Who Belongs? Theoretical and Legal Questions about Birthright Citizenship in the United States
Citizenship without Consent: Illegal Aliens in the American Polity by Peter H. Schuck; Rogers M. Smith
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Joseph H. Carens* WHO BELONGS? THEORETICAL AND LEGAL QUESTIONS ABOUT BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES†

In the Texas towns along the Mexican border, it is apparently common for Mexican women to cross the border illegally and to arrive at the door of the local public hospital just as they are about to give birth.¹ The hospitals are obliged to admit the women because they clearly need medical care. The children are born in the hospital, and because they have been born on American soil they automatically become American citizens. A few days later the women return to Mexico with their babies, content in the knowledge that they have greatly enhanced the life prospects for their newborn by securing for them the advantages of American citizenship. Their children may grow up in Mexico, but when they come of age they will be able to travel openly and freely in the United States, to take advantage of the economic opportunities which are so much greater than those in Mexico, and generally to claim the rights and privileges to which any American citizen is entitled. At the same time, as the children of Mexican citizens, they are also entitled to Mexican citizenship. If they choose to remain in Mexico, they suffer no disadvantage from their birth in the United States.

Who could blame the Mexican mothers for what they do? At some cost and risk to themselves, they seek to improve the life chances of their children. At the same time, it seems strange that they should be able to secure American citizenship for their children merely by arranging to give birth on American soil. Do these children really have links to the American political community? What differentiates them from the Mexican children, not born in the United States, with whom they grow up? What principles of citizenship and political community can lie behind the rule of automatic birthright citizenship to anyone born in the United States? Are these principles and concepts ones that Americans should continue to endorse?

In Citizenship without Consent, Peter Schuck and Rogers Smith answer this last question with a resounding no. In their view, the Mexican women

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¹ 'Mexican women cross border so babies can be u.s. citizens' New York Times 18 November 1983, cited in Schuck and Smith Citizenship without Consent 156, note 16.
who cross the border to give birth provide only one dramatic illustration of the serious problems created by the American practice of birthright citizenship. Schuck and Smith seek to challenge that practice at three different, though related, levels. At the level of normative theory, they argue that birthright citizenship is incompatible with the principle of consent, a principle that has played, and ought to play, a central role in the American view of political community. At the level of law, they offer a revisionist interpretation of the American legal tradition, challenging the conventional view that the Fourteenth Amendment to the U.S. Constitution mandates birthright citizenship. At the level of policy, they contend that birthright citizenship exacerbates the problem of illegal immigration and allocates membership unfairly among those seeking admittance to the American political community.

Schuck and Smith are distinguished scholars who have already contributed much to our understanding of citizenship and immigration. This book too makes a contribution, but not, in my view, because of the success of the arguments it contains. Nevertheless, the questions that Schuck and Smith raise and the arguments that they develop help one to understand the problems of immigration, citizenship, and political community even when one disagrees with their conclusions. Despite its American focus, the book should be of considerable interest to people outside the United States, and particularly to Canadians, because Canada, like the United States, has a history of considerable immigration, a growing (though still small) problem of illegal immigration, and a rule of universal birthright citizenship for all born in Canada. Moreover, questions about how constitutions should be interpreted have become much more important since the adoption of the Charter of Rights and Freedoms, and Schuck and Smith's book provides an interesting and controversial case study in constitutional interpretation.

In this essay I will focus on two questions raised by Schuck and Smith's discussion: (1) What does normative theory tell us about who is morally entitled to citizenship in a political community? (2) What does the issue of birthright citizenship tell us about how a constitution should be interpreted, and in particular about the role of normative theory and public policy considerations in legal interpretation?

Consider first the theoretical questions raised by the acquisition of political membership. How should membership in a political community

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be established? Who should be able to acquire membership and on what terms? What do the answers to these questions imply about the nature of political community?

Conventional discussions of nationality rarely address such fundamental questions. They are generally content to distinguish between right of birthplace (jus soli) and right of descent (jus sanguinis) as the two major alternative principles that states use in assigning citizenship at birth. They describe how different states use one or the other of these principles (or some combination of both) and discuss the problems posed for international order when the laws of different states conflict. They simply assume that people will normally acquire citizenship through birth and that there is nothing problematic about this. (States may permit citizenship to be acquired at a later stage but the very term used for this, ‘naturalization,’ suggests that birthright citizenship is the norm.)

Schuck and Smith want to go deeper. They argue that laws regarding nationality embody principles that reflect particular visions of political community and citizenship. To assign citizenship on the basis of the circumstances of a person’s birth makes sense, they suggest, only if one thinks of the political community as a natural order and of citizenship as an inherited status whose obligations and privileges are not subject to choice. They call this view the principle of ascription, and they contrast it with the principle of consent. The principle of consent entails the view that the legitimacy of political authority rests upon the free consent of those governed. The political community is an artificial order created by the voluntary surrender of natural freedoms, and no one, not even a parent, can permanently surrender the natural freedom of another. The obligations of citizenship cannot be imposed by birth. Each individual must choose to become a citizen.

In contrasting ascription and consent so sharply, Schuck and Smith challenge us to re-examine a long-established practice. Is birthright citizenship really compatible with our basic political principles? (Schuck and Smith emphasize the special place of consent in the American political tradition, but the principle of consent has deep roots in all liberal societies.)

Despite this challenge and their claim to defend an essentially consen-
usual ideal of citizenship, Schuck and Smith conclude that all children of current citizens (and permanent residents) should automatically become citizens at birth. They insist that these children should have the right to renounce their citizenship at maturity or at any time thereafter, but the admit that this is largely an empty formality in the context of the modern welfare state. One way to characterize their position is to say that they endorse a variant of birthright citizenship in which citizenship is ascribed on the basis of descent rather than birthplace (the continental rather than the British tradition), and to this ascribed membership they join the right of voluntary expatriation. How do Schuck and Smith arrive at this position, given their avowed opposition to birthright citizenship and their commitment to the principle of consent? What does this say about their claim that the principles of consent and ascription are fundamentally different?

I think that the principles of ascription and consent do indeed stand in deep tension with one another. Ironically, however, the substantive position that Schuck and Smith endorse can best be defended by a modern version of the principle of ascription rather than the principle of consent. The principle of ascription is far more attractive than Schuck and Smith acknowledge. It expresses many of our moral views about who belongs to a political community. But the principle of consent also offers a valuable critical perspective on the question of membership, especially if one adopts as the principle of legitimacy individual consent, rather than mutual consent as Schuck and Smith suggest. In what follows, I will first make the case for individual consent as a critical principle; I will then show why the version of mutual consent that Schuck and Smith defend is unpersuasive; and I will sketch a modern version of the principle of ascription, noting at the end the unresolved tension between this and the principle of individual consent.

Schuck and Smith take Locke as the paradigmatic spokesman for the principle of consent, so I will make the case for individual consent in the context of his theory. Locke says a great deal about the need for the individual to consent to the community before political membership can be established. He says nothing, however, about whether the community must consent to the individual before the individual can claim membership. Schuck and Smith regard this as an oversight. They note that the tradition of civic republicanism explicitly held that consent must be

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5 Schuck and Smith would clearly reject this characterization of their view (see, for example, page 139). They argue that the rule of *jus sanguinis* is a way of giving expression to the non-ascriptive principle of consent. I criticize this argument below.

6 For a fuller discussion of the arguments developed in this section, see Joseph H. Carens, *Aliens and citizens: The liberal case for open borders* Rev. of Politics (forthcoming).
mutual and that the community had the right to limit immigration and to choose whom to admit to membership, even among those living permanently within the boundaries of the state. The logic of Locke's social contract, they contend, leads to similar conclusions (pp. 29–31).

But does it? Recall that for Locke the purpose of government is simply to protect rights that individuals already enjoy in the state of nature, including property rights. He explicitly denies that the creation of a political community by some individuals restricts the natural liberty of those who do not join. If a farmer who owns land in one place (say, California) wants to hire workers from another place (say, Mexico), what right would a Lockean government have to interfere with their voluntary, peaceful transactions? Of course, that sort of transaction involves only migration, not membership, but one of the reason for limiting membership is to restrict the migration and employment of non-members. That is precisely what a Lockean natural rights perspective calls into question.

