Response to Some nbC Comments

by Joseph DeMaio, ©2022


LE DROIT
DES GENS.
OU
PRINCIPES DE LA
LOI NATURELLE,
Appliqués à la conduite & aux affaires des Nations & des Souverains.
PAR M. DE VATTEL.
Nihil est enim illi principi Deo, qui omnem hunc mundum regit, quod quidem in terris fiat, acceptius, quam concilia coetusque hominum jure sociati, quæ Civitates appellantur. CICER. Somn. Scipion.
TOME I.
A LONDRES.
M. DCC. LVIII.

"The Law of Nations" by Emmerich de Vattel

(Dec. 2, 2022) — Well, here we go again. As faithful P&E readers know, on occasion several of your humble servant's posts generate robust comments. These comments usually relate to posts addressing the "natural born Citizen" ("nbC") presidential eligibility clause of the Constitution, Art. 2, § 1, Cl. 5. There, of course, the Founders stated that, with the exception of persons who were a "Citizen of the United States, at the time of the Adoption of this Constitution…," in order to serve as President, one first had to be eligible as a "natural born Citizen."

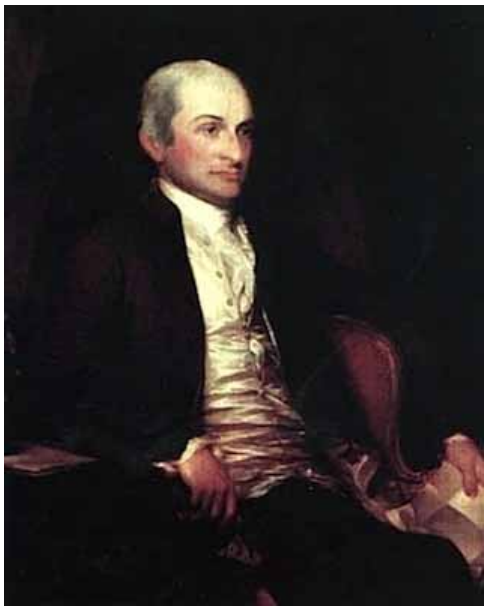
Two recent commenters on this post, Messrs. Lee and Fremick, have offered two comments, one an assertion by Mr. Lee, one a question by Mr. Fremick. Your humble servant would normally respond to those matters in the comment section of the post. But since a more detailed (*i.e.*, longer) response is indicated, this separate, free-standing post is offered. Let us begin.

Introduction

First, some necessary background. Much debate and many of the comments made and questions posed are posited in opposition to the argument that the Founders adopted the meaning of the term "natural born citizen" found in the 1758 treatise on international law, "*The Law of Nations,*" by Swiss lawyer, jurist and legal philosopher Emmerich de Vattel.

In § 212 of his tome (hereafter, for brevity, "§ 212"), de Vattel states, in French, at that time the language of international diplomacy: "Les Cityoens sont les membres de la Société Civile: Liés à cette Société par certains devoirs, & soumis à son Autorité, ils participant avec égalité à ses avantages. Les *Naturels*, ou *Indigènes*, sont ceux qui sont nés dans le pays, de Parens Citoyens."

In English, the two sentences translate thusly: "The Citizens are the members of the Civil Society: bound to this Society by certain duties and subject to its Authority, they participate equally in its advantages. The natives, or "indigènes" are those [who are] ***born in the country of parents who are citizens.***" (Emphasis added)



John Jay held many positions both before and following the American Revolution: President of the Continental Congress; ambassador to Spain; Foreign Affairs Secretary, New York Governor (1795-1801), and first chief justice of the U.S. Supreme Court under President George Washington.

At this juncture, the discussions usually turn to, "What did the Founders intend when fashioning the words 'natural born Citizen' for insertion into the Constitution?" The "pro-Vattel" camp – your humble servant included – argues that they adopted the words "natural born Citizen" from the identical words used by John Jay in his July 25, 1787 letter to George Washington.

That letter, of course, "hinted" to Washington that, in order to erect a "strong check" against and barrier to the "admission of Foreigners into the administration of our national government…" it would be wise and seasonable "to declare expressly that the ***command in chief of the [A]merican army shall not be given to, nor devolve on any but a natural born citizen.***"(Emphasis added)

Jay was familiar with the de Vattel tome, as he had frequently referenced it in correspondence with others during the time before and after Constitution was being drafted. Specifically, that John Jay respected and relied upon de Vattel's reasoning and logic – and by extension, de Vattel's § 212 definition of a "natural born citizen" – is corroborated by his several references to him in his correspondence of the period.

