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The Natural Born Citizen Clause of Our U.S. Constitution Requires that Both of the Child's Parents Be U.S. Citizens At the Time of Birth

The purpose of this essay is to show that one United States citizen parent is not enough to bestow "natural born Citizen" status upon a child. When interpreting the Constitution, we must decide whether we will look to the document as an original and static one whose meaning has already been established at a given time by the People and its Framers or one that is living and which can be changed over any given time by a court of law. See the address of Justice Antonin Scalia to the 2008 Annual National Lawyers Convention on November 22, 2008, at the Mayflower Hotel, in Washington, D.C. http://www.fed-soc.org/publications/pubid.1193/pub_detail.asp. (advocates originalism rather than living constitutionalism). I submit that Article II's "natural born Citizen" clause has a fixed and knowable meaning which was established at the time of its drafting and should therefore be interpreted through the eyes of the original Framers that drafted and ratified the clause so as to determine what they intended the clause to mean (original intent theory). I also submit that we should interpret the "natural born Citizen" clause in a way that reasonable persons living at the time of its adoption would have declared the ordinary meaning of the text to be (original meaning theory). This is not living constitutionalism but rather originalism or textualism as applied to interpreting the Constitution. It is this latter approach that I will utilize in this article.

E. Vattel stated in 1758, as translated into English in 1797: "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." E. Vattel, The Law of Nations or Principles of Natural Law, Sec. 212 Citizens and natives. In Footnote 1 at the end of Sec. 212, Vattel stated that "as a general rule" the child inherits his father's citizenship, or his mother's but only if she is not married.

The first thing that we have to understand about what Vattel wrote is that he made a distinction between a “citizen” and a “natural born Citizen.” A citizen is simply a member of the civil society who is bound to the society by certain duties and subject to its authority. “Citizens” also participate equally in all the advantages the society has to offer. On the other hand, a “natural born Citizen” means much more than just “citizen.” Vattel required that for a child to be a “natural born citizen,” or what he called in French in his 1758 first edition of The Law of Nations or Principles of Natural Law, les naturels, ou indigenes (the “natives or indigines”-The Venus, 12 U.S. (8 Cranch) 253 (1814)), the child must be born in the country to both parents who are also citizens of the same country.

In the original French, Vattel wrote: **"Les naturels, ou indigenes, sont ceux qui sont nes dans le pays de parents citoyens,” meaning the "natives or indigines" are those born in the country of citizen parents.** Both the Framers and later English translators of Vattel's treatise replaced the words"natural born Citizen" for the words "natives or indigenes." From Madison's notes, we see that there were some delegates who were concerned about foreigners. For example, from Max Farrand's transcripts of Madison's notes (August 9 and August 13, 1787), there is the following concerning the House of Representatives eligibility requirements: "Mr. Gerry wished that in future the eligibility might be confined to Natives." The word "native" occurs multiple times in the notes for these two days. (The phrase "natural born citizen" was not used here by the delegates.). The word "native" was a synonym for the phrase "natural born citizen." The delegates had already used the term “natural born citizen” when proposing the requirements for President, Vice President, and either House of Congress and later used the word “natives” when referring to eligibility requirements for the House of Representative. There is further evidence of this in at least three works: Blackstone's "Commentaries on the Laws of England" (see Book the First: The Rights of Persons; Chapter the Tenth: Of People, Whether Aliens, Denizens or Natives.), translations of Quintilian's "Institutio Oratoria", and the 1797 English edition of Vattel's "The Law of Nations or Principles of Natural Law."

In the beginning of his definition, Vattel required that the children be born of “parents” who are citizens. The use of the word “parents” refers to both mother and father. If he required only one parent such as the father, he would have said “of fathers who are citizens” and not “of parents who are citizens.” He did later refer to “fathers,” but only because wives automatically acquired the citizenship of their husbands the same way children did. Hence, if Vattel meant to focus only on “fathers,” he would have used “fathers” throughout his definition and never mentioned “parents” when he first defined “natural born Citizen,” for there would not have been any need to use the word “parents” when “fathers” would have sufficed. Hence, Vattel would have focused on the citizenship of the father since that citizenship would determine that of both the mother and child. It is also noteworthy that Vattel had no problem allowing the child to inherit the citizenship of the mother when the mother was not married to the child’s father. Given that Vattel in effect really focused on the citizenship of both the child’s father and mother in defining a “natural born Citizen,” Vattel’s definition of a “natural born Citizen” does not violate the equal protection guarantee embedded in the Fifth Amendment's Due Process Clause. Miller v. Albright, 523 U.S. 420 (1998); Nguyen v. INS, 533 U.S. 53, 121 S.Ct. 2053; 150 L.Ed.2d 115 (2001).

