10. AMERICAN BIRTHRIGHT CITIZENSHIP RULES AND THE EXCLUSION OF "OUTSIDERS" FROM THE POLITICAL COMMUNITY

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The United States has recently experienced vigorous and emotional debates over its immigration and citizenship policies, and among these debates, the possibility of changing America's famous "birthright citizenship" rule has been a recurring theme. A proposed statute to redefine American citizenship at birth does so in an attempt to exclude persons perceived as "outsiders"—and yet it would pose significant practical problems for state governments and for residents of the United States and would inherently exclude many "insiders" from citizenship as well. This chapter explains the historical background of this proposal and the hurdles to defining and affirming citizenship that arise from the terms—such as "allegiance"—used in the proposal, and then discusses the potential, unanticipated consequences of changing America's long-standing constitutional birthright citizenship rule. Those unanticipated consequences will include a rise in statelessness, as Polly Price discusses in chapter 1, but they will also inevitably exclude many more people from American citizenship than their proponents understand or anticipate.

The following is an excerpt from a 2012 radio interview:

> RUSSELL LEWIS: Barack Obama is a Christian not a Muslim. It's an issue that came up four years ago when he ran for president. And it's not the only topic that made a return appearance last night.

John Gentile of Crossville, Tennessee, still doesn't believe Mr. Obama is allowed to be president because his father was born in Kenya.

JOHN GENTILE: I just don't like the directions that he's headed in, and personally, I don't think he qualifies to be president and a natural born citizen. And the Constitution states that you have to have two parents that were born in the United States. So there's no alternative allegiance by any member of the family.

LEWIS: The Constitution actually doesn't say that . . .

The quotation from a National Public Radio (NPR) reporter's interview with John Gentile, a Tennessee voter, is remarkable in a number of ways, but in the birthright citizenship debate in America, Gentile's statement about the U.S. Constitution reflects a fundamental, underlying truth: many Americans are unfamiliar with the constitutional reality of American citizenship or are reading new meanings into the Constitution's references to "citizen." These new meanings are being debated, discussed, and repackaged as "true" interpretations of the Constitution—at least when necessary to exclude certain persons from participation in the political community. As discussed later in this chapter, some have even sought a new statute—the Interstate Birth Certificate Compact—to correct what they believe is a long-standing incorrect interpretation of a bedrock amendment to the U.S. Constitution.

As Gentile's comments indicate, these new interpretations are not being applied in any principled way—instead, they are nearly always aimed at excluding persons who are perceived as "outsiders" while overlooking similarly situated persons thought to be "insiders." Gentile, for example, excludes Barack Obama from eligibility for the presidency on the basis that his father was born in Kenya. He says nothing, however, about the presidential eligibility of Mitt Romney (whose father was born in Mexico), Ted Cruz (whose father was born in Cuba), or Rick Santorum (whose father was born in Italy). In fact, from the context of the NPR interview, it is clear that Gentile is a Republican voter who plans to vote for a Republican candidate whose father was not born in the United States. Gentile's "principled" reason for excluding Barack Obama from eligibility for the presidency is therefore not principled at all.

Moreover, in the interview excerpted here, Gentile is incorrect about the Constitution: as stated by the journalist in response, the original text of the Constitution says that a person must be a "natural born citizen" to be president of the United States. But the document gives no definition of "natural born citizen," and says nothing about the status of one's parents or the issue of "allegiance." In fact, the original Constitution gives no definition of "citizen" at all—although it

refers to a "citizen" or "citizens" some eleven times, and it distinguishes "citizens" from "persons" at several points.

