# PRACTICAL PROBLEMS WITH ATTEMPTS TO CHANGE THE FOURTEENTH AMENDMENT THROUGH AN INTERSTATE BIRTH CERTIFICATE COMPACT

**By Margaret D. Stock**

Recently, many politicians have proposed changing the Fourteenth Amendment's Citizenship Clause[1] to exclude the U.S.-born children of persons who do not hold an immigration status of which they approve.[2] Most scholars believe that a constitutional amendment would be necessary to change the Clause's meaning,[3] but others have discussed the possibility of changing the Citizenship Clause through a model Interstate Birth Certificate Compact.[4] How likely is it that the meaning of the Citizenship Clause could be changed through an interstate compact? What would be the practical implications of implementing an interstate compact regarding birthright citizenship?

Article I, Section 10 of the U.S. Constitution provides that "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."[5] This clause has been interpreted to allow certain agreements between states, if the states have the consent of Congress—and even if the states do not have the consent of Congress, if the matter does not encroach on federal prerogatives.[6] The consent of Congress is typically gained by obtaining the approval of the compact in both houses of Congress;[7] while some authorities opine that a presidential signature on a joint resolution is necessary to demonstrate congressional consent,[8] others argue that no presidential signature is necessary.[9] To date, several hundred state compacts have been signed.[10] For the most part, these compacts have involved matters on which interstate cooperation is necessary, including the settling of boundary disputes, crime control and corrections matters, education, energy, flood control, the sharing of facilities or information, resource issues, environmental matters, or taxes.[11]

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[1] U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

[2] Proponents of a change to the Citizenship Clause all agree that change is needed, but they do not agree on what that change should be. *See* Margaret D. Stock, *Is Birthright Citizenship Good for America?*, 31 Cato J. 146–47 (2012) (explaining that some proponents of change want birthright citizenship limited to the children of citizens, green card holders, and unauthorized immigrants on active duty in the military; others want birthright citizenship restricted so that only unauthorized immigrants are barred; still others want birthright citizenship for the children of anyone who lawfully entered the United States); *see, e.g.*, Shankar Vedantam, *State Lawmakers Taking Aim at Amendment Granting Birthright Citizenship*, Wash. Post, Jan. 5, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010503134.html ("[S]tate lawmakers from across the country announced Wednesday that they are launching an effort to deny automatic citizenship to the U.S.-born children of undocumented immigrants.").

[3] *See* James C. Ho, *Birthright Citizenship, the Fourteenth Amendment, and the Texas Legislature*, 12 Tex. Rev. L. & Pol. 161 (2007) [hereinafter Ho, *Birthright Citizenship*]; James C. Ho, *Defining "American": Birthright Citizenship & the Original Understanding of the Fourteenth Amendment*, 9 Green Bag 2d 367 (2006) [hereinafter Ho, *Defining "Amercian*"].

[4] Marc Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, N.Y. Times, Jan. 4, 2011, http://www.nytimes.com/2011/01/05/us/politics/05babies.html?pagewanted=all (quoting Kansas Secretary of State Kris W. Kobach as being in favor of the Interstate Compact approach, which he is "confident . . . will stand up in court").

[5] U.S. Const. art. I, § 10, cl. 3.

[6] For a thorough discussion of the background and history of interstate compacts, see John R. Koza et al., Every Vote Equal: A State Based Plan for Electing the President by National Popular Vote 187 (2011 ed.).

[7] *Id.* at 209.

[8] *Id.* at 213 (discussing how FDR vetoed a bill granting consent to the Republican River Compact but later signed a modified version of the bill).

[9] *See* Vedantam, *supra* note 2 ("If Congress approves a state compact, it can become a federal law without requiring the signature of the president, said [Kansas Secretary of State] Kris Kobach.").

[10] For a list of state compacts see the website of the National Center for Interstate Compacts, http://www.csg.org/ncic/.

[11] *Id.*; *see also* Koza et al., *supra* note 6.

As of this writing, no successful state compact has sought to change the meaning of the U.S. Constitution or one of its amendments. Allowing a state compact to change the meaning of the Constitution or one of its amendments would seemingly undermine the specific constitutional amendment process outlined in the Constitution at Article V.[12] Nor has any state compact previously sought to reverse a U.S. Supreme Court decision interpreting the meaning of the Constitution or one of its amendments.

Yet a proposed Interstate Birth Certificate Compact seeks both to change the meaning of the Fourteenth Amendment's Citizenship Clause[13] and reverse the U.S. Supreme Court decision in *United States v. Wong Kim Ark*,[14] which held that the Fourteenth Amendment's Citizenship Clause includes all U.S.-born children who are subject to U.S. civil and criminal laws.[15] State Legislators for Legal Immigration ("SLLI"), a coalition of immigration restrictionist legislators,[16] has proposed state legislation that would resurrect the notion of state citizenship and restrict that citizenship so as to create a two-tiered caste system by using the fact that states are the American government entities that issue birth certificates. Although its proposal has not yet been enacted in any state, SLLI supports an interstate compact strategy under which states would agree to "make a distinction in the birth certificates" of native-born persons so that "state citizenship" would be denied to children born to parents who owe "allegiance" to any foreign sovereignty.[17] The Interstate Birth Certificate Compact would be subject to the consent of Congress under Article I, Section 10 of the Constitution. The intent of this approach is ultimately to change the meaning of the Citizenship Clause in the Fourteenth Amendment without having to amend the Constitution formally.[18] Legislators supporting the concept believe that passage of the compact will trigger lawsuits, which will then allow the Supreme Court to review the constitutionality of the law; they hope that such review will cause the Supreme Court to reverse *Wong Kim Ark* and reinterpret the Citizenship Clause in the manner that they prefer.[19]

SLLI's proposed "model" state law and Interstate Birth Certificate Compact reads as follows:

> **BILL**
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> (a) A person is a citizen of the state of [insert name of state] if:
>
> (1) the person is born in the United States and subject to the jurisdiction thereof, and
>
> (2) the person is a resident of the state of [insert name of state], as defined by [state code § xyz],
>
> (b) For the purposes of this statute, subject to the jurisdiction of the United States has the meaning that it bears in Section 1 of the Fourteenth Amendment to the United States Constitution, namely that the person is a child of at least one parent who owes no allegiance to any foreign sovereignty, or a child without citizenship or nationality in any foreign country. For the purposes of this statute, a

[12] U.S. Const. art. V (describing specific procedures for amending the U.S. Constitution).

