RESPONSE

"NATURAL BORN CITIZEN": A RESPONSE TO THOMAS H. LEE

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In "Natural Born Citizen," *Thomas H. Lee provides a challenging and, in his own words, "novel interpretation" of the original meaning of that constitutional term. Professor Lee analyzes a wide range of sources including American constitutional history, Anglo-American legal treatises, continental natural law theory, and four centuries of English and British statutes and political and economic history. He concludes that the original meaning of the term at the adoption of the Constitution includes foreign-born children of "U.S. citizen fathers who had resided in the United States but went abroad temporarily for a private purpose," following the natural law principle of* jus sanguinis *(right of blood). He considers the analysis to be important in part because it shows "how to do originalism."*

This Response disputes Lee's conclusion and argues that he overlooks or misinterprets important authorities including writings of the Founders, legislative history from the First Congress, the 1608 English decision in Calvin's Case*, relevant portions of Blackstone's* Commentaries*, and the English and British statutes and cases interpreting them. It suggests that* "Natural Born Citizen" *represents a constructive rather than an originalist interpretation of the Constitution. Finally, it suggests that Lee's conclusion implies significant additional rights to birthright citizenship and judicial power to interpret natural law in the constitutional context.* "Natural Born Citizen" *may not be*

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originalism, and it may not restrain judicial power as some intend originalism to do, but it is certainly a bold and challenging interpretation of Anglo-American legal history that merits close attention.

TABLE OF CONTENTS

INTRODUCTION

In *"Natural Born Citizen,"* Professor Thomas H. Lee provides a challenging and, in his own words, "novel interpretation" of the original meaning of that constitutional term.[1] Lee analyzes a wide range of sources including American constitutional history, Anglo-American legal treatises, continental natural law theory, and four centuries of English and British statutes and political and economic history. He concludes that the original meaning of the term at the adoption of the Constitution includes foreign-born children of "U.S. citizen fathers who had resided in the United States but went abroad temporarily for a private purpose, like merchants."[2] He considers the analysis to be important in part because it shows "how to do originalism."[3]

This Response disputes Lee's conclusion and argues that he overlooks or misinterprets important authorities including writings of the Founders, legislative history from the First Congress, the 1608 English decision in *Calvin's Case*,[4] relevant portions of Blackstone's *Commentaries*, and the English and British statutes and cases interpreting them. It concludes by

1. *See* Thomas H. Lee, *"Natural Born Citizen,"* 67 AM. U. L. REV. 327, 327 (2017); *see also* U.S. CONST. art. II, § 1, cl. 5.
2. Lee, *supra* note 1, at 335.
3. *See id.* at 328–30.
4. Calvin v. Smith (Calvin's Case), 77 Eng. Rep. 377 (K.B. 1608).

questioning whether *"Natural Born Citizen"* reflects originalism and by speculating on the constitutional impact of Lee's analysis.

I. THE TRADITIONAL DEFINITION OF "NATURAL BORN"

The Supreme Court has long held that the English common law provides the constitutional definition of "natural born."[5] The traditional formulation of the common law rule is that of *jus soli* (right of soil): anyone born within the dominions and allegiance of the monarch was the monarch's natural born subject.[6] The definition excluded two classes of children born within the dominions because they were not born under the monarch's allegiance: those of foreign ambassadors and those of hostile foreign occupying forces.[7]

The traditional formulation of the rule included only one group of children born out of the monarch's dominions: children of English ambassadors.[8] Foreign-born children of serving soldiers were not natural born subjects,[9] nor were those of parents in other crown service.[10] Consistent with this traditional understanding, both the U.K.

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5. *See, e.g.*, Weedin v. Chin Bow, 274 U.S. 657, 660 (1927) (determining that common law followed *jus soli*); United States v. Wong Kim Ark, 169 U.S. 649, 654, 676 (1898) (holding that the Fourteenth Amendment is declaratory of the common law and grants birthright citizenship to all persons born in the United States regardless of race or national origin other than those born to foreign diplomats, to hostile foreign occupying forces, or under Native American allegiance); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 167–68 (1874); Lee, *supra* note 1, at 331 n.10.

6. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES 354, 357 (1st ed. 1765). *Cf.* Godfrey v. Dixon (1618), 79 Eng. Rep. 462, 463; Cro. Jac. 539 ("[T]rue it is there was a disability, but not in the blood, *viz.* his blood was not the cause of his disability, but the place of his birth; for the law respects not the blood, where there is not any allegiance . . . .").

7. *See, e.g.*, *Wong Kim Ark*, 169 U.S. at 657–58; BRITISH NATIONALITY: SUMMARY § 1.3.1 (2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267913/britnatsummary.pdf (last visited June 18, 2018). The United Kingdom government's website does not identify the author of the summary, but the U.K. Home Office confirmed to the author that the summary reflects its understanding of the law.

8. *See, e.g.*, 12 HL Jour. (1666) 86 (London), http://www.british-history.ac.uk/lords-jrnl/vol12/pp86-87; BLACKSTONE, *supra* note 6, at 361; LAURIE FRANSMAN, FRANSMAN'S BRITISH NATIONALITY LAW 131 (3d ed. 2011). Some consider British ships to be British territory for this purpose and all children of the monarch to be natural born. *See, e.g.*, FRANSMAN, *supra*.

9. *See, e.g.*, De Geer v. Stone (1882) 22 Ch. D. 243, 253 (rejecting arguments that the ambassador rule applied to serving soldiers and that British derivative nationality statutes were declaratory of the common law); FRANSMAN, *supra* note 8, at 132–33.

10. *See, e.g.*, FRANSMAN, *supra* note 8, at 132. Consequently, Parliament naturalized the foreign-born son of John Dymock, Gentleman Usher of the Chamber for Henry VIII, who had gone beyond sea "about the Kyng's affayres [sic]." *See* An Act for the Making Free and to Putt in the Nature of Mere Englisshmen Certayne Children Begotten and Born Byyonde the Sea, 1541, 33 Hen. 8 c. 25 (Eng. & Wales),

Home Office and the leading modern British nationality treatise deny that foreign-born children of English fathers who had gone abroad for private purposes were natural born subjects at common law.[11]

The Supreme Court has recognized that the traditional formulation of *jus soli* is the common law rule in both England and the United States, finding that:

> at common law in England and the United States, the rule with respect to nationality was that of the *jus soli*,—that birth within the limits of the jurisdiction of the Crown, and of the United States, as the successor of the Crown, fixed nationality, and that there could be no change in this rule of law except by statute . . . .[12]

The Court has applied the English common law right of soil to persons born in the colonies and in the independent United States before the adoption of the Constitution.[13]

The traditional rule of *jus soli* was not universally followed in Britain, however. Practice sometimes differed, treating as natural-born (a) children of parents in any crown service and (b) children born to any British parents in British protected territories (a territorial distinction that developed after the adoption of the Constitution).[14] A minority view held that all foreign-born children of English fathers were natural born subjects at common law.[15] And the House of Lords concluded in 1763 that it was simply "impossible to state with precision, how the common law stood as to alienage, before" Parliament enacted the most important statute on which Lee relies.[16] This could make room for Lee to establish his novel interpretation.

