Membership and Consent: Abstract or Organic?


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In 1970, an essay by Robert Dahl appeared in the Yale University Press' new Fastback series, reflecting on the nature of authority and legitimacy in a just society. What occasioned Professor Dahl's reflections was the recurrent talk of revolution, the reflexive demand for "power to the people," that slipped with surprising ease into political discourse during the late 1960's and early 1970's. Professor Dahl wrote: "Strange as it may seem to you, how to decide who legitimately make up 'the people'—or rather a people—and hence are entitled to govern themselves in their own association is a problem almost totally neglected by all the great political philosophers who write about democracy."1 Professor Dahl offered a framework for grappling with this fundamental question, and other political theorists have taken up his implicit invitation and are beginning to fill the void he identified.2

Peter H. Schuck and Rogers M. Smith's 1985 Yale Fastback adds to this genre.3 The book explores the specific issue of American political membership, and its very setting shows how far we have come in pondering Dahl's question. The context is no longer revolution; rather, the starting point for this inquiry is immigration, and specifically, illegal immigration. More people are on the move globally, to a more problematic reception. Are they entitled to claim a share in the new association to which they have moved, a right to join in the process of self-government? Are they—and, more to the point, are their children—to be considered

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part of "the people," even though the laws adopted by the existing association members attempt to forbid their very presence?

Professors Schuck and Smith are troubled by illegal immigration and by the questions it raises concerning membership and legitimacy. They—and we—should be. Their work addresses a genuine problem that is likely to worsen in coming decades. The book opens up a useful consideration of many issues that bedevil Americans, ambivalent as ever about the control of immigration. The authors challenge their readers to reflect more self-consciously than we ordinarily do upon national identity and the appropriate or prudent means for accepting new members and retaining old ones. Only in offering specific proposals for changes in the rules governing the acquisition and termination of American citizenship do they lose their sure-footedness, offering suggestions that are in fact profoundly troubling.

I.

I shall begin with the book's most controversial point. Professors Schuck and Smith argue that altering our citizenship rules would provide one important measure to help control illegal migration. Instead of perpetuating rules automatically assigning citizenship based on birth in U.S. territory (which they label "birthright citizenship"), Congress should exercise its option—prospectively only—to recognize as citizens only those children born here to citizens or legal permanent resident aliens. Children born to illegal aliens or to nonimmigrants (aliens present for only a temporary sojourn) would not obtain U.S. citizenship despite birth in American territory.

This will come as a surprising—even stunning—proposal to those who had assumed that a strong *jus soli* rule is a fixed part of our constitutional heritage. The Fourteenth Amendment provides: "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." A divided Supreme Court in 1898 ruled that this constitutional provision made Wong Kim Ark a citizen, based on his nativity in the United States, even though his parents were Chinese nationals ineligible

for naturalization. This landmark case has been widely understood as adopting a near-universal *jus soli* rule as a matter of constitutional entitlement. The qualifying language in the Fourteenth Amendment, recognizing birthright citizenship only for persons born "subject to the jurisdiction" of the United States, has been given little effect. Under the common understanding, virtually the only class excluded consists of children born to foreign ambassadors.

The book argues, however, that such a sweeping conclusion rests on dictum alone. The cases traditionally cited involved only claimants, like Wong Kim Ark himself, who were born to aliens lawfully admitted for permanent residence, not to illegal aliens or nonimmigrants. If the common understanding rests only on dictum, then a court might well have to decide the question anew. Professors Schuck and Smith review the congressional debates on the issue at the time Congress adopted the Fourteenth Amendment, and make the case for reading those rather confused proceedings as embracing the more limited position. In their view, "subject to the jurisdiction" means *wholly* subject, that is, subject as a lawful permanent resident or citizen. Only in that setting does the Constitution, of its own force, manifest the polity's consent to the alien parents' presence on terms that include the capacity to bestow citizenship on children born during their stay. If Congress wishes to go further in extending birthright citizenship, it certainly may; this accounts for the last hundred years' administrative practice with respect to the children of nonimmigrants and illegal aliens. But Congress should recognize that such extension is a matter of grace, not right, to be exercised in the future, if at all, with greater awareness of the explicit choices that are open.

Dictum so widely repeated and, apparently, so easily accepted by nearly all Americans may deserve more respect than the authors give it. I accept that it is dictum, however, and that the legislative history of the 1866 debates stops well short of an express embrace of the near-universal birthright citizenship rule now being implemented. Yet this only opens

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10. For a complete description of excluded categories, see 3 C. Gordon & H. Rosenfield, *supra* note 7, §12.6. The Supreme Court also decided, some 16 years after enactment of the Fourteenth Amendment, that Indians, as members of dependent nations (Indian tribes), do not come within the Fourteenth Amendment's citizenship provision even though born within the territory of the United States. Elk v. Wilkins, 112 U.S. 94 (1884). Congress has since extended statutory citizenship to all such Indians. *See* Immigration and Nationality Act of 1952, §301(b), 8 U.S.C. §1401(b) (1982).
the inquiry. If the question is to be examined anew, why disturb such a settled and accepted practice? What is to be gained?