Consider now the question of membership itself. In the Lockean state of nature, individuals who are free, equal, and independent agree to a social contract entrusting the enforcement of the law of nature to an authority they promise to obey and support (so long as it does not violate its trust). They agree to this contract in order to establish a more secure and impartial administration of justice than is possible when each interprets and enforces the law of nature himself. On what grounds could some of these individuals refuse permission to others to sign the social contract? What could motivate such a refusal, except perhaps a desire to gain partisan advantage in enforcing the law of nature, a desire that would be in direct conflict with the underlying goal of establishing an impartial administration of justice?

Even after the state of nature is replaced by civil society, the basic situation does not change for new entrants. Each individual must personally consent in order to become a member, but there are no grounds for refusing to let a person consent if he or she wishes to do so. The goals and limits of the state's authority remain the same for those who come after the original contract as they were for the founders. Perhaps it would be legitimate to exclude people who had proved by their behaviour that they did not respect others' rights, on the grounds that their promises to abide by the social contract could not be trusted. Perhaps others could be excluded on the grounds that they were incapable of the reason required by consent. But if apparently rational and law-abiding people wished to sign the social contract, how could they be refused? One does not run out of copies of this contract.

Locke's theory does not give current members the right to exclude

7 Locke The Second Treatise of Government (ed. Laslett)
others merely in order to promote a particular way of life. In this regard, Schuck and Smith underestimate the differences between Locke and the civic republicans. The latter see restrictions on immigration and admission as essential to protect the capacity for communal self-determination and the particular conceptions of virtue and the common good that the community has chosen to pursue. Locke’s state has no room for these sorts of purposes and thus no grounds for these sorts of restrictions.

I do not want to tie the principle of individual consent too closely to a particular interpretation of Locke. Schuck and Smith themselves do not accept all of Locke’s views and neither do I. The point is to see how the Lockean premises that Schuck and Smith themselves use as a starting-point can plausibly give rise to the radical view that political membership should be determined solely by individual consent. Indeed, modern libertarians who see themselves as the heirs of Locke often defend open borders along with the minimal state.

Schuck and Smith are clearly not Lockeans of this stripe. Part of their objection to birthright citizenship is that it threatens the welfare state by increasing the incentives for illegal immigration. But even those who share their concern for the welfare state (as I do) should feel the pull of the radical principle of individual consent. It is not a question of people trying to be free riders. It would be one thing to say that people are not entitled to the privileges and benefits of membership in a political community if they are not willing to bear the same burdens and obligations as other members. (paying taxes, obeying laws, etc.) It is quite another to say that people cannot join even if they are willing to do their fair share. Why is that justifiable no matter what sorts of benefits the state provides? Once one starts with a commitment to liberal principles of individual freedom and the moral equality of all human beings, one is well on the road to the conclusion that political membership should be determined on the basis of individual consent, no matter how expansive a view one takes of the state’s functions.8

The principle of consent, at least in the radically individualistic form I have sketched here, does indeed give rise to an understanding of political community that is fundamentally different from the principle of ascription. In this view, birth creates neither bonds of membership nor barriers to entry. A political community is seen as a voluntary association, but one that must be open to all who wish to join. Is this a vision of membership and political community that we should endorse?

Schuck and Smith would object that this is the wrong way to think about the principle of consent. They do not explore the individualistic form of

8 See Carens, supra note 6, for more on this.
the consent principle in any detail, but their rejection of it is implicit in the version they do explore: mutual consent. If Locke and the civic republican tradition clash on this point (as I have argued they do), then Schuck and Smith would surely say, 'so much the worse for Locke.' At one point they put it this way: '[C]onsent to membership must be mutual, expressed by the existing community as well as by the individual; otherwise, existing members will be coerced and their free choices nullified' (p. 37). Elsewhere they stress communal self-determination more than freedom of association. The right of a community to control admission to membership is essential to its capacity to 'shape its own destiny' (p. 40).

Let us explore this principle of mutual consent for a moment, leaving aside temporarily the conflict between it and individual consent. The most radical form of mutual consent would be one that acknowledged the right of the community to admit or exclude whomever it chose. And just as an individual would always have the right to leave (voluntary expatriation), the community would always have the right to expel existing members (exile or denationalization). Schuck and Smith say that they want to endorse the principle of mutual consent, but not in this extreme form.

What limits do they place on consent? In the first place, they assert that the community is obliged to admit all the children of existing and new members. They deny, however, that this requirement conflicts with the principle of consent. Instead they endorse Burlamqui and Vattel's argument that individuals would never agree to join a political community unless they were assured that their children would be entitled to membership. Schuck and Smith defend this assumption about what people would and would not consent to as psychologically plausible. Thus, birthright citizenship based on descent (jus sanguinis) is to be seen as a way of giving expression to the principle of consent (pp. 44, 46).

Schuck and Smith's argument that hereditary citizenship is compatible with the principle of consent lies at the heart of their claim to provide a more consensual, less ascriptive view of citizenship, but the argument will not stand up to critical scrutiny. Their claim that parents would not join unless their children were also guaranteed membership has some plausibility in the context of a discussion of the original social contract, if one makes certain assumptions about the state of nature and human motivation. It is not clear, however, why the consent of the original signers of the social contract would guarantee citizenship for any but their own direct descendants. Note that in the original situation there is no pre-existing community whose consent is required. It is the consent of each individual with every other individual that creates the community.
For those who join later (for example, immigrants who become naturalized), the situation is quite different; the consent of the pre-existing community is required. And it is not clear why the principle of mutual consent requires the community to offer the same terms of membership to those who join later as were offered to the original members. Perhaps a fear of future overpopulation would lead the community to offer citizenship as a non-hereditary status to new immigrants. That sort of arrangement seems perfectly compatible with the principle of mutual consent. After all, the immigrants are not required to join if they do not like the terms.

The claim that people will not join a political community unless their children are also guaranteed citizenship presupposes that they are in a good position to refuse if their terms are not met. Often that is not the case. For much of American history, some or all of those classified as 'non-white immigrants' were barred from naturalization and citizenship. Still they came. Presumably, if they had been offered a form of citizenship that could not have been passed on to their children, they would have accepted it and hoped for the best. No doubt they would have preferred a guarantee of citizenship both for themselves and for their children. But these would not have been terms to which the 'community' was willing to consent.

It seems doubtful that Schuck and Smith or anyone else would want to place much moral weight on blood links to the signers of an original social contract. Claims about an actual historical contract may seem more plausible in the American case than in most other states, but few Americans can claim this sort of inheritance. If the original contract is treated as hypothetical, as most theorists are inclined to do, then it undermines the power of the principle of 'mutual consent.' Like most doctrines of hypothetical or tacit consent — and this one involves elements of both — the claim that people would join only if their children were also guaranteed citizenship moves away from the real choices of real people. It appeals to reason rather than to will, to standards of justice and right rather than to freedom. It is designed not to give effect to, but to place limits upon, the choices that real individuals and real communities would make.

Why do Schuck and Smith insist on the principle of hereditary citizenship? Why not defend a full-blooded principle of mutual consent? After all, it is reasonable to suppose that most communities, including the United States, would choose to make citizenship automatically available to the children of existing citizens. What underlies Schuck and Smith's argument about hereditary citizenship, I think, is a concern that they make explicit elsewhere: the human rights and moral claims of individu-
als must set limits to the sorts of choices the community can make regarding membership. Schuck and Smith are worried about the problem of 'unjust exclusion.' The principle of mutual consent might mean that a society could deny outsiders opportunities for membership in ways that are harshly restrictive or discriminatory. It might also mean that a society could freely denationalize citizens against their will, reducing their security and status, perhaps even leaving them stateless. In both these instances, adherence to consent may well violate liberalism's other deep commitment to insuring that the basic human rights of all be secured as fully as possible (p. 37).

