“Native-Born” ≠ “Natural-Born”: Replies to the Responses

"DICTUM..., PURE AND SIMPLE"

by Joseph DeMaio, ©2022

“No person, except a natural born Citizen…shall be eligible to the office of president…”

(Mar. 5, 2022) — Where to start…, where to start?

Your humble servant’s post here generated several competing comments. While replies to those comments would normally appear there, once again, a longer offering is prompted by certain ones received regarding your humble servant’s assertions and conclusions regarding who can – and who cannot – meet the criteria of a “natural born Citizen” as contemplated by the Founders in Art. 2, § 1, Cl. 5 of the Constitution.

Specifically, prolific commenter Becker offered several remarks challenging your humble servant’s conclusions and reasoning regarding the issue. Neither your servant’s opinion nor Becker’s observations will likely alter anyone’s preexisting conclusions on the topic.

That said, it is still important that the record be clear in the event that at some future date, a more thorough analysis of the issue is undertaken, perhaps even by the Supreme Court…, but do not hold your breath… unless you are L.A. Mayor Garcetti explaining why it was OK for him to pose maskless for pictures in mask-mandated San Francisco during the Super Bowl. Hypocrisy, thy name is Garcetti.

Back to text.

Mr. Becker offered several interesting comments. Let us address three of the more significant ones serially.

First, in Mr. Becker's 3/4/22, 2:29 PM comment, he discusses among other things the opinion of Justice William Johnson in *Shanks v. DuPont*, 28 U.S. 242 (1830). At least he discloses that he is quoting from Johnson's ***dissenting*** opinion…, more on that disclosure later.

U.S. Supreme Court Associate Justice William Johnson served on the court from 1804-1834 (public domain)

In the precedential *Shanks* majority opinion, authored by Justice Joseph Story, it was held that the daughters of a deceased South Carolina mother who sought their share of an inheritance could not inherit. This was because when the mother married a British soldier and left the United States never to return, her prior allegiance to this country was abolished, or, as Justice Story characterized it, caused a "virtual dissolution of her allegiance, and fixed her future allegiance to the British crown…."

Justice Johnson dissented because he believed that her status as a "citizen" – or as he characterized it, her status as a "natural born citizen to a community…" of South Carolina – was not abolished or dissolved.

But nowhere in the majority opinion is the term "natural born citizen" mentioned, and certainly not within the context of the Constitution's "Eligibility Clause," Art. 2, § 1, Cl. 5. The ***only*** place where the term "natural born citizen" appears – and in the context of such a citizen under South Carolina law – is in Justice Johnson's dissent.

While Justice Story's majority opinion adverted, without specific citation, to the criteria of de Vattel's *The Law of Nations,* § 212, he avoided use of the term "natural born citizen," seemingly because the factual record in the case was incomplete. That anomaly aside, Justice Story's majority opinion nowhere uses the term "natural born citizen." Period.

It should go without challenge that while a dissent may, on occasion, presage future changes in the Court's majority opinions, the statements of judges who disagree with the

majority opinion – *i.e.*, dissent – are not part of the "holding" of a case or properly deemed to be binding precedent.

Accordingly, at most, Justice Johnson's references to a "natural born citizen" under South Carolina law, coming in a dissent to the holding of Justice Story's majority opinion – which majority opinion, to repeat, is devoid of any reference to a "natural born citizen" – can be said to constitute "dictum…, pure and simple." Again, as cogently noted by the Supreme Court in *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351, n. 12. (2005): "Dictum settles nothing, *even in the court that utters it.*" (Emphasis added).

Atty. Mario Apuzzo *(1956-2021)*

Second, and moving on, as to Mr. Becker's comment of 3/3/22 at 10:19 PM, referencing a quote from eligibility expert – may he rest in peace – constitutional attorney Mario Apuzzo, he is quoted as stating: "[d]uring the founding, 'natural born Citizen' meant the same thing as 'native born citizen.'" Apart from differences of opinion as to the sourcing and validity of that statement, but for present purposes assuming it to be true, a possible explanation exists.

The actual "founding" of the nation occurred on July 4, 1776, a fact recognized even by Justice Johnson in his dissenting opinion in *Shanks.* This took place at least a decade before the Constitutional Convention met in Philadelphia and may well have been the date to which Mr. Apuzzo was referring when making his observation, *viz.*, at the founding of the nation on July 4, 1776, the terminology now at issue may have had different connotations.