There is other evidence in his treatise that shows that Vattel meant to refer to both the child’s

mother and father in his definition of a "natural born citizen." When defining what a country is in Section 122, he stated the "term signifies the state, or even more particularly the town or place, where our parents had their fixed residence at the moment of our birth.… A man ought to preserve gratitude and affection for the state to which he is indebted for his education, and of which his parents were members when they gave him birth…." In commenting on the citizenship status of children born at sea at Section 216, he stated that a child born abroad a foreign vessel that is docked in a port belonging to their own nation is reputed born in the country, provided "she [the mother] and her husband have not quitted their native country to settle elsewhere." In commenting upon vagrants in Section 219he stated: "Vagrants are people who have no settlement. Consequently those born of vagrant parents have no country, since a man's country is the place where, at the time of his birth, his parents had their settlement (Section 122), or it is the state of which his father was then a member…" Given that Vattel in effect really focused on the citizenship of both the child's father and mother in defining a "natural born Citizen," Vattel's definition of a "natural born Citizen" does not violate the equal protection guarantee embedded in the Fifth Amendment's Due Process Clause. Miller v. Albright, 523 U.S. 420 (1998); Nguyen v. INS, 533 U.S. 53, 121 S.Ct. 2053; 150 L.Ed.2d 115 (2001).

There is also United States Supreme Court support for the position that Vattel's "Parents" meant mother and father. In the case of Dred Scott, Justice Daniel in his concurring opinion substituted the word "parent" for "father" and "parents" for "fathers." Dred Scott v. Sandford, 60 U.S. 393 (1856).

Historically, we have always treated the citizenship of the husband and wife as being merged in the husband. Historically, a women's citizenship merged into that of her husband upon marriage. Thomas Franck wrote: "[I]n domestic law a woman had been, until the 19th century, a 'femme couverte,' incapable of acquiring rights in her own name…" T.M. Franck, Individuals, Groups and States as Rights Holders in International Law, In Canadian Council on International Law, The Impact of International Law on the Practice of Law in Canada-Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa, October 15-17, 1998 (The Hague: Kluwer Law International, 1999), 62, 64. See also K. Knop, Feminist Re/Statements: Feminism and State Sovereignty in International Law, 3 Transna'l L. & Contemporary Pr. 293, 323-328 (1993). "[I]n every country, except where the English law prevails, the nationality of a woman on marriage merges in that of her husband, she loses her own nationality and acquires his." Cockburn, Nationality 24 (1869). On matters of a married woman's citizenship, we did not follow the English law. Rather we followed the "Continental private international law." Secretary Sherman, in an instruction to the United States Minister at St. Petersburg, March 15, 1897; Foreign Relations, 1901, 443.

The rule that the wife followed the condition of her huband was carried into our own naturalization laws, wherein citizenship could be derived from a marital and child relationship. Historically, a number of U.S. laws have provided for the automatic naturalization of children or wives (not husbands) of naturalized U.S. citizens. In some periods of our history, these laws provided that married women derived citizenship from their husband and had no control over their status. Under the Act of 10 February 1855, a woman automatically became an American upon marrying a U.S. citizen or following the naturalization of her foreign husband. Kelly v. Owen, 74 U.S. 7 Wall. 496 (1868). Further, Section 3 of the Citizenship Act of 1907,

