

# Presidential Timber: Foreign Born Children of American Parents

By Warren Freedman

## The President of the United States

### 1. Term and Powers

Open to All—The Presidency of the United States is the greatest office in the world, for which neither birth nor riches are required. Any American boy, however poor and whoever his parents may be, famous or unknown, can hope to become President. The only important restriction is that the President must have been born an American. (A naturalized citizen cannot be President.)<sup>1</sup>

Such a truism simply stated in a manner characteristic of our American heritage has recently been contested in the newspapers<sup>2</sup> upon the ground that a child born at sea or in a foreign country of American parents is not a “natural born citizen” within the meaning of the Constitution, which provides:

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....<sup>3</sup>

It is submitted that a foreign born child of American parents can rightly aspire to the position of President and hold such high office in accord with the eligibility requirements laid down under common law principles and the entire body of statutory law.

The meaning of the term “natural born citizen” is the crux of the controversy, but nowhere does the Constitution provide a definition,<sup>4</sup> except perhaps by way of inclusion or exclusion. Alexander Porter Morse, one of the foremost legal scholars on American citizenship,<sup>5</sup> defined the term in 1904 in an article appropriately entitled *Natural-Born Citizens of the United States—Eligibility for the Office of President*.<sup>6</sup>

A natural born citizen has been defined as one whose citizenship is established by the jurisdiction which the United States already has over the parents of the child, not what is thereafter acquired by choice of residence in this country.

He then pointed out that “if it was intended that anybody who was a citizen by birth should be eligible, it would only have been necessary to say, ‘no person except a native-born citizen’; but the framers thought it wise in view of the probable influx of European immigration to provide that the President should at least be the child of

citizens owing allegiance to the United States at the time of his birth.”<sup>7</sup> An earlier treatise on citizenship<sup>8</sup> confirmed this premise:

There is no prohibition on citizens of the United States sojourning in foreign countries. If while abroad children were born to them, such children followed the citizenship of the parent. This rule is the primary, positive regulation on this branch of this subject.

Professor Morse believes the term “natural born citizen” was inserted in order “to exclude aliens by birth and blood from that high office...it was scarcely intended to bar children of American parentage whether born at sea or in a foreign country.”<sup>9</sup> While referring to the intent of the framers of the Constitution, Morse distinguished “natural born” from “native-born”:

The framers generally used precise language; and the etymology actually employed makes the meaning definite. Its correspondent in English law ‘natural-born subject’ appears in constitutional history and parliamentary enactments; and there it includes all children born out of the king’s allegiance whose fathers were natural-born subjects....<sup>10</sup>

In able dissents by Chief Justice Fuller and Mr. Justice Harlan in the *United States v. Wong Kim Ark*<sup>11</sup> it was historically shown that foreign born children of American parents are not disqualified for the Presidency:

In the convention it was, says Mr. Bancroft (2 Bancroft, Hist. U. S. Const. 193), objected that no number of years could properly prepare a foreigner for that place; but as men of other lands had spilled their blood in the cause of the United States and had assisted at every stage of the formation of their institutions, on the 7<sup>th</sup> of September, it was unanimously settled that foreign-born residents of fourteen years who should be citizens at the time of the formation of the Constitution are eligible to the office of President.

In Van Dyne, *Citizenship of the United States*<sup>12</sup> the eminent author declared that “it is almost universally conceded that citizenship by birth in the United States was governed by the principles of the English common law.” Mr. Justice Gray in the *Wong Kim Ark* case<sup>13</sup> agrees that “it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett*, 21 Wall. 162; *Ex Parte Wilson*, 114 U. S. 417, 422; *Boyd v. United States*, 116 U. S. 616, 624, 625; *Smith v. Alabama*, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. I Kent Comm. 366;

Bradley, J. in *Moore v. United States*, 91 U. S. 270, 274.” Undoubtedly the fundamental principle of the common law with regard to English nationality was *birth within the allegiance of the King*.<sup>14</sup> Mr. Justice Swayne of the United States Supreme Court, speaking in 1866, definitively declared:

All persons born in the allegiance of the King are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country as well as of England.<sup>15</sup>