For example, in a Nov. 24, 1785 letter to Samuel Huntington, then-serving President of the Continental Congress, Jay confirmed that a legal question relating to the appointment of the Counsel-General of Great Britain to the United States "is settled by [de] Vattel…," thereafter quoting from the treatise. And in a letter of Sept. 7, 1794, British Foreign Secretary Lord Grenville responded to Jay stating that, "in conformity to what was mentioned by [Mr. Jay]" earlier that day, he would quote de Vattel with regard to the topic of their discussions.

Since Jay was conversant in French; familiar with the de Vattel treatise; and concerned that only a "natural born Citizen" should be eligible to the presidency, it is no intellectual leap to conclude that he adopted and subscribed to the de Vattel definition of the term: a person "qui sont nés dans le pays, de Parens Citoyens." "A person born in this country to citizen parents." It is posited that this concept embodied in Jay's letter to Washington – which letter Washington forwarded to the Convention's Committee of Eleven – was inserted into the Constitution by the Founders. It is that simple.

It is also the most rational and plausible reason why the Supreme Court many years later stated in *Minor v. Happersett*, 88 U.S. 162, 167-168 (1875), *abrogated*, *19th Amendment* (1920) ("*Minor*"), that although the Constitution did not itself define the term "nbC":

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

"[a]t 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 parents. *As to this class* ***there have been doubts, but never as to the first.****"* (Emphasis added)

The Lee Assertion

Against this backdrop, your humble servant first addresses Mr. Lee's contention (comment of 11/30/22 @ 3:23 PM) here: "There's no evidence the Framers relied on Vattel when drafting the natural born citizen clause."

Respectfully, your servant disagrees.

The sole direct – as opposed to indirect or tertiary – analogue between provisions of the Constitution and any of the various principles articulated in de Vattel's treatise is… wait for it…, wait for it: the discussion by de Vattel of those who comprise that category of persons qualifying as "les naturels ou indigènes" found in § 212. If there is another *direct* example, it remains elusive. Perhaps a commenter or faithful P&E reader can supply it.

As already noted, in § 212 of the treatise, de Vattel teaches, in French: "Les *Naturels*, ou *Indigènes*, sont ceux qui sont nés dans le pays, de Parens Citoyens." It is far short of rocket science to recognize that John Jay – who as an American diplomat was fluent in French – understood that, in English, de Vattel's words meant: "The naturals, or indigenous, are those who are born in the country, of citizen parents."

If in his "hint" letter to Constitutional Convention Chairman George Washington, John Jay did ***not*** get his terminology from de Vattel's treatise – with which he was plainly familiar – where did he get it? Clearly, this is "evidence" of reliance on de Vattel by Jay, Washington and – because the Committee of Eleven adopted Jay's "hint" – the "Founders" too.

Then there's Ben Franklin's expression of appreciation to Charles Dumas for the gift of the de Vattel treatise, which Franklin noted to Dumas "… came to us in good season, when the circumstances of a rising State make it necessary to frequently consult the law of nations…," adding that the treatise "has been continually in the hands of the members of our Congress now sitting." It is a safe bet that the "congress [then] sitting" and the Founders were not using the treatise as a mere paperweight. This too is "evidence" of reliance on de Vattel by the Founders.

But wait…, there's more. How about Supreme Court Associate Justice Powell authoring the opinion of the Supreme Court in *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 462, n.12 (1977)? There, Justice Powell recognized that de Vattel and his tome were "the most widely cited in the 50 years after the [American] Revolution," quoting from 1 J. Kent, *Commentaries on American Law* 18 (1826). The 50-year period after 1776 plainly spans the period when the Founders crafted and finalized the Constitution.

Again, this is "evidence" of reliance by the Founders on de Vattel and § 212. Indeed, even if not direct "smoking gun" evidence of the adoption of § 212 by the Founders, it nonetheless constitutes Supreme Court recognition and "judicial notice" – which is also an element of "evidence" – of the impact of de Vattel and the principles set forth in his treatise on American jurisprudence and the Founders' intent.

That influence continues to this day, as recently confirmed in *Franchise Tax Board of California v. Hyatt*, __ U.S. __, 139 S. Ct. 1485, 1493 (2019). There, Associate Justice Thomas refers to de Vattel as the "founding era's foremost expert on the law of nations."