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https://hdl.handle.net/2027/mdp.39015063784675 (naturalizing foreign-born children of two private subjects who, like Dymock, had alien wives).

11. *See* FRANSMAN, *supra* note 8, at 131; *British Nationality: Summary*, *supra* note 7, § 1.4.1.

12. Weedin v. Chin Bow, 274 U.S. 657, 660 (1927); *cf. Wong Kim Ark*, 169 U.S. at 681–82 (stating that the Constitution departs from the common law rule only as to "children of members of the Indian tribes").

13. *See, e.g.*, Inglis v. Trustees of Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99, 120–21, 126 (1830); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 116, 119–20 (1804).

14. *See* FRANSMAN, *supra* note 8, at 131–32, 131 n.7. Whether practice diverged prior to the adoption of the Constitution and, if so, what impact that practice might have on the constitutional definition of "natural born" are open questions.

15. *See, e.g.*, Leslies v. Grant (1763) 2 Pat. 68, 78 (Lord Hardwicke for himself).

16. *See id.* at 76 (Pratt, C.J. for the court) (citing A Statute for Those Who Are Born in Parts Beyond the Sea 1350, 25 Edw. 3 stat. 2 (Eng.)); Lee, *supra* note 1, at 368. Some cite the statute as "stat. 1," and others as "stat. 2." This Response uses "stat. 1" following Lee's article except when quoting sources that use "stat. 2."

II. PROFESSOR LEE'S ANALYSIS

Professor Lee argues that a series of statutes from 1350 to 1730 granting benefits to foreign-born children of English and British subjects incorporated the natural law doctrine of *jus sanguinis* (right of blood) into the common law, that treatises by Blackstone and Kent recognized this result, and that the use of the word "natural" in the constitutional term "natural born Citizen," reflects this natural law right as described by the continental legal theorist Emer de Vattel.[17]

"[S]tarting in 1350, Parliament passed statutes bestowing subject status upon the foreign-born children of English subjects, thereby invoking the . . . natural law birthright principle, *jus sanguinis* . . . ."[18] The statutes were the following: the 1350 *De natis ultra mare* (the "Act of Edw. III");[19] two late seventeenth-century statutes naturalizing foreign-born children after the Restoration[20] and a subsequent war with France;[21] and section 3 of the Foreign Protestants Naturalization Act, 1708 (the "Act of Ann.") as explained by the British Nationality Act, 1730 (the "Act of Geo. II").[22] Consequently, by the

> eighteenth-century mercantilist phase . . . Parliament had long extended "natural born" status to the foreign-born children of British subjects in government service and of British *fathers* generally. Some of the most settled of these statutes, by virtue of their ancient and uncontroversial status, had become part of the common law tradition, not departures from it.[23]

Chief among these "ancient and uncontroversial" statutes was the 1350 Act of Edw. III, which was "monumental," "great and famous,"

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17. EMER DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 1 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1797).

18. Lee, *supra* note 1, at 331.

19. A Statute for Those Who Are Born in Parts Beyond Sea ("*De natis ultra mare*") 1350, 25 Edw. 3 stat. 1 (Eng.); Lee, *supra* note 1, at 331.

20. *See* An Act for the Naturalizing of Children of his Majestyes English Subjects Borne in Forreigne Countryes Dureing the Late Troubles 1677, 29 Car. 2 c. 6 (Eng.); Lee, *supra* note 1, at 370.

21. *See* An Act to Naturalize the Children of such Officers and Souldiers & Others the Natural Borne Subjects of This Realme Who Have Been Borne Abroad During the Warr the Parents of Such Children Haveing Been in the Service of This Government 1698, 9 Will. 3 c. 20 (Eng.); Lee, *supra* note 1, at 372.

22. An Act for Naturalizing Foreign Protestants 1708, 7 Ann. c. 5, § 3 (Gr. Brit.), *repealed except as to section 3 by* An Act to repeal the Act of the Seventh Year of Her Majesties Reign Intituled An Act for Naturalizing Foreign Protestants 1711, 10 Ann. c. 9 (Gr. Brit.); The British Nationality Act 1730, 4 Geo. 2, c. 21 (Gr. Brit.); Lee, *supra* note 1, at 377–78.

23. Lee, *supra* note 1, at 331–32 (footnote omitted).

and a "towering live oak" that "cast its centuries-old shadow over the enactments of all subsequent Parliaments."[24]

Blackstone recognized "that the foreign-born children of an English father were unconditionally natural born subjects"[25] in his *Commentaries*, explaining that "by several more modern statutes . . . 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" fathers were tainted by specified acts.[26]

In the United States, Chancellor Kent agreed with Blackstone's interpretation in his own American *Commentaries*,[27] although other American treatise writers did not—they "were not as astute as Chancellor Kent in their assessment of English common law and Blackstone's treatise."[28] In addition, Professor Lee argues that the natural law work of Vattel "rivaled Blackstone as an essential reference for Americans on defining citizenship," and therefore the constitutional definition of "natural born" incorporates his recognition of *jus sanguinis* as a natural law right.[29]

The "vintage and continuity" of the English and British statutes and their subsequent validation by courts and treatises show them to be constitutive of the common law.[30] Parliament only enacted them to declare the common law because it feared that courts would not enforce the natural law right of blood, particularly after "Henry VIII's split from Rome and . . . resultant paranoia of foreign Catholic intrigues."[31] The establishment of *jus sanguinis* differed from that of *jus soli* only because the 1608 English decision in *Calvin's Case* established *jus soli* as English common law after the union of the crowns of England and Scotland in the person of King James.[32] Had Parliament instead enacted a statute granting Scots property and judicial rights in England after the union of the crowns then "*jus soli* and *jus sanguinis* would have stood on the same footing in England, both having been implemented by statutes."[33] Lacking such an iconic case implementing the right of blood, Parliament had to declare that right by statutes.[34]

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24. *Id.* at 332, 368, 374–75, 382.
25. *Id.* at 383.
26. BLACKSTONE, *supra* note 6, at 361 (footnote omitted); Lee, *supra* note 1, at 383.
27. *See* Lee, *supra* note 1, at 384–85.
28. *Id.* at 386.
29. *See id.* at 333. Blackstone and Vattel were the first two works that the Senate purchased. *See id.* at 333 n.20.
30. *See id.* at 364.
31. *Id.* at 367 (footnote omitted).
32. *See id.* at 365–66.
33. *Id.* at 366.
34. *See id.* at 367. The common and natural law right of blood was, however, sexist;