Under the common law all persons who would take the necessary oath of allegiance, wherever born, could be deemed “natural born”,<sup>16</sup> but that broad canon was greatly limited by statutory provisions in England before the adoption of our Constitution. However, these common law principles of “allegiance” serve to focus upon the historical differences between the doctrines of *Jus Soli* and *Jus Sanguinis*. The former, of feudal origin, refers citizenship to the place of birth, a territorial jurisdiction over the person.<sup>17</sup> *Jus Sanguinis* deals with the fact of citizenship by descent or inheritance regardless of the place where an American child may be born;<sup>18</sup> this principle of Roman law and early Germanic law was incorporated into the Napoleonic Code also.<sup>19</sup> *Jus Sanguinis* has the greater respect (on the status of a foreign born child of a citizen) among all writers<sup>20</sup> and greater authority in case law.<sup>21</sup> Statutory law since 1790 in the United States seems to have supplanted the doctrine of *Jus Soli* with reference to foreign born children of American parents. In *Ludlam v. Ludlam*, Judge Selden of the New York Court of Appeals provides a historical explanation:

The subject of alienage was very elaborately examined in *Calvin’s Case* (7 Coke, 1, 6 James I). Among the principles settled in that case and which have remained unquestioned since are these: (1) that natural allegiance does *not* depend upon locality or place: that it is purely mental in its nature, and cannot therefore be confined within certain boundaries; or to use the language of Coke that “liegeance and faith and truth which are her members and parts are qualities of the mind and soul of man, and cannot be circumscribed within the predicament of *ubi*.”<sup>22</sup>

Judge Selden concludes that “as a result of necessity from these principles, the children of English parents, though born abroad, are nevertheless regarded by the common law as natural-born citizens of England.”<sup>23</sup> Thus, parentage and not the accidental place of birth determine “natural born citizens” under common law principles.

This doctrine of *Jus Sanguinis* has found support also in various statutes passed by Parliament, *as declaratory of the common law*,<sup>24</sup> beginning with the Rolls of Parliament of 17 Edward III (1343), wherein it was decided “children of our Lord the King whether born on this side the sea or beyond the sea should bear the inheritance of their ancestors.” A statute was thereupon passed in 25 Edward III (1350).<sup>25</sup> In the Yearbook of 1 Richard III (1483) it was noted that “...he who is born beyond the sea and his father and mother are English, their issue inherit by the common law...”<sup>26</sup> The statute of 29 Car. II c. 6, Sec. 1 (1677), reiterated that “all persons who...were born out of His Majesty’s dominions and whose fathers or mothers were natural born subjects of this realm” were natural born subjects also. The statutes of 7 Anne c. 5, Sec. 3 (1708); 4 George II c. 21 (1731); and 13 George III c. 21 (1773), substantially reenacted the above provisions.<sup>27</sup>

In the *Annals of First Congress*<sup>28</sup> a Mr. Burke remarked that “the case of children of American parents born abroad ought to be provided for, as was done in the case of English parents in the 12<sup>th</sup> year of William III.” Thereafter in 1790 and 1795 the first piece of legislation on citizenship<sup>29</sup> in the United States was enacted by Congress. The Nationality Act of 1790, which was declaratory of the common law doctrine of *Jus Sanguinis*,<sup>30</sup> stated in clear language that “children of citizens of the United States that may be born out of the limits and jurisdiction of the United States shall be considered as *natural born citizens*...”<sup>31</sup> The intent of the framers of the Constitution was in effect reaffirmed, *i.e.*, foreign born children of American parents are “natural born citizens” under U. S. Const. Art. II, Sec. 1, cl. 4. Professor Morse believed that the Act of 1790 “followed closely the various parliamentary statutes of Great Britain; and its language in this relation indicates that the first Congress entertained and declared the opinion that children of American parentage, wherever born, were within the constitutional designation ‘Natural-Born Citizens’”.<sup>32</sup> The Act of April 14, 1802,<sup>33</sup> however, repealed the preceding Act, and unintentionally limited the term “natural born citizen” to foreign born children of citizen parents who then were or had been citizens. It took a student of nationality law, Mr. Horace Binney, to correct this defect,<sup>34</sup> and bring about passage of the Act of February 10, 1855,<sup>35</sup> which declared that persons *heretofore born or hereafter to be born* (italics added) out of the limits and jurisdiction of the United States whose fathers *were or shall be* (italics added) at the time of their birth, citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States.” In 1907, perhaps due to the abuse of the privilege of citizenship by foreign born children who never did enter the United States, Congress enacted a statute requiring such foreign born children of American parents still living outside the United States to record their intention before the age

of eighteen “to become residents and remain citizens.”<sup>36</sup> Professor Van Dyne,<sup>37</sup> however, negates the possibility of a “qualified citizenship” and concludes:

A child who acquires American citizenship by birth to an American father abroad under Rev. Stat. No. 1993 is a natural born citizen of the United States.