To avoid the violation of basic human rights, Schuck and Smith argue that the community should have no right to denationalize citizens against their will. They also seem to argue that the community has an obligation to admit to membership all those who live within their territory. This would prohibit the exclusion of current inhabitants from citizenship on the basis of such factors as religion, although Schuck and Smith's position in this seems slightly ambiguous (pp. 80, 38–40).

When joined with the guarantee of birthright citizenship for the children of current members, these requirements set significant constraints on the community's capacity to determine its own membership. Under these guidelines, the overwhelming majority of the population of a state would have a birthright claim to membership independent of the community's actual consent. In effect, the community's consent to membership would be required only in the case of those who had no birthright claim. This is a long way from the radical ideal of mutual consent. At the same time, none of these constraints conflicts with the principle of individual consent sketched earlier. They limit the right of the community to exclude many of those who might wish to join. So, the question arises, why not go all the way to the principle of individual consent and let anyone join who wants to do so? Why set all these limits on communal self-determination, but not the additional ones implied in the principle of individual consent?

Schuck and Smith do not address this specific question, but they do address similar ones. They recognize that needy aliens may have powerful moral claims, and they express the (obviously genuine) hope that the United States will adopt a generous and inclusive admissions policy. The final decision, however, must rest with the political community. 'As Vattel emphasized long ago, humanitarian claims set moral standards for a nation's use of its powers of self-determination, but recognition of the rights of its existing citizens means that such claims cannot obviate those powers' (p. 101).

Unfortunately, this response elides the very distinction it seeks to
elucidate. There is a difference between the right to use power and using power rightly. The claim that existing citizens have the right to self-determination is, in the first instance, a claim about the right to use power. If we say that a state has the right to determine its own laws regarding nationality, this means, in this context, that no other state or group may justifiably use force to implement a different set of laws. The issue here is the proper allocation of political power. Call this state sovereignty in the weak sense. Note that under this weak sense of state sovereignty, a state would have the right to pass the sorts of laws that Schuck and Smith say it ought not to pass. For example, a state could denationalize some of its citizens or bar the children of some citizens from membership without providing any moral grounds for other states to use force to abrogate these laws.

It does not follow from this first sort of claim about self-determination that a state is morally justified in passing whatever laws it chooses with regard to nationality. That would be state sovereignty in the strong sense. It would amount to the claim that a state can do no wrong, that it always uses power rightly no matter what it does. Schuck and Smith clearly do not accept this second sort of claim (nor would anyone committed to human rights). Their arguments against denationalization and against the exclusion of children of current citizens do not challenge state sovereignty in the weak sense, but only in the strong sense. They are claims about what the state is morally obliged to do and not to do. So, the distinction to which Schuck and Smith appeal does not help us to understand why they draw their moral lines where they do.

Schuck and Smith simply assume that it is morally permissible for the United States to exclude from citizenship most of the people not born in the United States. They focus their attention on children who are born in the United States but who are the offspring of illegal immigrants, and they argue that it is morally permissible to exclude these children from citizenship as well. However, they regard it as morally wrong to exclude from citizenship children who are born in the United States and who are the offspring of current citizens, no matter how undesirable they might be deemed by the existing community. For example, Schuck and Smith presumably would regard it as wrong to deny citizenship to the children of citizens on welfare, even if advocates of such a proposal could muster sufficient support to pass a constitutional amendment making it legal to do so.

What can account for this sharp distinction between the children of members and the children of non-members? Why do the former have so much more powerful moral claims to membership? The answer cannot lie in the principle of ‘consent,’ for the community’s desire to exclude might
be equally powerful in both cases, and, as we have seen, the claim that the community has consented to the membership of children in admitting parents will not bear scrutiny. Are the human rights claims of the children of members so much stronger than the human rights claims of the children of non-members? Only if one asserts that people have a basic human right to membership in the community of their parents but not to membership in any other community. And this only pushes the question back another level. What would support such a claim about human rights?

Schuck and Smith argue that the children of current citizens must be granted citizenship because otherwise they would be stateless, and that is a perilous and vulnerable condition in the modern world. By contrast, they point out that the children of illegal immigrants usually are entitled to the same citizenship as their parents. But this overstates the risks of statelessness and the value of some kinds of citizenship. Many people in the Third World would gladly trade their own situation as citizens for the (far less) perilous and vulnerable condition of statelessness in an affluent western democracy. In many important ways, that is precisely the trade that illegal immigrants to the West do make, since they forgo many of the claims and protections that legal residents enjoy but they still gain from the economic opportunities and civil security that such societies normally provide. The children of illegal immigrants have as much to gain from membership as the children of current citizens and almost as much to lose from its deprivation. Any human rights approach that focuses on the needs, interests, and life chances of individuals will find it difficult to draw sharp distinctions between the children of members and the children of non-members when it comes to assigning rights to membership.

Ironically, the distinctions that Schuck and Smith wish to draw make far more sense from an ascriptive perspective than from a consensual one. A contemporary version of the principle of ascription might be something like this: Think of the state not as a voluntary association formed by the consent of individuals past or present, but as a political community shaped by a variety of historical forces, including custom and, in some cases, consent. Moral claims to citizenship in a state normally rest not on choices that individuals make but on facts about people’s relationships with a society. People who have lived and worked throughout their lives in a particular society should normally be regarded as full members of that society. In the absence of unusual and special circumstances (for example, attachment to the diplomatic service of another country), such long-term residents have a powerful moral claim to citizenship. By contrast, people who have no connection to a society, who have never lived or worked there, normally should not be regarded as members of the society and have no moral claim to citizenship. Children are not born into the world as
isolated individuals, but as members of already established social networks. The mere fact of where they are born and to whom they are born creates social ties and therefore moral claims upon particular communities. Take, for example, a child born in France to parents who are French citizens and who have lived their entire lives in France. It is appropriate to regard such a child as a member of French society and morally entitled to French citizenship. Contrast this child's claim to French citizenship with that of a child born in the United States to parents who are American citizens and have always lived in the United States, never in France. The latter child is not a member of French society and has no moral claim to French citizenship, but she is clearly a member of American society and is morally entitled to American citizenship.

I have deliberately chosen examples in which the social ties are clear. There will be many people for whom this is not the case – for example, people who are citizens of one country but who live and work in another, and the children of such people, including the ones on whom Schuck and Smith focus their attention, the children of illegal immigrants. I will return to these sorts of cases in moment. Consider first, however, how many cases this principle of ascription would settle clearly and unambiguously. Given the ascriptive view I have just sketched, most people in the world would have a clear moral claim to citizenship in one particular state, and, just as clearly, would have no moral claim to citizenship in any other state. Even those who might have some ascriptive claim to citizenship in more than one state would rarely have a claim to more than two or three. So the ascriptive view of membership can make sense of ordinary moral assumptions about who clearly belongs to a community and who clearly does not belong, and what cases are likely to be contested and problematic.

As I noted before, Schuck and Smith assume that children born in the United States to citizen parents have a human right to American citizenship, while children born elsewhere to non-American parents do not. But this human rights claim makes sense only if it is based upon an ascriptive view of membership such as the one sketched above. Schuck and Smith intend the principle of mutual consent to justify the exclusion of aliens whom the community wishes to exclude. But this presupposes that one knows whose consent is required and therefore who belongs to the community in the first place. In the absence of a requirement of unanimity, it risks identifying the community with those who hold political power. One of the virtues of the ascriptive view I have described is that it creates a context in which claims about mutual consent and communal self-determination can make sense, because it provides an independent, non-circular criterion for those who belong to the commu-
nity. At the same time, the principle of ascription provides a critical perspective on the use of political power to exclude people who are entitled to citizenship.

