Revisiting Minor v. Happersett

by Joseph DeMaio, ©2023

Virginia Minor became an early figure in the Women's Suffragette movement, although not living to see the passage of the 19th Amendment allowing women to vote

(Jul. 17, 2023) — Well, faithful *P&E* readers, here we go again. As another "exploratory" candidate for president appears on the scene – Dr. Shiva Ayyadurai –, it may be prudent to once again revisit the Supreme Court's 1875 decision in *Minor v. Happersett*.

While the major holding of the case (*i.e.*, that Missouri's denial of suffrage to women did ***not*** violate the 14th Amendment) was abrogated 45 years later in 1920 by the 19th Amendment, the question remains as to whether the decision's other "observations" and "comments" remain viable and relevant to the "natural born Citizen" ("nbC") presidential eligibility question.

The answer to that question, in turn, may impact not only Ayyadurai's candidacy – competently explored here – but may in addition cast useful light on the questionable presidential candidacies and bona-fides of many others, including Vivek Ramaswamy;

Nikki Haley; Kamala Harris; and, of course, Barack Hussein Obama, Jr. A subsequent offering will address Dr. Ayyadurai's eligibility arguments.

Turning specifically therefore to the decision in *Minor v. Happersett*, 88 U.S.162 (1875) – and totally apart from the now-abrogated women's suffrage issue addressed by the Court in ruling against Virginia Minor – the relevance of the surviving, non-suffrage and non-abrogated portions of the opinion to the nbC issue remains. Those portions relate to the Court's following observations, found at 88 U.S. 162, 167-168:

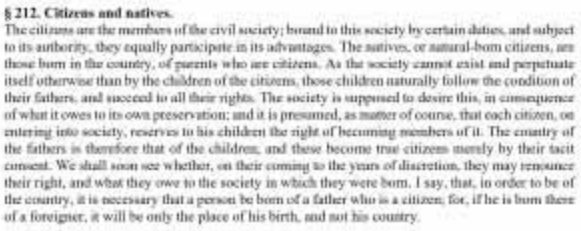
"The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, *it was never doubted that all children born in a country of parents who were its 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 parents. As to this class there have been doubts,* ***but never as to the first.****"* (Emphasis added)

This language is usually cited by advocates of the "natural born citizen" definition found in Book 1, Ch. 19, § 212 of the 1758 seminal treatise of Emer de Vattel, *The Law of Nations* (hereinafter "§ 212"). There, de Vattel posits that a natural born citizen is defined – not merely labeled or categorized – as a child born in the country wherein the mother and father are already its citizens, whether themselves natural-born or naturalized.

Interestingly, in the "open source" entry for the *Minor* decision found at en.Wikipedia.org, footnote 13 states as to the Court's comment regarding the definition of an nbC that the Court was "paraphrasing Emerich de Vattel, The Law of Nations, book I, chapter XIX, section 212." This is a significant, albeit non-judicial and non-precedential observation, because it specifically acknowledges that the definition of an nbC as adopted by the Court was the one which, "[a]t common-law, with the nomenclature of which the framers of the Constitution were familiar…," was most likely directly traceable to § 212.

Whether that extra-judicial "paraphrasing" statement carries evidentiary weight aside, it is most likely empirically correct. In any event, moreover, it is entirely consistent with the Court's coupled statement that, unlike other children born at variance with the § 212 criteria, there were never any "doubts" about the nbC status of a child born here to citizen parents.

Because the historical and Supreme Court record is replete with examples confirming the reliance of the Founders on the thinking of de Vattel and the principles set out in *The Law of Nations* while drafting the Constitution, they will not be repeated here. Suffice it to say that the Founders were quite familiar with de Vattel and his treatise – both in the original 1758 French and 1760 translation – and that detractors' efforts to undermine their reliance on the treatise are fatuous. And wrong.



§ 212. Citizens and natives.

The citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The natives, or natural-born citizens, are those born in the country, of parents who are citizens. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. The country of the fathers is therefore that of the children; and these become true citizens merely by their tacit consent. We shall soon see whether, on their coming to the years of discretion, they may renounce their right, and what they owe to the society in which they were born. I say, that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner, it will be only the place of his birth, and not his country.