The first clause of the Fourteenth Amendment follows the principle of jurisdiction over the person: “All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States.” Some writers seem to believe that this clause asserts the doctrine of *Jus Soli*,<sup>39</sup> but it is submitted that jurisdiction over the person describes the allegiance by the American parents and their foreign born offspring whose citizenship was secure at birth. The Act of May 24, 1934, provided that United States citizenship may be derived *jure sanguinis* through the mother as well as the father, if the citizen mother or father has resided in the United States prior to birth of the child. Under the Nationality Act of 1940<sup>40</sup> a person born outside the United States of citizen parents is a “citizen of the United States *at birth*”. (Italics added).

According to the Constitution there are only two types of American citizens today: (1) citizens by birth,<sup>41</sup> and (2) naturalized citizens.<sup>42</sup> The naturalized citizen, broadly speaking, “enjoys all the rights of the native citizen except so far as the Constitution makes the distinction, U. S. Const. Art. II, Sec. 1, cl. 4, *Osborn v. United States Bank*, and this constitutional exception is limited to the occupying of the office of President of the United States.”<sup>43</sup> In an official government publication, *The Nationality Laws of the United States (76<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1938)*,<sup>44</sup> it is authoritatively stated that “the term (naturalization) is not ordinarily applied to the conferring of the nationality of a state, *jure sanguinis*, at birth upon a child born abroad.” The Nationality Act of 1940<sup>45</sup> itself declares:

The following shall be nationals and citizens of the United States *at birth*:

(c) A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States...

Thus, also by exclusion from the definition of a naturalized citizen, the foreign born child of American parents is included within the definition of a citizen by birth.<sup>46</sup> The framers of the Constitution did not limit eligibility for the Presidency to “native-born citizens”, but used the broader term of “natural born citizen” with its common law background. Too strict a compliance with the language of the Constitution, in this sense, would have barred, for example, any election for Representative until seven years after the adoption of the Constitution, and any

election for Senator until nine years after the adoption, because in each case U. S. Const. Art. I, Sec. 2, cl. 2; and Art. I, Sec. 3, cl. 3, required that the respective candidate “should have been \*\*\*\* years a citizen of the United States.”<sup>47</sup>

Whether a foreign child of American parents is recognized as a “natural born citizen” under the common law doctrine of *Jus Sanguinis* or under general statutory provisions<sup>48</sup> is unimportant to our discussion, as long as it is clear that these children were, are, and will still be subject to the jurisdiction of the United States as of birth.<sup>49</sup> Courts have not always cited statutory language in holding foreign born children of American parents to be citizens of the United States.<sup>50</sup> One of the leading cases on American citizenship, *United States v. Wong Kim Ark*,<sup>51</sup> was decided on March 28, 1898, in a fifty-three page review of American nationality provisions. In this case the respondent was a child born in San Francisco in 1873 to parents who were subjects of the Emperor of China, though they had a permanent domicile and residence in the United States while carrying on a trade or business here. In 1890 the parents suddenly left for China, and a few years later the respondent on his return from China was not permitted to land in San Francisco. A writ of habeas corpus was issued by the federal district court for the Northern District of California (71 Fed. 382 (1896)), and respondent was discharged from custody upon the ground that he was a citizen. On appeal to the United States Supreme Court, Mr. Justice Gray affirmed the decision of the District Court that the respondent had become at the time of his birth a citizen of the United States.<sup>52</sup> Then, by way of dictum, Mr. Justice Gray asserted:

A person born out of the jurisdiction of the United States can only become a citizen by being naturalized either by treaty, as in the case of annexation of foreign territory, or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in enactments conferring citizenship upon foreign-born children of citizens....<sup>53</sup>

Support for this dictum is found in *United States v. Perkins*,<sup>54</sup> which, however, involved a special treaty with England making the American mother of the petitioning child a naturalized British subject upon her marriage to an Englishman. The *Wong Kim Ark* case on this incidental point of the citizenship of the foreign born child of American parents seems to have overlooked the earlier Supreme Court case of *Minor v. Happersett*,<sup>55</sup> in which Chief Justice Waite openly asserted:

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 citizens, became themselves upon their birth citizens also. These were natives or natural born citizens, as distinguished from aliens or foreigners.”