In contrast to the declaratory statutes described above, several eighteenth-century British statutes deemed foreign-born persons to be natural born based on other grounds like religion, military or marine service, and grandparentage.[35] These followed Britain's shift toward its empire phase, departed from natural law, typically required loyalty oaths or other conditions, and (except for the statute based on grandparentage) included provisions consistent with the Act of Settlement disabling their beneficiaries from holding office or receiving crown largesse (which the Act of Settlement did not apply to children of English parents).[36] Therefore, they were not incorporated in the common law.[37]

A popular competing constitutional theory that anyone born a citizen is a natural born citizen is incorrect because it paradoxically asserts that persons naturalized at birth by positive law are natural born.[38] That theory is inconsistent with the incorporation of natural law in the definition of "natural born."[39] It also violates the doctrine of separation of powers, which forbids Congress the power to define eligibility to the presidency.[40]

III. OBJECTIONS TO PROFESSOR LEE'S STATUTORY ANALYSIS

A. Calvin's Case

Professor Lee mischaracterizes the import of *Calvin's Case*.[41] England developed the common law rule over centuries,[42] based in part on declaratory statutory law[43] and in part by implication from positive statutory law.[44] Even before the decision in the case all agreed that place of birth governed for those born within the king's kingdom.[45] The distinguishing feature of *Calvin's Case* was that

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it only applied to children of subject fathers. *See id.* at 404.

35. *See id.* at 375–76 (noting that the rise of a global economy and mercantilism spurred a movement toward more open statutes that allowed for an increase in an empire's subjects and therefore power).

36. *See id.* at 375–76, 379.

37. *See id.* at 375–76.

38. *See id.* at 334.

39. *See id.*

40. *See id.* at 342.

41. Calvin v. Smith (Calvin's Case), 77 Eng. Rep. 377 (K.B. 1608).

42. *See, e.g.*, KEECHANG KIM, ALIENS IN MEDIEVAL LAW: THE ORIGINS OF MODERN CITIZENSHIP 1–9 (2000).

43. *See* 42 Edw. 3 c. 10 (1368) (referencing the common law).

44. *See* An Act for Denizens to pay Strangers' Customs 1530, 22 Hen. 8 c. 8, pmbl. (Eng.) (distinguishing aliens, who are "born out of this realm," from "natural born subjects," who are "born within this realm").

45. *See e.g.*, *Calvin's Case*, 2 St. Tr. 560, 577 (K.B. 1608) (argument of Lord Bacon)

Scotland remained a separate kingdom from England after James succeeded Elizabeth. The union of the crowns but not the kingdoms raised the discrete question whether the right of soil applied reciprocally in the monarch's independent kingdoms.[46] Were Scottish *post-nati* natural born subjects of James VI, king of the Kingdom of Scotland, and therefore aliens in James I's Kingdom of England? Or were they natural born subjects of James the human being and therefore natural born in all of his dominions? In the case report's metaphysical terms, did the *post-nati* owe allegiance to the king in his politic or his natural body?[47]

The case was iconic for its holding that subjects owed allegiance to the king in his natural body, and therefore the right of soil applied reciprocally in his politically independent kingdoms. It did not, however, establish the right of soil from birth within England. And the specific holding is irrelevant for Lee's purposes because the United States is not a monarchy or a collection of politically independent nations. Americans owe allegiance to the United States, not to anyone's natural body, and the United States is a single "great Republic . . . composed of States and territories."[48]

B. Blackstone

Blackstone contradicts Lee's interpretation. Blackstone explains that the Act of Edw. III granted children inheritance rights,[49] not that it bestowed subject status on them.[50] He further explains that the post-Restoration statute and the Act of Ann. naturalized children,[51] not that they declared the common law.[52]

Finally, Blackstone's statement that "by several more modern statutes"

(asserting that even the opposing party accepted that the rule would apply to Scots were the kingdoms united).

46. A parliamentary conference was convened in 1606 "not to consult of a Law to be made, but to declare the Law already planted" regarding the issue. *See id.* at 562–63. For the opponents, Sir Edwin Sandes acknowledged that the birthright from common subjection to the king existed but argued that it "is locally circumscribed to the places where they are brought forth" and therefore could not make those born in the Kingdom of Scotland natural born in the Kingdom of England. *See id.* at 563–64. Proponents argued that the rule extended to birth in any place under the subjection of the king, even in a different kingdom. *See id.* at 569.

47. *See Calvin's Case*, 77 Eng. Rep. at 388–89.

48. *See* Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.).

49. *See* BLACKSTONE, *supra* note 6, at 361.

50. *See* Lee, *supra* note 1, at 331.

51. *See* BLACKSTONE, *supra* note 6, at 361, 363.

52. *See* Lee, *supra* note 1, at 364.

the children "are now natural-born subjects themselves . . . without any exception" unless excluded by paternal taint did not recognize a common law right of blood.[53] The statement addressed a different question: whether the Acts of Ann. and Geo. II made the children natural born subjects by positive law.[54] Blackstone concluded in the first edition of the *Commentaries* that they did.[55] However, he later recognized that he was wrong. In the 1775 seventh edition, Blackstone revised the statement to add "deemed to be" and delete "without any exception," thus recognizing that the statutes merely deemed the children to be natural born by a legal fiction subject to exceptions.[56]

Similarly, the renowned British lawyer Francis Plowden initially wrote that the Act of Edw. III made children "in fact and law . . . true native subjects" and that the Acts of Ann. and Geo. II made persons "*natural born subjects* by the statute law" just as others were "*natural born subjects* by the common law."[57] However, Plowden also recognized later that he was wrong. In 1785 he wrote that the statutes did not make the children natural born subjects; rather, there remained a "relict of alienage in them" despite the application of the statutes.[58]

C. Common Law and Parliamentary Acts

Two important authorities contradict Lee's interpretation: the 1763 House of Lords decision in *Leslies v. Grant*[59] and the British Nationality Act, 1772 (the "Act of Geo. III").[60] In *Leslies*, the court examined the common law and the statutes from 1350 onward to determine the right

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53. *See* BLACKSTONE, *supra* note 6, at 383.

54. For his reference to the "more modern statutes" Blackstone cites exclusively the Acts of Anne and George II. *See* BLACKSTONE, *supra* note 6, at 361 n.b.

55. *See id.* at 361.

56. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES 373 n.b (7th ed. 1775) [hereinafter BLACKSTONE 7TH] (including for the first time "13 Geo. III. c. 21" among the more modern statutes). This was the first edition that reflected Parliament's 1773 explanation of the effects of the Acts of Ann. and Geo. II, discussed *infra* at note 67 and accompanying text. For a discussion of treatises following Blackstone's revised opinion see John Vlahoplus, *Toward Natural Born Derivative Citizenship*, 7 BRIT. J. AM. LEGAL STUD. 71, 109 n.220 (2018).

57. *See* FRANCIS PLOWDEN, AN INVESTIGATION OF THE NATIVE RIGHTS OF BRITISH SUBJECTS 74, 161–62 (1784). Plowden, who left the Jesuit novitiate after the Society's suppression, became a member of the bar and received an honorary Doctorate of Laws from Oxford University despite institutional prejudice against Catholics. *See* 12 CATHOLIC ENCYCLOPEDIA 168 (Charles G. Herbermann et al. eds. 1911).

58. *See* FRANCIS PLOWDEN, A SUPPLEMENT TO THE INVESTIGATION OF THE NATIVE RIGHTS OF BRITISH SUBJECTS 134 (1785).

59. Leslies v. Grant (1763) 2 Pat. 68.

60. *See* The British Nationality Act 1772, 13 Geo. 3 c. 21 (Eng.).

of a foreign-born person to inherit in Britain. The claimant's grandfather, Earnest, was a natural born subject.[61] The claimant's father, Charles, was born abroad.[62] The claimant, Anthony, was born abroad after the enactment of the Act of Ann.[63]

Had Charles been a natural born subject at common law because his father was natural born, then Anthony would have been entitled to inherit either at common law (if it operated successively down the paternal line) or under the Acts of Ann. and Geo. II (as the issue of a natural born father). Alternatively, if the statutes operated to naturalize successive generations down the paternal line then Anthony would have been entitled to inherit under statutory law.[64] After considering radically different characterizations of the statutes and common law and recognizing their inherent uncertainties, the judges rejected all of Anthony's arguments and found him to be an alien.[65] In particular, the court found that the statutes merely made persons natural born by a fiction, with the consequence that they only applied to the immediate issue of a natural born father; i.e., they only applied to children of a parent who was "a natural born subject, in fact and not by fiction."[66]

Parliament agreed with this interpretation, explaining in 1773 that the Acts of Ann. and Geo. II merely entitled their beneficiaries to the rights and privileges of natural born subjects.[67] Consequently, the beneficiaries were not natural born subjects for purposes of those acts. No law naturalized their foreign-born children.[68] In addition, the

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61. *See Leslies*, 2 Pat. at 77 (Pratt, C.J.) (identifying Anthony as the grandson of a natural born subject).

62. *See id.* at 69 (syllabus).

63. *See id.* at 69 (syllabus) (stating that Anthony was born abroad); 3 COLONEL LESLIE, K.H., HISTORICAL RECORDS OF THE FAMILY OF LESLIE FROM 1067 TO 1868–9, at 267 (1869).

64. Charles was born before the enactment of the Act of Ann., but the parties and judges considered this alternative nonetheless. *See Leslies*, 2 Pat. at 74 n.1, 74–76.

65. *See Leslies*, 2 Pat. at 77 (stating that the statute does not extend to grandchildren).

66. *See id.*

67. *See* The British Nationality Act 1772, 13 Geo. 3 c. 21, pmbl., § 1 (Gr. Brit.) The British Nationality Act of 1772 was enacted in 1773 but dated 1772 because the session of Parliament began that year. In repealing other parts of the Act of Ann. Parliament recognized that foreign-born children of natural born subjects continued to be born out of the queen's allegiance even after the enactment of section 3 of that act. *See* An Act to Repeal the Act of the Seventh Year of Her Majesties Reign Intitled An Act for Naturalizing Foreign Protestants 1711, 10 Ann. ch. 5 (repealing all but the clause "by which the children of all natural-born subjects, born out of the allegiance of her Majesty, her heirs and successors, are to be deemed, adjudged, and taken to be natural-born subjects").

68. *See* The British Nationality Act 1772, 13 Geo. 3 c. 21, pmbl. (applying, for the first time, "farther than to the Children born out of the Ligeance of His Majesty, whose Fathers were natural born Subjects of the Crown").

beneficiaries were unlikely to be British for purposes of the Act of Settlement. Their foreign-born children would not be able to hold office or receive crown largesse even if they were naturalized absent an exemption in their naturalization acts.[69] Blackstone conformed his *Commentaries* to Parliament's explanation two years later in the seventh edition of 1775.[70] The Act of Geo. III naturalized some second generation foreign-born children, and Blackstone did not distinguish them from the first generation born abroad; contrary to Lee, Blackstone described both generations together as being deemed natural born.[71] Likewise, a 1789 book review chided an election law text for choosing brevity over clarity in stating a broad rule that aliens cannot vote without explaining that those within the Acts of Edw. III, Ann., Geo. II and Geo. III could.[72]

Other factors militate against Lee's interpretation. The statutes that Lee relies on did not apply to children of British fathers generally, as he asserts.[73] They only applied to children of fathers who were natural born subjects in fact. They did not apply to children of naturalized fathers—not even children of fathers whom those very acts had naturalized.[74] Both of the seventeenth-century statutes that Lee relies on required taking loyalty oaths and the sacrament like later statutes that he considers to be positive law.[75]

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69. The Act naturalized limited classes of children of those fathers, and, in order to encourage them to move to Britain with their foreign wealth, it included a specific provision exempting them from the disabilities. *See id.* pmbl. (encouragement and wealth); *id.* § 1 (exemption); GREAT BRITAIN, REPORT FROM THE SELECT COMMITTEE ON THE LAWS AFFECTING ALIENS: TOGETHER WITH MINUTES OF EVIDENCE AND INDEX 13 (1843) (including the exemption to the Act of Settlement).

70. *See supra* note 51 and accompanying text.

71. *See* BLACKSTONE 7TH, *supra* note 56, at 373 n.b (citing the Acts of Ann., Geo. II and Geo. III together as the more modern statutes that deem children and grandchildren to be natural born).

72. *See* 15 EUR. MAG. & LONDON REV. 287, 288 (Apr. 1789), https://hdl.handle.net/2027/njp.32101065086199 (anonymous review of John Simeon, Esq., A Treatise on the Law of Elections, in all its Branches) (noting how the acts entitle aliens to the rights of natural born subjects).

73. *See, e.g.*, Lee, *supra* note 1, at 331–32 ("Parliament had long extended 'natural born' status to the foreign-born children of . . . British *fathers* generally.").