However, for those detractors who reject the "de Vattel" § 212 definition, the Court's language immediately following the quoted "never as to the first" statement above is usually interposed by them to claim that the quoted five sentences constitute "dictum," and thus cannot be treated as binding or of any precedential value at all. That "immediately following" language states:

"For the purposes of this case *it is not necessary to solve these doubts*. 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)

Thus, since the Court itself declared that it was unnecessary to "solve these doubts," it is clear that the nbC issue would not be directly made a part of its main "holding" regarding its women's suffrage decision. Furthermore, the language "these doubts" referenced by the Court as not needing immediate resolution refers to children born here to alien parents, ***not*** to children born here to citizen parents, as was the case with Virginia Minor and as to which there had *never* been any doubts regarding their nbC status. Those children as to which "no doubts" regarding their status were, by definition, "natural born citizens" in the eyes of the Court, precisely fitting the § 212 definition. Thus, only statements about the former class were regarded as "dictum," while observations as to the latter class were excluded from the former class.

In the "normal course of events," that comment by the Court has been argued by "de Vattel Deniers" as being sufficient to deem the "never as to the first" sentences dictum. And as noted by the Court in *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351, n. 12. (2005), "[d]ictum settles nothing, *even in the court that utters it.*" (Emphasis added).

There exist, however, recognized exceptions to the general "dictum settles nothing" rule. For example, as discussed here, if a court in a murder case makes the empirically true side or "passing statement" that "pi is the mathematical ratio of the circumference of a circle to its diameter," while that statement may be totally unrelated to the defendant's guilt or innocence, it remains a demonstrably provable fact. No one – except perhaps the mathematically-challenged current occupants of the White House – would disagree. This is an example of "obiter dictum."

On the other hand, while "obiter dictum" – passing side comments having little or no relevance to the issue actually before the court – may settle nothing, certain other "side comments" also unrelated directly to the issue under consideration may constitute "judicial dictum," a different species of dictum.

Judicial dictum is an expression of a judge's opinion on a point involved in a case, normally argued by counsel and deliberately mentioned by the court, and is generally regarded in lower courts as being precedential and authoritative despite technically being dictum. Specifically, it is a statement made in passing by a judge in a case that is not directly necessary to the decision, but is considered authoritative because of the judge's position.

In the context of statutory interpretation, much like the interpretation of constitutional language, "obiter dictum" constitutes an aside or a passing unnecessary extension of comments within an opinion, while "judicial dictum" provides a construction of language to guide the future conduct of inferior courts and "*must be given considerable weight and cannot be ignored.*…." (Emphasis added). *See*, *e.g.*, *United States v. Bell*, 524 F.2d 202, 206 (2nd Cir. 1975).

Few would argue that judicial dictum emanating from a Supreme Court Justice can or should be ignored without consequence. While judicial dictum is an additional statement made by the judge that is not necessary to the decision, it is nevertheless important to understand that dictum can still be empirically correct and useful.

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 (Art. 2, Sec. 1) 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 (Art. 1, Sec. 8) 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 parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. The words "all children" are certainly as comprehensive when used in this connection as "all persons," and if females are included in the last, they must be in the first. That they are included in the last is not denied. In fact, the whole argument of the plaintiffs proceeds upon that idea.

With this distinction between "obiter dictum" and "judicial dictum" in place, it is posited that the *"never as to the first"* remarks of the unanimous Court in *Minor* constitute, at minimum, judicial dictum and, indeed, are arguably a necessary part of the actual "holding" of the case and thus of binding precedential weight.

Specifically, because the issue in the case first turned on whether Virginia Minor was a "citizen" otherwise entitled to vote if she were a male, the Court was obliged to address that threshold issue before addressing the suffrage issue. The Court noted that she was "a native born, free, white citizen of the United States, and of the State of Missouri, over the age of twenty-one years." *See* 88 U.S. at 163.

She was born in 1824 in Caroline County, Virginia to Warner Washington Minor (a cousin of George Washington) and Maria Timberlake Minor, both citizens of the United States. With those facts as a starting point, the Court recognized her as being not only a "citizen," but also as an nbC.