Chief Justice Waite then pointed out that there are only two exceptions to citizenship by birth, *i.e.*, children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state. The dissenting opinions of Chief Justice Fuller and Mr. Justice Harlan in the *Wong Kim Ark* case echoed the earlier language of Chief Justice Waite that children of our citizens born abroad were always natural-born citizens, except where the father had never resided in the United States.<sup>56</sup> In *State of Vermont ex rel. Phelps v. Jackson*<sup>57</sup> a child born in Canada of American parents was deemed a citizen of the United States and therefore eligible to hold the office of state’s attorney in Vermont. In *Ware v. Wisner*<sup>58</sup> the sons born in Canada of American parents were “citizens of the United States by birth.” In *Wolff v. Archibald*<sup>59</sup> the Circuit Court of Appeals in Minnesota declared that for a Canadian-born child of an American citizen “the law is that children of citizens of the United States who are born in foreign countries are citizens of the United States.” And, in *Ex Parte Gilboy*<sup>60</sup> the court said: It is entirely clear that Alexander (born in Germany) was born an American citizen if at the time of his birth his father was still an American citizen.”

In summary, once more Professor Morse provides a competent and scholarly statement:

After some consideration of the history of the times, of the relation of the provision to the subject matter and of the acts of Congress relating to citizenship, it seems clear to the undersigned that such persons (children of citizens of the United States born at sea or in foreign territory) are natural born, that is, citizens by origin; and that if otherwise qualified, they are eligible to the office of President.<sup>61</sup>

In support of the Morse view are Professor Frederick Van Dyne, author of numerous books on citizenship and former Solicitor of the State Department,<sup>62</sup> and Professor Luella C. Gettys, distinguished Carnegie Fellow in International Law and author of *The Law of Citizenship in the United States*.<sup>63</sup> The only apparent authority to the contrary is the prolific writer on all phases of government, Professor Westel W. Willoughby,<sup>64</sup> who finds a “qualified citizenship” because of the Act of 1907<sup>65</sup> requires a determination by the foreign born child of American parents to come to the United States before the age of eighteen so as to indicate an intention to become a resident and remain a citizen; therefore, one whose citizenship is so “qualified” cannot be deemed a “natural born citizen”. Professor Willoughby cites the case of *Weedin v. Chin Bow*,<sup>66</sup> wherein the citizen parents *never* did reside in the United

States, and therefore could not pass on to their offspring any “citizenship”, much less that of being a “natural born citizen” under U. S. Const. Art. II, Sec. 1, cl. 4. The entire argument stems from too recent an analysis of nationality statutes without reference to the earlier statutory and constitutional law of the days of the adoption of the Constitution, discussed above.

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Footnotes:

1. Parsons, **The Land of Fair Play** 40 (1919)
2. A **North American Newspaper Alliance** dispatch, referred to in the **N. Y. Times**, May 26, 1949, p. 26, col. 3,4, declared that Franklin D. Roosevelt, Jr., third son of the late President, “never can carry that great name back into the White House.” His alleged ineligibility for the Presidency was based upon his birth on August 17, 1914, at Campobello Island, New Brunswick, Canada, where the Roosevelts had a summer estate. According to the **N. Y. Times**, *op. cit.*, “members of the Washington Bureau of the Cox newspaper chain who have searched the Supreme Court files here, stress that Mr. Roosevelt cannot be eliminated as Presidential candidate so easily.” And so the newspaper controversy ensued! However, the scope of this article is concerned only with the legal question of eligibility for the Presidency of foreign born children of American parents, and does not in any way, nor should it, give rise to political considerations engendered by the above newspaper controversy.
3. “...neither shall any person be eligible to that Office who shall not have attained to the age of thirty-five Years, and been fourteen Years a Resident within the United States.” U. S. Const. Art. II, Sec. 1, cl. 4.
4. Bouvier, **Law Dictionary** 834 (1934).
5. Author of the standard text, *Citizenship By Birth and Naturalization* (1881). In addition to hundreds of important cases involving citizenship, Morse handled the famous Insular Cases before the United States Supreme Court. He served as Ass’t Attorney of the United States before the Spanish Treaty Claims Commission in 1901, and was counsel before the Electoral Commission on Tilden and Hayes in 1878. He was born in 1842 and died in 1921.
6. **66 Albany L. J.** 99 (1904)
7. **66 id.** at 100.
8. Webster, **A Treatise on the Law of Citizenship in the United States** 85 (1891).
9. **66 Albany L. J.** 100 (1904). “A natural-born citizen is one NOT made by law or otherwise, but born...The Constitution does not make the citizen; it only