Take the case of South Africa. Those who seek to defend apartheid claim that whites and blacks are really members of separate societies, so that it is no injustice to the blacks to deny them citizenship, to exclude them from the political process, and to treat them as aliens. Of course, much of South African policy towards blacks would not be justifiable even if they were aliens, but let us focus on the question of membership. Most of the blacks whom the white South Africans seek to exclude are people who were born in South Africa and who have lived and worked there all their lives, as their parents did before them. To deny that they are members of South African society is to ignore basic facts about their everyday lives and about their economic, social, cultural, and political ties to South Africa. On the ascriptive view, these facts make them members of South African society, and because they are members of that society, they are entitled to citizenship. That is why the exclusion of South African blacks from the political process is a violation of communal self-determination (rather than an expression of it, as some white South Africans claim). By contrast, if blacks born and raised in Kenya and still living there are denied South African citizenship and excluded from the South African political process, that is not a violation of their human rights or of the principle of communal self-determination. The Kenyans are not members of South African society. It is hard to see how the principle of mutual consent would provide any grounds for making these sorts of distinctions.

The version of ascription I have just sketched is quite different in some ways from Schuck and Smith’s. Their analysis presents Coke and Filmer as paradigmatic spokesmen for the principle of ascription and emphasizes the way Coke and Filmer link the assignment of citizenship at birth to a hierarchical view of society and an insistence on the permanent character of political allegiance. For Coke and Filmer voluntary expatriation is out of the question. Citizenship is inalienable.

But why should a modern version of ascription have to carry all the baggage that Coke and Filmer load upon the principle? It is one thing to use a discussion of Coke and Filmer as an expository device, quite another to suggest that theirs is the only coherent account of the principle of ascription. Schuck and Smith give no reason why we should regard Coke and Filmer’s doctrine of permanent allegiance as a necessary part of any principle of ascription.

The key difference between ascription and consent lies in the question of whether membership ought to be regarded, in the first instance, as a question of fact or a question of will (whether the will of the individual or
that of the community). The ascriptive view treats membership as primarily a question of fact, but not necessarily an irreversible fact or one to which the individual's will is always irrelevant. The principle of ascription I have described entails no commitment to the inalienability of citizenship. It implies that people are entitled to citizenship in any state to which they have sufficiently powerful social ties. They cannot legitimately be deprived of such citizenship against their will. This does not mean that they are positively obliged to keep whatever citizenship they acquire at birth. They can renounce their hereditary citizenship (as one could a hereditary title of nobility) without calling into question the principle of ascription. On this view, people should be free to change their social ties, to give up old memberships and establish new ones, if they wish to do so and can find communities willing to admit them. The right of voluntary expatriation is therefore fully compatible with a modern version of ascription.

What does this version of ascription imply about the citizenship status of people whose social ties are not as clear as the cases I have discussed so far? The general principle is that the stronger the social ties, the stronger the moral claim to citizenship, and the weaker the social ties, the weaker the moral claim to citizenship. This means that there will be a continuum from those who have overwhelmingly powerful claims to those who have few or none. Between these extremes there will be a substantial grey area wherein reasonable people can disagree about whether or not the ties are sufficient to ground a claim to citizenship. Within this grey area different states may make different judgments about what ties are sufficient without acting wrongly. For example, states are presumably free to adopt either jus soli or jus sanguinis (or some combination of the two) in assigning birthright claims to citizenship without violating the principle of ascription.9

States are presumably free as well to extend legal birthright entitlement to citizenship to people who have no powerful ascriptive claims to it. Britain, for example, traditionally granted automatic citizenship to almost all persons born in the United Kingdom, including children born to temporary visitors (such as tourists or students from abroad) and to people who had entered the country without authorization. The British Nationality Act of 1981 changed this, however, and excludes the children of temporary visitors and illegal immigrants from birthright citizenship. The 1981 act has rightly been criticized on a number of grounds, but I do not think this retrenchment from an almost unqualified jus soli rule

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9 States may be morally obliged to consider the interactive effects of different laws and, in particular, to avoid the problem of statelessness wherever possible.
violates the principle of ascription. Temporary presence in a society for the purposes of study or tourism does not create the sort of deep social ties that justify a moral claim to citizenship, nor does mere birth in the territory. If a state wishes to do so, it may follow a broad *jus soli* rule, perhaps using place of birth as a crude indicator of social ties, perhaps promoting immigration, perhaps just following custom. It may thereby grant citizenship to some who have no powerful ascriptive claim. But no state is obliged by the principle of ascription to adopt such a rule, and it (normally) does no wrong from that perspective in defining *jus soli* more narrowly.

Finally, what about the children of illegal immigrants, the people whose birthright claim to American citizenship motivated Schuck and Smith’s inquiry? The children of illegal immigrants who are quickly caught and expelled appear to have no more (and perhaps less) basis for a moral claim to citizenship than the children of visiting tourists or students. For example, the children of the Mexican mothers who pop over the border to have their babies on American soil do not appear to have a powerful moral claim to citizenship from an ascriptive perspective. Again, mere birth in a territory does not create deep social ties.

10 In the British case, there were at least two types of objections to the changes undertaken. The first was that the British Nationality Act of 1981, along with earlier changes in immigration laws, had deprived some people of full British citizenship who were entitled to it on ascriptive grounds. In particular, new Asians who had moved to British colonies in Africa and elsewhere with the encouragement of the British government were deprived of a right to settle in Britain which they had previously enjoyed and felt entitled to as British subjects. To the critics, the British restrictions were a betrayal of historic responsibilities and a failure to respect the real ties these people had to the British community, including implied promises of access to Britain. (*The principle of ascription does not exclude ties based on consent.*) The second type of objection did not focus on the ascriptive claims of those excluded but on the vision of Britain underlying the move to exclude. The claim was not that the children of visiting students or of illegal aliens had a powerful moral claim to citizenship, but rather that the change reflected an increasing narrowness and defensiveness in the British self-understanding and encouraged those who sought to identify being British with being white. As this second sort of objection shows, the principle of ascription is not the only critical perspective that can be brought to bear on immigration law. For a fuller discussion of the British case, see Evans *Immigration Law* 2d ed. (1983) and Blake, *Citizenship, law, and the state: The British Nationality Act of 1981 (1982)* 45 Mod. L. Rev. 179, 184.

11 This argument assumes that social ties correspond to political borders. Perhaps they don’t, especially in border towns. It is arguable that Mexicans living along the border have ties to American society (and thus claims to admittance) that are much stronger than the ties (and corresponding claims) of those living in central Mexico or Brazil or Argentina. If so, these ties may receive partial de facto recognition through a rule of birthright citizenship, since the strategy of crossing the border to have children is really feasible only for those who live in border towns. For those Mexican children who grow up in a society that is partly American (in terms of work, consumption, and popular culture), a birthright entitlement to American citizenship is not as unreasonable as it may seem at first glance.
What about the children of illegal immigrants who manage to remain in the society a long time? Their case is much more difficult. The children are not responsible for their parents' illegal entry, and as they grow up they probably will develop social ties to the land in which they were born, and will have much weaker ties to the land from which their parents came. They really are members of the society in which they live. From the perspective of the principle of ascription, it would be wrong to deny them citizenship and to expel them after many years from the only country they have ever known. The 1981 British Nationality Act recognizes this. While it denies automatic birthright citizenship to the children of illegal immigrants, it grants citizenship to such children if they are born in the United Kingdom and spend the first ten years of their lives there.12

Why ten years, one may ask. Does the principle of ascription provide any good reason for distinguishing between children who have spent their first ten years in a country and those who have spent only nine? For that matter, does the principle of ascription provide any reason for distinguishing between children who were born six months before their parents entered the country and those who were born six months after? No, or at least not much of a reason. But moral principles recognize continua more easily than laws. The weight given to the distinction between two cases that fall just on either side of a legal line is bound to seem arbitrary from a moral perspective because the cases are (ex hypothesi) much closer to each other than to the extremes to which they are assimilated by law. But this is unavoidable in practice. One can multiply criteria and distinctions, but not indefinitely, and considerations of administrative feasibility do come into play. So a rule like the one in the 1981 British Nationality Act is a reasonable way to try to implement the principle of ascription.13

