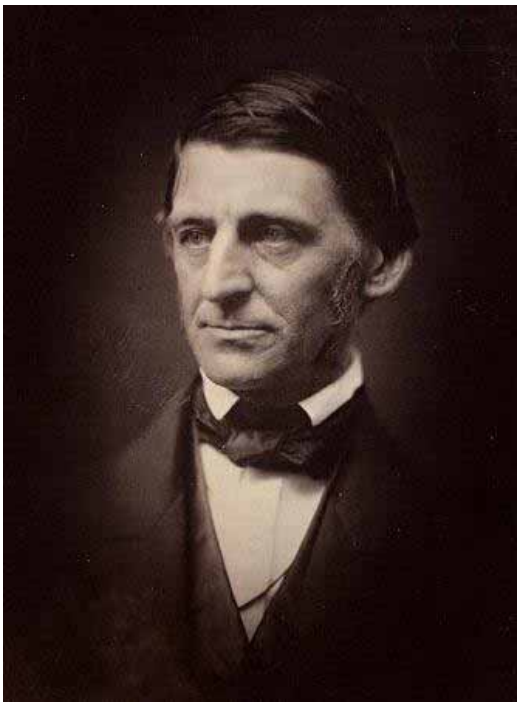
Foolish Consistency, Little Minds and Hobgoblins

by Joseph DeMaio, ©2023



"*Ralph Waldo Emerson" by Josiah Johnson Hawes, 1857 (public domain)*

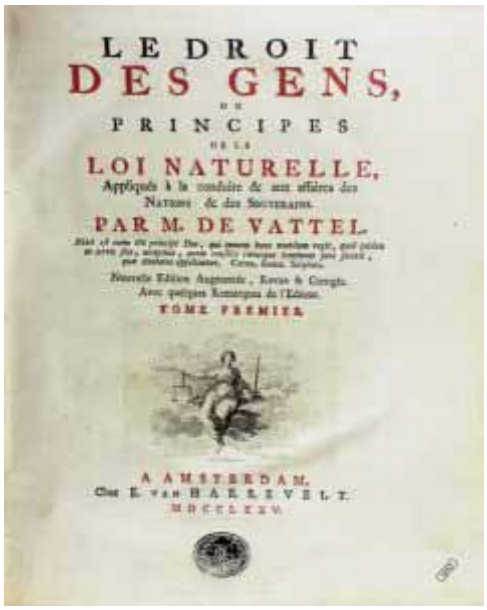
(Aug. 21, 2023) — As a preface to what follows, noted American author and philosophical thinker Ralph Waldo Emerson once observed: "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines." Stated otherwise, Emerson was contending that pursuit of consistency for the sake of remaining consistent and unchanging is foolish. This becomes particularly so when empirical facts exist – ignored by, among others, "little statesmen" – undercutting or eliminating the rationale for perpetuating a false narrative or conclusion simply to remain consistent. Move along, folks…, nothing to see here.

In the law, there is a direct analogue: the doctrine of *stare decisis.* In order, purportedly, to foster stability and predictability, once a legal decision is made on the merits, the doctrine requires that the "decision stands" unless and until there are compelling reasons to change course. Such a compelling event took place in 2022, when the Supreme Court overruled its prior 1973 decision in *Roe v. Wade.*

The "foolish consistency" observation made by Emerson back in his 1841 essay "*Self-Reliance*" also has a 21st Century parallel regarding the issue of who is – and of greater importance, who is ***not*** – properly recognized as a "natural born Citizen" ("nbC") under

Art. 2, § 1, Cl. 5 of the Constitution. This, of course, is the presidential Eligibility Clause, restricting an occupant of that office exclusively to a "natural born Citizen."

In his essay, Emerson counsels people to "do what they think is right no matter what others think." Sage advice…, particularly with regard to the nbC issue. A while back, and in the context of presidential eligibility under the Constitution, your humble servant penned an offering here taking a deeper dive into the Supreme Court's decision in *Minor v. Happersett*.



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That decision, of course, is the one most frequently cited by those adhering to the definition of a natural born Citizen as set out by Emer de Vattel in Book 1, Ch. 19, § 212 of his 1758 treatise, *The Law of Nations.* That definition states that a natural born citizen is one who is born in a country to a mother and father both of whom are already its citizens, owing allegiance to no other country. Your servant has for many years posited that this is the definition adopted by the Founders when they crafted the nbC Eligibility Clause in the Constitution, Art. 2, § 1, Cl. 5.