recognizes such of them as are natural, home-born and provides for naturalization.” Morse, *op. cit. supra* note 5, at 125.

10. 66 *id.* at 100.

11. 169 U. S. 649, 715 (1898).

12. At p. 32 (1904).

13. 169 U. S. 649, 654 (1898).

14. “If at common law all human beings born within the liegeance of the King and under the King’s obedience, were natural-born subjects and aliens, I do not perceive why this doctrine does not apply to these United States in all cases in which there is no express constitutional or statute declaration to the contrary.” 2 Kent, Comm. 258 (6<sup>th</sup> ed. 1848).

“A person who is born on the ocean is subject to the prince to whom his parents then owe allegiance; for he is deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns.” United States v. Wong Kim Ark, 169 U. S. 649, 659 (1898), *citing*, *Inglis v. Sailors’ Snug Harbor*, 3 Pet. 99, 155 (U. S. 1830).

Black, **Law Dictionary** (3<sup>rd</sup> ed. 1933) at p. 1222 defines a “natural-born subject” as “...one born within the dominion, or rather within the allegiance, of the king of England.”

15. United States v. Rhodes, 1 Abbott 28, 40 (U. S. 1866).

16. 2 Kent, Comm. 258 (6<sup>th</sup> ed. 1848).

Note that “the term ‘citizen’ as understood in our law is precisely analogous to the term ‘subject’ in the common law, and the change of phrase has entirely resulted from the change of government.” State v. Manuel, 4 Dev. L. 20, 24 (N. C. 1838).

17. “By long-continued executive practice, by constitutional declaration, and by judicial determination, the United States have declared that the common law principle of *Jus Soli* shall govern in determining citizenship—that in all cases, persons born in the United States and subject to the jurisdiction thereof are to be held native-born citizens. Yet when convenience and sentiment indicate a different rule, we do not hesitate to affix our citizenship to specified classes of persons born on foreign soil.” 1 **Am. J. Int’l L.** 907, 914 (1904).

Mr. Justice Curtis in *Dred Scott v. Sanford*, 19 How. 393, 576 (U. S. 1857) stated: “The first section of the second article of the constitution uses the language ‘a natural born citizen.’ It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at

the time of the adoption of the Constitution, which referred citizenship to the place of birth.”

This doctrine of *Jus Soli* is somewhat weakened by the presumption that every person is a citizen of the country in which he resides. *Bors v. Preston*, 111 U. S. 253 (1884); *Shelton v. Tiffin*, 6 How. 163 (U. S. 1848).