[13] U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

[14] 169 U.S. 649 (1898).

[15] *Id.* at 689–90, 693 (explaining that the "jurisdiction" requirement derived from English common law was intended to exclude the children of foreign ministers and sovereigns).

[16] *See* State Legislators for Legal Immigration, http://www.statelegislatorsforlegal immigration.com/ (last visted Feb. 19, 2012). The group describes itself as:

> "a nation-wide coalition founded . . . to provide a network of state legislators who are committed to working together in demanding full cooperation among our federal, state and local governments in eliminating all economic attractions and incentives (including, but not limited to: public benefits, welfare, education and employment opportunities) for illegal aliens, as well as securing our borders against unlawful invasion."

*Id.*

[17] Press Release, *State Lawmakers Convened in D.C. to Deliver Historic, Nationwide Correction to the 14th Amendment Misapplication*, State Legislators for Legal Immigration (Jan. 5, 2011), http://www.state legislatorsforlegalimmigration.com/NewsItem.aspx?NewsID =10195. The State Legislators for Legal Immigration ("SLLI") does not provide a copy of the model Interstate Birth Certificate Compact on its website; however, Pennsylvania State Representative and SLLI founder Daryl Metcalfe released a copy to Southern California Public Radio, which published the Compact on its Multi-American blog. *See* Leslie Berestein Rojas, *The Model Bill to Challenge the 14th Amendment*, Multi-American (Jan. 5, 2011, 12:13 PM), http://multiamerican.scpr.org/2011/01/the-model-bill-to-challenge-the-14th-amendment/. This blog provides the text of both the model bill and Interstate Compact. This Article will refer to the bill as "SSLI Model Bill" and the Interstate Compact as "SLLI Model Compact."

[18] Vedantam, *supra* note 2.

[19] *Id.*

person who owes no allegiance to any foreign sovereignty is a United States citizen or national, or an immigrant accorded the privilege of residing permanently in the United States, or a person without citizenship or nationality in any foreign country.

(c) In addition to the criteria of citizenship described under sections (a) and (b), a person is a citizen of the state of [insert name of the state] if:

> (1) the person is naturalized in the United States, and
>
> (2) the person is a resident of the state of [insert the name of the state], as defined by [state code § xyz],

(d) Citizenship of the state of [insert name of the state] shall not confer upon the holder thereof any right, privilege, immunity, or benefit under law.[20]

**STATE COMPACT**

(a) The signatories to this compact shall make a distinction in the birth certificates, certifications of live birth, or other birth records issued in the signatory states, between persons born in the signatory state who are born subject to the jurisdiction of the United States and persons who are not born subject to the jurisdiction of the United States. Persons born subject to the jurisdiction of the United States shall be designated as natural-born United States Citizens.

(b) Subject to the jurisdiction of the United States has the meaning that it bears in Section 1 of the Fourteenth Amendment to the United States Constitution, namely that the person is a child of at least one parent who owes no allegiance to any foreign sovereignty, or a child without citizenship or nationality in any foreign country. For the purposes of this compact, a person who owes no allegiance to any foreign sovereignty is a United States citizen or national, or an immigrant accorded the privilege of residing permanently in the United States, or a person without citizenship or nationality in any foreign country.

(c) This compact shall not take effect until Congress has given its consent, pursuant to Article I, Section 10, Clause 3 of the United States Constitution.[21]

This model bill was apparently drafted by lawyers at the Immigration Reform Law Institute ("IRLI"),[22] an organization affiliated with Kansas Secretary of State Kris W. Kobach.[23] IRLI identifies itself as a "supporting organization" of the Federation for American Immigration Reform.[24] IRLI has had a hand in much of the immigration restrictionist state and local legislation that has been enacted in recent years.[25] Its lawyers, however, have little apparent practical background in how immigration and citizenship laws work,[26] and this lack of experience is

[20] SLLI Model Bill, *supra* note 17.

[21] SLLI Model Compact, *supra* note 17.

[22] Press Release, *supra* note 17 ("Due to the historic and Constitutional ramifications that have created the anchor baby status, the Immigration Reform Law Institute (IRLI) has provided expert legal research and analysis to ensure that the plain English, straightforward legislative solution meets any and all Constitutional challenges brought against it once enacted by state Legislatures across the nation.").

[23] Kris W. Kobach is of counsel to IRLI. *Attorneys and Staff*, Immigration Law Reform Institute, http://irli.org/about/attorneys (last visited Feb. 19, 2012).

[24] *See Board of Directors*, Immigration Reform Law Institute, http://irli.org/about/board (last visited Feb. 19, 2012) ("Incorporated in the District of Columbia since 1989, IRLI is a supporting organization of the Federation for American Immigration Reform (FAIR)."). FAIR seeks to reduce both legal and illegal immigration to the United States. *See About FAIR*, Federation for American Immigration Reform, http://www.fairus.org/site/PageNavigator/about.html (last visited Feb. 19, 2012) ("FAIR seeks to . . . stop illegal immigration, and to promote immigration levels consistent with the national interest—more traditional rates of about 300,000 a year."). This represents a substantial reduction in legal immigration, making it accurate to call FAIR a "restrictionist" organization.