which would have confirmed the general rule prevailing at the time, provided that any American woman who married a foreigner took the nationality of her husband. Indeed, our Supreme Court in Mackenzie v. Hare, 239 U.S. 299 (1915) upheld the constitutionality of the Citizenship Act of 1907 which provided "[t]hat any American woman who marries a foreigner shall take the nationality of her husband…." The Court applied this rule to an American woman born in California and held that she lost her American citizenship and took on his citizenship when she married a "native and subject of the kingdom of Great Britain." The Court said that "the identity of the husband and wife is an ancient principle of our jurisprudence, and is still retained notwithstanding relaxation thereof." The Court said that the husband and wife merge their identity, with dominance given to the husband. It said that the rule is dictated not only by domestic policy but more importantly by international policy. The Court added that Congress has such power to make such a rule as part of its power to deal with international relations with other countries and to keep the United States out of embarrassments and controversies with other nations. Id. at 311-12. "Until September 22, 1922, the status of the wife depended upon that of her husband, and therefore the children acquired their citizenship from the same source as had been theretofore existent under the common law." In re Citizenship Status of Minor Children Where Mother Alone Becomes Citizen Through Naturalization, 25 F.2d 210 (D.C.N.J. 1928). The rule for woman finally changed with the 1922 Cable Act which established that a woman's marriage to an alien no longer automatically stripped her of her citizenship. See FAM 1200 Appendix E, Loss of Nationality of Married Women Under the Act of 1907 and Successor Statutes (provides a full discussion on the status of women marrying aliens). On the rule that the wife's citizenship automatically merged into that of her husband, it is also noteworthy that Section 1993 of the Revised Statutes of 1878 (48 Stat. 797) permitted the transmission of citizenship only by U.S. citizen fathers until it was amended prospectively on May 24, 1934, to permit transmission by U.S. citizen mothers. (The similar rights of women were also addressed by the 1994 amendment to section 301 INA (see 7 FAM 1133.2-1).)

The Framers were very familiar with William Blackstone. We can also see in the writings of Blackstone that the allegiance of both parents to the King was needed to avoid dual allegiance in the child. Blackstone wrote:

"When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law indeed stood absolutely so; with only a very few exceptions: so that a particular act of parliament became necessary after the restoration, for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles. And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's embassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of postliminium) to be born under the king of England's allegiance, represented by his father, the embassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2. that all children born abroad, provided both their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants. But by several more modern statutes these restrictions are still farther taken off: so that all

children, born out of the king's ligeance, whose fathers were natural-born subjects, are now natural-born subjects themselves, to all intents and purposes, without any exception; unless their said fathers were attainted, or banished beyond sea, for high treason; or were then in the service of a prince at enmity with Great Britain (emphais in the original)." William Blackstone, Commentaries 1:354, 357--58, 361-62 (1765).

We can see that even the English Parliament gave importance to a child having both parents be "in the allegiance of the king," which under English common law meant the parents would have been "natural born subjects." By having both parents be "natural born subjects," the child would not have been born with any other conflicting allegiance other than the one that attached from the foreign soil. Parliament was willing to live with any allegiance attaching to the child from the foreign soil but not with any that may attach by descent from one of the parents, the latter one being by nature a much more stronger one. It was only later in time that the rule was made less restrictive and allowed for just the father to be a "natural born subject."

There is historical evidence that the Founders also borrowed heavily from the Dutch when making the new nation. During the revolutionary period Dutch law provided for citizenship by jus sanguinis. There is considerable evidence that the Framers were also influenced by the citizenship law of Holland. "The American colonists had become familiar with the rights of citizenship possessed in other countries, both from the fact that some of them resided in Holland for a time, before they came to America, and from the further fact that the New York colony was essentially Dutch in its original settlement and government." John S. Wise, A Treatise on American Citizenship (1906). In Holland, "[c]itizenship could be acquired in several ways. Probably the most common was birth. Some towns accepted everyone as citizen who was baptized in a local church. But more commonly it was required that one's parents were citizens too. . . ." R. Po-chia Hsia & Henk F. K. van Nierop, Calvinism and Religious Toleration in the Dutch Golden Age 161(2002). "One's parents" would necessarily included one's mother and father. This Dutch law is consistent with Vattel's definition of what is a "natural born citizen."