74. *See, e.g.*, Leslies v. Grant (1763) 2 Pat. 68, 77; FRANSMAN, *supra* note 11, at 132.

75. *See* An Act for the Naturalizing of Children of his Majestyes English Subjects Borne in Forreigne Countryes Dureing the Late Troubles 1677, 29 Car. 2 c. 6, § 2 (Eng.) (excepting only specifically named children); An Act to Naturalize the Children of such Officers and Souldiers & Others the Natural Borne Subjects of This Realme Who Have Been Borne Abroad During the Warr the Parents of Such Children Haveing Been in the Service of This Government 1698, 9 Will. 3 c. 20, § 3, 4 (Eng.); An Act for Naturalizing Such Foreign Protestants, and Others Therein Mentioned, As

In addition, natural born subjects owed indelible allegiance wherever they were in the world, which Britain vigorously enforced against even those who had been naturalized in foreign countries.[76] Yet an 1869 royal commission that examined the effects of the Acts of Edw. III, Ann., Geo. II, and Geo. III reported that:

> so far as we are aware, no attempt has ever been made on the part of the British Government, (unless in Eastern countries where special jurisdiction is conceded by Treaty), to enforce claims upon, or to assert rights in respect of, persons born abroad as against the country of their birth whilst they were resident therein, and when by its law they were invested with its nationality.[77]

Natural allegiance from place of birth was dominant. Statutory allegiance to Britain under those acts was subordinate, if it existed at all.[78]

Moreover, the three main statutes that Lee relies on were far from uncontroversial. Case law interpreting the Act of Edw. III differed so wildly that the Attorney General for England and Wales concluded in 1763 "that there never was a statute of so doubtful a construction."[79] Subjects owed allegiance to the king, not the kingdom,[80] yet the Act of Edw. III referred to the "Ligeance of *England*"[81] and the Act of Ann. to "natural born Subjects

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Are Settled or Shall Settle, in Any of His Majesty's Colonies in America 1740, 13 Geo. 2 c. 7, §§ 1 , 2 (oaths and sacrament with Jewish and Quaker exceptions).

76. *See, e.g.*, THE RIGHT AND PRACTICE OF IMPRESSMENT, AS CONCERNING GREAT BRITAIN AND AMERICA, CONSIDERED 5, 17–18 (1814).

77. GREAT BRITAIN, REPORT OF THE ROYAL COMMISSIONERS FOR INQUIRING INTO THE LAWS OF NATURALIZATION AND ALLEGIANCE: TOGETHER WITH AN APPENDIX CONTAINING AN ACCOUNT OF BRITISH AND FOREIGN LAWS, AND OF THE DIPLOMATIC CORRESPONDENCE WHICH HAS PASSED ON THE SUBJECT, REPORTS FROM FOREIGN STATES, AND OTHER PAPERS vii–viii (1869), https://archive.org/details/reportofroyalcom69grea.

78. The royal commission declined to take a position on the question whether the four acts imposed involuntary obligations of allegiance. *See id.* at viii. It appears that most of those who considered the issue concluded that they did not. *See, e.g.*, Dundas v. Dundas (1839) 12 Scot. Jur. 165, 171 (Moncreiff, J.) (stating that "neither the Queen nor Parliament can command the allegiance of a man who was *born the subject of another state*"; one could not be guilty of treason for bearing arms against Britain in defense of his native land merely because "he *might*, if he had chosen, have enjoyed the privileges of a natural-born British subject" under the acts); 190 Great Britain, Hansard's Parliamentary Debates 2006 (1868), https://hdl.handle.net/2027/osu.32435069737625 (Sir Roundell Palmer) (stating that the acts confer benefits but do not impose burdens absent consent; to construe them to make persons "in every respect" natural born is "absurd"). Two other Members of Parliament agreed with Palmer; one thought that doubts existed; and one thought that the Acts of Ann. and Geo. II imposed allegiance, but the Act of Geo. III did not. *See id.* at 1984–2005.

79. *Leslies*, 2 Pat. at 74 n.1. For examples of the inconsistent interpretations see Vlahoplus, *supra* note 56, at 90.

80. *See, e.g.*, Calvin v. Smith (Calvin's Case), 77 Eng. Rep. 377, 389 (K.B. 1608).

81. A Statute for Those Who Are Born in Parts Beyond Sea ("*De natis ultra mare*")

of this Kingdom,"[82] raising interpretive problems such as the question whether the Act of Ann. applied to children of Scottish fathers.[83]

The Act of Geo. II explained that the Act of Ann. applied to the child of a father who was a natural born subject at the time of the child's birth (excluding children of tainted fathers).[84] One interpretation of this temporal condition was that Parliament intended it to prevent subsequent legitimation from bringing a non-marital child within the Act of Ann.—i.e., to prevent parents' later marriage from imparting "paternity as well as legitimacy" and thereby retroactively giving a child who was *nullius filius* at birth a British father and statutory nationality.[85] An alternate, and more likely correct, interpretation is that the exclusion codified the reasoning of the 1730 House of Lords decision in the case of Horan and Arcedeckne,[86] which held that a defeated Jacobite rebel who had emigrated to France had lost his subject status, and consequently his foreign-born child could not benefit from the Act of Ann.[87] The statutory exceptions to the exclusion that Lee notes[88] therefore retroactively naturalized children whose fathers were not even subjects at their births. Moreover, the exceptions did not apply equally to children of all classes of otherwise excluded fathers.[89]

1350, 25 Edw. 3 stat. 1 (Eng.).

82. An Act for Naturalizing Foreign Protestants 1708, 7 Ann. c. 5, § 3 (Gr. Brit.), *repealed except as to section 3 by* An Act to repeal the Act of the Seventh Year of Her Majesties Reign Intituled An Act for Naturalizing Foreign Protestants 1711, 10 Ann. c. 9 (Gr. Brit.).

83. *See, e.g.*, *Leslies*, 2 Pat. at 76 (noting that the construction of the Act of Edw. III is "out of the ligeance of the realm, and not out of the faith and ligeance of the king. By the law of England these two cases are distinct."); *see also* CLIVE PARRY, BRITISH NATIONALITY LAW AND THE HISTORY OF NATURALISATION 75–76 (Milan, 1954) (children of Scots).

84. The British Nationality Act 1730, 4 Geo. 2 c. 21, § 3 (Gr. Brit.).

85. *See* Shedden v. Patrick (1854) 149 Rev. Rep. 55, 73–74 (Lord Chancellor Cranworth); *id.* at 81 (Lord Brougham).