[25] *See Litigation, Federal Courts, State Courts, Agencies*, Immigration Reform Law Institute, http://irli.org/litigation (last visited Feb. 19, 2012).

[26] IRLI's website lists five attorneys who currently work for the organization. Among them, Kris Kobach has never worked as an immigration or citizenship lawyer; his only "practical" experience in the field came when he briefly served as a White House Fellow and an advisor to U.S. Attorney General John Ashcroft. *Attorneys and Staff*, *supra* note 23. At that time, Kobach was the architect of the National Security Entry Exit Registration System ("NSEERS"), a program that was started in 2002 and partially suspended about a year later—with the remainder finally suspended in 2011—after DHS officials concluded that it was an expensive failure that had diverted agency resources from other priorities. *See U.S. to End Registration Program*, Wash. Post, Dec. 2, 2003, at A11. Among the

reflected in the language of the model Interstate Birth Certificate Compact. In fact, due to serious drafting flaws in the language of the proposed compact, the compact is a costly measure that will not accomplish its purported purpose—to stop the children of unauthorized immigrants from being recognized as U.S. citizens at birth.[27]

The compact's initial flaw is that it uses language that is not defined: the term "allegiance" is used in the proposed bill and compact, but no definition of the term is given.[28] Under federal law, a person who owes "permanent allegiance" to the United States is a U.S. national;[29] but the Interstate Birth Certificate Compact implies some different, unstated meaning.

If one looks up the term "allegiance" in Black's Law Dictionary, one finds more than five different definitions.[30] The term is defined first as "[a] citizen's obligation of fidelity and obedience to the government or sovereign in return for the benefits of the protection of the state." The definition then states that "Allegiance may be either an absolute and permanent obligation or a qualified and temporary one." Black's then lists five types of allegiance—(1) "acquired allegiance," defined as "[t]he allegiance owed by a naturalized citizen"; (2) "actual allegiance," defined as "[t]he obedience owed by one who resides temporarily in a foreign country to that country's government. Foreign sovereigns, their representatives, and military personnel are typically excepted from this requirement"; (3) "natural allegiance," defined as "[t]he allegiance that native-born citizens or subjects owe to their nation"; (4) "permanent allegiance," defined as "[t]he lasting allegiance owed to a state by citizens or subjects"; and (5) "temporary allegiance," defined as "[t]he impermanent allegiance owed to a state by a resident alien during the period of residence."[31] The model Interstate Birth Certificate Compact does not indicate which type of allegiance is meant. Furthermore, Black's Law Dictionary says nothing about allegiance requiring lawful residence in its second or last definitions, which could both apply to unauthorized immigrants—and if an unauthorized immigrant owes "allegiance" to the United States, then under the compact, the immigrant's children could be U.S. citizens.

The model Interstate Birth Certificate Bill and Compact also uses the phrase "subject to the jurisdiction," language that appears in the Fourteenth Amendment's Citizenship Clause.[32] The language "subject to the jurisdiction" has long been understood by the U.S. Supreme Court and the Executive Branch of the Federal Government to refer to persons who are subject to U.S. civil and criminal law, excluding only those persons who are immune from U.S. civil and criminal law, such as immunized diplomats, invading foreign armies, and members of sovereign Indian tribes.[33] Yet the proposed compact seeks to alter the

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other four lawyers listed on the IRLI website, one has interned at the Board of Immigration Appeals, but the other three appear to have no experience navigating the U.S. administrative immigration or citizenship system on behalf of themselves or clients. *See Attorneys and Staff*, *supra* note 23. Such experience is crucial to drafting effective immigration legislation because the U.S. immigration system is a "mystery and a mastery of obfuscation." *See Md. Family Ensnared in Immigration Maze*, Wash. Post, Apr. 24, 2001, at B1. The system has been accurately described as akin to "King Minos's labyrinth in ancient Crete." Lok v. INS, 548 F.2d 37 (2d Cir. 1977).

[27] *See* Vedantam, *supra* note 2.

[28] SLLI Model Bill, supra note 17, § (b); SLLI Model Compact supra note 17, § (b).

[29] *See* 8 U.S.C. § 1101(a)(22) (2006) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."). The courts have held that a person cannot acquire "nationality" merely by asserting an allegiance to the United States. *See, e.g.*, Matter of Tuitasi, 15 I. & N. Dec. 102 (BIA 1974) ("One does not acquire United States nationality merely by asserting an allegiance to the United States."). Section 308 of the Immigration & Nationality Act defines non-citizen U.S. nationals as certain persons who were born in outlying possessions of the United States. 8 U.S.C. § 1408. Lawful permanent residents of the United States are not U.S. nationals, and persons cannot become U.S. nationals merely by taking an oath of allegiance to the United States. See Reyes-Alcaraz v. Ashcroft, 363 F.3d 937, 938 (9th Cir. 2004) ("[S]ervice in the armed forces of the United States, along with the taking of the standard military oath, does not alter an alien's status to that of a 'national' within the meaning of the [Immigration & Nationality Act].").

[30] Black's Law Dictionary 74–75 (7th ed. 1999).

[31] *Id.*

[32] SLLI Model Bill, *supra* note 17, § (a) ("A person is a citizen of the state of [insert name of state] if . . . the person is born in the United States and subject to the jurisdiction thereof[.]"); *see also* SLLI Model Compact, *supra* note 17, § (a).

