

Revisiting the Heritage Guide to the Constitution

"MANIFEST OMISSIONS"

by [Joseph DeMaio](#), ©2023



[Architect of the Capitol](#), public domain

(May 13, 2023) — *Introduction*

Recently, your humble servant addressed the flawed reasoning of the “[Heritage Guide to the Constitution](#)” (“Guide”) set out in its explanatory analysis of Art. 2, § 1, Cl. 5. This, of course, is the Constitution’s “natural born Citizen” (“nbC”) presidential Eligibility Clause, the source of increasing scrutiny and debate as more and more presidential (and fallback vice presidential) candidates announce interest in seeking those offices as the 2024 general election approaches.

The same critique was made of the “kissing cousin” of the Heritage Guide, the Library of Congress (“LoC”) website page “[Qualifications for the Presidency](#)” [here](#). Apart from the fact that the word “qualifications” is not the same as “eligibility,” the LoC digital document arrives at the same problematic conclusions as does the Heritage Guide.

As a prefatory refresher, the Constitution’s Eligibility Clause states: “No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President....” Simple words, more complex meaning.

Your servant's first offering addressed the Eligibility Clause issues alone, based on the digital version of the Heritage Guide eligibility essay downloaded earlier this month, which is to say, in 2023. That section is worded virtually identically to the 2014 edition of the Guide available in hard copy book form. Other changes between and among the original 2005 edition, the 2014 edition and the 2023 digital edition largely reflect changes in the personnel who assisted in the preparation of the editions. However, there are also several substantive changes, discussed hereafter.

All three editions list as the author of the section explaining the nbC issue one "James C. Ho." The 2005 edition lists him as "Majority Chief Counsel, United States Senate Judiciary Subcommittee on the Constitution" while the 2014 edition and digital version list him as "Partner, Gibson, Dunn & Crutcher LLP." Now-Judge Ho was appointed to the U.S. Court of Appeals for the Fifth Circuit by President Trump in 2018. He is no dunce, having [graduated](#) from Stanford University, the University of Chicago Law School and served as a law clerk to Supreme Court Associate Justice Clarence Thomas (2000-2001). That said, even well-credentialed lawyers can arrive at erroneous conclusions.

Each edition or version of the Guide states in the preface that it is intended "to provide a succinct [in the 2005 edition, "brief"] and accurate explanation of each clause of the Constitution as understood by the framing generation [in the 2005 edition, "Framers"] and as applied in contemporary law." While that may have been the stated intent, respectfully, the "eligibility" essay of each edition of the Guide falls short, at least with regard to the explanation produced by Judge Ho while he was Majority Chief Counsel (2005) and later, in private law practice (2014 and digital). Many of the shortcomings are relatively minor, such as the mis-citation to 1 Stat. 104 (a 1790 governmental appropriations bill unrelated to the nbC issue) instead of 1 Stat. 103, but others are – respectfully in your servant's view – substantive and substantial.

The Present Offering

The present offering – admittedly, a long one, so interested readers should keep a supply of their favorite caffeinated beverage close by – will dig a bit deeper into the preface of each edition, as some useful information is found there. Specifically, all three editions state that each contributor of the numerous "explanations," including, presumably, James C. Ho while Majority Chief Counsel (2005) and while in private practice (2014 and digital), was tasked with writing an essay on a particular clause, "with two objectives."

The first one was to provide a "description of the original understanding of the clause," as far as it could be determined. Then, "if within the standard of original understanding there are credible and differing interpretations, they were to be noted and explained." Second, each essay was to "provide an explanation of the current state of the law regarding the clause and, where appropriate, to give brief explanations of the historical development of current doctrine."

These are important instructions, as they support the need for transparency and objectivity over subjectivity and political bias. As posited in your servant’s prior post, due to errors in reasoning and misapplication of law, with due respect, the Guide – in both hard copy (2005 and 2014) and digital (2023) form – misfires on meeting these criteria.