If the children of long-term immigrants have an ascriptive claim to citizenship, what about the illegal immigrants themselves? After all, they too build the sorts of deep social ties over time that make them members of society. Don't they have a moral claim to citizenship? The answer is yes, and this is precisely why it is so difficult for states to expel long-term illegal aliens and why there are such strong pressures for amnesty programs. Of course, they broke the law by entering the country in the first place. It can be argued that amnesty would reward law-breaking and create incentives for more illegal immigration. Moreover, to grant citizenship, or even the right of continued residence, to long-term illegal immigrants may seem unfair to those potential immigrants who have respected the law and

12 See Evans Immigration Law for a more precise and detailed discussion.
13 This is not to be taken as a general defence of the act. See note 11 above.
waited their turn, often for years. These arguments against amnesty have merit, but that only confirms the power of the principle of ascription on the other side. If the social ties of the long-term immigrants did not give rise to moral claims to continued membership, we would find it easy to expel them. As it is, even the critics of amnesty programs usually admit that they are torn.14

Arguments about unfairness to legal entrants and incentives for future illegal immigrants often seem abstract and bloodless next to the concrete reality of the harm that will be done to people whom we have known as friends, neighbours, and co-workers if we expel them. These people are not usually robbers and murderers. They are ordinary, hard-working people, willing to abide by all the laws except the one that would have excluded them from the chance for a decent life. Do we really have the right to send men with guns to drive them out of our midst? (I use the image deliberately, for it is only the armed force of the state that enables us to expel them.)

Ironically, the fact that the principle of ascription supports the moral claims of long-term illegal immigrants against expulsion leads us back to the principle of individual consent in a way that challenges the principle of ascription. If we do not have the right to expel them now, what gave us the right to exclude them in the first place? What grounds our assumption that we are entitled to keep out of our society people who want no more than the chance to be decent, hard-working, contributing members of the society? At times it seems self-evident that we have the right to exclude people who are not members at birth, who have no ascriptive claim. But from the perspective offered by the problem of long-term illegal immigrants, that seems far more problematic. The principle of ascription, as I have outlined it above, expresses the conventional moral assumption that we have a right to exclude non-members, but it does not provide any basis for defending that assumption against the challenge posed by the principle of individual consent, a principle that takes as it starting-point the claim that all human beings have an equal right to freedom and that constraints upon freedom must be justified in ways that respect that fundamental moral equality. It is common for those of us born in affluent western societies to assume that we are morally entitled to citizenship in the states in which we were born (or in which our parents held citizenship) and that potential immigrants from the Third World have no claim to admission beyond an appeal to our generosity. Perhaps that implication of the principle of ascription will appear to subsequent generations to be

as complacent and self-serving as the feudal nobility’s assumption that it was morally entitled to its birthright privileges.\textsuperscript{15}

II

I turn now to some of the questions about law raised by Schuck and Smith’s book. As I noted earlier, the book operates at three different but related levels of analysis: normative theory, constitutional law, and public policy. Just how these levels of analysis should be related is one of the interesting issues raised by the book.\textsuperscript{16} The heart of the book is devoted to challenging the conventional view that children born in the United States are automatically citizens under the Fourteenth Amendment. The arguments that Schuck and Smith develop to support their challenge illustrate the importance of normative theory and public policy in some approaches to legal reasoning, especially in the area of constitutional law. Their basic strategy is pluralistic. They do not deny the relevance, in principle, of traditional legal concerns about the meaning of the text, the intention of the framers, and the bearing of previous judicial decisions. Instead, they try to show that these factors are inconclusive with regard to the particular issue, so that theoretical and policy considerations properly become decisive.

As a general strategy of legal reasoning, this seems to me to be a sound approach, but its use here is particularly bold. Few issues of constitutional law have seemed more clearly settled than birthright citizenship. The Fourteenth Amendment includes the sentence ‘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.’ The language seems fairly clear. Whatever doubt existed about its meaning was generally thought to have been resolved by \textit{United States v. Wong Kim Ark} in 1898.\textsuperscript{17} In that case the Supreme Court held that a child born in the United States to parents who were Chinese subjects was an American citizen by virtue of his birth, despite the fact that a treaty between China and the United States and the naturalization statute then in effect prohibited Chinese parents and their children from becoming naturalized citizens. Since that time there has been no serious debate among jurists and legal scholars about who was a citizen by birth. Whether desirable in theory or wise as policy, it was thought to be settled as a matter

\textsuperscript{15} For a defence of this suggestion, see Carens, supra note 6.

\textsuperscript{16} Schuck and Smith do not provide much discussion of methodological questions, with the exception of a few brief remarks on pp. 116–17. I am attempting to make explicit the theory of interpretation that is presupposed by their argument.

\textsuperscript{17} 169 U.S. 649, 732 (1898)
of law that children born in the United States were American citizens, regardless of the citizenship status of their parents, provided only that their parents were not foreign diplomats or (prior to 1925) American Indians (the true native Americans). In a recent case taking up other questions about the rights of illegal aliens, the Supreme Court casually referred to the question of birthright citizenship in a footnote, saying that the issue had been settled by *Wong Kim Ark.*

Schuck and Smith contend that the Supreme Court could assume the issue to be settled only because the court had not studied it closely. The key puzzle in the text of the amendment, they say, is the phrase ‘subject to the jurisdiction thereof.’ This cannot apply to all who are born in the United States, because it would be redundant. It must represent an additional narrowing qualification. Whom does it exclude? The legislative debates over the citizenship clause of the Fourteenth Amendment (and a related civil rights law) seem to indicate that the supporters of the legislation intended it to grant citizenship to the American-born children of resident aliens, including Chinese resident aliens. So *Wong Kim Ark* was rightly decided. But the parents of *Wong Kim Ark* were *legal* resident aliens, so the case did not settle the question of the citizenship status of American-born children of *illegal* aliens. Moreover, the Congress that wrote the Fourteenth Amendment could not have intended the jurisdiction clause to include the children of illegal aliens for the simple reason that there were no illegal aliens at the time. (The first restrictions on immigration were not passed until 1875.) Of course, this last argument also implies that Congress could not have intended to exclude the children of illegal aliens through the jurisdiction clause. Schuck and Smith are perfectly content with that result, however. By arguing that the text, the intention of the framers, and legal precedents all leave the question open, they hope to create space for their theoretical and policy considerations to prove decisive.

Schuck and Smith do not simply adduce these considerations directly, but try to link them to the law. They argue that both the principle of consent and the principle of ascription find support in the American legal tradition, but that the principle of consent fits better with the most fundamental American values. The place of ascription in American law is clear, because that is the common law view of nationality and it was affirmed in *Lynch v. Clarke* in 1844 in an opinion that explicitly rejected Vattel’s public law conception of consensual membership. Where does the principle of consent find support in the American legal tradition?

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19 1 *Sanford* 583, 663 (N.Y. 1844)
Schuck and Smith argue that the public law principle of voluntary expatriation is implicit in the Declaration of Independence and was repeatedly affirmed by the executive and legislative branches in conflicts with the British over the treatment of naturalized British-born American citizens. They acknowledge, however, that a number of court rulings in the nineteenth century affirmed the conflicting common law ascriptive view that the allegiance acquired at birth was perpetual. The strongest support for the public law consensual view of membership in the American tradition comes from the treatment of native Americans and free-born blacks. These were people who would seem to have been entitled to citizenship under the common law ascriptive view. Instead, public law conceptions were used to exclude them. In the case of native Americans, Vattel's concept of 'tributary states' was used to conclude that tribes were sufficiently independent that those born in the tribes were not members of the American political community even though they were subject to federal law in many respects (pp. 64–6). In the case of blacks, Chief Justice Taney used a consensual view of citizenship in the *Dred Scott* case to reach the conclusion that no American of African descent, whether freeman or slave, could be a United States citizen by birth.\(^2\) Of course, the Fourteenth Amendment was designed to overturn *Dred Scott*, but the debates in Congress made clear that the jurisdiction clause was not intended to include native Americans who were still full members of their tribes. The continuing exclusion of native Americans was reaffirmed by the Supreme Court in *Elk v. Williams* in 1884, and the majority explicitly linked the jurisdiction clause to 'the principle that no one can become a citizen of a nation without its consent.'\(^3\)