The Historical Record: Exclusion of "Outsiders" from Citizenship

The first U.S. Constitutional definition of "citizen" came, of course, at the end of the Civil War, with the ratification of the Fourteenth Amendment. At the time of the Founding, the new United States encouraged immigration and also encouraged qualified foreigners to become Americans. In 1787, the United States recognized three different ways that a person could obtain American citizenship: First, a person could be born a foreigner and later apply to become a U.S. citizen through the naturalization process; this avenue was governed by Article I, Section 8, of the U.S. Constitution, which established Congress's power to create a "uniform rule of naturalization." Second, following the international law rule, a person might inherit citizenship from his or her citizen parents; this method of obtaining American citizenship—termed the "jus sanguinis," or the citizenship by blood or descent rule—was within Congress's power to legislate and was first recognized in U.S. law when Congress passed the Naturalization Act of 1790, according "natural born citizen" status to the foreign-born children of certain U.S. citizens if the child's father had resided in the United States.[1] Finally, the United States also adopted the British common-law rule of jus soli (law of the soil) for persons born within the territorial jurisdiction of the United States whose parents were subject to U.S. civil and criminal laws. This common-law birthright citizenship rule was most famously described in the New York state court case of *Lynch v. Clarke* (1844), in which Judge Lewis Sandford opined that he could "entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen. The entire silence of the constitution in regard to it, furnishes a strong confirmation, not only that the existing law of the states was entirely uniform, but that there was no intention to abrogate or change it."

In 1857, however, in the case of *Scott v. Sandford* (commonly termed the *Dred Scott* case), the U.S. Supreme Court determined, as a matter of constitutional law, that the original political community in America had not consented to the inclusion of Africans or their descendants as full members of the American community.[2] Using its power of judicial review, the Supreme Court reinterpreted the common-law birthright citizenship rule to exclude persons of African descent. According to the majority opinion written by Chief Justice Roger Taney, Africans and their descendants born in America were not

included within the common law's concept of birthright citizenship and thus were forever barred from being U.S. citizens. In reaching its decision, the Supreme Court held that mere birth on U.S. soil was not enough to confer U.S. citizenship; one also had to show that the American political community had consented to one's presence. Notably, this is the same argument that modern proponents of a change to the Fourteenth Amendment make, except that they argue that the American political community has not consented to the presence of unauthorized immigrants on American soil, and so their children should not be considered to be U.S. citizens at birth (Eastman 2004).

After the Civil War, the *Dred Scott* decision was explicitly reversed and repudiated by the Fourteenth Amendment's citizenship clause. The ratifiers of the Fourteenth Amendment chose to amend the Constitution so as to ensure that the U.S. Supreme Court would not have the power to decide which people would be U.S. citizens at birth; instead, the birthright citizenship rule would be made into an explicit constitutional right. During debates leading up to passage of the Fourteenth Amendment, there was vigorous discussion over the fact that the citizenship clause would apply to the children of foreigners, even if those foreigners were in the United States in violation of various laws. Senator Edgar Cowan of Pennsylvania, for example, expressed concern that the citizenship clause would expand the number of Chinese and Gypsies in America by granting birthright citizenship to their children, although the parents owed no "allegiance" to the United States and were committing "trespass" by being in the United States (Wydra 2011). Arguing against him, supporters of the citizenship clause defended the right of these children to be U.S. citizens at birth. Both sides in the debate agreed that the clause would extend U.S. birthright citizenship to the children born in the United States to all foreigners who were subject to U.S. civil and criminal laws—thus excluding only the children of foreign diplomats, invading armies, and sovereign Native American tribes.

Following ratification of the Fourteenth Amendment, the U.S. Supreme Court consistently followed this interpretation of the citizenship clause (there was a passing comment in the *Slaughterhouse Cases* [1873] that has caused some to argue otherwise, but *Slaughterhouse* was not a birthright citizenship or immigration case). As conflicts over Asian immigration arose in the western United States in the late 1800s, however, some government officials began to deny the rights of U.S. citizenship to U.S.-born children of Chinese descent. Thus, in 1898, the U.S. Supreme Court had occasion, in the *Wong Kim Ark* decision, to confirm unequivocally that birthright citizenship belonged to any child born within the territorial jurisdiction of the United States, as long as the child—at the time of his or her birth on U.S. soil—was subject to U.S. civil and

criminal laws. The Court held that an American-born child of Chinese immigrants was entitled to citizenship because the "Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes." The dissenting view—which is the view espoused by modern proponents of a change to the citizenship clause—was resoundingly rejected by the Court's majority.