The Differences Between/Among the Guide’s Editions/Versions

The conclusion of each edition’s eligibility essay is the same – that if one is a “citizen from birth” wherever in the world born, and regardless of U.S. citizen parentage in both the mother and father, one is “[t]hus” “plainly” (in the 2014 and digital editions, but not present in the 2005 edition) a “natural born citizen eligible to be president....” However, other differences exist.

RESOLUTION

Recognizing that John Sidney McCain, III, is a natural born citizen.

Whereas the Constitution of the United States requires that, to be eligible for the Office of the President, a person must be a "natural born Citizen" of the United States;

Whereas the term "natural born Citizen", as that term appears in Article II, Section 1, is not defined in the Constitution of the United States;

Whereas there is no evidence of the intention of the Framers or any Congress to limit the constitutional rights of children born to Americans serving in the military war to prevent those children from serving as their country's President;

Whereas such limitations would be inconsistent with the purpose and intent of the "natural born Citizen" clause of the Constitution of the United States, as evidenced by the First Congress's own statute defining the term "natural born Citizen";

Whereas the well-being of all citizens of the United States is preserved and enhanced by the men and women who are assigned to serve our country outside of our national borders;

Whereas previous presidential candidates were born outside of the United States of America and were understood to be eligible to be President; and

Whereas John Sidney McCain, III, was born to American citizens on an American military base in the Panama Canal Zone in 1936; Now, therefore, be it

Resolved, That John Sidney McCain, III, is a "natural born Citizen" under Article II, Section 1, of the Constitution of the United States. —

<https://www.congress.gov/bill/110th-congress/senate-resolution/511/text>

The main differences exist between the 2005 and 2014 editions, with the 2023 digital version being essentially identical to the 2014 hard copy edition. The primary difference between the 2005 and 2014 editions lies in the arrangement of the discussions of the principles of *jus soli* (law of the soil) and *jus sanguinis* (law of the bloodline), the relevance of a 2008 Senate Resolution – S.Res. 511 – addressing the presidential eligibility of Sen. John McCain, and the operation of 1 Stat. 103, misidentified in all three editions as “1 Stat. 104.”

None of the three editions addresses the **repeal** of 1 Stat. 103 (1790) a mere five years after its enactment by 1 Stat. 414 (1795), but the 2005 edition, cryptically, asserts that the “natural born” terminology of the 1790 statute was “dropped shortly thereafter,” citing, by way of an “*e.g.*” “for example” reader signal, “[8 U.S.C. 1401\(c\)](#).” That statute, born out of the 14th Amendment, declares who shall be U.S. “nationals” or “citizens,” but says absolutely **nothing** about status as a “natural born citizen.”

Summary

The Constitution sets out three eligibility requirements to be President: one must be 35 years of age, a resident "within the United States" for 14 years, and a "natural born Citizen." There is no Supreme Court case which has ruled specifically on the presidential eligibility requirements (although several cases have addressed the term "natural born" citizen), and this clause has been the subject of several legal and historical treatises over the years, as well as more recent litigation.

The term "natural born" citizen is not defined in the Constitution, and there is no discussion of the term evident in the notes of the Federal Convention of 1787. The use of the phrase in the Constitution may have derived from a suggestion in a letter from John Jay to George Washington during the Convention expressing concern about having the office of Commander-in-Chief "devolve on, any but a natural born Citizen," as there were fears at that time about wealthy European aristocracy or royalty coming to America, gaining citizenship, and then buying and scheming their way to the presidency without long-standing loyalty to the nation. At the time of independence, and at the time of the framing of the Constitution, the term "natural born" with respect to citizenship was in use for many years in the American colonies, and then in the states, from British common law and legal usage. Under the common law principle of *jus soli* (law of the soil), persons born on English soil, even of two alien parents, were "natural born" subjects and, as noted by the Supreme Court, this "same rule" was applicable in the American colonies and "in the United States afterwards, and continued to prevail under the Constitution ..." with respect to citizens. In textual constitutional analysis, it is understood that terms used but not defined in the document must, as explained by the Supreme Court, "be read in light of British common law" since the Constitution is "framed in the language of the English common law."

