

Response to “Lucius Boggs” Critique on Presidential Eligibility

by [Joseph DeMaio](#), ©2023

Lucius Boggs

Monday, March 20, 2023 at 1:33 PM — [Edit](#)

The author appears to ignore the current case law. A number of state courts have already ruled on this question and they all appear to read *US v. Wong Kim Ark* (1898) as authoritative if not binding precedent. Would any legislative attempt to override these decisions be ruled unconstitutional?

In a previous comment I pointed out that even Professor Titus (a two-citizen parent advocate) recognized that *Wong Kim Ark* (not *Minor*) is the precedent which controls this issue. In his amicus brief in *Rudy v Lee* (2014-1056) Professor Titus does not rely on *Minor v Happersett* as a precedent but rather points out that the choice is between Justice Gray's opinion or Chief Justice Fuller's dissent in *Wong Kim Ark*. It is clear from his argument that he recognized that even though Justice Gray did not specifically declare *Wong* a natural born citizen the effect of the decision made him eligible to be president.

<https://www.thepostemail.com/2023/03/08/the-natural-born-question-will-it-be-answered/#comment-436108>

Professor Titus amicus brief (*Rudy v Lee*)

<http://cldef.org/briefs/Rudy%20v%20Lee%20USJF%20Amicus%20Brief.pdf>

<https://www.thepostemail.com/2023/03/20/the-role-of-states-and-popes-in-presidential-eligibility-determinations/#comment-436251>

(Mar. 22, 2023) — The recent comments above by one “Lucius Boggs” in response to the [article](#), “The Role of States and ‘POPE’s’ in Presidential Eligibility Determinations” are many and lengthy, thus necessitating longer than normal responses, below.

[Monday, March 20, 2023 at 1:33 PM](#)

Boggs: The author appears to ignore the current case law.

Author’s Response: “Current case law” is not the same as precedential Supreme Court case decisions.

Boggs: A number of state courts have already ruled on this question and they all appear to read *US v. Wong Kim Ark* (1898) as authoritative if not binding precedent.

Response: The commenter appears to ignore that for that very reason, the POPE proposal makes eminently rational sense, since *WKA* did *not* involve the “natural born citizen” issue. Moreover, it must be recalled that once, the decisions in *Scott v. Sandford*

and *Roe v. Wade* were claimed to be both authoritative and binding precedent..., and look what happened to them.

Boggs: Would any legislative attempt to override these decisions be ruled unconstitutional?

Response: Recalling that *WKA* by its own terms confined its holding to analysis of the 14th Amendment's application to determine whether the person was a "citizen," all of the rest of the opinion discussing a "natural born citizen" is "dicta, pure and simple." Moreover, the commenter conspicuously fails to identify the provision of the Constitution, specifically, which would purportedly be violated.

Boggs: In a previous comment I pointed out that even Professor Titus (a two-citizen parent advocate) recognized that *Wong Kim Ark* (not *Minor*) is the precedent which controls this issue.

Response: Because Justice Gray's *WKA* opinion is fundamentally flawed – *see* "In the Same Words?" [here](#) – this is yet another compelling reason to deploy the POPE option.

Boggs: In his amicus brief in *Rudy v Lee* (2014-1056) Professor Titus does not rely on *Minor v Happersett* as a precedent but rather points out that the choice is between Justice Gray's opinion or Chief Justice Fuller's dissent in *Wong Kim Ark*. It is clear from his argument that he recognized that even though Justice Gray did not specifically declare *Wong* a natural born citizen the effect of the decision made him eligible to be president.

Response: The commenter misleads by failing to note that the amicus brief filed by Professor Titus did not "recognize" that "the effect of the [*WKA*] decision made *Wong Kim Ark* eligible to be president" or that *WKA* "controls this issue." That claim is a festooning of what Professor Titus actually argued and constitutes an unsubstantiated extrapolation of his actual amicus argument. It is worthy of analogizing to selected "products" of the Congressional Research Service.

The amicus argument was solely that *WKA*, in addressing the 14th Amendment, Justice Gray's (flawed) majority opinion clarified the statement made in *Minor v. Happersett* regarding the "citizen" status of persons born to aliens here, as to which "there had been doubts." Indeed, the amicus brief noted that Justice Fuller's dissent was "cogent" (amicus brief at 16).