Schuck and Smith argue that, given the support in the tradition for both ascription and consent, we should interpret the jurisdiction clause as setting a consensual limit to the principle of ascription embodied in the Fourteenth Amendment. In their view, the amendment extends citizenship ascriptively to some who would not be entitled to it on a purely consensual model, and denies it to others who would be entitled to it on such a model. They resist the suggestion that the amendment should be entirely interpreted in the light of the theoretical requirements of the principle of consent. The traditional elements of law – the meaning of the text, the intention of the legislators – constrain theory. But when these elements are unclear, when conflicting principles are available, then theory may shape interpretation. Thus, the theoretical case for the principle of consent supports its use in interpreting the jurisdiction clause

\(^{20}\) *Dred Scott v. Sanford*, 60 U.S. 393 (1857)

\(^{21}\) 112 U.S. 94 (1884), 103
as a consensual limitation on the acquisition of citizenship by birth in the United States. Illegal aliens, say Schuck and Smith, 'are manifestly individuals ... to whom the society has explicitly and self-consciously decided to deny membership. And if the society has refused to consent to their membership, it can hardly be said to consent to that of their children who happen to be born while their parents are here in clear violation of American law' (p. 94). The same arguments apply to the children of nonimmigrant aliens, that is, people such as visiting students and tourists, who have been admitted for a limited time and for restricted purposes. They have not been admitted to permanent membership, and so any children born while they are in the United States should not be regarded as 'subject to the jurisdiction of' the United States. Such children would therefore not be entitled to citizenship under the Fourteenth Amendment.

This line of interpretation is also supported by policy considerations. One of the ongoing problems of constitutional interpretation is trying to decide how principles established with one set of concerns in mind should be applied in a new situation in which different, unforeseen concerns have arisen. Schuck and Smith emphasize how much circumstances have changed since the middle of the nineteenth century. Then the United States had a policy of open borders and sought to encourage immigration. Now the goal of policy is to control the borders and reduce illegal immigration. Granting birthright citizenship to the children of illegal immigrants strengthens the incentives for people to enter illegally. These policy considerations would not be sufficient to override a clearly established constitutional rule, but, given the ambiguities surrounding the text and the strong theoretical case for the principle of consent, these policy concerns provide considerable support for an interpretation of the jurisdiction clause that excludes the children of illegal aliens.

Whatever else one learns from this book, it provides a useful reminder that it is always helpful to have a good lawyer on your side. Despite the difficulties in challenging such a deeply rooted rule as birthright citizenship, Schuck and Smith have stitched together an attractive case. But their skilful tailoring can not altogether disguise the sow's ear from which the case has been constructed. Almost every point they raise was anticipated in the debate over Wong Kim Ark. Their arguments echo — sometimes in surprising detail — those of the minority in Wong Kim Ark, while the majority's counter-arguments are either rejected or neglected. So, in effect, their reasoning involves a repudiation of the majority opinion in Wong Kim Ark, even if a technical distinction can be made between that case and their proposal on the grounds that Wong Kim Ark's parents were legal residents. I have two objections to this beyond
whatever force might be granted to precedent. First, the majority in *Wong Kim Ark* had the better of the argument. Second, Schuck and Smith are ignoring the symbolic importance of law.

The central argument of Chief Justice Fuller in the dissenting opinion in *Wong Kim Ark* was that the government had explicitly refused to allow people of Chinese descent to become naturalized citizens and had admitted them with that restriction clearly in view. The government could not reasonably be supposed to have agreed to grant citizenship to children who happened to be born in the United States while denying it permanently to their parents. The jurisdiction clause of the Fourteenth Amendment should therefore be interpreted to exclude the American-born children of people who entered under conditions that did not make them eligible for future citizenship.22 The similarities between this line of argument and the one advanced by Schuck and Smith could hardly be more striking. Like Schuck and Smith, Fuller supported his case with a criticism of the view that the English common law understanding of birthright citizenship should guide American interpretation.23 Like them, he appealed to the revolutionary origins of the nation and to its traditional defence of voluntary expatriation to show that the American understanding of nationality differed from the English.24 Like them, he cited Vattel and other public law theorists in support of his views.25 Like them, he denied that the children of temporary nonimmigrant visitors could acquire citizenship by birth in the United States.26 Like them, he appealed to *Elk* to support his defence of a more restrictive, consensual interpretation of the jurisdiction clause.27

Against this, Justice Gray, writing for the majority, tried to set the jurisdiction clause in historical and legal context. Ironically, he was far more wary than Schuck and Smith of resting the case entirely on what the framers of the amendment said in legislative debate.28 According to Gray, these debates did not control the legal meaning of the amendment, but merely provided evidence about what informed contemporaries thought its legal meaning was.29 He cites them as supporting evidence, but relies more heavily on a long series of cases and treatises in both English and American law dealing with the issue of birthright citizenship.30 The point

22 *Wong Kim Ark*, supra note 17, 729–32
23 Ibid. 707
24 Ibid. 709, 711, 729
25 Ibid. 708
26 Ibid. 715, 718, 729
27 Ibid. 724
28 Compare Schuck and Smith, 78.
29 *Wong Kim Ark*, supra note 17 697–9
30 Ibid. 654–93
of his discussion was that there had been a long history of concern with these questions and a long history of linguistic usage of the term ‘jurisdiction’ and of its applicability to aliens. It was in this context that the amendment was to be interpreted.31

This context made it clear that the point of the jurisdiction clause was to use familiar language to exclude three familiar exceptions to the rule of birthright citizenship: (1) the children of foreign diplomats; (2) the children of the members of a hostile occupying army; and (3) the children of native Americans still living in their tribes.32 The first two exceptions were recognized in both English and American law, the third only in American law. Thus, Gray accepted the claim that the English common law did not determine American law in every respect. The distinct status of Indians under American law was unknown to the English common law.33 But there was overwhelming evidence that American law did not differ from English law with regard to the citizenship status of children born to foreign aliens. In both legal regimes children were citizens of the land in which they were born, regardless of their parents’ status (apart from the named exceptions). Similarly, the history of the use of the term ‘jurisdiction’ made it clear that foreign aliens were regarded as ‘subject to the jurisdiction of’ whatever land they were in, with the three exceptions cited above.34

The whole point of the amendment was to extend citizenship to people who had previously been denied it by court rulings. It would be a perversion of history to read it as imposing new restrictions or denying birthright citizenship to people who had previously enjoyed it.35 (In this respect, it is worth emphasizing even more than Gray did the relevance of Lynch, which had clearly held that a child born in the United States to a non-immigrant, temporary visitor was a citizen by birth. On Schuck and Smith’s construction, the Fourteenth Amendment would overturn Lynch as well as Dred Scott, narrowing birthright citizenship as well as expanding it.)

According to Gray, the decision in Elk did not show that the amendment established a new consensual limitation on birthright citizenship, but merely confirmed the unique status of native Americans tribes under American law.36 (At the same time, Gray cited the dissent in Elk sympathetically.)37 Gray acknowledged that American citizens had the

31 Ibid. 687–8
32 Ibid. 693
33 Ibid. 682
34 Ibid. 687
35 Ibid. 676
36 Ibid. 680–2
37 Ibid. 681
right of voluntary expatriation, but dismissed this as irrelevant to the question of who was entitled to birthright citizenship.\(^{38}\) (His discussion of the status of native Americans had already noted that English and American law were not identical in every respect.) Finally, Gray argued that Fuller’s consensual interpretation would logically exclude from citizenship any group to which Congress denied the right of naturalization. Thus, Congress would be able to bar blacks from citizenship by barring people of African descent from naturalization. But this would defeat the main purpose of the amendment.\(^{39}\)

I find Gray’s arguments compelling. The case does not directly address the question of whether the children of illegal aliens are also entitled to birthright citizenship (Wong Kim Ark’s parents were legal residents), but, as I have shown, the arguments over illegal aliens are essentially the same as the arguments presented in *Wong Kim Ark*. Whether one adopts the ascriptive, common law perspective advanced by Gray or the consensual, exclusionary perspective defended by Fuller and by Schuck and Smith, it makes far more sense to group illegal aliens with non-immigrant visitors (as in *Lynch*) and with legal resident aliens barred from citizenship (as in *Wong Kim Ark*) than with foreign diplomats and native Americans. Acceptance of Schuck and Smith’s argument would require a de facto repudiation of the decision in *Wong Kim Ark*.