In addition to historical and textual analysis, numerous holdings and references in federal (and state) cases for more than a century have clearly indicated that those born in the United States and subject to its jurisdiction (i.e., not born to foreign diplomats or occupying military forces), even to

<https://www.scribd.com/doc/74188632/Qualifications-for-President-and-the-Natural-Born-Citizenship-Eligibility-Requirement-11-14-20#>

Furthermore, the term "dropped" in the 2005 edition is in this context misleading, as it suggests the potential that the words were inadvertently omitted – much as suggested by the CRS [here](#) – as being merely a "stylistic or grammatical" decision.

The conscious and intentional repeal of the "natural born" modifier by Congress in 1795 in apparent recognition that 1 Stat. 103 could not statutorily alter or amend the definition of a "natural born Citizen" as contemplated by the Founders in Art. 2, § 1, Cl. 5 of the Constitution cannot properly be analogized to actions which may be "accidental," "immaterial" or "inadvertent." Yet, the Guide and the CRS do both. Thus, use of the term "dropped" was inappropriate in 2005, explaining, perhaps, why that sentence from the 2005 edition was "dropped" in subsequent editions.

In this regard, the 2014 edition asserts that "1 Stat. 104" (*sic*: 1 Stat. 103) codified the *jus sanguinis* principle, declaring children born to U.S. citizen parents "beyond sea" as being "considered as natural born citizens," but adds that commentators have "debated" whether a person – "so long as he is a U.S. citizen at birth" – was eligible "regardless of the place of his birth." Apart from the fact that this statement indirectly acknowledges that 1 Stat. 103 was repealed, the "as long as he is a U.S. citizen at birth" is a false ratifying conditional assumption: the core question is whether the "citizen at/by birth" standard or the "born in the country to two citizen parents" standard should control.

The 2014 edition then claims that the "debate" ended, as a practical matter, when in 2008, the U.S. Senate passed [S.Res. 511](#), purporting to "deem" Senator John McCain eligible to the presidency. As discussed [here](#), that non-binding resolution, expressing only the "sense" or "opinion" of the Senate, rather than constituting a substantive "law," was based in large part on the mistaken belief that 1 Stat. 103 was still controlling law..., 213 years after it had been repealed.

Moreover, the resolution’s claim that 1 Stat. 103 “defined” the term “natural born citizen” is manifestly wrong as well: the only thing 1 Stat. 103 did was *declare* – not “define” – that children born “beyond sea” to U.S. citizen parents were to be “*considered* as natural born citizens.” (Emphasis added) That is not a definition of the term. Instead, it only identifies those who may be “considered” a member of the class of persons *elsewhere* defined. Moreover, the use of the term “considered” suggests that the reality is different, much like use of the term “deemed.”

In 2008, there were two places where a true definition of the term “natural born Citizen” could be found: (1) § 212 of Book 1, Ch. 19 of the 1758 [treatise](#) *The Law of Nations* by Swiss jurist and legal scholar Emer de Vattel; and (2) the U.S. Supreme Court’s decision in [Minor v. Happersett](#) (“*Minor*”). And neither of the definitions found there supports the conclusions (or the “whereas” claims) of S.Res. 511.

The 2005 edition (unlike the 2014 and 2023 editions) discusses in text the decision in [United States v. Wong Kim Ark](#) (“*WKA*”). The *WKA* decision is considered by most adherents of the “citizen at birth” or “citizen by birth” nbC theory to be the “be-all-end-all” authority on the point, despite the fact that its holding deals *only* with the question of the 14th Amendment status of a “citizen” and not the issue of a natural born citizen under Art. 2, § 1, Cl. 5 of the Constitution. Conspicuously – and inexplicably – the eligibility essays of the Guide make no mention of *Minor at all*. Odd.



https://en.wikipedia.org/wiki/United_States_v._Wong_Kim_Ark

The Omission of Minor v. Happersett

To begin with, as noted in the Supreme Court’s decision in *Minor*, the Constitution does not provide a definition of “natural born Citizen.” Neither the hard nor digital versions of the Guide mention or analyze the *Minor* case *at all*, either in the “eligibility” essay text or in the “Significant Cases” section at the end of each essay.