18. “The child of American parents born in a foreign country on board an American ship of which the father was a captain is an American citizen.” Bouvier, **Law Dictionary** 173 (1934). See 13 **Ops. Att’y Gen.** 89, 91 (1869).
19. Gettys, **The Law of Citizenship in the United States** 9 (1934). See 3 Moore, **Digest of International Law** 282 (1906); Van Dyne, **Citizenship** 32 (1904); *Oldtown v. Bangor*, 58 Me. 353 (1870).
20. “It is of interest to note that the first law which provided for United States citizenship *jure sanguinis* specifically provided that children born abroad of citizens of the United States would be considered ‘natural born citizens.’ Subsequent laws omitted the word ‘natural born.’ While there has as yet been no occasion to obtain official opinion or decision on this point, it may be very probably that such opinion would be in harmony with the early law which attributes the status of ‘natural born’ to those persons acquiring United States citizenship *jure sanguinis*.” Gettys, *op. cit. supra* note 19, at 175.  
See Van Dyne, **Citizenship** 32 (1904).
21. “The domicile of the minor child is always that of the father during his life (*Westlake on Priv. Int. Law* 35; 5 Ves. 750, 787), and I think the same rule applies to citizenship....” *Ludlam v. Ludlam*, 26 N. Y. 356, 371 (1863). See *United States v. Rhodes*, 1 Abbott 28 (U. S. 1866). *Inglis v. Sailors’ Snug Harbor*, 3 Pet. 99 (U. S. 1830).
22. 26 N. Y. 356, 364 (1863).
23. *Id.* at 363.
24. *Accord*: *Crane v. Reeder*, 25 Mich. 303 (1872); *Ludlam v. Ludlam*, 26 N. Y. 356 (1863); *Lynch v. Clarke*, 1 Sandf. Ch. 583, 659-60 (N. Y. 1844); 2 Kent, Comm. 50, 53 (6<sup>th</sup> ed. 1848); Webster, *op. cit. supra* note 8, at 127.
25. “I believe it to have been the common law of England that children born abroad of English parents were subjects of the Crown. The statute 25 Edw. III St. 2 appears to have been declaratory of the common law.” *Lynch v. Clarke*, 1 Sandf. Ch. 583, 659 (N. Y. 1844).
26. “The notion that there is any common law principle to naturalize the children born in foreign countries of native-born American father and mother must be discarded.” Binney in 2 **Am. L. Reg.** 199, 203 (1853).

27. The opinion in *Weedin v. Chin Bow*, 274 U. S. 657 (1926), which held that child born in China whose grandfather was an American citizen did not ipso facto become an American citizen, discusses historically *Jus Sanguinis*: "...by the statute of 7 Anne (1708) ch. 5, sec. 3, extended by the statute 4 George II (1731), ch. 21, all children born out of the liegeance of the Crown of England whose fathers were or should be natural-born subjects of the Crown of England, or of Great Britain, at the time of the birth of such children respectively, were deemed natural-born subjects of that kingdom to all intents and purposes whatsoever. That statute was extended by statute of 13 George III (1773), ch. 21, to foreign-born grandchildren of natural-born subjects."
28. At p. 1121.
29. As pointed out in *United States v. Wong Kim Ark*, 169 U. S. 649, 688 (1898): "The Fourteenth Amendment...has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in exercise of the power conferred by the Constitution...."
30. Professor Morse in 66 **Albany L. J.** 99 (1904) has written: "This provision as its terms express is declaratory; it is not the statute that constitutes children of American parentage citizens; it is the fact of American descent, the jus sanguinis, that makes them citizens at the moment of birth—a fact which, for sufficient and convenient reasons, the legislative power of the State recognizes and announces to the world. If there was ambiguity, the rights and privileges of children of American parents dependent upon constitutional guarantees would demand recognition; and constitutional guarantees in favor of such persons might not be restricted or denied by Congress."
31. 1 Stat. 104 (1790); 1 Stat. 415 (1795).
32. 66 **Albany L. J.** 99, 100 (1904).
33. 2 Stat. 155 (1802). This act is very similar in language to the English rule of 7 Anne, c. 5, sec. 3, covering English children born abroad of English subjects.
34. Note his article in 2 **Am. L. Reg.** 193 (1853). The opinion in *United States v. Wong Kim Ark*, 169 U. S. 649, 674-75 (1898) based much of its holding on and article by Mr. Binney: "Here is nothing to countenance the theory that a general rule of citizenship by blood or descent has displaced in this country the fundamental rule of citizenship by birth within its sovereignty.... In the forefront, both the Fourteenth Amendment of the Constitution and of the Civil Rights Act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms."

But Judge Selden in *Ludlam v. Ludlam*, 26 N. Y. 356 (1863) did not accept Mr. Binney's interpretation so readily: "All the cases which the author Binney cites to sustain his position have been above referred to; and after a careful examination of them, I am satisfied that they *do not* satisfy or sustain his conclusion." Judge Selden cites *Collingwood v. Pace*, 1 Vent. 413, 422, with opinion by Lord Hall; and *Rex v. Eaton*, Litt. 23.