The net result, then, was that following passage of the Fourteenth Amendment, the U.S. government recognized all nondiplomatic persons born within the territorial jurisdiction to be Americans, regardless of the status of their parents. Congress also passed a number of statutes recognizing the extension of birthright citizenship to persons born within newly acquired U.S. territories, including Alaska, Hawaii, Guam, Puerto Rico, and the U.S. Virgin Islands. More recently, in the case of *Plyler v. Doe* (1982), the U.S. Supreme Court confirmed this view in an explicit statement that the Fourteenth Amendment extends to anyone "who is subject to the laws of a state," including the U.S.-born children of unauthorized immigrants. Similarly, in the case of *INS v. Rios-Pineda* (1985), the Court stated that a child born on U.S. soil to an unauthorized immigrant parent is a U.S. citizen from birth.

For modern-day proponents of a change to the meaning of the Fourteenth Amendment, however, the gloss of history appears to be irrelevant. They suggest that a change to the meaning of the Fourteenth Amendment should be made and can be made quite easily (Eastman 2004). First, some have argued that the U.S. Supreme Court can change the citizenship clause by reversing or reinterpreting its decision in the *Wong Kim Ark* case that all children born in the United States are U.S. citizens at birth unless they are immune from U.S. civil and criminal laws—such as the children of diplomats or children born in certain sovereign Native American tribes. It is possible that a modern Supreme Court could reverse this decision and instead adopt the opinion of the *Wong Kim Ark* dissenting justices, reinstating the discredited theory of "consent" that resulted in the *Dred Scott* decision. But this is not likely to happen. The Court has had the opportunity to do so, as recently as 2006, and declined to take up the invitation. In an amicus brief filed with the U.S. Supreme Court in the *Yaser Hamdi* case, Professor John Eastman of Chapman University School of Law argued that a change in the Supreme Court's interpretation of "subject

to the jurisdiction" language of the citizenship clause could retroactively take away the U.S. citizenship of Yaser Hamdi, a U.S.-born citizen who was captured fighting against American forces on the battlefield in Afghanistan; Eastman (2004) argued that the Court could punish Hamdi by reinterpreting the citizenship clause to take away Hamdi's birthright citizenship because Hamdi was born in the United States to parents who held temporary work visas at the time of his birth. Eastman's proposed new interpretation, however, if it had been adopted by the U.S. Supreme Court, would have taken away not only the U.S. citizenship of Yaser Hamdi but also the citizenship of millions of other Americans born under similar circumstances (including some of the U.S. military personnel who captured Hamdi). Unsurprisingly, the U.S. Supreme Court ignored Eastman's invitation.

In the *Hamdi* case, Eastman urged a new U.S. Supreme Court interpretation as a means of changing the citizenship clause, but others have urged congressional and state legislative approaches instead. Some have proposed congressional legislation, and some have introduced state legislation to bring back the concept of "state citizenship" so as to create a two-tier system that would deny U.S. citizenship to some babies born in the United States. Others have suggested a constitutional amendment for this purpose.

In line with the first approach, some have argued that changing the citizenship clause requires no constitutional amendment. Congress can change the Fourteenth Amendment's meaning by passing a statute that "clarifies" that "subject to the jurisdiction" means "subject to the complete or full jurisdiction." They point to Section 5 of the Fourteenth Amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." It is unlikely, however, that Congress can use its Section 5 power to reinterpret the meaning of the citizenship clause, any more than Congress can use its Article I, Section 1, powers to "reinterpret" the First or Second Amendment. Section 5 of the Fourteenth Amendment merely answers critics of the draft Fourteenth Amendment who said that the original text of the Constitution contained no language giving Congress any enumerated power to enforce the Fourteenth Amendment; Section 5 was not a grant of legislative power to change the meaning of the amendment. Section 5 also allows Congress to define the geographic jurisdiction of the United States, thereby allowing the Fourteenth Amendment to apply in acquired states and territories; it does not allow Congress to limit the application of the Fourteenth Amendment by changing the plain meaning of the text. Furthermore, Congress has already acted to enforce the citizenship clause by enacting numerous statutes reaffirming the "traditional" meaning of the clause.[3] Even if it were possible to legislate a "new interpretation" of

a constitutional amendment, these existing statutes would have to be repealed before any new "interpretation" could take effect.