86. Plowden summarizes the facts of the case and quotes the opinion of P. Yorke and C. Talbot in PLOWDEN, *supra* note 58, at 47–50, which spells "Arcedeckne" without the "k". The author has not found an officially published opinion. For abbreviated reports of the proceedings in the case, which Horan and his co-parties won, see 23 GREAT BRITAIN, JOURNALS OF THE HOUSE OF LORDS, BEGINNING ANNO DECIMO-TERTIO GEORGII REGIS 310, 380, 454, 456, 497, 513, 553, 555, 560–63 (London, H.M. Stationary Office 1726-31).

87. *See* PLOWDEN, *supra* note 58, at 47–49, 54 (involving emigration permitted by the Articles of Limerick).

88. *See* Lee, *supra* note 1, at 378 n.282, 399 n.372.

89. *See* The British Nationality Act 1730, 4 Geo. 2 c. 21, § 3 (Gr. Brit.) ("[O]ther than and excepting always out of this Proviso all Children of such Persons, who went out of *Ireland* in pursuance of the Articles of *Limerick*."). Indexes to the Journals of the House of Lords refer to Arcedeckne and Horan in connection with the Act of Geo. II. One mentions a petition that the bill be amended so as not to affect Horan or his co-party Burke and that the bill was recommitted and reported out amended. *See* 20–35

Finally, a stark example of Parliament's own resistance to inherited nationality and confusion about the Act of Edw. III came in 1624. James had allowed the Dutch to recruit English soldiers to fight in the Thirty Years War in order to further English strategic interests,[90] and some of the soldiers had children abroad. Sir Edward Cecil proposed "An act for and concerning the naturalizing of such Englishmen's children as have served the states of the Low Countries as soldiers since your Majesty's coming to the crown, for their better encouragement and relief."[91] Sir Thomas Wentworth supported the proposal on the ground that if the soldiers had children there and then died, the children could not inherit English land.[92]

The sense of the House of Commons was against the proposal.[93] Members objected that it was unlawful to naturalize persons if they did not take oaths of loyalty and supremacy;[94] that naturalization should not be general, but should be granted only to those who are deserving;[95] that it should not apply to anyone who is "disaffected in religion or to the state";[96] and that it would be "inconvenient to bring in so many Dutch English at once."[97] Consistent with this view, specific acts of Parliament naturalized the foreign-born children of English commanders in the war both before and after the debate, such as those

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GENERAL INDEX TO THE JOURNALS OF THE HOUSE OF LORDS 405, 660 (Thomas Brodie compiler 1817) (containing index entries titled "PROTESTANT FOREIGNERS" and "HORAN, JAMES"). It is likely that proviso 1 reflects the petition and amendment, protecting Horan and Burke by carving Arcedeckne out of the otherwise applicable retroactive naturalization proviso.

90. *See, e.g.*, 58 DICTIONARY OF NATIONAL BIOGRAPHY 236 (London, Sidney Lee ed. 1889) [*hereinafter* DICTIONARY].

91. *12th March 1624, I. Journal of the House of Commons, PA, hc/cl/jo/1/12*, BRITISH HISTORY ONLINE, *in* PROCEEDINGS IN PARLIAMENT 1624: THE HOUSE OF COMMONS (Philip Baker ed. 2015–2018) [hereinafter *March 12, 1624 Journal*], http://www.british-history.ac.uk/no-series/proceedings-1624-parl/mar-12 (last visited June 18, 2018).

92. *See VIII. Diary of Edward Nicholas, TNA, SP 14/166, in March 12, 1624 Journal*, *supra* note 91.

93. *See id.* (statement of Mr. [John] Glanville regarding "the sense of this House").

94. *See id.* (statement of Sir Thomas Posthumous Hoby). Presumably, Hoby referred to An Acte that all such as are to be naturalized or restored in Blood shall first receive the Sacrament of the Lord's Supper and the Oath of Allegiance and the Oath of Supremacye, 1609–10, 7 Jac. 1 c. 2, https://hdl.handle.net/2027/mdp.39015004827039 (also limiting the "naturalizinge of Strangers" to those "as are of the Religion nowe established in this Realme").

95. *See IX. Diary of Sir William Spring, Houghton Library, Harvard University, MS ENG. 980, in March 12, 1624 Journal*, *supra* note 91 (statement of Sir Henry Poole).

96. *Id.*

97. *XI. Diary of John Pym, Northamptonshire Record Office, FH/N/C/0050, in March 12, 1624 Journal*, *supra* note 91 (summary of argument recorded by Pym).

of Sir Horace Vere (whose wife was also English) and Sir Jacob Astley.[98]

On the other hand, one Member asserted that the children did not require naturalization because "if they be born of English parents they have by law as much capacity of right here as home-born subjects."[99] Notes of the debates suggest that he was referring to the Act of Edw. III.[100] Moreover, Cecil himself commanded English troops in the war,[101] and other notes of the debate explain that "the naturalizing of a daughter of Sir Edward Cecil's, it was done by declaration rather than act."[102]

In a last ditch effort, Cecil offered to amend the proposal to require the children to swear oaths when they came of age,[103] but it was futile. Sir Walter Earle reported that "[t]he House thought fit to let this bill die without any further proceeding in regard of the strang[eness] and impossibility of it."[104] Unsurprisingly, the later seventeenth century act that naturalized children born to English soldiers fighting in France required the children to take oaths at Westminster and the sacrament in the Church of England when they came of age.[105]

Two conclusions follow from these wartime experiences. First, Parliament opposed giving children the rights of natural born subjects

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98. *See* Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. U.L. REV. 317, 354–55 (2015) (Vere details and 1624 naturalization, and Astley children's naturalization in 1628); DICTIONARY, *supra* note 90, at 236–37 (Vere command); BCW Project, *Sir Jacob, Lord Astley* (Astley command), http://bcw-project.org/biography/sir-jacob-astley. The Vere naturalizations passed the House of Commons on March 6, 1624. *March 12, 1624 Journal*, *supra* note 91.

99. *See supra* note 83 (statement of Mr. Christopher Brooke).

100. *See supra* note 79 (suggesting "25 Ed. 3"). Another note suggests instead an act in the 25th year of Henry V. *See* XIII. Journal of Sir Simonds D'Ewes, BL, HARL. MS. 159, *in March 12, 1624 Journal*, *supra* note 79. This is mistaken; Henry V did not reign that long.

101. *See* DICTIONARY, *supra* note 90, at 236.

102. *See* XIII. Journal of Sir Simonds D'Ewes, BL, HARL. MS 159, *in March 12, 1624 Journal*, *supra* note 91 (notes of D'Ewes).

103. *See* VIII. Diary of Edward Nicholas, TNA, SP 14/166, *in March 12, 1624 Journal*, *supra* note 91.

104. *See* XII. Diary of Sir Walter Earle, BL, ADD. MS 18,597, *in March 12, 1624 Journal*, *supra* note 91.