35. 10 Stat. 604 (1885). Children born abroad whose fathers were native-born citizens of the United States were under the Act of February 10, 1855, c. 71 citizens of the United States. 13 **Ops. Att'y Gen.** 89, 91 (1869).

A contrary position was taken in **Ops. Exec. Dep't on Expatriation, Naturalization, and Allegiance** 17, 18 (1783): "It is evident from the provision of the act of the tenth of February, 1855,...that it has conferred only a qualified citizenship upon the children of American fathers born abroad without the jurisdiction of the United States, and has denied to them, what pertains to other American citizens, the right of transmitting citizenship to their children, unless they shall have made themselves residents of the United States...."

*Accord, United States Foreign Relations* 1191-92 (1873-4).

36. 34 Stat. 1229 (1907). Similar provisions were also included in the act of 1855, *supra* note 35.

The election on attaining majority is discussed in 15 **Ops. Att'y Gen.** 15 (1875). *See also*, 23 **Am. J. Int'l L.** (Spec. Supp.) 80, 81 (1929); 20 **Proc. Am. Soc'y Int'l L.** 60 (1926); *Dual Nationality and Election*, 30 *Yale L. J.* 545 (1921).

In *Ludlam v. Ludlam*, 26 N. Y. 356 (1863) the foreign born child of an American citizen was subject to double allegiance, but on reaching maturity he had the right to elect one and repudiate the other, and such election was conclusive upon him. *Cf.* *Haaland v. Att'y Gen.*, 42 Supp. 13 (Md. 1941).

37. Van Dyne, **Citizenship** 32, 50 (1904). Illegitimate children born abroad to an American parent do *not* acquire American citizenship. *Guyer v. Smith*, 22 Md. 239 (1864).

38. Van Dyne, **Citizen** 32, 50 (1904). The contrary position is stated in *In re Reid*, 6 F. Supp. 800, 805 (1934): "Where a child was born in Canada and lived there for a considerable time, but claimed American Citizenship of his father, it was a qualified one...", pointing the need for the election before maturity. Additional support is found in the fact that even a native-born citizen who has not attained the age of 21 years cannot renounce allegiance to

the United States [*United States ex rel. Baglivo v. Day*, 28 F. 2d 44 (1928); *Ludlam v. Ludlam*, 26 N. Y. 356 (1863)], thus implying here even a qualified citizenship until maturity. But the argument soon breaks down inasmuch as one born in the country of citizen parents is a “citizen by birth” without qualification either.

39. See note 17 *supra*.

40. 8 U. S. C. A. 601 *et seq.* (1940).

41. Cf. *Schaufus v. Att’y Gen.*, 45 F. Supp. 61 (Md. 1941).

42. Webster, *op. cit. supra* note 8, at 129: “Naturalization signifies the act of adopting a foreigner and clothing him with the rights of a citizen.”

In **Nationality Laws of the United States** (76<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1938) at 3: “Naturalization according to the usual acceptance of the term in the United States undoubtedly means the grant of a new nationality to a natural person *after* birth. (Cooley, **Principles of Constit. Law** 88; *Osborn v. Bank of U. S.*, 9 Wheat. 827; 9 **Op. Atty. Gen.** 359).”

43. *U. S. v. Fisher*, 48 F. Supp. 7, 8 (S. D. Fla. 1942). *Accord*, *Baumgartner v. United States*, 322 U. S. 665 (1944); *Luria v. United States*, 231 U. S. 9, 22 (1913); *Elk v. Wilkins*, 112 U. S. 94, 101 (1884); *United States v. Fischer*, 48 F. Supp. 7 (S. D. Fla. 1942).

In a dissenting opinion in *Knauer v. United States*, 328 U. S. 645, 677 (1945) Mr. Justice Rutledge stated: “I do not find warrant in the Constitution for believing that it contemplates two classes of citizens, excepting only two purposes. One is to provide how citizenship shall be acquired, Const. Art. I, sec. 8; Amend. XIV, sec. 1, the other to determine eligibility for the presidency, Const. Art. II, sec. 1. The latter is the only instance in which the chapter expressly excludes the naturalized citizen from any right or privilege....”