Accordingly, its discussion of the nbC issue and the issue of who might – or might not – qualify as such in reaching its conclusion that she was, in fact, a "citizen" within the

meaning of the 14th Amendment cannot properly be characterized as obiter dictum. The critical threshold finding that she was a "citizen" under the 14th Amendment was a crucial foundational component of the "holding" in the case that, despite her status, the 14th Amendment did not preclude Missouri from denying her the right to vote.

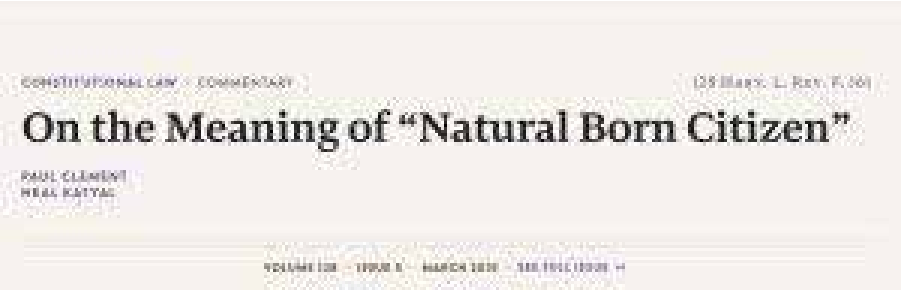
The completely ironic facet of the decision was that, even though she was not allowed to *vote* under Missouri law, she would have otherwise (but for the culture of the day) been eligible to run for and, if elected, serve as president under Art. 2, § 1, Cl. 5 of the Constitution. Perhaps this irony was one of the reasons compelling her to become one of the leading proponents of women's suffrage in the years following the Court's adverse decision. Lamentably, she died in 1894 and never saw the passage in 1920 of the 19th Amendment, abrogating the main holding of the *Minor* decision.

But I digress.

Even if the *Minor* Court's "never as to the first" language were to be deemed "dictum," it plainly fits the definition of judicial dictum rather than obiter dictum. And because it emanates from the unanimous opinion of nine Supreme Court Justices, it should be accorded binding, precedential authority on the definition of who the Founders intended to be eligible to the presidency: a "natural born Citizen" as defined (not categorized) by Emer de Vattel in § 212.

Stated otherwise, lower court decisions which ignore this result – including, among others, the otherwise ill-reasoned Indiana Court of Appeals decision in *Ankeny v. Governor of the State of Indiana*, 916 N.E.2d 978 (App. 2009) – do so at the risk of ultimate reversal…, assuming the U.S. Supreme Court discovers the courage to stop "evading" the presidential eligibility issue.

As an interesting sidelight to the *Minor* decision, one Robert Laity – who in 2020 unsuccessfully challenged the eligibility of Vice-President Kamala Harris because the Court held that he lacked "standing" – has recently initiated AI (artificial intelligence) "exchanges" on a computer platform with a program calling itself "Bing."



https://harvardlawreview.org/forum/vol-128/on-the-meaning-of-natural-born-citizen/

The first series of "conversations" between Mr. Laity and Bing yielded the expected "de Vattel Denier" party line that an nbC was anyone who was a "citizen at birth" or a "citizen by birth." Without citing the 2015 article "*On the Meaning of Natural Born Citizen"* by Paul Clement and Neal Katyal, addressed and critiqued here, here and here,

the Bing response to Mr. Laity reads like a Cliff's Notes® version of it. In addition, in subsequent exchanges with Mr. Laity, the Bing responses are replete with references to the Clement-Katyal article, despite its myriad shortcomings.

More recently (*i.e.*, yesterday, 7/16/23), *The P&E's* intrepid editor posted a follow-up report on additional exchanges between Bing and Mr. Laity. In addressing the decision in *Minor* and in response to a correction pointed out by Mr. Laity, Bing acknowledged the language of the case confirming that there had never been any doubts about the nbC status of children born here to citizen parents. But then Bing added:

"However, it is important to note that this statement was *made in passing* while discussing the issue of whether the right to vote was one of the 'privileges or immunities' of citizenship protected by the Fourteenth Amendment. The Court's ruling did not specifically address the definition of a natural-born citizen or establish a *binding precedent on the matter*." (Emphasis added)

There you go: "made in passing," the dog-whistle signal for "dictum." Your humble servant begs to differ with Bing. As the preceding portions of this offering demonstrate, there would seem to be a pretty good if not compelling argument that the "never [any doubts] as to the first" statement in *Minor* is, at minimum, judicial dictum to be accorded great weight as authoritative precedent emanating from the highest court in the nation.