105. *See* An Act to Naturalize the Children of such Officers and Souldiers & Others the Natural Borne Subjects of This Realme Who Have Been Borne Abroad During the Warr the Parents of Such Children Haveing Been in the Service of This Government 1698, 9 Will. 3 c. 20, § 3, 4 (Eng.) (granting citizenship to children of servicemen within five years of attaining age fourteen). In addition, the post-Restoration Act required taking oaths and the sacrament in England within seven years of enactment. *See* An Act for the Naturalizing of Children of his Majestyes English Subjects Borne in Forreigne Countryes Dureing the Late Troubles 1677, 29 Car. 2 c. 6, § 2 (Eng.) (excepting specifically named children).

by reason of parentage generally, in part because of its own animus toward Catholics—not because it feared judicial animus toward them. Second, even Members of Parliament disagreed on the operation of the Act of Edw. III almost three centuries after its enactment.

Lee's assertion that the statutes were uncontroversial and declared or incorporated a common law right of blood is unconvincing. The incongruity of the Acts of Edw. III, Ann. and Geo. II and the confusion that they engendered are readily apparent from the 1763 arguments and judicial analysis in *Leslies* and from Plowden's detailed attempt in 1785 to explain their interrelationships.[106] The decision in *Leslies*, Parliament's concurrence in the Act of Geo. III, Blackstone's *Commentaries*, and Plowden all confirm that the statutes were positive law that merely entitled limited classes of children to the rights and privileges of natural born subjects by a legal fiction. The 1624 parliamentary debates and the late seventeenth century derivative nationality statutes' requirements of taking oaths and the sacrament in England show that Parliament did not believe that the common law recognized a right of blood.

D. American Understanding of Common and Constitutional Law

In his 1783 *Notes on British and American Alienage*, Thomas Jefferson wrote that "[t]he state of the father . . . does not draw to it that of the child, at the Common law."[107] Instead, "a Natural subject having a son born in a foreign state; the son was an alien at the Common law."[108] Jefferson did not believe that the statutes were declaratory of the common law; rather, he wrote that they naturalized the foreign-born child. "The stat. 25.E.3. st.2. first naturalized him if *both* parents were, at the time of his birth, natural subjects; and 7.Ann.c.5. and 4.G.2.c.21. where the father alone was."[109] James Madison agreed, writing in 1813 that Britain "naturalizes persons born of British parents in *Foreign Countries*."[110] And the most widely used law dictionary in the early Republic listed the Acts of Edw. III, Ann., Geo. II and Geo. III under the term "Naturalization" along with the act naturalizing

106. *See generally* PLOWDEN, *supra* note 58, at 84–100.

107. Thomas Jefferson, *Notes on British and American Alienage [1783]*, NAT'L ARCHIVES, http://founders.archives.gov/documents/Jefferson/01-06-02-0346 (last visited June 18, 2018).

108. *Id.*

109. *Id.*

110. James Madison, *Memorandum on Impressment and Naturalization*, NAT'L ARCHIVES [1813], http://founders.archives.gov/documents/Madison/03-06-02-0165 (last visited June 18, 2018).

persons who lived in the colonies for seven years and private acts of Parliament naturalizing foreigners.[111]

Similarly, John Adams did not consider the common law to include a right of blood for children born outside the king's dominions. He wrote in 1775 that colonization was *Casus omissus* (an omitted case) at common law,

> [s]o that our ancestors, when they emigrated, . . . could not have taken arms against the king of England, without violating their allegiance, but their children would not have been born within the king's allegiance, would not have been natural subjects, and consequently not intitled to protection, or bound to the king.[112]

In addition, all of the members of the First Congress who spoke in the reported debates over the first federal naturalization act recognized that foreign-born children of American citizens are aliens who can only become citizens by naturalization.[113] In discussing them, Rep. Sherman stated that the difference between a citizen and an alien is that "the citizen is born in the country."[114] Rep. White proposed that the statute only consider the children as natural born temporarily until they reached maturity, when their citizenship would expire to prevent the inconvenience of dual nationality, showing that their condition did

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111. *See* GILES JACOB, THE NEW LAW-DICTIONARY (10th ed., J. Morgan ed. 1782) (unpaginated); Gary L. McDowell, *The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation*, 44 AM. J. LEGAL HIST. 257, 260–61, 261 n.25 (2000) (noting that Jacob's law dictionary was the most widely used).

112. Letter from John Adams to the Inhabitants of the Colony of Massachusetts-Bay (Mar. 13, 1775), *in* 2 THE ADAMS PAPERS, PAPERS OF JOHN ADAMS, DECEMBER 1773–APRIL 1775, at 327 (Harvard University Press, 1977).

113. *See, e.g.*, 1 ANNALS OF CONG. 1121 (1789) (Joseph Gales ed., 1834) (Rep. Burke stating that they ought to be included in the naturalization act); *id.* at 1125 (Rep. Hartley stating that he had a clause to provide for the children); and 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 529 (Helen E. Veit et al. eds., 1994) [hereinafter 12 HISTORY] (Rep. Hartley stating that the act must have a plan for the children because some citizens will go abroad and have children there; Rep. Livermore stating that it may be useful to include them in the act); *id.* at 530 (Rep. Laurance stating that including them could create inconveniences; Rep. Sherman noting that including them could cause many difficulties; Rep. Scott proposing that the act only consider the children as citizens if they come to reside in the United States within a limited time); *see also infra* note 114 and accompanying text (Rep. Sherman), *infra* note 115 and accompanying text (Rep. White), and *infra* notes 123–25 and accompanying text (Rep. Smith).

114. 12 HISTORY, *supra* note 113, at 530. Sherman was a lawyer, judge, and signatory to all four foundational American compacts; Patrick Henry described him as "one of the three greatest men at the Constitutional Convention." *Architect of the Capitol, Roger Sherman*, ARCHITECT OF THE CAPITOL (Apr. 2011), https://www.aoc.gov/sites/default/files/sherman_2011.pdf.

not follow that of their fathers.[115]

Finally, the first draft of the final bill, H.R. 40, provided that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens, on their coming to reside in the United States."[116] This makes clear the drafters' understanding that foreign-born children do not inherit citizenship from their fathers under the Constitution. The draft bill would only have naturalized them and granted them the rights that Lee discusses (such as the right to inherit real property)[117] if and when they moved to the United States and became U.S. residents. Notably, seven of the nine Representatives appointed to the select committee that produced H.R. 40 were lawyers (Reps. Hartley, Jackson, Laurance, Moore, Sedgwick, Seney, and Sherman).[118]

The historical evidence from Jefferson, Madison, Adams, and the First Congress demonstrates that Americans did not consider foreign-born children of citizen fathers who had gone abroad for private purposes to be natural born citizens under the common law or the Constitution.