Attempts at such a reinterpretation are aimed at depriving newborns of U.S. citizenship if their parents do not hold certain specified lawful immigration statuses. The theory is that those parents are not subject to the "complete" jurisdiction of the United States because they hold allegiance to a foreign country. Representative Steve King (R-IA) and Senator David Vitter (R-LA) have repeatedly introduced legislation to "reinterpret" the Fourteenth Amendment in a way that would exclude more people born in the United States from American citizenship. The latest version of their proposal, the Birthright Citizenship Act of 2015, would restrict citizenship under the citizenship clause to a child at least one of whose parents is a citizen, is a lawful permanent resident, or is on active duty in the armed forces. It is unclear what effect, if any, the courts would give such a statutory reinterpretation of the Fourteenth Amendment, but if enacted, the law would immediately throw into confusion the citizenship of thousands of babies.

State Legislators for Legal Immigration (SLLI), a coalition of immigration restrictionist legislators from forty states, has proposed state legislation that would resurrect the notion of state citizenship and restrict it so as to create a two-tier caste system. The plan relies on the fact that states are the entities that issue birth certificates. Although its proposal has not yet been enacted in any state, the SLLI suggests an interstate compact strategy under which states would agree to "make a distinction in the birth certificates" of native-born persons so that Fourteenth Amendment citizenship would be denied to children born to parents who owe allegiance to any foreign sovereignty. The interstate compact would be subject to the consent of Congress under Article I, Section 10, of the Constitution. This approach would change the meaning of the citizenship clause without having to secure the approval of the president or a veto override. A significant problem with this approach—which would be expensive to implement—is it cannot obligate the U.S. State Department to recognize distinctions in the birth certificates. Some state constitutions also prohibit such discriminatory state legislation.

Assume for the sake of argument that one believes that the Fourteenth Amendment has been erroneously applied for more than a hundred years. Under the changes sought by modern-day revisionists, who would be excluded from American citizenship? What groups are targeted by modern revisionists for exclusion from the modern American political community? From the news accounts of the debate, one would think that the targeted groups include the children of "birth tourists" (Gonzalez 2011) or the children of unauthorized immigrants. In fact, however, the changes proposed to the Fourteenth

Amendment would exclude extremely large numbers of Americans—including several past U.S. presidents and many leading modern American politicians.

Why is this so? This wide-ranging exclusion of large numbers of Americans comes about because those who call for changes to the meaning of the Fourteenth Amendment's citizenship clause focus on the language "subject to the jurisdiction" and attempt to read it broadly to exclude the children of persons who (1) have no permanent immigration status in the United States or (2) hold "allegiance" to countries other than the United States (Eastman 2004). This group potentially includes millions of Americans, including several prominent American politicians who have run for or are currently running for the office of president of the United States.

If one looks up the term "allegiance" in *Black's Law Dictionary*, one finds more than five definitions. 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, "Allegiance may be either an absolute and permanent obligation or a qualified and temporary one" (*Black's Law Dictionary* 1999). Black's then lists five types of allegiance: (1) "acquired allegiance," defined as "the allegiance owed by a naturalized citizen"; (2) "actual allegiance," defined as "the 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 "the allegiance that native-born citizens or subjects owe to their nation"; (4) "permanent allegiance," defined as "the lasting allegiance owed to a state by citizens or subjects"; and (5) "temporary allegiance," defined as "the impermanent allegiance owed to a state by a resident alien during the period of residence." Those who write and speak about "allegiance" as a requirement of Fourteenth Amendment citizenship do not typically indicate which type of allegiance they mean.[4] Furthermore, *Black's Law Dictionary* says nothing about allegiance requiring lawful residence in its second or last definition, both of which could apply to unauthorized immigrants—and if an unauthorized immigrant owes "allegiance" to the United States, then under some proposed changes to the Fourteenth Amendment's meaning, the immigrant's children could be U.S. citizens.

The problems in changing the Fourteenth Amendment's meaning by invoking the concept of "allegiance" are clear if one examines a model Interstate Birth Certificate Compact that was drafted and proposed by the Immigration Reform Law Institute (IRLI; State Legislators for Legal Immigration 2011). The institute's proposed "model" state law and Interstate Birth Certificate Compact read as follows:

Bill

(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 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.

