligibility Clause purposes, including ascertaining the Founders' intent, in addition to birth on U.S. soil, parental citizenship must clearly be taken into account. To do otherwise is to sanction the potential that, for example, had Osama bin Laden been born at, say, the Kapi'olani Maternity and Gynecological hospital in 1957 in Honolulu while his Saudi parents were there on holiday, he would have been eligible to the presidency.

Since the Clement-Katyal article addresses Senator Cruz's eligibility against the backdrop of his mother's U.S. citizenship alone (his father was a Cuban citizen when Cruz was born… in Calgary…), the bin Laden hypothetical would not apply. Yet there are those who would argue that, yes, the Founders intended that anyone born here, regardless of parental citizenship, was eligible to be president as an nbC, including people like bin Laden.

Those who argue that this hypothetical would have mirrored the Founders' intent are either (a) woefully mistaken; (b) in deep denial, or (c) indulging in a controlled substance. By adopting the nbC concept articulated in *Minor* – let alone the concept set out in § 212 – the Founders manifested their intent to absolutely preclude such a possibility. And yet the CRS and a host of others advocate for just that opposite and dangerous *non sequitur*.

Conclusion

This response, of course, will not end the debate. On the other hand, it might generate some additional comments. Again, is not the First Amendment great?

Faithful P&E readers (and opposition commenters), this post is already too long. Few minds will be changed by your servant's responses or commenters' replies, rejoinders, etc. Perhaps an additional, future post will address some of the other comments and questions not answered above.

There is, however, one additional point that needs to be made, and it relates to the reality of the situation today rather than trying, 235 years after the signing of the Constitution, to divine the intent of the Founders. Stay tuned, "de Vattel deniers," as you will enjoy what follows. The reality in 2022 America is that the Republic is deeply polarized. It is polarized along political lines, cultural lines, racial lines and societal lines. That being the case, your humble servant fears that a more problematic issue affecting the entirety of the nbC issue and the discussions surrounding it exists.

Formal group photograph of the Supreme Court as it was been comprised on June 30, 2022 after Justice Ketanji Brown Jackson joined the Court. The Justices are posed in front of red velvet drapes and arranged by seniority, with five seated and four standing. Seated from left are Justices Sonia Sotomayor, Clarence Thomas, Chief Justice John G. Roberts, Jr., and Justices Samuel A. Alito and Elena Kagan. Standing from left are Justices Amy Coney Barrett, Neil M. Gorsuch, Brett M. Kavanaugh, and Ketanji Brown Jackson. Credit: Fred Schilling, Collection of the Supreme Court of the United States

Specifically, the question arises: would a decision by the Supreme Court now, concluding and holding that, in fact, the Founders had adopted and intended to implement the de Vattel § 212 definition of an nbC, cast an unwelcome shadow on Barack Hussein Obama, Jr. and his eight-year presidency?

If that were the holding of the Court, it would confirm that Obama had been a usurper of the office for two full terms. His presidential retirement stipend (nearly $208,000 annually… like he even needs it…) would be put at risk. And the indignity of such a ruling would be a catastrophic

blow to his ego, with the WaPo headline reading: "First Black President Was a Common Usurper." Would the leftists scream that the Justices "will not know what hit them?"

If the public's reaction to the Court's recent *Dobbs* decision, overruling *Roe v. Wade*, is any indicator, the answer may well be, "Yes." The risk of volcanic blowback is just too great to even consider adopting a "de Vattel" theory of what constitutes an nbC. An opinion confirming your servant's view on the nbC issue may be seen, even if correct, as simply a "bridge too far." As the Republic's first "black" chief executive (something of a misnomer, since his mother, Ann Dunham Obama, was Caucasian), such a ruling would tarnish forever his administration, the legitimacy of same and his own personal legacy. Would the Court be prepared to weather another storm of criticism, invective and, ominously, threats of assassination?

Stated otherwise, even if the Court were to conclude that Obama's term in office constituted an usurpation, would the potential public reaction – at least from Democrats, leftists, media talking heads and progressives – force or "persuade" them to simply say: "Move along…, nothing to see here?" It might well be easier to simply issue an opinion declaring that its prior ruling in the *Wong Kim Ark* case controlled and that Obama was an nbC solely on the basis of his birth in Honolulu. Besides, it is all "water under the bridge," so it is akin to "no harm, no foul."

All too frequently, people believe what they want to believe. If enough people voice their opinion and belief that Obama was fully eligible to occupy the presidency, it would not be difficult to predict a decision by the Court ratifying that belief – right or wrong – if for no reason other than to "put the issue to bed," avoid future threats of assassination…, and just "move along" to "more important things."

Author of the "hint" letter to George Washington, John Jay served as the first chief justice of the U.S. Supreme Court

That would be a lamentable, although not altogether unexpected day. Expedient remedies are more often than not unprincipled ones. And one wonders what the Founders would think of such a decision. Kinda sad…, no?