However, it is unlikely that those who continue rejecting the relevance and materiality – both being elements of "evidence" – of § 212 and the reliance by the Founders on it will accept anything less than an original certified statement, on sheepskin parchment, from each Founder that in fact, they specifically relied on § 212. And even that would likely not change their minds.

But unless and until they can point to a specific, direct analogue in the Constitution adopting some *other* principle of law from de Vattel, the conclusion is compelled that the references cited above confirm that clear "evidence" of the questioned "reliance" exists. Since § 212 is apparently the sole direct analogue to a specific provision in the Constitution, the rational and logical conclusion arises that John Jay and the Founders relied directly and solely on de Vattel for that principle.

The Fremick Question

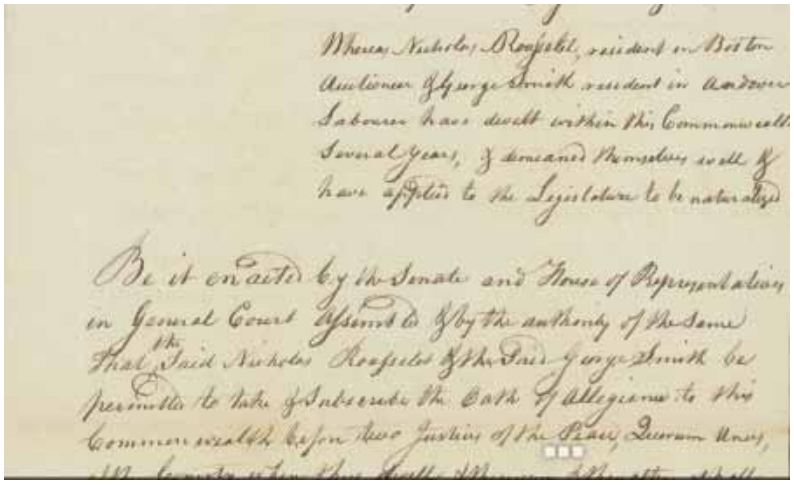
Mr. Fremick poses the following question in his 12/1/22 @ 12:34 AM (night owl) comment directed to your humble servant: "And your position appears to be: The natural born citizens of the states were not natural born citizens of the United States. Is that your position? [DeMaio response: yes.] [If so], [c]an you explain who were the natural born citizens of Massachusetts mentioned in this February 1785 legislative act?"

The comment then proceeds to replicate the Massachusetts act:

"AN ACT FOR NATURALIZING NICHOLAS ROUSSELET AND GEORGE SMITH.

Whereas Nicholas Rousselet, resident in Boston, auctioneer, and George Smith, resident in Andover, labourer, …shall be deemed, adjudged, and taken to be citizens of this Commonwealth, and entitled to all the liberties, rights and privileges of natural born citizens."

Where to start…, where to start?



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First, the Massachusetts act was one declaring – in its own title – that its purpose was to "naturalize" Messrs. Rousselet and Smith. It was not intended, nor did it purport, to retroactively bestow upon them status as a "natural born citizen." And if they were already Massachusetts "natural born citizens," (a) why was there a need to naturalize them at all, and (b) why did not the naturalization act divest them of their prior "natural born citizen" status?

As all will (or should) concede, a "naturalized" citizen is not a "natural born Citizen" for purposes of Art. 2, § 1, Cl. 5 – the presidential Eligibility Clause – of the Constitution. So although Messrs. Rousselet and Smith were, after the Massachusetts act was passed, "naturalized" citizens of both Massachusetts and the United States, the act did not retroactively *convert* them into nbC's. If de Vattel is correct – and your servant posits that he is – the only way one can exist as an nbC is via birth in the country where the two parents are already citizens.

On the other hand, and to be clear, for purposes of U.S. Constitution Eligibility Clause analysis, both men would still have been eligible to serve as president of the nation (assuming they were elected) under the "citizen grandfather clause" of Art. 2, § 1, Cl. 5. But the fact that the Massachusetts legislature wished to "deem" the two persons to be entitled to the liberties, rights and privileges of natural born citizens is akin to the mistaken attempt by the First Congress to "deem" children born "beyond sea" to U.S. citizen parents to be "considered as natural born citizens."