This leads to my point about the symbolic importance of law. Great legal cases have a cultural meaning that goes beyond their particular findings and their precedential power. *Dred Scott* is one of the most powerful symbols of the oppression of blacks in the United States. While there may be other cases more important than *Elk* in symbolizing the oppression of native Americans, still *Elk* clearly stands for the rejection of native Americans who *want* to join the dominant society; it is a denial that they will ever really be accepted by whites. Both these cases are compelling reminders of the dark side of American society. They embody and express the racism that is central to American history and culture. By contrast, *Wong Kim Ark* provides one of the few bright spots in American legal history in the second half of the nineteenth century. The case was decided in 1898 at the height of the ‘Yellow Peril’ scare. As the minority opinion shows, there were ways to justify the exclusionary position in legal terms. So the decision in *Wong Kim Ark* stands for the affirmation of the legal rights of an unpopular racial minority in the face of powerful opposition and hostility.

Given all this, what would it mean today if courts were to adopt a line of

\(^{38}\) Ibid. 704

\(^{39}\) Ibid. 702–4
reasoning that explicitly echoed the reasoning of *Dred Scott* and *Elk* while repudiating that of *Wong Kim Ark*. What message would it send to racial minorities about their place in American society? What would it say about the society’s self-understanding and its interpretation of its own history? Schuck and Smith clearly want to repudiate, on moral grounds, the treatment of blacks and native Americans endorsed by *Dred Scott* and *Elk*, but at the same time they want to draw on the arguments used to justify those decisions as historically legitimated conceptual resources in American law. This is a difficult and a dangerous line and one that is ultimately impossible to sustain. The unintended but inevitable consequence of Schuck and Smith’s reasoning would be the symbolic rehabilitation of *Dred Scott* and *Elk* and the symbolic repudiation of *Wong Kim Ark*. In the context of American history and culture, this would be a tragedy.

This concern for the symbolic importance of law takes us back to the question of what bearing broader concerns can have upon the interpretation of law. Schuck and Smith claim that arguments about the meaning of the text, the intention of the framers, and the relevance of precedent are inconclusive when considering the question of whether the Fourteenth Amendment mandates birthright citizenship for the children of illegal aliens. By contrast, I have just tried to show that all of these factors point decisively in one direction. Does that settle the question of how the Fourteenth Amendment should be interpreted? Not at all.

Legal scholars disagree sharply (at least in theory) about whether and how normative theory and public policy concerns should be taken into account in the interpretation of law. I cannot address these questions in

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40 One of the dangers of their approach is illustrated by their attempt to use the decision in *Elk* to justify the exclusion of children of illegal aliens. They argue as follows: ‘If the native-born, adult Indians who lived openly in American society, but who had none of these protections [the protections of citizenship in another state] (except, perhaps, from a “domestic, dependent nation”) did not enjoy birthright citizenship under the clause, then it is difficult to understand why the native born child of illegal aliens, who ordinarily retains all such protections, should be constitutionally preferred’ (p. 97). Schuck and Smith usually defend their position with moral sensitivity, but this is a perverse comparison. The rhetoric suggests that we somehow disfavour and degrade native Americans by supporting birthright citizenship for the children of illegal aliens. That is clearly wrong. The obvious alternative is to regard *Elk* as a scandal, as one more incident in a long history of oppression. The injustice done to native Americans in denying them citizenship was undoubtedly worse than whatever wrong (if any) would be done to the children of illegal aliens by excluding them from citizenship. But that past injustice provides no grounds for denying membership to anyone else, and the exclusion of children of illegal aliens would in no way compensate for the injustice. Schuck and Smith are led to this unfortunate line of argument by their desire to defend the principle expressed in *Elk*. Commitment to the principles of *Elk* and *Dred Scott* will inevitably lead to morally indefensible positions.

41 See for example, Berger *Government by Judiciary* (1977); Bobbitt *Constitutional Fate* (1982); Choper *Judicial Review and the National Political Process* (1980); Perry *The Constitution, the Courts, and Human Rights* (1982); and Ely *Democracy and Distrust* (1980).
detail here. As suggested above, I am generally sympathetic to a pluralistic approach such as the one Schuck and Smith have adopted, even though I disagree with their particular arguments. In my view, interpretation of all law, but especially of constitutional law, should reflect some concern for the fundamental values and principles embodied in the law and for the consequences of judicial decisions. My argument about the symbolic importance of *Dred Scott*, *Elk*, and *Wong Kim Ark* reflects this broader concern. But that argument supports the same conclusion as the narrower one about the text and precedent—that the Fourteenth Amendment does guarantee birthright citizenship even to the children of illegal aliens.

What if the arguments from theory and policy conflicted with the narrower legal arguments? Which ones should prevail? I do not think that can be answered in the abstract, because so much depends on the relative weight and power of the arguments, and that can only be judged in context. On this issue, for example, I have not claimed that the arguments advanced by Fuller and by Schuck and Smith are entirely without merit or that no reasonable person could find this line of interpretation at all persuasive. I have asserted, rather, that Gray's arguments are clearly better. Suppose that the balance of arguments from theory and policy strongly favoured the more restrictive reading of the jurisdiction clause. Perhaps a sum of strong arguments from theory and policy and weak (but not negligible) arguments from text and precedent should prevail over a sum of strong arguments from text and precedent and weak arguments from theory and policy. Is that the sort of balancing judgment we have here? I think not, because neither the considerations from theory nor those from policy favour the restrictive view of birthright citizenship as decisively as Schuck and Smith suppose.

Consider the bearing of normative theory first. I tried to show in the first part of this essay that Schuck and Smith's principle of mutual consent will not stand up to critical scrutiny but that a version of the principle of ascription is more plausible and leads to similar conclusions.42 What are

42 Schuck and Smith might object to my attempt to replace their theory of consent with my theory of ascription on the grounds that consent is much more closely linked to fundamental American values than is ascription. Many of their arguments defend consent not as an abstract ideal but rather as the particular ideal that Americans have embraced. I have two replies to this. First, different forms of consent have differing degrees of importance in the American tradition. The principle that political authority must rest upon the consent of the governed is not the same as consent to membership. Similarly, the individual's right to leave (voluntary expatriation) is not the same as the community's right to exclude. The right to leave is linked conceptually and historically to the principle of government resting on the consent of the governed, and both forms of consent have been central to the American tradition from the time of the Revolution. By contrast, the community's right to exclude played only a marginal role in American
the implications of this normative principle for constitutional interpretation? From the ascriptive perspective, children born within the territory to parents who are clearly members of the society would be morally entitled to citizenship even against the wishes of a democratic majority. So, if one were designing a constitution on the basis of the principle of ascription, it would be appropriate to make this right the subject of a constitutional guarantee. By contrast, from the ascriptive perspective, children who are born within the territory to parents who are not members (for example, recent illegal immigrants) have no strong moral claim to citizenship. The principle provides no reason for granting such children a constitutional guarantee to birthright citizenship. So far, this seems to fit with Schuck and Smith’s position. However, most principles do not forbid everything that they do not require. Nothing in the theory of ascription prohibits a society from extending constitutional guarantees of birthright citizenship to people who would not be morally entitled to it on theoretical grounds. One might argue that ascription fits better with a narrower and more exclusionary reading of the jurisdiction clause, but it provides no grounds for thinking that it would be morally wrong to read the clause in the broader, more inclusive way proposed by the majority in *Wong Kim Ark* and presupposed by later courts. In short, the principle of ascription simply leaves space for other sorts of arguments, such as the ones about the meaning of the text and the relevance of precedent.