Finally, the commenter omits the fact that the amicus brief argued (correctly, in your humble servant's view) that certiorari should be granted to address the constitutional eligibility of Barack Hussein Obama, Jr. The lower trial court had dismissed (with the dismissal affirmed) Mr. Rudy's claim that Mr. Obama was not a natural born Citizen on the grounds that the matter constituted a "political question" and was thus "non-justiciable."

The matter addressed in the amicus brief, therefore, was *not* directly aimed at the merits of the natural born Citizen issue. Instead, it focused on the abstract jurisdiction of the Supreme Court and urged the granting of Mr. Rudy’s petition for certiorari. Thus, if the amicus brief were a court opinion, its comments about *WKA* and *Minor* would be deemed obiter dictum. Naturally, the Supreme Court denied certiorari..., you expected something else?

Boggs: <https://www.thepostemail.com/2023/03/08/the-natural-born-question-will-it-be-answered/#comment-436108>

Professor Titus amicus brief (Rudy v Lee)

<http://cldef.org/briefs/Rudy%20v%20Lee%20USJF%20Amicus%20Brief.pdf>

Supreme Court docket (Rudy v Lee)

<https://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-36.htm>

There are two cases that should be read as both influenced Justice Gray’s opinion and are cited by him.

Lynch v Clarke 1844 New York Chancery Reports

“6. Upon principle, therefore, I can entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen.”

Response: Nowhere in the records of the U.S. Supreme Court will one find the name of Chancellor Nathan Sanford, author of the opinion in *Lynch*, as being included among the various Justices of the Supreme Court.

Opinions of judges from courts inferior to the U.S. Supreme Court may be “authoritative” within their local jurisdictions and even “persuasive” as a general matter. But they are not pronouncements which become a part of U.S. Supreme Court jurisprudence and, tangentially, the “supreme law of the land.”

Accordingly, *Lynch* – like *Ankeny v. Governor of the State of Indiana* – articulates noting more than the opinion(s) of judges of inferior courts of appeal. This only underscores the allure of POPE laws: at the “end of the day,” the objective is to *force* the nbC issue into the Supreme Court, if not by a private litigant – where standing issues would arise – then under Art. 3, § 2, Cl. 5.

That provision mandates that “[t]he judicial Power [of the Supreme Court] *shall* extend... to Controversies between two or more States...” (Emphasis added). The Founders understood the difference between the words “shall” and “may,” and selected the former for use in the Constitution.

Boggs:

[https://cite.case.law/pdf/2163616/Lynch%20v.%20Clarke,%201%20Sand.%20Ch.%20583%20\(1844\).pdf](https://cite.case.law/pdf/2163616/Lynch%20v.%20Clarke,%201%20Sand.%20Ch.%20583%20(1844).pdf)

In re look Tin Sing 21 F. 905 (D.Cal. 1884)

Citing Lynch v Clarke – “It was held that she was a citizen of the United States. After an exhaustive examination of the law, the vice-chancellor said that he entertained no doubt that every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural-born citizen; and added that this was the general understanding of the legal profession, and the universal impression of the public mind.”

<https://casetext.com/case/in-re-look-tin-sing>

The author of the opinion in Look Tin Sing with [*sic*: was?] Justice Stephan [*sic*: Stephen] Field who was also on the Court for the Minor v Happersett decision.

Response: As to the decision in *In re Look Tin Sing*, Judge Field – while parroting as a Ninth Circuit Court of Appeals Judge portions of the opinion of Chancellor Sanford in *Lynch* – joined, as a Supreme Court Justice, the unanimous decision in *Minor*.

The *Minor* decision, of course, articulates the proposition that the Founders knew well that a natural born citizen was a person born here to two parents who were already citizens. It also noted that there had been doubts about whether similarly, persons born here to foreigners were natural born citizens..., but also that “no doubts” existed as to those born here to citizen parents. Instead of dissenting, as might have been expected given his prior opinion in *In re Look Tin Sing*, Justice Field joined in the unanimous *Minor* decision, suggesting that he understood — unlike some — the difference between a “citizen” and a “natural born citizen.”

Side out.