[33] *See, e.g.*, U.S. Dep't of State, Foreign Affairs Manual: Acquisition of U.S. Citizenship by Birth in the United States, 7 FAM 1110 (Aug. 21, 2009), *available at* http://www.state.gov/documents/organization/86755.pdf ("'Subject to the Jurisdiction of the United States': All children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth even if their parents were in the United States illegally at the time of birth."); *see also* Ho, *Birthright Citizenship*,

meaning of that language, changing it to mean that "the person is a child of at least one parent who owes no allegiance to any foreign sovereignty, or a child without citizenship or nationality in any foreign country."[34] This definition has never been held to be the meaning of the language "subject to the jurisdiction" in any U.S. court case or statute. It is a new definition entirely. It also uses the term "allegiance" as part of its definition, and that term, as described above, is undefined.

Next, the model bill clearly provides that signatory states will create a system for issuing two types of birth certificates, so the compact would require signatory states to set up new procedures for issuing two types of birth certificates and determining which type of birth certificate will be issued to each baby born in the state.[35] One type of certificate, which will demonstrate citizenship in the state, may only be issued to babies born in the affected state who meet certain strict requirements. The model legislation says nothing about whether a parent is an unauthorized immigrant. Instead, under the compact, to be a citizen of the state at birth, a baby must: (1) have at least one parent "who owes no allegiance to any foreign sovereignty";[36] or (2) have no "citizenship or nationality in any foreign country."[37] The child of an unauthorized immigrant can easily fall within these two definitions. An unauthorized immigrant might have renounced his or her foreign citizenship, or lost it through some expatriating act, which might include a long absence from the country of citizenship.[38] An unauthorized immigrant may have taken an oath of allegiance to the United States upon being drafted[39] or enlisting in the U.S. military.[40] Such an unauthorized immigrant could fall within the definition of a parent "who owes no allegiance to any foreign sovereignty."[41]

An unauthorized immigrant could also arrange to have his or her child fall within the second prong of the model legislation by taking steps to ensure that his or her child has no "citizenship or nationality in any foreign country."[42] A parent could intentionally fail to file the necessary paperwork with a foreign government to seek formal recognition of a U.S.-born child's foreign citizenship; if the parent failed to do so, the child would apparently be a child without "citizenship or nationality in any foreign country."[43]

Even more strangely, however, the model bill then goes on to say that "[f]or the purposes of this statute, a

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*supra* note 3; Ho, *Defining "American," supra* note 3; Stock, *supra* note 2, at 146.

[34] SLLI Model Bill, *supra* note 17, § (b); SLLI Model Compact, *supra* note 17, § (b).

[35] Inexplicably, the Model Compact has no provision for issuing "first-tier" state birth certificates to foreign-born adopted children after U.S. citizens have adopted these children within the state. This appears to be yet another oversight by the drafters, who are apparently unaware of the Child Citizenship Act of 2000, or the procedures common in most states for parents of adopted foreign-born children to obtain a state birth certificate. Such children are often accorded U.S. citizenship automatically, by operation of law, but will apparently end up with a "second tier" birth certificate under the wording of the proposed Interstate Compact.

[36] SLLI Model Bill, *supra* note 17, § (b); SLLI Model Compact, *supra* note 17, § (b).

[37] SLLI Model Bill, *supra* note 17, § (b); SLLI Model Compact, *supra* note 17, § (b).

[38] For example, a person who is Argentinian might lose Argentianian citizenship by accepting "employment or honors from a foreign government without permission"; an Armenian citizen can lose Armenian citizenship merely by living abroad for seven years and failing to register at the Armenian consulate; a Paraguayan can lose citizenship for an "[u]njustified absence from the country for more than three years." *See* U.S. Office of Pers. Mgmt., Citizenship Laws of the World 19, 21, 157 (Mar. 2001), *available at* http://www.opm.gov/extra/investigate/is-01.pdf.

[39] Unauthorized male immigrants are required to register for Selective Service and may be drafted into the U.S. Armed Forces, if there is a draft. Margaret D. Stock, *Essential to the Fight: Immigrants in the Military Eight Years After 9/11*, Immigration Policy Center (Nov. 2009), *available at* http://www.ilw.com/articles/2009,1124-stock.pdf.

[40] Everyone who enlists or is commissioned into the U.S. military takes an oath of allegiance to the U.S. Constitution. Although unauthorized immigrants are currently not permitted to enlist voluntarily in the U.S. military, some Republican lawmakers have suggested that they should be permitted to do so. *See Development, Relief and Education for Minors (DREAM) Act of 2011: Hearing on S. 952 Before the S. Judiciary Subcomm. on Immigration, Refugees and Border Security*, 112th Cong. 26 (2011) (statement of Sen. Cornyn, Ranking Member, S. Subcomm. on Immigration, Refugees and Border Security). Some unauthorized immigrants have also managed to enlist, against service policies, and have taken the oath of allegiance as a result. Miriam Jordan, *Soldier Finds Minefield on Road to Citizenship*, Wall St. J., Feb. 10, 2011, http://online.wsj.com/article/SB10001424052748704570104576124091336851306.html.

[41] SLLI Model Bill, *supra* note 17, § (b).

[42] *Id.*

[43] *Id.* Ironically, the model Interstate Compact would encourage parents of U.S.-born children to render their children stateless, as stateless children are guaranteed state citizenship under the model bill.

person who owes no allegiance to any foreign sovereignty is a United States citizen or national, or an immigrant accorded the privilege of residing permanently in the United States, or a person without citizenship or nationality in any foreign country."[44] This language may be meant to allow dual citizens to be included within the law's ambit, despite the earlier indication that they are not, but this section also uses the word "allegiance"—which is again undefined. This language also includes unauthorized immigrants who are stateless (whether by choice or otherwise). Moreover, this language speaks of immigrants "accorded the privilege of residing permanently in the United States," a phrase which is also undefined.[45] If the drafters meant this language only to include lawful permanent residents, then they have seemingly missed the point that lawful permanent residents do not owe "permanent allegiance" to the United States; instead, they owe permanent allegiance to their foreign country of citizenship. A non-citizen who is not a U.S. national continues to hold allegiance to his or her foreign country of citizenship, at least until he or she renounces or loses that foreign citizenship through some expatriating act. Moreover, a lawful permanent resident does not typically take any "oath of allegiance" to the United States until he or she naturalizes as a U.S. citizen.