44. Webster, *op. cit. supra* note 8.

45. See note 40 *supra*. Note also that section 501 defines the term “national” as either a citizen of the United States, or “a person who, though not a citizen of the United States, owes permanent allegiance to the United States. It does not include the alien.” Hence, reaffirmance of the “allegiance” doctrine here testifies to the derivation from *Jus Sanguinis* at common law.

46. The Act of 1802 is not being overlooked here as providing for *naturalization* of “foreign born children of American citizens coming within the definition prescribed by Congress.” But as explained in *Kansas, Citizenship of the United States of America* 283 (1948): At the time of the passing of the Act of April 14, 1802, the powers of authority of the general government of the United States did not extend to individuals but were limited to the states.

A child born abroad, *one* of whose parents was a citizen of the United States acquired American Citizenship *at birth*. 38 **Ops. Att’y Gen.** 10 (1934)

47. Wise, **A Treatise on American Citizenship** 19 (1906).

48. See generally 14 C. J. S. 1135, and note *United States ex rel. Guest v. Perkins*, 17 F. Supp. 177 (Dist. Ct. D. C. 1936) (where the child born in England of an American mother who had married an Englishman and who intended to reside in England permanently was not a natural born citizen.)

In a rather lengthy opinion in *United States v. Wong Kim Ark*, 169 U. S. 649, 665 (1898) Mr. Justice Gray narrated: Mr. Binney, in the second edition of a paper on the alienigenae of the United States printed in pamphlet at Philadelphia, with a preface bearing his signature and the date of December 1, 1853, said: ‘The common law principle of allegiance was the law of all the States at the time of the Revolution, and at the adoption of the Constitution; and by that principle the citizens of the United States are with the exception before mentioned (namely, foreign born children of citizens under statutes to be presently referred to) such only as are either born or made so, born within the limits and under the jurisdiction of the United States, or naturalized by the authority of the law, either in one of the States before the Constitution, or since that time by virtue of an act of Congress.’ p. 20. ‘The right of citizenship never descends in the legal sense, either by common law or under the common naturalization acts. It is incident to birth in the country, or it is given personally by statute. The child of an alien if born in the country is as much a citizen as the natural born child of a citizen and by operation of the same principle.’ p. 22, note. This paper without Mr. Binney’s name and with the note in a less complete form and not containing the passage last cited was published (perhaps from the first edition) in the *American Law Register* for February 1854, 2 *Amer. Law Reg.* 193, 303, 204.”

49. See note 20 *supra*. *Accord*, *Slaughterhouse Cases*, 16 Wall. 36 (U. S. 1873).

50. *In re Reid*, 6 F. Supp. 800 (D. Ore. 1934); *Wolfe v. Archibald*, 14 Fed. 369 (C. D. Minn. 1882).

51. 169 U. S. 649 (1898).

52. *Ibid. Accord*, *In re Bolter*, 66 F. Supp. 566 (S. D. Cal. 1946).

53. *United States v. Wong Kim Ark*, 169 U. S. 649, 702 (1898).

54. 17 F. Supp. 177, 179 (D. D. C. 1936).

55. 21 Wall. 162, 166-68 (U. S. 1874).

56. Referred to in *Weedin v. Chin Bow*, 274 U. S. 657 (1926) wherein a child born abroad of citizen parents who never resided in the United States did not become a citizen.

57. 79 Vt. 504, 65 A. 657 (1905).

58. 50 Fed. 310, 312 (C. C. D. Iowa 1883).
59. 14 Fed. 369 (C. C. D. Minn. 1882).
60. 257 Fed. 110, 116 (S. D. N. Y. 1919).
61. See note 6 *supra*.
62. Professor Van Dyne is the author of *Van Dyne on Naturalization* (1907); *Our Foreign Service* (1909); *The ABC of American Diplomacy*; etc. etc. Born in 1861, he died in 1915.
63. Professor Gettys is also author of *The Administration of Canadian Conditional Grants* (1938).
64. He is professor of political science at Johns Hopkins University, and Editor of the American Political Science Review. The range of his prolific writing achievements is too great to review here, but see his *The Constitutional History of the United States*, Vol. I, 354 (2d ed. 1929).
65. 34 Stat. 1229 (1907).
66. See note 27 *supra*.