While the Court in *Minor* did not specify that it was relying on de Vattel and the definition of an nbC found there, it closely paraphrased § 212 from the de Vattel tome, stating that while doubts existed as to persons born here to parents who were not already U.S. citizens, the Founders had "no doubts" that a person born here to citizen parents was an nbC. And because there is abundant evidence that the Founders understood and relied upon de Vattel's treatise, and since the Court as recently as June 2023 has cited de Vattel's treatise approvingly, albeit on a non-nbC issue, it is far less than rocket science to posit that the nbC clause in the Constitution mirrors § 212.

In June 2012, U.S. Supreme Court Chief Justice John G. Roberts cast the deciding vote upholding the Affordable Care Act (colloquially known as "Obamacare,") writing in his opinion that the mandate to buy insurance was constitutional if considered a "tax" and not a "penalty"

While other "eligibility" theories exist, it is again contended – no matter what others may think – that the "§ 212" definition is the one adopted by the Founders in 1787. If people disagree and think a different result should obtain, the remedy is Article 5 of the Constitution: propose and secure ratification of a constitutional amendment. But please, stop arguing that "up" means "down" and that "penalty" means "tax."

And please stop contending that phraseology appearing in 1 Stat. 103 in 1790, but repealed ***in toto*** by 1 Stat. 414 in 1795 – and never thereafter re-enacted – today still controls analysis of the issue. That species of consistency is the "foolishness" addressed by Emerson.

On a related topic, many people argue – again, foolishly – that those who would challenge the constitutional eligibility of Barack Hussein Obama, Jr. and/or Kamala Harris as vice-president, or in addition GOP candidates Vivek Ramaswamy and Nikki Haley, are indulging in racism, because each of those individuals are of mixed race other than Caucasian.

And in the case of Mss. Harris and Haley, the additional false accusation of "misogyny" is made. Nothing could be farther from the truth…, except perhaps Brandon's claim that he never discussed or knew ***anything*** about his ne'er-do-well crackhead son's business dealings.

Stated otherwise, racist slanders have nothing to do with the nbC issue, which is concerned exclusively with the concept of ***nationality*** and ***not ethnicity.*** In fact, properly analyzed, the Founders in 1787 were clearly far more concerned about the potential for the insinuation of foreign influence into the new republic being formed which originated in Western Europe and Scandinavia rather than anywhere else populated by "persons of color."

Yet the nbC restriction applies worldwide to those of foreign nationality, ***not*** non-Caucasian ethnicity. Arguments to the contrary are not only wrong, they are ill-reasoned and thus, stupid. And the same goes for the misogyny claims.

Returning to the decision in *Minor*, and as discussed here, the Court concluded its opinion by commenting, 88 U.S. at 177-178: "If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. *Our province is to decide what the law is, not to declare what it should be*." (Emphasis added) This is simply another way of justifying the doctrine of *stare decisis.*

Translation: if a "uniform practice long continued can settle the construction of the Constitution," then the more often and widespread the rote narrative of "anyone born as a citizen here can be president" is propagated, the more likely it will come to be accepted as "settling" the issue. And that acceptance will occur not only in the electorate at large, but in the judiciary, including at the highest level.

Another way of stating this result, in more colloquial terms: "We've been doing it wrong for so long and people have become so accustomed to the wrong interpretation, we will just call it 'settled' and move on." That attitude might work in a banana republic – which in many respects, under Brandon, this nation has become – but it is anathema in a constitutional republic where the rule of law, rather than the rule of the jungle, where midnight ballot "discoveries" have become commonplace, should prevail.

https://www.scribd.com/doc/41131059/CRS-Congressional-Internal-Memo-What-to-Tell-Your-Constituents-Regarding-Obama-Eligibility-Questions

Ever since the first Congressional Research Service report was issued April 3, 2009 purporting – misleadingly – to validate the constitutional eligibility of Barack Hussein Obama, Jr. up through the present time – where the claim that merely being a "citizen at birth" or a "citizen by birth," regardless of whether both parents are U.S. citizens, is "close enough for government work" to qualify one as an nbC – a steady stream of narratives parroting that conclusion has emerged.

Respectfully, your servant again posits that the "citizen at/by birth" theory as being sufficient to qualify one as an nbC is pure hobgoblin material. Unless and until the U.S. Supreme Court issues a binding, precedential ruling on the issue, your servant will take Emerson's advice and persist in doing what he thinks is right, "no matter what others think."

And by "others," he is referencing the de Vattel Deniers, whomever and wherever they might be…, including potential dissenters at the Supreme Court. There is, after all, the "legacy" of Obama to protect…, and do not forget that a major part of the legacy offloaded onto us by Obama includes the current occupant of the White House. And his dog. And his son. Yikes.