In part, the authors’ answer rests on the philosophical exploration to be canvassed in the next section: citizenship should result from and reflect mutual consent, not automatic imputation based merely on the accident of place of birth. In larger measure, their answer seems to rest on certain instrumental policy calculations. We are faced, they accurately point out, with an illegal alien problem of unprecedented dimensions. Moreover, the continuing growth of the welfare state magnifies its impact.\textsuperscript{14} Today, illegal presence means not only the opportunity to work and enjoy the economic fruits of one’s labors, but also entitlement to various services and supports. Although legislatures have tried to cut back on welfare-state benefits for illegal aliens, those restrictions are often weakened or circumvented if the household contains a citizen child.\textsuperscript{15} Changing the birthright citizenship rules would contribute toward solving the underlying problem of allocation of limited resources by drying up one possible source of attraction.

I am skeptical that an expanding welfare state accounts in any significant degree for the growth of illegal migration.\textsuperscript{16} I am especially dubious that the birthright citizenship rules contribute much to this growth. Professors Schuck and Smith, however, are careful not to oversell their case. They argue only that birthright citizenship rules provide some added incentive, operative at the margin.\textsuperscript{17} And they quote one estimate placing the level of births to illegal aliens in this country at the surprisingly high level of 75,000 per year.\textsuperscript{18}

Even assuming that the attractions of birthright citizenship are significant, one must still wonder about the choice of this particular proposal as any part of a strategy for addressing the problem of illegal migration. To be sure, Professors Schuck and Smith do not propose a change in citizenship rules as the only element in such a strategy. From the beginning of the book, they emphasize that this is only one of four policy changes that should be implemented. The others are “more effective enforcement of existing immigration laws; . . . a system of realistic, credible employer

\textsuperscript{14} Pp. 3-4, 95.
\textsuperscript{16} Analysts have hotly debated the extent of welfare usage by illegal migrants. See, e.g., T. ALENIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 782-87 (1985) (quoting discussion in the Staff Report of the Select Commission on Immigration and Refugee Policy); HOUSE JUDICIARY COMM., 99TH CONG., 1ST SESS., IMPACT OF ILLEGAL IMMIGRATION AND BACKGROUND ON LEGALIZATION 64-86 (Comm. Print 1985).
\textsuperscript{17} Pp. 94, 104.
\textsuperscript{18} P. 95.
sanctions to remove the chief incentive to most illegal immigration; [and] 
. . . more generous legal admission policies, especially within this hemi-
sphere . . . . ”19 Because these other three possibilities are more familiar proposals (as any follower of Congress' recent struggles with the Simpson-Mazzoli bills20 will recognize), the authors understandably devote their attention in this book to the new element.

But why add this element? If the other three measures (especially the first two) are reasonably successful, far fewer children will be born to illegal aliens, and the membership problem the authors identify will virtually disappear. This is especially the case because their proposal would not apply the new citizenship rules retroactively.

More importantly, consider what happens if the new citizenship rules are adopted, but the other measures either are not implemented or fail to have an appreciable impact on new illegal migration. From the date of the change onward, we would find a growing class of people who were born and raised in the United States but who do not have, and presumably cannot easily obtain, U.S. citizenship. What would be the consequences? What would be the effect on their attitudes toward the country in which they live? What effect would this new and unfortunate status have on the attitudes of citizens, not only toward this new class but toward other “aliens” present?

These are not abstract questions. Many European countries are now struggling with the so-called problem of the second generation.21 Those countries imported foreign workers during the boom years of the 1950's and 1960's. It was assumed that such “guests” came on a temporary basis and would leave should the need for their labor disappear. When the 1973 oil crisis forced a halt in new importation of guest workers, however, governments were surprised at how few longtime workers returned home voluntarily. When the lawmakers decided, in most cases,
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not to compel those who had been present many years to leave, humanity dictated that spouses and children be allowed to join the original migrants. Over the years, those workers have produced children, born in their parents' European country of residence, but without immediate citizenship rights there, because broadly applicable birthright citizenship rules are not in force.

Those children (many now adults) have known only life in Europe, but in disturbingly large numbers resist identifying with it. Although naturalization is available, relatively few of the guest workers or their children pursue it. This refusal has persisted despite expanding governmental efforts to encourage naturalization and integration by those who are now guaranteed permanent residence, for as long as they wish to keep it, in their adopted countries. Against this background, anti-foreigner political parties have enjoyed increasing success.

In these circumstances, beset with a kind of “apartheid volontaire” that resists new governmental programs and augurs continuing and deepening problems for those polities, some European observers look with envy at “la formidable machine assimilatrice de la société américaine.”

Though the fabric of the United States is woven from diverse strands, the country has been notably successful in encouraging newcomers, or at least the children of newcomers, to identify closely with the polity. There are problems, to be sure, but by and large they come to be seen as problems to be solved within the polity, by Americans acting as Americans. That assimilative capacity (which need not entail obliteration of cultural heritage) represents a precious national asset, especially for so large and diverse a country. Its existence and value are sometimes overlooked because its maintenance has so far been relatively effortless. We have no European-style “second generation problem” here, in part because we cannot have second generation aliens. The children may have dual citizenship, of course, and they are free to choose to make the other allegiance their principal one. But if they stay here, a secure citizenship status forms a basic foundation for the shaping of identity and involvement in the polity. They are thereby encouraged to embrace life here as full participants, not as half-hearted, standoffish “guests.”