The language of the SLLI model bill and compact also fails to explain whether dual citizens of the United States and other countries are deemed to fall within the compact's parameters; such dual citizens hold allegiance to both the United States and the foreign country in which they hold dual citizenship or nationality.[46] They cannot be said to hold "no allegiance" to a foreign country.[47]

To illustrate the complexity and confusion that will result from attempts to apply the compact's rule, it is helpful to consider a famous example, Willard Mitt Romney. Mitt Romney was born in the State of Michigan in 1947.[48] Mitt's mother Lenore was a birthright U.S. citizen who was born in Utah,[49] but she likely also held British citizenship because her father was born in England;[50] there is no evidence that she or her father ever renounced British citizenship.[51] Mitt's father, George Romney, was born in Mexico in 1907,[52] and apparently was a birthright Mexican citizen[53] and

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[44] *Id.*

[45] *Id.* The drafters may have meant this phrase to refer to lawful permanent residents, or they may have meant to include persons whom immigration lawyers commonly call "PRUCOL"—persons "permanently residing under color of law." Many of these persons are unauthorized immigrants. *See, e.g.*, N.Y. Dep't of Health, Documentation Guide for PRUCOL Alien Categories (July 15, 2004), *available at* http://www.health.ny.gov/health_care/medicaid/publications /docs/adm/04adm-7attb2.pdf (providing requirements for Medicaid program).

[46] The U.S. Supreme Court has stated that dual citizenship is "a status long recognized in the law" and that "a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other." Kawakita v. United States, 343 U.S. 717, 723–24 (1952). U.S. law also does not require U.S. citizens who are born with dual citizenship or acquire another citizenship after birth to choose one or the other when they reach adulthood. *See* Mandeli v. Acheson, 344 U.S. 133 (1952); *cf.* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (discussing the case of dual Mexican-American citizen who was obligated to obey United States military draft laws).

[47] *See Kawakita*, 343 U.S. at 717.

[48] *See Willard 'Mitt' Mitt Romney*, Wash. Times, Dec. 7, 2011, http://www.washingtontimes.com/campaign-2012/ candidates/ willard-mitt-mitt-romney-893/.

[49] William Addams Reitwiesner, *The Ancestry of Mitt Romney*, William Addams Reitwiesner Genealogical Services, *available at* http://www.wargs.com/ political/romney.html (last visited Feb. 19, 2012).

[50] *Id.* Britain, like many countries, has long accorded British citizenship to children born overseas to birthright British citizens. *See* U.S. Office of Pers. Mgmt., *supra* note 38, at 209.

[51] Naturalization as a U.S. citizen is not an act that causes a person to lose British citizenship under longstanding British law. *Id*. It is not clear that Lenore Romney's father ever naturalized as a U.S. citizen, but even if he did, the British government would have considered him a British citizen unless he completed the formal process to renounce his British citizenship—and his renunciation was approved by the government of the United Kingdom.

[52] *See* David E. Rosenbaum, *George Romney Dies at 88; A Leading G.O.P. Figure*, N.Y. Times, July 27, 1995 ("George Wilcken Romney was born in 1907 in a Mormon colony in Chihuahua, Mexico. His parents were American citizens and monogamists, but they had moved to Mexico along with many other Mormons when Congress outlawed polygamy in the 1800's.").

[53] Mexico had birthright citizenship at the time of George Romney's birth, according to historical records, and accorded birthright citizenship to the Mexican-born children of Mormon settlers in Mexico. Mexico also allowed U.S.-born Mormon settlers to naturalize as Mexican citizens. Some did not, which allowed their Mexican-born sons to avoid Mexican miltiary service. *See* Thomas Cottam Romney, The Mormon Colonies in Mexico 195 (1938) ("A few of the Mormons are naturalized Mexicans."); *id.* at 233 ("I remembered with a deep sense of gratitude to my father's memory that he refused to become citizenized lest revolution should again raise its head and his sons would be conscripted to fight side by side with the down-trodden peon."); *id.* at

a "derivative" foreign-born U.S. citizen under U.S. citizenship statutes in effect at the time of his birth.[54]

At the time of Mitt's birth, no state compact regarding birthright citizenship was in effect, so Mitt's parents merely registered the fact of Mitt's birth in the State of Michigan and Mitt was issued a standard Michigan birth certificate, making Mitt Romney a "natural born citizen" of the United States.[55] Had the proposed state compact been in effect at the time, however, Michigan would not have issued a birth certificate to Mitt without inquiring as to his parents' "allegiance" to any foreign country and his parents' citizenship. Both of his parents were likely dual citizens of the United States and other countries—Mitt's mother was apparently a dual citizen of Britain and the United States, and his father was a dual citizen of Mexico and the United States[56]—so Mitt Romney might not have been able to qualify as a state citizen under the first prong of the interstate compact as a child who has at least one parent "who owes no allegiance to any foreign sovereignty,"[57] if both of his parents "owed allegiance" to foreign countries. If Mitt could not pass the first prong of the test, the State of Michigan would have to look to the second clause of the compact, which would require Mitt's parents to show that Mitt would have no "citizenship or nationality in any foreign country."[58]