Apart from the heavy Dutch influence upon the Founders, when the Framers drafted the Constitution, they relied heavily upon Vattel to guide them. Citizenship was a topic that affected U.S. relations with other nations. Given that citizenship affects "the behavior of nation states with each other" (Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), the Founders would have looked to the law of nations to define it for the purposes of the new nation. The law of nations definition on citizenship also gave uniformity to the subject area, which the Framers wanted to achieve for citizenship laws as they did for naturalization laws. Gibbons v. Ogden, 22 U.S. 1, 36 (Wheat) (1824). They would therefore have referred to and accepted Vattel's law of nations definition to give meaning to what an Article II "natural born Citizen" was.

The meaning of a "natural born Citizen" as expressed by Vattel, including that both parents of the child must be citizens at the time of the child's birth in order to make the child a "natural born Citizen," was carried forward in American history following the Founding. The standard provided by Vattel has not changed in our jurisprudence and is still valid today as it was during the Founding. Also, the Fourteenth Amendment has not changed the meaning of a "natural born Citizen." Legislative activity by the early Congresses provides insight into the question of whether Vattel required one or two parents to be citizens. There are Congressional acts that were

passed after the Constitution was adopted that give us insight into what the Framers of the Constitution meant by "natural born Citizen." The 1790 First Congress, which included twenty members who had been delegates to the Constitutional Convention eight of whom were members of the Committee of Eleven that drafted the "natural born Citizen" clause, passed the Naturalization Act of 1790 (1 Stat.103,104) which provided that "And the children of citizens of the United States that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural born citizens." This phrasing followed the literal terms of British statutes, beginning in 1350, under which persons born abroad, whose parents were both British subjects, would enjoy the same rights of inheritance as those born in England; beginning with laws in 1709 and 1731, these statutes expressly provided that such persons were natural-born subjects of the crown." The Naturalization Act of 1790 declared these children to be "natural born Citizens," but only retrospectively. See Weedin v. Chin Bow, 274 U.S. 657 (1927). It is interesting to note that George Washington was president of the Constitutional Convention and President of the United States when this bill became law and if he had disagreed with the two U.S. citizen-parent requirement, he could have vetoed this bill. One would then at first think that this legislation strongly suggests that the Framers of the Constitution understood this phrase to refer to citizenship acquired from both of the child's parents at birth, regardless of whether or not that birth had taken place in the United States. This statute shows what role the parents played in the minds of the early founders.

While only retrospectively, the First Congress was willing to declare a child born out of the United States to two United States parents a "natural born Citizen." This was not consistent with what Vattel wrote in The Law of Nations of Principles of Natural Law, at Sec. 215. Children of citizens, born in a foreign country, where he declared these children just "citizens" and not "natural born citizens": "It is asked, whether the children born of citizens in a foreign country are citizens? By the law of nature alone, children follow the condition of their fathers, and enter into all their rights (Sec. 212); the place of birth produces no change in this particular, and cannot of itself furnish any reason for taking from a child what nature has given him; I say 'of itself,' for civil or political laws may, for particular reasons, ordain otherwise. . . ." (emphasis supplied). Clearly, Vattel addressed the question of whether these children are "citizens," not "natural born citizen." He does not address the question of whether they are "natural born citizens" because according to his own definition, a child had to be born "in the country" in order to be a "natural born citizen." Being born abroad and therefore not "in the country," such a child could not be a "natural born citizen."

Vattel did did state that there was an exception to the "in the country" rule for children born abroad to citizen parents who were serving the armies of the state or in government service, for he considered these children to be "reputed born in the country." Vattel, Sec. 217. In this connection and as an aside which applies to the question of whether Senator McCain is an Article II "natural born Citizen," it should be noted that according to Vattel, being physically born out of the country did not necessarily mean that one was not born "in the country." Vattel explained that if a child was born "in the armies of the state," that child was "reputed born in the country; for a citizen, who is absent with his family on the service of the state, but still dependent on it, and subject to its jurisdiction, cannot be considered as having quitted its territory." Vattel, Sec. 217. Since this child would have been born in the foreign "armies of the state," he would normally not be granted citizenship in the country in which he was physically born. Additionally,

the country on whose soil the child might be born might adhere to a jus sanguinis system of conferring citizenship (meaning that born on its soil alone would not confer citizenship and therefore allegiance and loyalty on the child). Being born under those conditions, this child would therefore be born with sole allegiance to the country of his parents and would qualify as a "natural born citizen" of that country.