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.

The IRLI is an organization affiliated with Kansas secretary of state Kris W. Kobach (State Legislators for Legal Immigration 2011),[5] a prominent immigration restrictionist. The IRLI also identifies itself as a "supporting organization" of the Federation for American Immigration Reform (2012), and has had a hand in much of the immigration restrictionist state and local legislation that has been enacted in recent years. Its lawyers, however, have little apparent practical experience with immigration and citizenship laws. Drafting flaws mean the measure will have unintended consequences and not accomplish its purported purpose—to stop the children of unauthorized immigrants from being recognized as U.S. citizens at birth.

The model Interstate Birth Certificate Compact uses the phrase "subject to the jurisdiction," language that appears in the Fourteenth Amendment's citizenship clause. As discussed earlier, 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. Yet the proposed compact seeks to alter that language 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."

The model bill provides that signatory states will create a system for issuing two types of birth certificates, requiring signatory states to set up new procedures. One type of certificate, which will demonstrate citizenship in the state, may be issued only to newborns who meet certain strict requirements. Interestingly, 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" or (2) has no "citizenship or nationality in any foreign country." 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 may

have lost it through some expatriating act, which might include a long absence from the country of citizenship.[6] An unauthorized immigrant may have taken an oath of allegiance to the United States upon being drafted or enlisting in the U.S. military.[7] Such an unauthorized immigrant could fall within the definition of a parent "who owes no allegiance to any foreign sovereignty."

An unauthorized immigrant could also take steps to ensure that his or her child has no "citizenship or nationality in any foreign country." Thus, 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 be a child without "citizenship or nationality in any foreign country."

The model bill then goes on to say that "for the purposes of this statute, 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." This language may be meant to allow dual citizens to be included within the law's ambit, but this section also uses the word "allegiance"—again undefined. In addition, this section includes unauthorized immigrants who are stateless. Moreover, this bill references immigrants "accorded the privilege of residing permanently in the United States," a phrase that is also undefined.[8] If the drafters meant this language to include only lawful permanent residents, then they have failed to recognize that lawful permanent residents do not owe "permanent allegiance" to the United States; instead, they owe permanent allegiance to their foreign country of citizenship, unless or until they renounce or lose that foreign citizenship through expatriation. Moreover, a lawful permanent resident typically performs no "oath of allegiance" to the United States until he or she naturalizes as a U.S. citizen.

The language of the 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.[9] They cannot be said to hold "no allegiance" to a foreign country.

To illustrate the complexity and confusion that will result from attempts to apply the compact's "allegiance" rule, it is helpful to consider a famous example, Willard Mitt Romney. Mitt Romney was born in Michigan in 1947 (Reitwiesner 2012). Mitt's mother, Lenore, was a birthright U.S. citizen who was born in Utah, but she likely also held British citizenship because her father was born in England;[10] there is no evidence that she or her father ever renounced British citizenship.[11] Mitt's father, George Romney, was born in

Mexico in 1907.[12] He apparently was a birthright Mexican citizen.[13] In addition, he was a "derivative" foreign-born U.S. citizen under U.S. citizenship statutes in effect at the time of his birth.[14]

At the time of Mitt's birth, the Fourteenth Amendment's current interpretation 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 him a "natural born citizen" of the United States.[15] 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[16]—so Mitt Romney might have been unable 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," 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 his parents to show that Mitt would have no "citizenship or nationality in any foreign country."

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 (Gutierrez 1997; U.S. Office of Personnel Management 2001). But what if George Romney chose not to bother to claim Mexican nationality for his newborn 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 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 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 readjudicate 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 preceding example illustrates that interpreting and implementing changes to the Fourteenth Amendment's citizenship clause would be quite cumbersome. Even implementing complex new bureaucratic rules is costly (Stock 2012). At a minimum, a state attempting to apply the new rules would have to add more 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 are a matter controlled by that country's domestic law and not by international law or the laws of the United States. 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 legally stateless. Mexico, for example, could ensure Mitt Romney's Michigan state citizenship—under the example given earlier—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 of the United States. 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 denies state citizenship only to children whose parents—both citizen and noncitizen, authorized and unauthorized—are inclined (or perhaps foolish enough) to apply for foreign citizenship documents for their children.

