The Role of States and "POPE's" in Presidential Eligibility Determinations

by [Joseph DeMaio](), ©2023

by Roger Ogden, Patriot Fire, ©2023

(Mar. 18, 2023) – The Constitution requires the president to be a "natural born citizen". However, the term is not defined in the Constitution. Neither has a law or court ruling been made more exactly delineating the constraints of the term. The purpose of this post is not to re-hash the arguments about what "natural born citizen" means, but to outline a process that generates a legal standard for how it is enforced. The States are key to this process.

This proposal is to have one or more states enforce via legislation the implementation of the requirement in their state, according to their understanding of the requirement. If a candidate or political party sues the state, the Supreme Court will review the law and decide

https://www.thepostemail.com/2023/03/18/states-should-enforce-natural-born-citizen-requirement/

(Mar. 20, 2023) — Recently there appeared here at *The P&E* – one of the few remaining viable and non-censored Internet "natural born Citizen" information sources – a particularly relevant and insightful post. The *P&E* post reprised the article and substance of a proposal advanced here by one Roger Ogden. Mr. Ogden, in turn, properly acknowledged the origins of the argument by eligibility guru Mario Apuzzo, Esq. – lamentably, passing away at age 65 on October 10, 2021 – and first advanced by him back in March 2011. That post by Mr. Apuzzo from 2011, by the way, should first be perused by anyone interested in the proposal now being advanced in 2023 by Mr. Ogden.

The essence of the current proposal is quite simple: the states have the power under the Constitution's "Elections Clause," Art. 1, § 4, Cl., 1 to enact laws of their own setting forth the requirements of a presidential candidate to qualify for inclusion on a primary or general election ballot. Under that power, states would be able to adopt, in their own jurisdictions if they so chose, the definition of a "natural born Citizen" ("nbC") articulated in § 212 of Emmerich de Vattel's 1758 treatise "*Le Droit des Gens*," or "*The Law of Nations.*" This provision, of course, is believed by many to be the source for John Jay's noted July 25, 1787 letter to George Washington "hinting" at the wisdom of restricting the presidency exclusively to a "natural born Citizen." (Emphasis Jay's)


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, quae Civitates appellantur. CICER. Somn. Scipion.
TOME I.
A LONDRES.
M. DCC. LVIII.

"[The Law of Nations](#)" by Emmerich de Vattel (public domain)

Thus, a "red" state could then prescribe that a presidential candidate must adduce competent evidence that the candidate is a nbC as posited by de Vattel – born on U.S. soil to two parents who are already U.S. citizens – as discussed among many other places here, here and here.

On the other hand, a different "blue" (or even purple) state might enact a statute adopting the "*Wong Kim Ark*" ("*WKA*") theory mandating a definition stating that mere birth alone here – and under some variations on the theme, birth, for example say, in Canada or Panama – and regardless of parental citizenship, would be enough to render the person a nbC.

Clearly, this dichotomy would (or at minimum, should) present a wealth of opportunities for opposing litigants in either the red state, the blue state or the purple state to file suit challenging the constitutionality of the respective statutes. For ease of reference here, let us give these species of statutes an acronym: "POPE" or "Proof of Presidential Eligibility" statutes.

United States v. Wong Kim Ark

Supreme Court of the United States

Argued March 5, 8, 1897
Decided March 28, 1898

Full case name	*United States v. Wong Kim Ark*
Citations	169 U.S. 649 (*more*) 18 S.Ct. 456; 42 L.Ed. 890
Prior history	Appeal from the District Court of the United States for the Northern District of California; 71 F. 382

Holding

Children born in the United States of foreigners permanently domiciled and resident in the U.S. at the time of birth automatically acquire U.S. citizenship via the Citizenship Clause of the Fourteenth Amendment.

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

In addition to providing an avenue to challenge a POPE law before the Supreme Court by a private party in a state that had enacted a statute requiring, in order to appear on the ballot, documentation of a candidate's presidential eligibility articulated under either a de Vattel § 212 definition of a nbC or, alternatively, a "*Wong Kim Ark"* or "*WKA*" definition, another potential option exists.

Specifically, in order to avoid "standing" issues which could otherwise complicate challenges to either of such species of POPE statutes by private litigants, original jurisdiction in the Supreme Court – obviating questions of private litigant standing – may be found in Art. 3, § 2, Cl. 5: "The judicial Power [of the Supreme Court] shall extend… to Controversies between two or more States…."

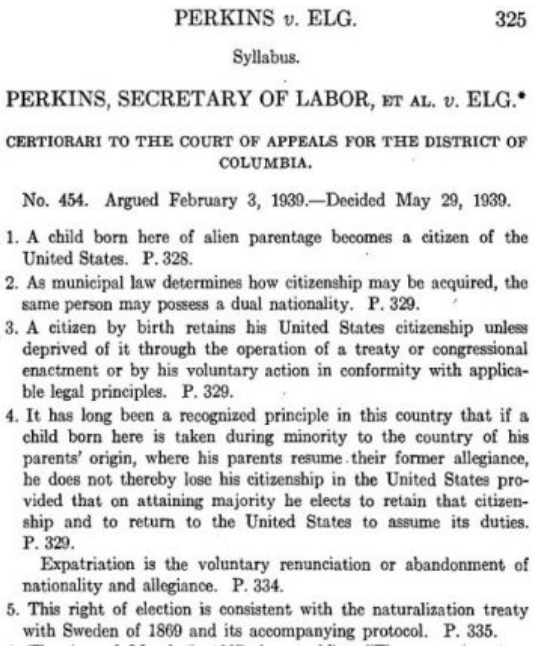
Under this provision, if red state "A" enacted a de Vattel POPE statute and blue or purple state "B" enacted a "*WKA*" POPE statute, clearly, the Supreme Court would have original "Elections Clause" jurisdiction to take a case challenging one or both of those statutes. Whether it would finally do so – abandoning its "evasive" history on the issue – is of course another question. The Court could, for example, simply decline to take the case on the grounds that it constituted a "political question" or involved a problematic "separation of powers" issue. Anyone who still believes that the Supreme Court is not influenced by politics needs professional help.