While the 1790 act naturalized all "persons" and so included women, it also declared that "the right of citizenship shall not descend to persons whose fathers have never been resident in the United States...." This prevented the automatic grant of citizenship to children born abroad whose mother, but not father, had resided in the United States. Citizenship was inherited exclusively through the father. As we have seen above, Congress did not remove the inequity until 1934. This focus on the father as the source of citizenship (but not meaning that the status of the mother was not considered) is consistent with what Vattel wrote in Section 212 of The Law of Nations. This is further evidence that the Framers relied upon Vattel in defining citizenship for the new Republic.

In 1795 the Congress passed the Naturalization Act of 1795 which removed the words "natural born" from the term "natural born citizen" and thereby just left "citizens" as the status to be given to children born out of the United States. The fact that the 1790 Act as written was short lived and was only retrospective shows that Congress just wanted to make certain persons born abroad during the early years of the Republic "natural born Citizen" so that they could be eligible to be President. This sort of special allowance was comparable to the grandfather clause of Article II which allowed a "citizen" to be President provided that he was such at the time of the adoption of the Constitution which the Framers in 1790 knew occurred in 1789. It seems that the Third Congress passed this amendment to the 1790 Act to clarify for those living at that time who was and who was not a "natural born Citizen" per the Framers intent at that time, since the 1790 Act had introduced confusion into that subject regarding the use of those special words as found in Article II. United States v. Wong Kim Ark, 169 U.S. 649, 714 (1898) (Fuller, C.J., dissenting) (statute "passed out of abundant caution to obviate misunderstandings" about the citizenship status of foreign-born children of Americans). It is again important to note that George Washington was also President in 1795, making him aware of this change by the Third Congress. If he disagreed with the clarification and change in the wording in the new 1795 Act, he would have vetoed it. The 1790 and 1795 Acts are contemporaneous evidence of who the Framers meant to include as "natural born Citizens." Pryor, The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty, 97 Yale L.J. 881 (1988).

Subsequent Supreme Court cases have stated that in interpreting the Constitution, we must look to the common law that the Framers accepted at the time of the Founding. There is strong historical evidence that the Framers in constituting the new Constitutional Republic rejected the English common law and accepted the new federal common law which emanated from the law of nations. On this subject, see my article included at this blog entitled, The Law of Nations or Principles of Natural Law as U.S. Federal Common Law Not English Common Law Define What an Article II Natural Born Citizen Is. Indeed, as we will see below, our Supreme Court adopted that definition when defining a "natural born Citizen" and thereby incorporated it into U.S. federal common law.

The definition and two-parent requirement has been reiterated by the Supreme Court and other courts in the cases of The Venus, 12U.S. 253(1814), Shanks v. Dupont, 28 U.S. 242 (1830), Scott v. Sandford, 60 U.S. 393 (1856), Minor v. Happersett, 88 U.S. 162 (1875) , Ex parte Reynolds, 20 F. Cas. 582 (C.C.W.D. Ark 1879), United States v. Ward, 42 F. 320 (1890); Wong Kim Ark, 169 U.S. 649 (1898), and Ludlam, Excutrix, & c., v. Ludlam, 26 N.Y. 356 (1863). It has also been confirmed by renowned legislators, including Senator Trumbull, the author of the Civil Rights Act of 1866, and Representative John A. Bingham, the architect of the 14th Amendment to our Constitution.

In the case of **The Venus 12 U.S. 253, 289 (1814)**, Justice John Marshall said: "Vattel, who, though not very full to this point, is more explicit and more satisfactory on it than any other whose work has fallen into my hands, says '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 indigenes are those born in the country of parents who are citizens. Society not being able to subsist and to perpetuate itself but by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights.'"