Moreover, 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. Armed with federally issued presumptive proof of citizenship in the United States, the child could then turn around and demand a new birth certificate; if one is not granted, the child could sue the state for discrimination. Under federal law, the child would also have a cause of action for declaratory relief and could also seek damages against the state for the state's discriminatory treatment and failure to recognize the child's citizenship.

Some state constitutions also prohibit state legislation that discriminates on the basis of citizenship. 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.[17]

Arizona legislators failed to pass the proposed Interstate Birth Certificate Compact, and for now, the question is moot. In early 2011, Arizona state senator Russell Pearce and nine other Arizona state senators introduced Senate Bill 1308, the Arizona Interstate Birth Certificate Compact. This bill adopted the main language of the model interstate compact that appears earlier in this chapter; it also added some further provisions, such as a "Findings and Declaration of Policy" section that states, "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."[18] The bill made it out of committee on a vote of eight to five but then failed to pass in the Arizona Senate; it has not been resurrected (Arizona Legislature 2011; *AZ Central* 2011).

During testimony about the bill and its proposed effects, it became clear that the Arizona proponents of the bill did not understand their own proposal: "'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" (ABC15 .com 2011). Similar bills were introduced in 2011 in Indiana, Mississippi, Texas, Oklahoma, and South Dakota, but after Arizona failed to pass its bill, no other state passed one.

Unprincipled Principles of "Allegiance"

Perhaps the most startling aspect of the modern calls to change the meaning of the Fourteenth Amendment's citizenship clause is the large number of persons who potentially would be affected by such a change. Presumably, any such change would not be retroactive, but many modern proponents of a change have argued that the change should be retroactive because the Fourteenth Amendment has been "misinterpreted" for more than a hundred years, and their new, revisionist interpretation is the correct one (Eastman 2004).

Take, for example, the arguments made by Professor John Eastman in the amicus brief discussed earlier in this chapter. In that case, Eastman argued that under the Fourteenth Amendment, "mere birth on U.S. soil was insufficient to confer citizenship as a matter of constitutional right. Rather, birth, together with being a person subject to the complete and exclusive jurisdiction of the United States (i.e., not owing allegiance to another sovereign) was the constitutional mandate, a floor for citizenship below which Congress cannot go in the exercise of its Article I power over naturalization." Eastman's argument was obviously intended to create a retroactive change. He filed the amicus brief for the purpose of arguing that Yasser Hamdi, an American born in Louisiana in 1980, should not be recognized as a U.S. citizen, his current status as such notwithstanding, because Hamdi's parents were in the United States temporarily on work visas when Hamdi was born.

Eastman has stated on many occasions that his interest in the case was driven by the fact that Hamdi was a member of a group fighting against the United States in Afghanistan; Eastman felt that the benefits of birthright U.S. citizenship should not be accorded to someone whose parents were on temporary work visas at the time of his birth, and who later turned out to be a terrorist.

TABLE 10.1. Prominent U.S. Politicians with "Allegiance" Issues

Name	Political Party	Birthplace and Date of Birth	Citizenship/Parentage	Outcome under New Fourteenth Amendment Rules Requiring "Allegiance" Solely to the United States
Chester Arthur	Republican	Fairfield, Vermont, USA, October 5, 1829 [Disputed]	Father was Irish and/or Canadian; Chester Arthur himself may have been born in Canada*	Owed allegiance to Ireland, Canada, United Kingdom
John F. Kennedy	Democrat	Brookline, Massachusetts, USA, May 29, 1917	Dual American-Irish citizen (Irish law grants Irish citizenship to persons with at least one Irish-born grandparent)	Owed "allegiance" to Ireland
Donald John Trump	Republican	New York, New York, USA, June 14, 1946	Father was dual citizen of Germany and the United States, mother was dual citizen of the United States and the United Kingdom	Parents owed "allegiance" to Germany and to the United Kingdom
Willard "Mitt" Romney	Republican	Detroit, Michigan, USA, March 12, 1947	Father was born in Mexico; mother was British American	Parents owe "allegiance" to Mexico, United Kingdom
Richard "Rick" Santorum	Republican	Winchester, Virginia, USA, May 10, 1958	Father was born in Italy	Father owed "allegiance" to Italy
Robert Menendez	Democrat	New York, New York, USA, January 1, 1954	Parents both held Cuban citizenship at the time of his birth	Parents both owed "allegiance" to Cuba