While the 2005 edition addresses and in text discusses *WKA*, both the 2014 and digital editions include only its citation at the end of the essay. The “Significant Cases” section lists two cases, *i.e.*, the Supreme Court decision in *WKA* – again, a case involving only

who may be a “citizen” under the 14th Amendment and having *zero* bearing or materiality on the issue of who may be a natural born Citizen under Art. 2, § 1, Cl. 5 – and the lower district (trial) court decision in [*United States ex rel. Guest v. Perkins*](#) – a case holding that the plaintiff was a “naturalized citizen,” but not, as the plaintiff claimed, a “natural born citizen.” Given the holding in the case, the relevance of *Perkins* to the nbC issue – other than its holding that the plaintiff therein was *not* a natural born citizen – is somewhat obscure.

The unanimous Court in *Minor* stated:

“[t]he 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)

Against this backdrop, the Guide’s omission of *Minor* from the list of eligibility section “significant cases” is manifestly incomplete, as is its failure to “note and explain” in the text of the “explanation” the “differing interpretations” of the nbC clause extant among those examining it. That omission and failure suggests surrender to a species of bias the Guide professes it specifically seeks to avoid.

Stated otherwise, to fail to include a unanimous Supreme Court decision directly commenting on the meaning of the term “natural born Citizen” – as understood under the “nomenclature of which the framers of the Constitution were familiar...” and to fail to address “differing interpretations” of the same – is both baffling as well as troubling.

Indeed, under the first stated objective of the Guide – to ascertain a “description of the original understanding of the clause,” – the omission of the Supreme Court’s confirmation that, under the nomenclature of the common law, the Founders understood that a natural born citizen was a child born here to two parents who were already citizens, is plainly in error. As to that category, their natural born status “was never doubted.” But as to children born here without regard to both parents’ U.S. citizenship, “there have been doubts.” Stated otherwise, as to the “born here to citizen parents” group, any “doubts” as to their nbC status under the “nomenclature” as understood by the Founders were nonexistent. Yet the conclusions of the various Guide editions posit just the opposite by adopting the “citizen at/by birth” nbC theory.

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.

<https://virginiaminor.com/documents-pertaining-to-minor-v-happersett/>

Finally, as for the argument that the *Minor* discussion of the Founders’ understanding of the term “natural born citizen” constituted dicta, even if that were an accurate characterization, the empirical truth of the discussion – wholly apart from the women’s suffrage issue in the matter – cannot reasonably be challenged, at least in the collective opinion of the unanimous majority in the case.

The Citizen-Grandfather Exception

Undaunted by the (ignored) language in *Minor*, both the digital and hard copy editions of the Guide contend that under the *jus soli* principle purportedly extracted from British common law, anyone born within the “territory of the sovereign” became a “citizen from birth” (in Great Britain, a “subject” of the Crown). The Guide then boldly states: “Thus, [– a patent *non sequitur* when applied to the nation that had just vanquished Great Britain and forever terminated the “subject/liege” relationship theretofore existing] persons born within the United States are [“plainly” added to the 2005 edition language in the 2014 and digital editions] “natural born citizens” eligible to be president.”

Respectfully..., no they are not, and certainly not “thus” or “plainly.”

§ 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.

<https://lonang.com/wp-content/download/Vattel-LawOfNations.pdf>

If that were true, there would have been no need at all for the “citizen-grandfather” clause as a time-limited exception to the rigorous “natural born Citizen” barrier to the

presidency. Indeed, the mere presence of the citizen-grandfather clause ratifies and confirms the Founders' original intent to adopt the natural born citizen restriction under the "nomenclature" of the language of the time with which they were "plainly" familiar: a "natural born citizen" was a person born here to U.S. citizen parents as articulated in § 212 of the de Vattel treatise. Without explanation, each edition of the Guide ignores this reality.