Here, of course, the State would be presented with a complicated legal and factual dilemma: if George Romney, having been born in Mexico, chose to seek a certificate of Mexican nationality for his son Mitt, then Mexican law would allow him to obtain such a certificate, because Mexican law has long granted Mexican nationality to the U.S.-born children of Mexican men who were born in Mexico.[59] But what if George Romney chose not to bother to claim Mexican nationality for his newborn baby son? Would the State of Michigan have the expertise to determine—based on reading Mexican law books or hiring a Mexican lawyer—that Mitt actually held Mexican nationality? Would the State simply take George Romney's word for it that his son, Mitt Romney, held no "citizenship or nationality in any foreign country"? Would the State ask Mexico for its opinion on the matter? Would the State hire an expert lawyer to make the determination

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236 (describing how Mexican-born Mormon men were Mexican citizens under Mexican law). Many Romney cousins who remain in Mexico today hold dual U.S. and Mexican citizenship. *See* Nick Miroff, *In Besieged Mormon Colony, Mitt Romney's Mexican Roots*, Wash. Post, July 24, 2011 ("Many are eligible to cast absentee ballots in U.S. elections, having acquired U.S. citizenship through their parents."); Mike Taibbi, *Romney's Roots: Meet Mitt Romney's Relatives in Mexico*, MSNBC, (Jan. 9, 2012), http://video.msnbc.msn.com/rock-center/45936316 ("[M]ost of the Romneys [are] dual citizens, and proud of it.").

[54] Mitt Romney was born in 1947, and his father was born (in Mexico) in 1907. George Romney's father Gaskell (Mitt Romney's grandfather) had been born in the United States in 1871, but Gaskell Romney left the United States as a teenager in 1885; he accompanied a large group of Mormons who planned to settle in Mexico so as to avoid prosecution by federal authories for polygamy. *See* Romney, *supra* note 53, at 51 (describing how the Mormons fled the United States to escape prosecution by federal law enforcement authorities). Gaskell Romney lived in Mexico with an intent to remain permanently and married Anna Amelia Pratt in Mexico in 1895; she was a birthright U.S. citizen due to her birth in Utah in 1876. During the Mexican Revolution, the couple fled back to the United States in 1912, taking five-year old George with them. At the time of George Romney's birth, George would have derived U.S. citizenship automatically from his father if the family had been able to prove that Gaskell Romney had resided in the U.S. prior to George's birth. *See* Daniel Levy & Charles Roth, U.S. Citizenship & Naturalization Handbook, §§ 4:18–:19 (2011-2012 ed.). No one checked the Romneys' citizenship papers at the border when they returned to the United States, but George Romney's claim to American citizenship went unchallenged. The law of derivative U.S. citizenship is different today (and has changed repeatedly over the decades, largely because citizenship by descent laws have been statutory, not constitutional).

[55] Because Mitt Romney was born in the United States, and subject to U.S. civil and criminal laws at the time of his birth (his parents did not hold diplomatic immunity from U.S. law), Mitt Romney is also a "natural born" American citizen, and eligible to be elected to the office of President of the United States. *See* Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L.J. 881, 881 (1988) ("It is well settled that 'native-born' citizens, those born in the United States, qualify as natural born."). There is some dispute as to whether Mitt's father, George Romney, was so eligible. *See* Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968) (arguing that George Romney was a "natural-born" citizen under common law).

[56] Mitt's father's Mexican citizenship status may have been quite complicated to determine, depending on the point in time when the analysis was done, because Mexico has changed its laws—and sometimes made them retroactive—many times over the past one hundred years. *See* Paula Gutierrez, *Mexico's Dual Nationality Amendments: They Do Not Undermine U.S. Citizens' Allegiance and Loyalty or U.S. Political Sovereignty*, 19 Loy. L.A. Int'l & Comp. L. Rev. 999, 1003–04 (1997).

[57] SLLI Model Compact, *supra* note 17, § (b).

[58] *Id.*

[59] *See* Gutierrez, *supra* note 56, at 1000 ("Each state or country has exclusive jurisdiction over its nationality laws."); *see also* U.S. Office of Pers. Mgmt., *supra* note 38, at 133.

about the baby's eligibility for citizenship in Michigan? What if the foreign country changed its laws over time and made them retroactive—would the State re-adjudicate the issuance of a certain type of birth certificate when the foreign law changed, or would a child's status be frozen at the moment of birth? The State would presumably have to answer these questions before determining what type of birth certificate to issue to the newborn baby under the terms of the proposed interstate compact.

The above example illustrates that interpreting and implementing the Interstate Birth Certificate Compact's rules will be quite complex. Furthermore, implementing complex new bureaucratic rules is never inexpensive.[60] At a minimum, a state attempting to apply the new rules would have to add additional questions to its questionnaire for issuing birth certificates and presumably would have to ascertain the truth of the answers to those questions and their legal significance. The state would have to determine whether it would rely on parents' representations about their citizenship and nationality, or whether the state's birth registry officials would be required to verify a child's status with foreign law sources or experts. The state would have to determine what to do if the parents' claims were false or doubtful. If parents refused to apply for proof of a foreign citizenship or nationality for their U.S.-born offspring, would the state categorize the child as a person with no citizenship or nationality in any foreign country? What if a parent, upon learning of the state's rules, chose to renounce a foreign citizenship or failed to file papers by a foreign law deadline so as to render the newborn stateless? The decision to claim state citizenship could be controlled by the parents' choice—and unauthorized immigrant parents could ensure American citizenship for a child merely by failing to register the child's birth with the appropriate foreign country or renouncing their own or their child's foreign citizenship.