As is commonly known, in 1790, the First Congress enacted 1 Stat. 103, "An Act to establish an uniform Rule of *Naturalization*" (emphasis added). That act, like the Massachusetts act of five years earlier, effectuated a naturalization of children born to "citizen parents" other than in the United States, but it did not effectuate a retroactive alteration of their status at birth. To be "deemed" or "considered" to be one thing underscores the reality that one is ***not*** that "thing."

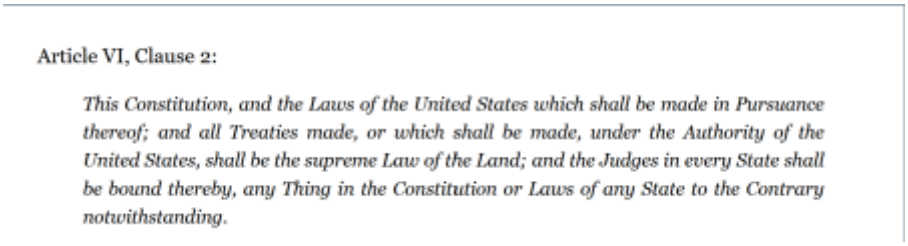
Moreover, although 1 Stat. 103 stated that children born "beyond sea" to U.S. citizen parents were "considered" to be "natural born citizens," only five years later, in 1795, that statute was repealed in its entirety. In the new statute – 1 Stat. 414, repealing 1 Stat. 103 – the Congress, apparently recognizing that it could not by a statute like 1 Stat. 103 alter or amend the intent of the Eligibility Clause regarding the understood "§ 212" definition of "natural born Citizen"

therein (*cf. Minor v. Happersett*, 88 U.S. at 167-168), deleted the words "natural born" before the word "citizen."

The fact that Congress actually made the deletion – regardless of whether it was a conscious, intentional deletion, as opposed to a "stylistic" or "accidental" omission – is beyond dispute: the words "natural-born" in 1 Stat. 103 do not appear in 1 Stat. 414 – or any other subsequently-enacted naturalization statute, the statements of Supreme Court Justices Waite (in *Minor*) and Gray (in *Wong Kim* Ark) notwithstanding, as discussed here.

Accordingly, while the Massachusetts Legislature could, so to speak, "knock itself out" in "deeming" Messrs. Rousselet and Smith to be entitled – as *naturalized* citizens of Massachusetts – to the "benefits" of a true natural born citizen, they were still "naturalized" citizens, not "nbC's" as contemplated by the Founders under the Constitution.

Which brings us to the next point. Whatever were the enactments of the states, including those of the Massachusetts Legislature, prior to the adoption, ratification and enforcement of the Constitution after 1789 – and without regard to the chaos of the Civil War – when the individual states amalgamated into the United States of America, they each became subject to and bound by Art. 6, § 2 of the Constitution. That provision states, in relevant part:



Article VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/

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To the extent that the argument is being advanced that a state law using the term "natural born citizen" for that state's purposes can properly also use and define the term in a manner that is inconsistent and at odds with the definition of the term most likely intended and relied upon by the Founders – the one found in § 212 as seemingly ratified in *Minor* – the argument must fail. To conclude otherwise is to advocate that the "supreme Law of the Land" under the Constitution is not supreme at all.

Moreover, the language of the Constitution confirms that the same reasoning applies to the decisions of judges – at minimum, judges of state courts, appellate or otherwise – which run afoul of the Constitution. *Cf. Ankeny v. Governor of State of Indiana,* 916 N.E.2d 678, 688 (Ind. App., 2009).

And as for the latent argument that the 9th Amendment applies, respectfully, it does not. The 9th Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed

to deny or disparage others retained by the people." The restriction in Art. 2, § 1, Cl. 5, prohibiting anyone other than an nbC to serve as president, is not a "right." Instead, it is a *prohibition* on any purported "right" possessed by any person *other* than a natural born Citizen to be president.

Conclusion

The argument will persist on what, exactly, the Founders understood the term to mean and what their intent was when placing it in the Constitution. And yet, the "evidence" discussed in this post would seem to suggest – if not compel – the conclusion that the Founders, including John Jay, meant to adopt de Vattel's § 212 meaning.

And that the argument will persist will likely be proven when a new chain of email comments from Messrs. Lee and Fremick, as well as others, will launch against this post. And perhaps there will even be citations to provisions of the Constitution having direct analogues to principles set out in the de Vattel treatise ***other*** than § 212. Now *that* would be interesting.

Let the exchanges begin.