In the approximately dozen years transpiring between the 1776 "founding" and the 1787 insertion of the "natural born Citizen" clause in the Constitution, Mr. Apuzzo explains that a lot of evolutionary linguistic changes took place. This could well explain, at least in Mr. Apuzzo's mind, why in drafting the Constitution's "Eligibility Clause," the drafters differentiated between a "citizen" in the "citizen grandfather clause" and a "natural born citizen" with respect to general and future presidential eligibility.

In this regard, Mr. Becker conveniently omits the rest of the contextual background in Mr. Apuzzo's blog post addressing these changes. Specifically, Mr. Apuzzo notes in the four sentences immediately following the one extracted by Mr. Becker these points:

THE DIFFERENCE BETWEEN "NATURAL" AND "NATIVE" AS APPLIED TO AN ARTICLE II "NATURAL BORN CITIZEN"

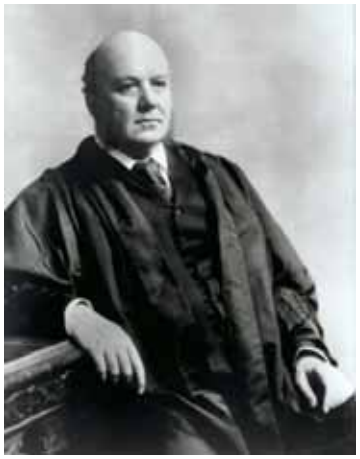
https://puzo1.blogspot.com/2009/01/difference-between-natural-and-native.html

"It is only in later years that the term 'native born citizen' came to mean a child born in the United States without any reference to the citizenship of his or her parents. [a likely reference to the 1898 decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898)]. The term was so used to distinguish a born citizen from a naturalized citizen. ***But use of the word 'native' in this sense caused it to no longer mean the same thing as 'natural born Citizen.***' In this modern context, 'natural born Citizen' means much more than 'native born citizen,' ***for the former also has a connection to the child's parents and not just to the soil on which the child was born.***"

(Emphasis added)

Because Mr. Apuzzo passed away in October, 2021, we cannot ask him for clarification. But most would agree that, from his writings that remain, he strongly believed that a "natural born Citizen," as contemplated by the Founders in 1787 in Philadelphia and as defined in § 212 of de Vattel's treatise, was a person born in the United States to two parents who, at the time of birth, were already U.S. citizens. Any suggestion to the contrary would be ill-informed.

Third, and finally, as to Mr. Becker's comment of 3/3/22 at 10:13 PM, it might have been more persuasive – and far less misleading – if he had not premised his comment on the language of the ***dissenting*** opinion in *Schneider v. Rusk*, 377 U.S. 163 (1964). At least with respect to his discussion of *Shanks*, a signal was given to readers that the source of the discussion was Justice Johnson's dissent. Not so in his 3/3/22 10:13 PM comment.



U.S. Supreme Court Associate Justice Horace Gray served in that capacity from 1882 to 1902, the year of his death

Specifically, the actual ***majority*** opinion in Schneider says, at p. 165: "only the 'natural born' citizen is eligible to be President. Art. II, § 1." On the other hand, the confusing dissenting opinion in *Schneider* says, at p. 177: "Only a native-born may become President, Art. II, § 1."

Mr. Becker thus commits the error (let us not at this point call it a "misrepresentation") of quoting from the dissenting opinion in the case, but offering it up as purportedly being from the majority opinion by referencing the source of the quote as being "p. 165," – where Justice Douglas actually referenced "natural-born" citizen – yet substituting the "native-born citizen" term from the dissent.

Wrong. Bad form. Reminiscent of the linguistic chicanery of the Congressional Research Service and Justice Gray's "in the same words" goof in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), a blazing error still unexplained (or justified) by anyone…, including Mr. Becker.

There is no question that the dissent in *Schneider*, written by Justice Clark, used that terminology, albeit itself somewhat ambiguous. However, recalling that all natural-born citizens are also native-born citizens, but not all native-born citizens are natural-born citizens, Justice Clark's dissenting statement only makes sense when viewed against that "Euler diagram" backdrop: he was presumably speaking of native-born citizens who were ***also*** natural-born citizens, consistent with the unambiguous language of the majority – and controlling – non-dictum opinion.

In conclusion, your humble servant awaits another slew of comments…, but at least now there is another post to which they may be appended.