Dred Scott v. Sandford, 60 U.S. 393 (1857), did not directly deal with Article II "natural born Citizen." But there are parts of the Dred Scott decision that are relevant to the question of what is a "natural born Citizen." The case clearly defined "natural born citizen." While as repugnant as slavery was and still is, no court or amendment has over turned the meaning of "natural born citizen" from Dred Scott. The main point is that in deciding what a "citizen" was in 1857, both the majority and dissent went back to 1787 to examine what the Framers and the people of that time considered a "citizen" to be. The Court said that the Constitution must be understood now as it was understood at the time it was written. The judges did not disagree that one had to look back to the Founding Fathers. What they disagreed on is what the public opinion was at that time as to whether a freed slave was a citizen. In this regard, we know that the case was overruled by the Thirteenth Amendment. As to the "natural born Citizen" clause, the Court said: "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 society cannot perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their parents, and succeed to all their rights. Again: I say, to be of the country, it is necessary to be born of a person who is a citizen; for if he be born there of a foreigner, it will be only the place of his birth, and not his country. . . ." Dred Scott v. Sandford, 60 U.S. 393, 476-77 (1857). As can be seen from the quoted language, the Court actually removed from the Vattel's definition the reference to "fathers" and "father" and replaced it with "parents" and "person," thus showing that it is not just one parent (the father) that needs to be a citizen, but the "parents," i.e., both mother and father. Also, both Vattel and the Court stated that "if he be born there of a foreigner, it will be only the place of his birth, and not his country." The controlling language is "a foreigner." In the English language, the letter "a" is an indefinite article meaning one. Hence, the use of the word "a" shows that only one is required. We know that a child has both a mother and father and the "a" would necessarily refer to either the mother or father. Surely, if the child were born of one parent who was not a citizen, he would be "born there of a foreigner," who would be either his foreign mother or father. As can be seen, it is our United States Supreme

Court that has made this reading and interpretation of Vattel. This understanding of Vattel is not only correct but also binding upon us.

Chief Justice Waite, in **Minor v. Happersett, 88 U.S. 162 (1874)**, stated: "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." Here we can see that the U.S. Supreme Court in all three of these cases adopted Vattel's definition of what a "natural born Citizen" is, and specifically repeated his two U.S.-parent test. Dred Scott even removed the word "father" and replaced it with the word "parents."

The Civil Rights Act of 1866 (Act of April 9, 1866) first established a national law that provided: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." Civil Rights Act of April 9, 1866 (14 Stat. 27). Not being subject to a foreign power includes being free from any political and military obligations to any other nation and not owing any other nation direct and immediate allegiance and loyalty. The primary author of this Act was Senator Trumbull who said it was his intention "to make citizens of everybody born in the United States who owe allegiance to the United States." Additionally, he added if a "negro or white man belonged to a foreign Government he would not be a citizen." In order for this requirement to be satisfied, clearly both parents of the child must be U.S. citizens, for if one is not, the child would inherit the foreign allegiance and loyalty of foreign parent and would thereby "belong to a foreign Government." Rep. John A. Bingham, who later became the chief architect of the 14th Amendment's first section, in commenting upon Section 1992 of the Civil Rights Act, said that the Act was "simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural born citizen" (emphasis supplied). Rep. Bingham said "parents." He did not say "one parent" or "a mother or father."

Now let us turn to the Fourteenth Amendment. Senator Trumbull, when commenting on that Amendment declared: "The provision is, that 'all persons born in the United States, and subject to the jurisdiction thereof, are citizens.' That means 'subject to the complete jurisdiction thereof.' What do we mean by 'complete jurisdiction thereof?' Not owing allegiance to anybody else. That is what it means." Sen. Howard added: "the word jurisdiction, as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now." On May 30, 1866, Senator Howard continued: "This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are

foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Govern- of the United States, but will include every other class of persons." Congressional Globe, 39th Congress, 1st Session, May 30, 1866, P. 2890, col. 2. Again, only if the both parents of the child were citizens at the time of birth could the child be subject to the complete jurisdiction of the United States, not owe allegiance to any foreign power, and not be a person "born in the United States who are foreigners [or aliens]."

There then followed Supreme Court cases that discussed citizenship under the Fourteenth Amendment. In **The Slaughter-House Cases, 83 U.S. 36, 73 (1873)**, in discussing the meaning of the Fourteenth Amendment's citizenship clause said: "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States." Even the dissenting opinion affirmed that the citizenship clause was designed to assure that all persons born within the United States were both citizens of the United States and the state in which they resided, provided they were not at the time of birth subjects of any foreign power. Again, only if both parents of the child were citizens at the time of birth could the child not be considered a citizen or subject of a foreign State born within the United States, be subject to the complete jurisdiction of the United States, and not be subject to any foreign power.