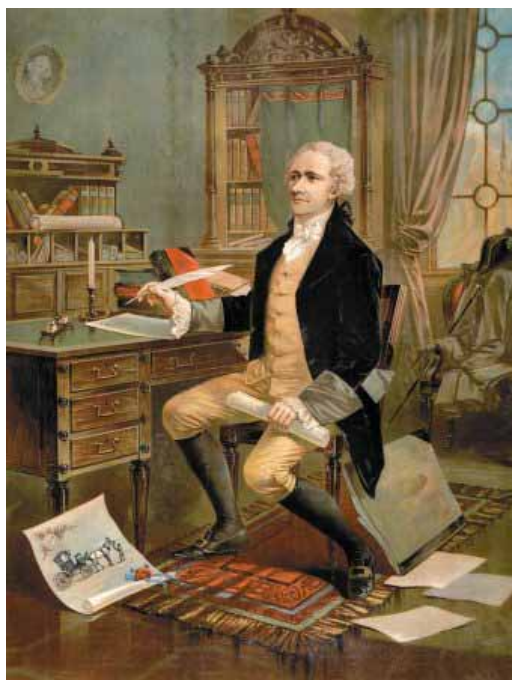
Furthermore, the claim by some in the "de Vattel Denier" camp that the citizen-grandfather exception clause was included merely as an accommodation to Alexander Hamilton – who was born out of wedlock in Charlestown, Nevis, British West Indies and thus, under a de Vattel analysis, discussed hereafter, not a natural born citizen – is highly unlikely. Certain other Constitutional Convention delegates or foreign "Revolutionary War Patriots" were also born abroad, and the "accommodation" theory would presumably extend to them as well. The theory is that the exception was added to allow Hamilton, as one of the Founders, or other delegates to be eligible to the presidency despite having been born outside the territorial limits of British America to parents who were not U.S. citizens.

For two primary reasons, this theory seems wildly implausible. First, if it was done, purportedly, as a "favor" or an accommodation to Hamilton, it could not have occurred without Hamilton's knowledge and acquiescence and, in any event, the "accommodation" was ignored by Hamilton. This is confirmed by reference to Hamilton's position in the 1796 election, the first one after the initial presidency of George Washington..., who, by the way, was the first beneficiary of the "citizen-grandfather" clause.

Instead of running for President himself, Hamilton supported John Adams (then Vice-President under President Washington) and Thomas Pinckney for Vice-President.

Against this backdrop, if the "citizen-grandfather" clause was intended to benefit Alexander Hamilton, it was a colossal failure.

Second, the "accommodation" theory disregards the principles of § 212 of the de Vattel treatise, discussed hereafter, which views and concepts Hamilton himself praised and adopted. Indeed, Hamilton's biographer, Forrest McDonald, notes that with regard to the objectives of government, Hamilton's views "paralleled the ideas of [de]Vattel." See John C. Miller, *Alexander Hamilton: Portrait in Paradox*, pp. 169-170, 316 (1959). It is thus highly unlikely that Hamilton would have subscribed to the theory that the "citizen-grandfather" clause was properly inserted into the Constitution merely as a "favor" to him or other similarly-situated Founders or Revolutionary War foreign-born patriots.



[“Alexander Hamilton making the first draft of the Constitution for the United States 1787,” Wikimedia Commons, public domain](#)

The more likely scenario is that Hamilton knew and *accepted* that he was not a natural born citizen as defined in § 212 of de Vattel’s tome and as to which treatise Hamilton’s views and ideas “paralleled.” Instead, it seems highly likely that as a matter of principle, and in order to underscore the commitment he had articulated in Federalist No. 68, he would not and did not seek by way of the “citizen-grandfather” clause to claim constitutional eligibility to the office. Other Founding Fathers might do so – as for example, George Washington, John Adams and Thomas Jefferson – but Hamilton would not. Although his face appears on \$10.00 Federal Reserve notes, this is why he is not listed among the prior occupants of the office of the President. These facts are ignored in each edition of the Heritage Guide.