The drafters of the model Interstate Birth Certificate Compact were apparently unaware that citizenship and nationality in a particular foreign country is a matter controlled by that country's domestic law and not by international law or the laws of the United States.[61] Because the drafters failed to understand this basic principle, their Interstate Birth Certificate Compact cedes authority to foreign governments to determine who will be a state citizen. If a foreign country passes a law stating that U.S. born children of its nationals are not citizens of that foreign country, then under the interstate compact, the foreign country could guarantee that those children could claim state citizenship in the United States because the children would be "stateless." Mexico, for example, could ensure Mitt Romney's Michigan state citizenship—under the example given above—simply by changing its nationality laws so that a Michigan-born child of a male Mexican citizen would not be considered a Mexican national. Mexico could also "have it both ways" by passing a law allowing a child like Mitt Romney to claim Mexican citizenship when he reaches the age of majority or at some other convenient point after his birth.

The plain language of the interstate compact allows foreign governments to decide who will or who will not be a state citizen. The compact thus allows foreign governments to deprive thousands of U.S.-born children of state citizenship simply by passing laws granting those children citizenship or nationality in those foreign countries. Conversely, the compact also allows foreign countries to force states to grant state citizenship to U.S.-born children of foreign country nationals; the foreign country can ensure this result simply by enacting laws depriving U.S.-born children of citizenship in those foreign countries. To a large extent, then, the state compact cedes state citizenship determinations to foreign countries—and, in doing so, does little to achieve its desired purpose of denying citizenship to the children of unauthorized immigrants. In fact, the compact likely only denies state citizenship to children whose parents—both citizen and non-citizen, authorized and unauthorized—are inclined (or perhaps foolish enough) to apply for foreign citizenship documents for their children.

A more significant problem with the interstate compact approach, of course, is that the federal government could easily override it. Unless the federal government joined in the interstate compact, the compact would not be binding on the executive branch of the federal government. Bound by the Supreme Court and executive branch understandings of the Citizenship Clause, the U.S. Department of State would not recognize any distinction in the birth certificates. A U.S.-born child who is given a "lesser" birth certificate could use that birth certificate to obtain a U.S. passport, and, armed with federally-issued presumptive proof of citizenship in the United States, the child could turn around and demand a new birth certificate; if one is not granted, the child could sue the state for discrimination.[62] Under federal law,

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[60] *See generally* Margaret Stock, *The Cost to Americans and America of Ending Birthright Citizenship*, Nat'l Found. for Am. Policy Brief (Feb. 2012), *available at* http://www.nfap.com/pdf/NFAPPolicyBrief.Birthright Citizenship.March2012.pdf.

[61] *See* Gutierrez, *supra* note 56, at 1000.

[62] *See, e.g.*, 42 U.S.C. § 1983 (2006):

the child would also have a cause of action for declaratory relief,[63] and a child could also seek damages against the state for the state's discriminatory treatment and failure to recognize the child's citizenship.[64]

Some state constitutions also prohibit state legislation that discriminates on the basis of citizenship.[65] Accordingly, a state may find that its enactment of the Interstate Birth Certificate Compact is unconstitutional under its own state constitution. Arizona may be one such state.[66]

Fortunately for Arizona, it need not face that problem at present, because Arizona legislators failed to pass the proposed Interstate Birth Certificate Compact. In early 2011, Arizona State Senator Russell Pearce and nine other Arizona state senators introduced Senate Bill 1308, the Arizona Interstate Birth Certificate Compact.[67] This bill adopted the main language of the model interstate compact that appears earlier in this essay; SB 1308 also added some additional provisions, such as a "Findings and Declaration of Policy" section stating that

> It is the purpose of this Compact through the joint and cooperative action among the party states to make a distinction in the birth certificates, certifications of live birth or other birth records issued in the party states between a person born in the party state who is born subject to the jurisdiction of the United States and a person who is not born subject to the jurisdiction of the United States. A person who is born subject to the jurisdiction of the United States is a natural born United States citizen.[68]

The bill made it out of committee on an 8–5 vote,[69] but then failed to pass in the Arizona Senate;[70] it has not been resurrected.

During testimony about the bill and its proposed effects, it became clear that the Arizona proponents of the bill did not understand what the language of the bill meant. Legislators expressed confusion about the meaning and implementation of the bill: " 'I want to know what allegiance means,' " said Republican Representative Adam Driggs of Phoenix, Arizona, a conservative Republican who "expressed skepticism about how the proposal would be carried out by state government."[71] After Arizona failed to pass the bill, no

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

*Id.*

[63] 8 U.S.C. § 1503 (2006) provides:

> If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States.

*Id.*

[64] *See* 42 U.S.C. § 1988(b).

[65] *See, e.g.*, Ariz. Const. art. II, § 13.

[66] Article II, Section 13 of the Arizona Constitution provides that "[n]o law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." While the matter has not been litigated—because the Interstate Birth Certificate Compact failed to pass in Arizona—this provision may render the Interstate Birth Certificate Compact unconstitutional under Arizona state law.

[67] S.B. 1308, 50th Leg. 1st Reg. Sess. (Ariz. 2011).

[68] *Id.* The "natural born" language in the bill upset some who believed that it was purposefully put into the bill to allow Barack Obama to be placed on the Arizona presidential ballot, although these persons question President Obama's eligibility for presidential office because he is a dual citizen of the United States and Kenya. *See, e.g.*, Leo Donofrio, *Beware: Arizona Senate Bill 1308 Defines Dual Citizens As Natural Born Citizens*, Natural Born Citizen, http://naturalborncitizen.wordpress.com/2011/02/23/beware-arizona-senate-bill-1308-defines-dual-citizens-to-be-natural-born-citizens/ (last visited Feb. 19, 2012) ("Apparently, the US citizenship of anchor babies is being sacrificed to protect Obama from competing eligibility legislation—such as Arizona HB2544—which does, in fact, require Presidential candidates to prove they have never owed allegiance to a foreign nation.").