If normative theory fails to offer much support for a more restrictive interpretation, what about policy? It is certainly true, as Smith and Schuck

theory and practice until the late nineteenth and the twentieth centuries. It was the open door, not the right to exclude, that was central to membership. Second, any complex tradition embodies many competing values. In embracing some parts of a past, one rejects other parts. In choosing what to embrace, a critical perspective on the past is unavoidable. In this case, the ideas that political authority should rest upon the consent of the governed and that individuals should be free to leave stand up under critical scrutiny as enduring ideals, even if the United States has not always lived up to those ideals. By contrast, the right to exclude is associated in American history only with racism and xenophobia. These are also values that run deep in the American tradition, but not ones that anyone should want to defend.

This is also true of Schuck and Smith’s theory of consent, despite their protestations to the contrary. They concede that Congress would have the right to extend birthright citizenship beyond the parameters required by their theory of consent, but they object that a constitutional guarantee of citizenship for the children of illegal aliens ‘would limit a nation’s very power to determine what it will be — and also to determine who will decide that question in the future’ (p. 191). But this is true of any constitutional guarantee regarding membership: constitutional guarantees always limit the self-determination of subsequent majorities. Unlike some radical democrats, Schuck and Smith clearly think that constitutions are compatible with the principle of consent. So the United States would clearly have the right to extend constitutional guarantees of birthright citizenship to the children of illegal aliens, and we are back to the question of whether that is what the United States did in passing the Fourteenth Amendment.
say, that circumstances have changed since the nineteenth century and that illegal immigration is now widely (but not universally) regarded as a serious problem. What bearing does this have on the interpretation of the jurisdiction clause?

At times, the answer that Schuck and Smith offer seems to be a variation of the case for judicial restraint. Because circumstances have changed so much, the Fourteenth Amendment should be read as narrowly as possible so as to leave Congress room to decide what to do, especially when there is no good theoretical reason for extending birthright citizenship to the children of illegal aliens. The point is not that birthright citizenship should be denied to the children of illegal aliens, but that Congress rather than the courts should decide the question. This argument seems to me to have some merit. Perhaps if the conflicting arguments about the meaning of the text and the relevance of precedent were more evenly weighted, this would tip the balance. But given the powerful textual arguments for reading the jurisdiction clause inclusively, for the courts to adopt a posture of legislative deference here would be to abandon judicial responsibility, for all the reasons familiar from the standard critiques of judicial restraint.44

At other times Schuck and Smith make a substantive rather than a procedural case. Birthright citizenship for the children of illegal aliens is a bad thing because it encourages illegal immigration, and illegal immigration is bad because it threatens the welfare state. They insist, however, that they favour a more generous and inclusive immigration policy. They see no conflict between this (clearly genuine) commitment to more open immigration and their opposition to birthright citizenship for the children of illegals. There will always be some restrictions on immigration, they say. Why should these children be given priority over others who might be more needy and more deserving?

At a purely analytical level, this argument makes sense. There is no compelling moral case for admitting the American-born children of (recent) illegal aliens ahead of other needy and deserving people. Moreover, this rule of birthright citizenship may encourage illegal immigration at the margins, and illegal immigration, considered abstractly, is clearly a bad thing. If someone were to assert, 'For any given size flow of immigration, it would be better if the entrants were all legal,' I doubt that anyone would disagree. It would be better for the immigrants and better for the country, and worse only for the exploiters of illegal entrants. This way of thinking about the issue is misleading, however, because it abstracts policy entirely from politics.

44 See the works cited in note 41 supra.
Suppose there were no constitutional barrier to the elimination of birthright citizenship for the children of illegal aliens (and non-immigrant visitors) and the proposal came before Congress. Who would support it and who would oppose it? The answer seems reasonably clear. Supporters of a more open immigration policy would oppose it, while supporters of a more restrictive policy would favour it. Why? The answer lies partly in the symbolism of such a change and partly in practical considerations. As Schuck and Smith point out, the practice of birthright citizenship for all has long been associated with the strain in the American tradition that welcomes new immigrants and encourages them to come. To change such a deeply entrenched, long-standing practice would be widely perceived as sending a message that the gates are no longer open. Of course, the gates have not actually been completely open for a long time, but the commitment to openness remains a powerful strain in the American tradition, one which this change would help to erode. At a practical level, admission to the United States is not quite the zero-sum game that Schuck and Smith’s analysis suggests. There is no reason to believe that the children of illegal aliens are taking up legal admission slots that would otherwise be available, or that elimination of this method of entry would lead to an increase in the quotas for legal immigrants. On the contrary, given the incremental, coalition-building nature of American politics, the elimination of birthright citizenship for the children of illegal aliens might well lead to greater restrictions in other areas. In a system with many veto-points, where it is easier to stop change than to bring it about, the first lesson of politics is not to give up something valuable that you already have in a securely established form merely for the prospect of something else, even if that something else would be slightly better than what you have now. From this perspective, supporters of more open immigration would be well advised to defend the current rule of birthright citizenship as strongly as possible. Therefore, even if one accepts what Schuck and Smith say about the relative merits of competing claims to admissions, one cannot conclude that the elimination of birthright citizenship for the children of illegal aliens is obviously desirable from a policy perspective.

What does this sort of analysis have to do with the interpretation of law? Some would argue that it shows why legal interpretation should avoid taking policy into account altogether. This sort of political analysis is appropriate for legislators but not for judges. I am sympathetic to this view. The tasks of legislators and judges are different. Still, there are many cases where judges cannot avoid making policy judgments of some kind, and if they do have to make policy judgments, it seems to me that they should think about the actual outcomes of the alternative policies implied in different decisions rather than hypothetical or ideal possibili-
ties. Perhaps the lesson to be drawn from this discussion is that judges should use policy considerations as a constraint on final decisions rather than as a factor shaping interpretation. In other words, they should think first about the meaning of the text, precedent, and theory, and ask themselves not whether the decision reached on the basis of these factors leads to the best policy but only whether the policy implications of the decision are clearly unacceptable. Of course, if one defines the range of acceptable policies narrowly enough, that will determine the outcome.

In this case, for example, even Schuck and Smith concede that birthright citizenship plays only a modest role in contributing to the problem of illegal immigration. So even if we focus exclusively on illegal immigration as the policy issue and agree that it is an important problem, it is clear that the elimination of birthright citizenship will not do much to solve the problem, and the perpetuation of birthright citizenship will not prevent other measures from being successful. Where the overall consequences are small, as in this case, policy considerations should play no role in shaping interpretation.

There is another kind of policy consideration that is harder to bracket. One question those defending a particular interpretation ought to consider is where their arguments lead with regard to other legal developments. A broad, theoretically based line of argument such as that developed by Schuck and Smith in support of the principle of consent is apt to have implications for a range of issues beyond the one under immediate scrutiny. In this case it seems to me that Schuck and Smith’s emphasis on the distinction between members and non-members and on the importance of consent to citizenship will seem particularly congenial to those legal theorists and jurists who wish to draw sharper distinctions between the rights of citizens and the rights of aliens (including resident aliens) than the Supreme Court has drawn in such recent cases as Graham v. Richardson and Plyler v. Doe. Schuck and Smith explicitly say that Graham devalues citizenship and reduces the importance of consent, so one might reasonably infer that they recognize the tension between that decision and the line of argument they have developed.

I do not have the space here to explore the merits of Graham and the cases involving aliens. Suffice it to say that those who generally applaud the expansion of rights for aliens (as I do) have reason to be wary of Schuck and Smith’s argument. I do not claim that their argument about birthright citizenship absolutely requires a retrenchment of other rights granted to aliens. Few legal arguments are absolutely required. Good lawyers can always draw distinctions. But some distinctions are more persuasive than others. Some concepts and lines of argument fit together

45 Of course, if one defines the range of acceptable policies narrowly enough, that will determine the outcome.

better than others. And the principle of consent encourages the drawing of a sharp line between citizen and alien. To read the jurisdiction clause as Schuck and Smith propose is to invite a whole series of arguments about the differences between citizens and aliens. This is one sort of consequence that legal scholars and jurists clearly should take into account in adopting one interpretation rather than another. In my view, it counts against the interpretation offered by Schuck and Smith.