Returning, therefore, to the “no doubts” principle recognized by the Supreme Court in *Minor*, of course, the principle is identical to that found in Book 1, Ch. 19, § 212 of *The Law of Nations*. But as with the omission of reference to the *Minor* decision, the “eligibility clause” analysis of the Guide, both hard copy and digital, improperly ignores altogether any mention of the effect that de Vattel had or how his tome may have influenced the Founders regarding presidential eligibility.

The Omission of de Vattel

In fact, Emer de Vattel was well-known to the Founders as well as to other contributors to the Heritage Guide, as confirmed by reference to him and his treatise in the Heritage essays relating to [declarations of war](#) and the prohibition on [state treaties](#). Similarly, other Guide contributors reference *Minor* with regard to the Constitution’s [Guarantee Clause](#) and the issue of women’s suffrage under the [19th Amendment](#). Thus, the omission in the

eligibility essays of references to de Vattel *and Minor*, while simultaneously lionizing *WKA*, sticks out like the proverbial “sore thumb.”

Moreover, at minimum, the editors of the Guide knew, or should have known, of de Vattel’s impact on the Founders as they drafted the Constitution as a consequence of the Supreme Court’s recognition of his influence in [*United States Steel Corp. v. Multistate Tax Commission*](#). There, he is described as being the “[t]he international jurist most widely cited in the first 50 years after the Revolution...,” citing 1 J. Kent, Commentaries on American Law 18 (1826). The “50 years after the Revolution” encompassed, plainly, the entirety of the period when the Constitution was being drafted, debated and ultimately ratified.

In addition, regarding de Vattel’s impact on the Founders, in the preface to the 1999 digital edition of his treatise, and commenting on the 1883 edition by Joseph Chitty, Esq., is found [this](#):

“This 1758 work by Swiss legal philosopher Emmerich de Vattel is of *special importance* to scholars of constitutional history and law, for *it was read by many of the Founders of the United States of America, and informed their understanding of the principles of law which became established in the Constitution of 1787*. Chitty’s notes and the appended commentaries by Edward D. Ingraham, used in lectures at William and Mary College, *provide a valuable perspective on Vattel’s exposition from the viewpoint of American jurists who had adapted those principles to the American legal experience.*” (Emphasis added)

Stated otherwise, even if it was not an intentional act, the omission of any mention or analysis and discussion – even to distinguish or diminish – of de Vattel’s § 212 as contemplated under the Guide’s “differing interpretations” admonition and direction that such other interpretations “be noted and explained,” misses the mark. And this is true regarding both the 2005 and 2014 hard copies and the digital edition downloadable in 2023.

For a document purporting to “provide a succinct *and accurate* explanation of each clause of the Constitution,” (Emphasis added), Heritage might well consider preparing a third edition of the Guide addressing and correcting these anomalies.

The Reliance on Charles Gordon

Each edition of the Guide includes in its respective “Suggestions for Further Research” a law review [article](#) by one Charles Gordon: “*Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968). At the time he wrote the article, Charles Gordon was General Counsel, U.S. Immigration and Naturalization Service and Adjunct Professor of Law, Georgetown University Law Center.

Among various other things, he addressed the statements of the Justices of the Supreme Court in the *WKA* case regarding the natural born Citizen issue thusly: “It is manifest that

these statements of the majority and dissenters in *Wong Kim Ark* were ***dicta, pure and simple...***” (28 Md. L.Rev. at 19) and characterizing them as “questionable” and “***not addressed to the presidential qualification clause and cannot control its construction.***” (Emphasis added) (28 Md. L. Rev at 31-32). These statements by Professor Gordon cannot in any principled way be reconciled with the “plainly natural born citizens” language of the 2014 and digital eligibility essays touting the purported “be-all-end-all” decision in *WKA*. It is the old “you can’t fit a square peg into a round hole” problem. The Guide finesses the problem by simply – but improperly – just making the hole bigger.