[69] *Arizona Birthright Citizenship Law Passed By Senate Panel*, Az Central, (Feb. 22, 2011, 7:39 PM), http://www.azcentral.com/news/election/azelections/articles/2011/02/22/20110222arizona-immigration-birthright-citizenship-bill-advances.html.

[70] See *Bill Status Overview:Vote Detail*, S.B. 1308, 50th Leg., 1st Reg. Sess. (Ariz. 2011), *available at* http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/50leg/1r/bills/sb1308.sthird.1.asp&Session_ ID=102 (Ayes 12, Nays 18, "Final Disposition: Failed in Senate on Third Reading").

[71] *Vote on Birthright Citizenship Called Off at Last Minute*, ABC15.com, (Feb. 7, 2011), http://www.abc15.

other state did, either. Similar bills were introduced in 2011 in Indiana, Mississippi, Texas, Oklahoma, and South Dakota, but none have been enacted.[72]

Assuming that a state eventually enacts the Interstate Birth Certificate Compact, however, one final matter remains to be discussed: what would be the cost to a state of implementing the law, if a state decided that creating a two-tiered system for the issuance of birth certificates was a worthwhile goal? Arizona's legislature asked for a fiscal impact statement when considering the Interstate Birth Certificate Compact, and that Fiscal Note concluded that

> DHS estimates there would be one-time costs of approximately $150,000 for changes to the Birth Registry System, as well as ongoing costs of approximately $300,000 per year for the certification process. This estimate assumes hospitals and counties are involved in the verification process. . . .
>
> This bill would likely increase Vital Records workload in 2 main areas: 1) increased paperwork and 2) increased appeals. The entire cost of [Arizona Department of Health Services or DHS] Vital Records is currently $1.6 million, including $1.2 million from the General Fund and $425,000 from user fees.[73]

According to Arizona's own Fiscal Note, then, the Interstate Birth Certificate Compact would require a nineteen percent budget increase in one state agency alone—and this is likely an underestimate of the overall cost because the Fiscal Note did not consider the cost to hospitals and counties, the cost of hiring legal experts to opine about foreign citizenship laws or statelessness, or the cost of litigation and awards of attorneys' fees against the state for discriminatory treatment.

IRLI's prior pieces of "model" state immigration law have proven costly to those states and localities that have enacted them; none have yet been shown to have a positive impact on the public treasury. IRLI previously assisted the City of Hazleton, Pennsylvania, with a local immigration ordinance that cost Hazleton more than $2.4 million in attorneys' fees when a federal judge struck down their ordinance after a two-week trial.[74] IRLI and Kris Kobach also had a hand in Alabama's famous immigration law, HB 56, which has been projected to cost Alabama more than $11 billion[75] (and legislators there plan to amend the law at the first opportunity).[76] IRLI, of course, does not reimburse state taxpayers for the costs of its legislation—and apparently makes no effort to warn state legislators that its model legislation may potentially cost far more than the state may "gain" in perceived benefits.[77]

Any new system of determining citizenship based on parentage, rather than place of birth, will prove costly to U.S. taxpayers.[78] Such a system will necessarily require detailed and complicated legal criteria; a substantially expanded bureaucracy to obtain, evaluate, and retain information about all parents and their immigration or citizenship status; and a significant expansion in the administrative hearing and judicial systems in order to provide due process review for those who are aggrieved by adverse citizenship determinations. Such a system would not *require* a national birth registry—in fact, the Interstate Birth Certificate Compact calls for these individual determinations to be made by fifty different state bureaucracies. But the main effect of instituting such a

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com/dpp/news/region_phoenix_metro/central_phoenix/vote-on-birthright-citizenship-called-off-at-last-minute (quoting Republican legislator Adam Driggs and explaining why he voted against Arizona's birthright citizenship State Compact bill).

[72] *Id.* ("The South Dakota measure was rejected by a committee Monday.").

[73] Aaron Galeener, *Fiscal Note: S.B. 1308* (Feb. 21, 2011), *available at* http://www.azleg.gov/legtext/50leg/1r/fiscal/sb1308.doc.pdf.

[74] Terrie Morgan-Besecker, *Legal Bills May Sock Hazleton*, Wilkes-Barre Times Leader (May 8, 2009), http://www.timesleader.com/news/Legal_bills_may_sock_Hazleton_05-08-2009.html (reporting on the legal battle between the city of Hazleton and its insurance carrier, which refused to cover Hazleton's attorneys' fees or pay the award to the plaintiffs). This case is currently on appeal, and the costs are continuing to pile up.

[75] *See* Samuel Addy, *A Cost-Benefit Analysis of the New Alabama Immigration Law*, Center for Business and Economic Research (University of Alabama), Jan. 2012, *available at* http://cber.cba.ua.edu/New%20AL%20Immigration%20Law%20-%20Costs%20and%20Benefits.pdf.

[76] Ira Glass, *This American Life: 456: Reap What You Sow* (Jan. 27, 2012), *available at* http://www.thisamericanlife.org/radio-archives/episode/456/transcript (describing how Alabama Republican State Senator Gerald Dial is leading a campaign to amend the law; he stated "I would not have voted for the bill had I understood the unintended consequences.").

[77] As discussed in the papers this author has published with the Cato Journal and NFAP, there are significant costs associated with denying citizenship to U.S.-born children. *See* Stock, *supra* note 2, at 151–55; Stock, *supra* note 60, at 13–15.

[78] *Id.*

program through fifty different state governments (instead of at the federal level through a single registry) would simply be to add a further level of confusion, redundancy, and cost to this already unwieldy proposal. Americans should recognize the practical and fiscal implications of more recipes for chaos such as the proposed Interstate Birth Certificate Compact.

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