* The exact location of Chester Arthur's birth is disputed. According to John Curran (2009), "Nearly 123 years after his death, doubts about his US citizenship linger, thanks to lack of documentation and a political foe's assertion that Arthur was really born in Canada—and was therefore ineligible for the White House, where he served from 1881 to 1885."

Name	Political Party	Birthplace and Date of Birth	Citizenship/Parentage	Outcome under New Fourteenth Amendment Rules Requiring "Allegiance" Solely to the United States
Barack Obama	Democrat	Honolulu, Hawaii, USA, August 4, 1961	Father was born in Kenya and held student visa status in the United States when Barack Obama was born	Father owed "allegiance" to the United Kingdom and/or Kenya
Marco Antonio Rubio	Republican	Miami, Florida, USA, May 28, 1971	Parents were both Cuban citizens at the time of his birth; they naturalized as U.S. citizens in 1975	Parents owed "allegiance" to Cuba; also, under Cuban law, Rubio himself "owes allegiance" to Cuba
Piyush "Bobby" Jindal	Republican	June 10, 1971, Baton Rouge, Louisiana, USA	Parents were both Indian citizens at the time of his birth	Parents owed "allegiance" to India
Nimrata Nikki Haley	Republican	Bamberg, South Carolina, USA, January 20, 1972	Parents were both Indian citizens at the time of her birth	Parents owed "allegiance" to India
Ludmya "Mia" Bourdeau Love	Republican	Brooklyn, New York, USA, December 6, 1975	Parents were both Haitian citizens who were in the United States in tourist status or as tourist visa overstays at the time of her birth	Parents owed "allegiance" to Haiti

But Eastman has not felt compelled to challenge the eligibility for high office of other persons whose parents were also in the United States on temporary visas at the time of their birth. He has not challenged, for example, the eligibility for high office of Republican candidate Mia Love of Utah, whose Haitian parents were in the United States in tourist status (or perhaps as unauthorized immigrants) at the time of her birth (Anderson 2012). Nor has he challenged the eligibility of Bobby Jindal to be governor of Louisiana or run for president of the United States, although Jindal's parents owed "allegiance" to India at the time of Jindal's birth.

For the sake of exploring Eastman's arguments, however, let us look at a number of U.S. politicians from the post–Fourteenth Amendment period and consider how they would fare under Eastman's interpretation of the Fourteenth Amendment and the modern-day demand that U.S. birthright citizenship be conferred only on persons whose parents do not owe "allegiance" to another sovereign. Table 10.1 lists the names, party affiliations, birthplaces, and parental citizenship status of the named politicians, along with an analysis of the "outcome" under Eastman's citizenship rules. As one can see from the table, all ten of these politicians would be excluded from complete membership in the American political community: under the new interpretation of the Fourteenth Amendment that Eastman espouses, none of these famous politicians would be U.S. citizens at birth. Some of them would also end up becoming stateless and deportable if the Fourteenth Amendment were reinterpreted in the way that Eastman urges.

In all the literature written by proponents of a "new interpretation" of the Fourteenth Amendment, the authors have used only examples of those whose politics they oppose and have not explained how their interpretation would apply to groups whom they disfavor, while not being applied to groups whom they favor. Eastman has never explained how his "allegiance" rule would be applied to Hamdi but not to Nikki Haley, Bobby Jindal, Mia Love, or Marco Rubio or to past presidents.