In summary, the Heritage Guide’s failure to include in its eligibility essay discussions of *Minor*; of § 212 of de Vattel’s tome; and of the fact that the *WKA* decision has nothing to do with presidential eligibility because, as Professor Gordon notes, its “dicta are not addressed to the presidential [eligibility] clause and cannot control its construction” are manifest omissions. Moreover, its subliminal reliance on the “ghost of 1 Stat. 103” (despite being erroneously cited as 1 Stat. 104) in support of its conclusion that a “citizen from birth” is the equivalent of a natural born Citizen is both careless and, respectfully, unsupportable.

The “Natural Born Citizenship” Neologism

An additional substantive error is present in all three editions of the Guide: each edition utilizes the term “natural born citizenship” and attributes it to former Supreme Court Associate Justice Joseph Story in § 1473 of his treatise, *Commentaries on the Constitution of the United States*. As discussed [here](#), the term “natural born citizenship” is a neologism, an unknown phrase frequently manufactured or concocted to drive a particular desired conclusion or result. The phrase appears nowhere in the Constitution, the 14th Amendment or in any Supreme Court case.

On the other hand, the Congressional Research Service (“CRS”) has used the term frequently, seemingly in an attempted linguistic somersault to equate the concept of a “natural born Citizen” with “citizenship” under the 14th Amendment. Contrary to the Guide’s claims, Justice Story never used the neologism but confined his discussion in § 1473 of his treatise to a “natural born citizen.” Suggestions to the contrary are misinformed as well as misleading.

In reality, this is what Justice Story [had to say](#) in § 1473 of his treatise, addressing not only the nbC issue for the presidency, but also the citizen-grandfather exception, and not once using the term “natural-born citizenship”:



U.S. Supreme Court Associate Justice Joseph Story was nominated by James Madison and became the youngest member of the Supreme Court at the age of 32 ([public domain](#)).

*“It is indispensable, too, that the President should be a natural born citizen of the United States; or a citizen at the adoption of the constitution, and for fourteen years before his election. This permission of a **naturalized** citizen to become President is an exception from the great fundamental policy of all governments, to exclude foreign influence from their executive councils and duties. It was doubtless introduced (for it has now become by lapse of time merely nominal, and will soon become wholly extinct) out of respect to those distinguished revolutionary patriots, who were *born in a foreign land*, and yet had entitled themselves to high honours in their adopted country. A positive exclusion of them from the office would have been unjust to their merits, and painful to their sensibilities. *But the general propriety of the exclusion of foreigners, in common cases, will scarcely be doubted by any sound statesman.*” (Emphasis and bolding added)*

Conclusion

One would expect closer adherence to transparency, objectivity and balance – not to mention proofreading – in essays from a law clerk to Justice Thomas; Majority Chief Counsel to a Senate subcommittee; a partner (now a federal appellate court judge) at a major D.C.-based law firm; and a respected organization such as the Heritage Foundation. Some expectations are met, while others are not.

There is in the law a Latin phrase: *“Falsus in uno, falsus in omnibus.”* In English: “False in one thing, false in all things.” Your humble servant cannot posit that each of the three Heritage Guides in their eligibility essays are “false” in the sense that they were consciously written with the objective of misleading readers. Additional evidence would be needed to establish that fact. Mistaken, yes, but short of malevolent. But the same cannot be said of certain CRS “products,” especially if they include “collegial exchanges of information” with and from private law firms, as noted [here](#) and [here](#).

That said, if the original objective of Heritage was to produce an “accurate explanation” of Art. 2, § 1, Cl. 5, then the reasoning, conclusions and decisions made in each edition of the Guide eligibility essays – which avoid addressing known Supreme Court precedent and known authorities who had substantive impact on the Founders as they drafted the Constitution, including the nbC Eligibility Clause – leave much to be desired.

And with the 2024 general election fast approaching, that is far from being a positive or acceptable outcome.