In **Elk v. Wilkins, 112 U.S. 94 (1884)**, the Supreme Court specifically addressed what is meant by "subject to the jurisdiction thereof," and held: "The persons declared to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired." Only if the child's both parents were citizens at the time of birth could the child be "completely subject to their [U.S.] political jurisdiction and owing them direct and immediate allegiance.

U.S. v. Wong Kim Ark, 169 U.S. 649 (1898), did not address what an Article II "natural born Citizen" is as it applies to presidential eligibility. Rather, the Supreme Court there gave a new, divergent, and incorrect interpretation of the "subject to the jurisdiction" clause of the Fourteenth Amendment and vetoed the will of the People and their Legislature to declare Wong a U.S. "citizen of the United States" under the unique circumstances of that case. While the case did approvingly cite Minor v. Happersett, since the case only dealt with what is a Fourteenth Amendment "citizen of the United States," the holding of the case cannot be used to define what the Founders meant by Article II's "natural born Citizen" clause. While Justice Gray was correct in stating that it was public law that defined national citizenship, he was not correct in defining that law with reference to the English common law. Justice Gray went to great lengths to tell us what the English common law was during the colonies on the question of citizenship. But he failed to show that the Founders and Framers adopted that law to define the national citizenship in the new Constitutional Republic. Wong Kim Ark is the only United States Supreme Court case that up to that time relied upon English common law to define U.S.

national citizenship. While he provided evidence that the English common law continued to be applied by the States to resolve local issues, Justice Gray provided no evidence that our public law used the English common law to define national citizenship. Indeed, the Court in Wong Kim Ark was misled by British authority that applied only during the colonial period. What the Court did through its decision and by relying on English common law is create a class of born "Citizens of the United States" who are born in the United States who are not necessarily eligible to be President because they are not born to a citizen mother and father. But regardless of whether the Court erred in relying on English common law to define a "citizen of the United States," the decision did not change the meaning of an Article II "natural born Citizen," for the case's holding only defined what a "citizen of the United States" is under the Fourteenth Amendment and in the decision the Court also cited Minor and quoted its passage which included Vattel's definition of what a "natural born Citizen" is. Justice Antonin Scalia, during his address to the 2008 Annual National Lawyers Convention on November 22, 2008, at the Mayflower Hotel, in Washington, D.C., gave three reasons in ascending order (the last being the most compelling) which would serve justification for overturning a prior case: how wrong was it, i.e., was it blatantly and malicious improperly decided ; how well has the public accepted the case; and did the decision cast the Court as a policy maker rather than an interpreter of the law. Given that the Wong Court did not give Congress and the Executive the wide deference that they deserve in exercising its immigration and naturalization powers (Nguyen v. INS, 533 U.S. 53, 121 S.Ct. 2053; 150 L.Ed.2d 115 (2001) and the Scalia factors, the Wong decision is a prime candidate for reversal.

We have seen that the citizenship status of the parents of a child determines whether that child is born a "natural born Citizen." Why should we want the child's parents to be citizens? Alexander Hamilton explained what happens to a person when he or she becomes a citizen of the country: "But there is a wide difference between closing the door altogether and throwing it entirely open; between a postponement of fourteen years, and an immediate admission to all the rights of citizenship. Some reasonable term ought to be allowed to enable aliens to get rid of foreign and acquire American attachments; to learn the principles and imbibe the spirit of our government; and to admit of a probability at least, of their feeling a real interest in our affairs. A residence of not less than five years ought to be required. " Alexander Hamilton, The Works of Alexander Hamilton, (Federal Edition), vol. 8 > EXAMINATION OF JEFFERSON'S MESSAGE TO CONGRESS OF DECEMBER 7, 1801 1 > paragraph 827. Additionally, the development in the formative years of a child's minority of a relationship between citizen parents and their child is essential to the child's ties and allegiance to the United States. Nguyen v. INS, 533 U.S. 53, 121 S.Ct. 2053; 150 L.Ed.2d 115 (2001) (addressing the importance of the tie between a child and his U.S. citizen father before the child's 18th birthday as a crucial ingredient in the child attaching and owing allegiance to the United States and that the U.S. government has a "profound" important interest and objective in promoting that link; showing that a child must meet all statutory preconditions [would also mean constitutional requirements] no matter how much one may deem them to be unfair or onerous in order to be bestowed U.S. citizenship). But we have seen that United States Supreme Court case law, the early 1790 and 1795 Naturalization Acts, legislative history of the Civil Rights Act of the 1866, and the Fourteenth Amendment all conclusively show that Vattel was understood to say that both parents had to be citizens in order for a child to be a "natural born Citizen." The Founders, our Supreme Court, Congress, and framers of the Fourteenth Amendment all adopted Vattel's law of nations definition and two-