Proponents of a change to the American birthright citizenship rule fail to explain how their new interpretation or new rule would be implemented, and they never admit what should be obvious at this point: their new proposed rule would likely exclude more "insiders" than "outsiders" from American citizenship. The rule would not be easy to implement and would have unanticipated side effects. Of course, their proposals have not made much headway, which may underscore a fundamental theme of this volume: there is value in rules that make it relatively easy to identify the citizens of one's country, and Americans may fundamentally value a simple, more inclusive rule more than a complex, less inclusive one.

Postscript: The 2012 Egyptian Elections

As Alfred Babo explains in chapter 11, Americans have not been alone in contemplating changes to their constitutional citizenship definitions to exclude certain perceived outsiders from full participation in the political community. The Egyptian Constitution, due to recent amendment, now apparently requires that all presidential candidates—and their parents and spouses—hold only Egyptian citizenship (Fadel 2012). The new amendment had been intended to exclude Mohamed ElBaradei, the famous diplomat and Egyptian Nobel laureate, from running for the Egyptian presidency. However, the media reported that this constitutional amendment had inadvertently snared ultraconservative Egyptian politician Hazem Abu Ismail, who then faced controversy over his eligibility for the Egyptian presidency because his mother had naturalized as a U.S. citizen. Like Americans seeking to change the Fourteenth Amendment to exclude certain disfavored groups, Egyptians who supported the Egyptian constitutional amendment suddenly discovered that the constitutional citizenship exclusion net had caught many more Egyptians than originally intended.

NOTES

1. The Naturalization Act of 1790 (March 26, 1790) stated: "And 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: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States."

2. The U.S. Supreme Court was wrong on this point—several states had recognized persons of African descent as citizens. Abraham Lincoln famously criticized Chief Justice Taney's underlying assumptions: "Chief Justice Taney, in delivering the opinion of the majority of the Court, insists at great length that Negroes were no part of the people who made, or for whom was made, the Declaration of Independence, or the Constitution of the United States. [In several of the original States], free Negroes were voters, and, in proportion to their numbers, had the same part in making the Constitution that the white people had" (Basler 1953, 403).

3. See, for example, 8 USC 1401 ("a person born in the United States, and subject to the jurisdiction thereof" is a United States citizen); 8 USC 1402 ("All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth").

4. For example, in the quoted passage at the beginning of this chapter, Tennessee voter John Gentile mentions his belief that Barack Obama's parents were required to have "allegiance" to the United States, and this apparent failure of both Obama parents to hold "allegiance" to the United States is, Gentile believes, a fatal flaw in Obama's presidential eligibility.

5. Kris W. Kobach is of counsel to the IRLI (Immigration Reform Law Institute 2012).

6. For example, a person who is Argentinian might lose Argentinian 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 "unjustified absence from the country for more than three years" (U.S. Office of Personnel Management 2001, 19).

7. 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 (Stock 2009). Everyone who enlists in 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 (Cornyn 2011). Some unauthorized immigrants have also managed to enlist, against service policies, and have taken the oath of allegiance as a result (Jordan 2011).

8. 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 (New York Department of Health 2004).

9. 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); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (discussing the case of a dual Mexican-American citizen who was obligated to obey U.S. military draft laws).

10. Britain, like many countries, has long accorded citizenship to children born overseas to birthright British citizens. See U.S. Office of Personnel Management 2001, 209.

11. Naturalization as a U.S. citizen is not an act that causes a person to lose British citizenship under long-standing British law. 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.

12. According to Rosenbaum (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."

13. 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 military service (Romney 1938, 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"; Romney 1938, 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 (Miroff 2011). "Many are eligible to cast absentee ballots in U.S. elections, having acquired U.S. citizenship through their parents" (MSNBC 2012).

14. 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 to avoid prosecution by federal authorities for polygamy (Romney 1938, 51). 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 his birth, George Romney 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 United States prior to George's birth (Levy and Roth 2011). 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).

15. 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 is eligible to be elected to the office of president of the United States (Pryor 1988). There is some dispute as to whether Mitt's father, George Romney, was so eligible (Gordon 1968).

16. 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 hundred years (Gutierrez 1997).

17. Article II, Section 13, of the Arizona Constitution provides that "no 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.

18. 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 Obama's eligibility for presidential office because he is a dual citizen of the United States and Kenya (Donofrio 2011). (Donofrio writes: "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.")