E. Relevance of Vattel

Finally, Lee does not provide any evidence that Americans generally or the Constitution specifically shared Vattel's natural law view of *jus sanguinis* citizenship. As Jack Maskell concludes for the Congressional Research Service, Vattel's purported influence on the term "natural born" in the Constitution "is without any direct historical evidence."[119] There is only one reference to Vattel's work at the 1787 constitutional convention, and that involved state voting representation in Congress.[120] Beyond that,

> there is no other reference to the work in the entire notes of any of the framers published on the proceedings of the Federal Convention of 1787, and specifically there is *no* reference or discussion of the

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115. *See* 12 HISTORY, *supra* note 113, at 529.

116. *See* 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1519 (Charlene Bangs Bickford & Helen E. Veit eds. 1986) [hereinafter 6 HISTORY]. Rep. Livermore explained that the provision was intended to allow foreign-born children to receive their deceased parents' estates if the children came to the United States. *See* 12 HISTORY, *supra* note 113, at 529–30.

117. *See* Lee, *supra* note 1, at 392.

118. *See* 6 HISTORY, *supra* note 116, at 1515; STAFF OF JOINT COMM. ON PRINTING, 108TH CONG., BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONG. 1774–2005, at 1210, 1319, 1423, 1608, 1885, 1888, 1902 (U.S. Government Printing Office 2005).

119. JACK MASKELL, CONG. RESEARCH SERV., R42097, QUALIFICATIONS FOR PRESIDENT AND THE "NATURAL BORN" CITIZENSHIP ELIGIBILITY REQUIREMENT 22 (2011) (footnotes omitted).

120. *Id.*

> work at all in relation to *citizenship* at the Convention, in the Federalist Papers, or in any of the state ratifying conventions.[121]

The Founders and Congress utilized Vattel for matters such as international law,[122] not citizenship.

Notably, there is only one apparent reference to Vattel in the documentary history of the First Congress. Rep. Smith defended his American citizenship in 1789 because of his birth in South Carolina and separately because of his parentage, citing Vattel's statement that "*[t]he country of the father is that of the children, and these become citizens merely by their tacit consent.*"[123] James Madison rejected Smith's reliance on parentage, explaining "that birth is a criterion of allegiance. Birth, however, derives its force sometimes from place, and sometimes from parentage; but, in general, place is the most certain criterion; it is what applies in the United States; it will, therefore, be unnecessary to investigate any other."[124] In the subsequent debates over the first federal naturalization act, Smith did not assert any right to citizenship by parentage and on the contrary supported a paternal residency requirement for the naturalization of foreign-born children of American citizens.[125]

CONCLUSION

Lee purports to offer an originalist analysis of what the term "natural born Citizen" likely meant at the drafting and adoption of the Constitution in 1787 to 1789.[126] However, he chooses Kent's usage over that of other American treatise writers because he believes that they "were not as astute as Chancellor Kent in their assessment of English common law and Blackstone's treatise."[127] Lee argues that the facts supported the challenge to Rep. Smith's citizenship, yet Congress ruled in favor of Smith.[128] He relies on Vattel, although he

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121. *Id.* (footnotes omitted).

122. *See, e.g.*, Letter from James Madison to James Monroe (Nov. 27, 1784), *in* 8 THE PAPERS OF JAMES MADISON, 10 MARCH 1784–28 MARCH 1786, at 156 (Robert A. Rutland & William M. E. Rachal eds., 1973) (relying on Vattel as support for the proposition that Congress should be authorized to deliver offenders to foreign nations).

123. *See Report of the House Committee of Elections, 12 May 1789*, *in* 8 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 546–53 (Kenneth R. Bowling et al. eds., 1998).

124. *Ramsay v. Smith* (1789), *reprinted in* CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, INCLUSIVE 33 (M. St. Clair Clarke & David A. Hall eds., 1834). In this context, Madison's statement cannot be distinguished to support *jus sanguinis* as Lee attempts to do. *See* Lee, *supra* note 1, at 359–62.

125. *See* 12 HISTORY, *supra* note 113, at 530.

126. *See* Lee, *supra* note 1, at 328–29 n.2.

127. *Id.* at 386.

128. *See id.* at 358–59.

provides no evidence that Americans relied on Vattel for purposes of defining citizenship in the Constitution. Lee's analysis appears to be a robust, deep, and well-documented example of constructive rather than originalist constitutional interpretation, using political, economic, philosophical, and legal materials to draw out a coherent principle of constitutional law and reject inconsistent usage as needed.

If Lee's analysis is correct then it would significantly affect American constitutional law. If foreign-born children of citizen fathers who went abroad for private purposes are natural born citizens, then Congress cannot exclude them from citizenship (let alone presidential eligibility) by setting any further conditions for their citizenship. Only a constitutional amendment could alter the substantive definition of "natural born Citizen" that applies to them.[129] American naturalization statutes that have set greater presence requirements on the father or any personal residence requirements on the children must be unconstitutional. Similarly, non-marital children of citizen mothers must also receive birthright constitutional citizenship because "*[t]he Law of Nature is this, that he that is born without lawful Marriage should follow the Mother's Quality.*"[130] Statutes that have set additional requirements on the mothers or their children must also be unconstitutional.

More importantly, if natural law governs the meaning of "natural" born citizenship then the definition might be open to ongoing reinterpretation as philosophers and courts determine what natural law actually requires, just as the determination of what process is "due" might not be limited to what people thought was due at the enactment of the Fifth and Fourteenth Amendments.

Lee's conclusion departs from traditional usage in Britain and the United States. It implies significant new rights to birthright constitutional citizenship and judicial power to interpret natural law. It may not be originalism, and it may not restrain judicial power as some intend originalism to do, but it is certainly a bold and challenging interpretation of Anglo-American legal history that merits close attention.

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129. *See, e.g.*, William T. Han, *Beyond Presidential Eligibility: The Natural Born Citizen Clause as a Source of Birthright Citizenship*, 58 DRAKE L. REV. 457, 465 (2010) (explaining that the first generation born abroad has "birthright citizenship that Congress has no power to diminish"); Lee, *supra* note 1, at 334 (stating that separation of powers doctrine prevents Congress from tinkering with eligibility to the presidency); Alexander Porter Morse, *Natural-Born Citizen*, 31 WASH. L. REP. 823, 823 (1903) (noting that Congress cannot impair or deny that constitutional right "even if legislation to that end was enacted").

130. 3 H. GROTIUS, OF THE RIGHTS OF WAR AND PEACE 132 (London, 1715) (quoting *Ulpian*).