parent requirement and made it part of Article II, United States citizenship federal common law, the Civil Rights Act of 1866, and the Fourteenth Amendment, respectively.

Obama is missing one of the two necessary natural conditions needed to make one a "natural born Citizen." He would satisfy the birth-in-the-country requirement. But he would be missing the two-U.S.-citizen-parent requirement to be an Article II "natural born Citizen." Obama would be missing unity of citizenship and allegiance at birth which is necessary to be a "natural born Citizen." One who meets the definition of a "natural born Citizen" is considered to have been born with sole and absolute allegiance to the United States and not owing allegiance by birth to any foreign state. Obama's mother was probably a "natural born Citizen." But because his father was a British subject/citizen and never a "Citizen of the United States" and Obama himself was a British subject/citizen" at the time of his birth, he was born with dual allegiances rather than just one to the United States. Therefore, Obama is not and cannot be an Article II "natural born Citizen" because of his father's and his birth allegiance to Great Britain. That his mother was a United States citizen does not in any way alter that reality bestowed upon Obama by nature at the moment of his birth. Obama still acquired a complete and natural allegiance to Great Britain at the time of his birth. In other words, at birth he was as much a British subject/citizen as he was an American citizen, assuming he was born in Hawaii. His mother's United States citizenship did not and could not change that. It also would not make sense to allow just one United States citizen parent to be sufficient to bestow "natural born Citizen" status on a child, for each parent has just as much influence as the other in creating in the child attachment to a nation.

The purpose of Article II's "natural born Citizen" clause is to exclude foreign influence from the Office of President and Commander in Chief. It "cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments . . ." Joseph Story, Commentaries on the Constitution 3:Sec 1472-73 (1833). Remember that Vattel said that if a child is born on a nation's soil to a non-citizen father (meaning parents), that place "will be only the place of his birth, and not his country." Article II's "natural born Citizen" clause looks only to the moment of birth and not thereafter. This interpretation is consistent with Jay's underlining the word "born" in his 1787 letter to General (later President) Washington. In other words, to meet that special Presidential eligibility requirement, one must be born a "natural born Citizen" and cannot acquire that status later in life. Under the British Nationality Act 1948, when Obama was born in 1961 his father was a British subject/citizen and Obama himself was a British subject/citizen by descent from his father. Under the British Nationality Act 1981, today Obama can still be a British Overseas Citizen (BOC). See my April 7, 2009 article on this topic at this blog entitled, Obama, the President of the U.S., Is Currently Also a British Citizen. Hence, when Obama was born he failed to meet the two-U.S.-citizen-parent test which caused him to be born subject to a foreign power. See my article at this blog entitled, Being Born Subject to a Foreign Power, Obama Cannot be President and Military Commander. It is inescapable that Obama is not and cannot be an Article II "natural born Citizen" and is therefore not eligible to be President and Commander in Chief of the Military.

Obama's current citizenship status is the same as that which the Framers and Founders had during the Constitutional Convention. If he was born in Hawaii (which he has yet to conclusively prove), he is a "Citizen of the United States" under the Fourteenth Amendment just as they were

under natural law and the law of nations. And he is not a "natural born Citizen" as they also were not. Like a naturalized citizen who is not a "natural born Citizen" and therefore not eligible to be President, the Framers and Founders were born subject to a foreign power as was Obama. Being born subject to a foreign power, both the original Founders and Obama qualify as "citizens of the United States" but not as "natural born Citizens." But the difference between Obama and the original Founders is that Obama cannot take advantage of Article II's grandfather clause to make him eligible to be President. Obama is therefore not eligible to be President and Commander in Chief of the Military.

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