Moreover, because that discussion of what the Founders believed constituted an nbC under the familiar "nomenclature" of the day was directly related to the threshold determination of Virginia Minor's citizen status, the statement should be deemed part of the "holding" of the case and neither obiter dictum nor judicial dictum. And recall that the Court's acknowledgment that it was not necessary to "solve these doubts" in the case before it referred to the "doubts" over the status of children of *alien* parents, and *not* the children of *U.S. citizen parents*, as to which there had never been any doubts as to their nbC status.

It grows increasingly clear that platforms touting the wonders of AI are simply extensions of the Left's propaganda apparatus. The label "AI" could just a well be an acronym for "Advanced Indoctrination." Joseph Goebbels, the Third Reich Minister of Propaganda, would be proud: if misinformation is repeated sincerely and long enough, people will in time come to accept it as the truth.

Indeed, in the initial exchanges between Mr. Laity and Bing, the AI guru characterized Emer de Vattel as only a Swiss "legal philosopher," when he was, in addition, an attorney and judge. Bing also asserted that his 1758 treatise, *The Law of Nations*, "is not a legal authority on the meaning of natural born citizen in the U.S. Constitution, which was written in 1787. The U.S. Constitution does not cite or refer to *The Law of Nations* or Vattel anywhere."


LE DROIT
DES GENS.
OU
PRINCIPES DE LA
LOI NATURELLE,
Appliqués à la conduite & aux affaires des Nations & des Souverains.
PAR M. DE VATTEL.
TOME I.
A LONDRES.
M. DCC. LVIII.

The Swiss philosopher Emmerich de Vattel wrote "The Law of Nations," which was heavily referenced by the Framers of the U.S. Constitution. Source: Wikimedia Commons, public domain

Memo to Bing: U.S. Supreme Court Justices of widely differing judicial philosophies have over many terms and years when pondering fundamental constitutional questions – including as recently as June 15, 2023 in *Haalland v. Brackeen*, – have cited, recognized, approved, referred to and acknowledged the significance and continuing influence of Emer de Vattel and his treatise on this nation's jurisprudence. To intimate or suggest otherwise – as do virtually all of the AI guru Bing responses to Mr. Laity, along with repeated references to the Clement Katyal article – is to propagate misinformation. The antidote to misinformation is research and correct information.

Minor v. Happersett's "holding" or "judicial dictum" regarding the nbC issue should result in the conclusion that, if one is not born in this country to parents who are already U.S. citizens, that person is not eligible to the presidency or, *via* the 12th Amendment, the Vice-Presidency. The Supreme Court needs to find an eligibility backbone before the tsunami of the "citizen at/by birth" and "anyone-born-here-can-be-president" narrative renders contrary discussion and analysis meaningless.

Conclusion

Problematically, one of the other comments of the Court in the *Minor* case states, 88 U.S. at 177-178: "If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. *Our province is to decide what the law is, not to declare what it should be*." (Emphasis added)

Translation: if a "uniform practice long continued can settle the construction of the Constitution," then the more often and widespread the rote narrative of "anyone born here

can be president" is propagated, the more likely it will come to be accepted as "settling" the issue. And that acceptance will occur not only in the electorate at large, but in the judiciary, including at the highest level. It has already established a beachhead in the *Ankeny* decision.

Formal group photograph of the U.S. Supreme Court as of June 30, 2022

Guru Bing contends that "it is up to the courts [*sic*: the U.S. Supreme Court is the single one that matters] to interpret the Constitution and determine the precise meaning of the term "natural born citizen." While this is absolutely true, it would help if the Supreme Court would stop "evading" the issue.

Until that happens, the debates will likely continue until, lamentably, misinformation and indifference to the history and realities of the eligibility clause could overtake reasoned analysis, and the "uniform practice long continued" of accepting the prepackaged narrative that a "citizen at/by birth" is "good enough for government work" will come to be accepted as the truth.

The Founders would not be pleased.