A refusal by the Court to take jurisdiction in such cases, of course, would only further compound the confusion. While it is difficult to see, beyond the politics, why the Court would decline to take such a case, at minimum, it would again present a perfect opportunity for one or more of the Justices to prepare a separate "Opinion Relating to Orders" explaining their positions either supporting (or refusing) jurisdiction and, finally,

hopefully producing some tangible, but not binding or precedential authority, on what the Founders – as opposed to those who were ***not*** among the Founders–intended.

But for some practical impediments, the idea makes a lot of sense: if the Congress refuses to act by way of proposing a constitutional amendment; if the Supreme Court continues to "evade" the issue as being too controversial – as if the overruling of *Roe v. Wade* was not –; and the electorate is otherwise too preoccupied with the serial disasters dumped upon them by Brandon's Regime, perhaps the time has come to try something different.

However, there are some complicating issues that need to be addressed. As Mr. Apuzzo pointed out in his 2011 post, a lawyer at the Congressional Research Service ("CRS"), one Jack Maskell, had addressed these issues in a memorandum issued on April 3, 2009. That CRS memorandum contains a number of citations to appellate case decisions which must be taken into consideration as impacting the proposal for state action on the nbC eligibility issue.



PERKINS *v.* ELG. 325

Syllabus.

PERKINS, SECRETARY OF LABOR, ET AL. *v.* ELG.*

CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 454. Argued February 3, 1939.—Decided May 29, 1939.

1. A child born here of alien parentage becomes a citizen of the United States. P. 328.
2. As municipal law determines how citizenship may be acquired, the same person may possess a dual nationality. P. 329.
3. A citizen by birth retains his United States citizenship unless deprived of it through the operation of a treaty or congressional enactment or by his voluntary action in conformity with applicable legal principles. P. 329.
4. It has long been a recognized principle in this country that if a child born here is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, he does not thereby lose his citizenship in the United States provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties. P. 329.

   Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. P. 334.
5. This right of election is consistent with the naturalization treaty with Sweden of 1869 and its accompanying protocol. P. 335.

http://cdn.loc.gov/service/ll/usrep/usrep307/usrep307325/usrep307325.pdf

It is also the CRS memorandum dissected here, here and here regarding the ellipsis alteration of quoted Supreme Court language from its decision in *Perkins v. Elg*, 307 U.S. 325 (1939), facilitating a "conclusion" that Barack Hussein Obama, Jr. was a constitutionally-eligible nbC. Respectfully, a pretty good argument exists that he was not.

But I digress.

Mr. Apuzzo, quoting Mr. Maskell's memorandum, notes that the decision in *Storer v. Brown*, 415 U.S. 724, 730 (1974) holds that "the States have evolved comprehensive, and

in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, *and the selection and qualification of candidates.*" (Emphasis added).

Assuming that Mr. Maskell equated the term "qualification" with the term "eligibility," it would seem clear that he was acknowledging that states – red, blue or purple – could enact laws regarding that particular state's adoption of whatever it believed constituted a "natural born Citizen." As long as the state law did not define a nbC in a way that contravened the actual words of the Constitution, it should be validated.

But since the Constitution itself does not define the term, the next best place to look would be – no surprise here – decisions of the Supreme Court on or sufficiently close to the issue of its definition. As consistently argued by Mr. Apuzzo as well as by many others, including your humble servant, perhaps the leading Supreme Court case addressing the issue is *Minor v. Happersett*, 88 U.S. 162 (1875). There, the Court stated that the term "natural born citizen" was understood by the Founders to mean that which de Vattel posited: – a person born on U.S. soil to two parents who are already U.S. citizens.

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.

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

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

https://www.law.cornell.edu/supremecourt/text/88/162

Any state that enacted a POPE statute based on the definitions of de Vattel and adopted in *Minor* could hardly be seen as "changing" a nonexistent definition of the nbC term in the Constitution. Accordingly, that would be a case where the Supreme Court *could* accept jurisdiction, but, in your humble servant's opinion, *should* – if not "must" – accept jurisdiction.

Stated otherwise, the suggestion made at *The P&E* and here that the states should take up the challenge where the Supreme Court has refused merits serious consideration. Kudos go out to Mr. Ogden and posthumous thanks as well to Mario Apuzzo. The problem, of course, will be to find those states with a legislature and governor willing to take these steps, thereby eliminating perhaps as many as fully one-half – or more – of the states in the Union.

No one ever claimed that "keeping the Republic" would be easy, and Ben Franklin even suggested that it might be difficult.

The guy was prescient.