22. See, e.g., Hammar, supra note 21, at 440-43.
important, other citizens are induced to treat them as coequal members of the polity, not as intruders who stay too long.\textsuperscript{26}

America's assimilative capacity rests on many bases, and perhaps it would be unaffected by a change in our birthright citizenship rules. But I wonder. Before tinkering with any part of the machinery that in combination gives us so beneficial a result, we ought to be far more certain than the authors leave us that birthright citizenship rules are themselves a significant part of the problem.

\section{II}

This book offers more, however, than merely a set of prescriptions meant to help master the problem of illegal migration. Its major contribution comes from the authors' exploration and critique of widely accepted conceptions of citizenship, and beyond this, of the notions of membership, community, and political identity each conception entails. Professors Schuck and Smith accomplish this task in Chapters One through Three with admirable brevity and considerable narrative skill.

As they present it, citizenship doctrine reflects two sharply differing worldviews or principles. Their description builds not on the customary dichotomy between \textit{jus soli} and \textit{jus sanguinis}, but on the contrast between ascriptive and consensual views of citizenship. Professors Schuck and Smith explain:

In its purest form, the principle of \textit{ascription} holds that one's political membership is entirely and irrevocably determined by some objective circumstance—in this case, birth within a particular sovereign's allegiance or jurisdiction. According to this conception, human preferences do not affect political membership; only the natural, immutable circumstances of one's birth are considered relevant.

The principle of \textit{consent} advances radically different premises. It holds that political membership can result only from free individual choices. In the consensualist view, the circumstances of one's origins may of course influence one's preferences for political affiliation, but they need not do so and in any event are not determinative.\textsuperscript{27}

The heart of the book consists of the authors' review of these two contrasting conceptions, in pure and modified forms, particularly as they

\textsuperscript{26} There are, to be sure, vast differences between Europe's guest worker dilemma and this country's illegal immigration dilemma. I invoke the European experience only to illustrate one set of problems that might well result if Professors Schuck and Smith's proposals are adopted—problems which the United States, to date, has not had to confront in any significant measure.

\textsuperscript{27} P. 4.
have competed in the shaping of American citizenship rules through legislation and judicial decision.

The authors trace *jus soli*, or "birthright citizenship," the central ascriptive principle, to its feudal roots. Originating as an assertion of royal authority, it emphasized not only that all born within the realm, even to alien parents, were subjects, but also that such allegiance was perpetual.28 This ancient view, the accepted vision of the English common law, poses problems. For example, it cannot resolve competing claims, should there be a direct confrontation, concerning the nationality of a child born to alien parents. One sovereign might claim allegiance based on *jus soli*, while the other might make a similarly absolute claim using the equally ascriptive doctrine of *jus sanguinis*.29

Even more objectionably, irrevocable ascription restricts individual freedom by denying a right of voluntary expatriation. During the nineteenth century, this feature of the doctrine provoked repeated clashes between the United States and England. The British insisted on a right to impress into their military service young men who had been born in the kingdom but whom the United States regarded as its own naturalized citizens.30 The ascriptive principle also posed acute problems for American judges struggling to interpret U.S. citizenship law, then largely uncodified. Several American decisions bear witness to the tension between the common law doctrine of perpetual allegiance and the homegrown assertion that American freedoms must embrace a right to renounce citizenship.31 Most judicial holdings inclined toward the former view32 until the Expatriation Act of 186833 settled the question in favor of the individual's right to withdraw consent. Professors Schuck and Smith helpfully trace the contours and evolution of the ascriptive principle and describe its advantages and disadvantages. Especially useful is their close evaluation of representative adherents of the ascriptive view: Coke, Filmer, Blackstone (to a lesser extent), and the authors of several nineteenth-century American court decisions.34

The consensual principle of citizenship has obvious links to basic democratic ideas concerning consent of the governed and individual freedom—principles familiar in America since the Declaration of Independence. The authors usefully trace consensualism's roots back

32. *Id*.
still further to certain Enlightenment thinkers and Puritan revolutionaries. As they explain, these writers “hoped to revitalize their world by placing political society on a new, explicitly consensual footing, which would erode the authority of the feudal elites and infuse all social institutions with a responsiveness to current ideas and needs and to what they took to be the natural rights of mankind.” 35 Again, Professors Schuck and Smith trace the evolution of these ideas by close attention to certain representative adherents—principally Locke and Godwin in an early chapter and later Burlamaqui and Vattel. 36 They explore each theorist’s efforts to explain the sources and duration of citizenship obligations, to account for the relation of political membership to other sorts of membership (principally within the family), and to overcome certain theoretical problems (such as the question of the membership of children and whether “tacit consent” adequately accounts for the affiliations and obligations of members upon attaining majority).

Crucial to Professors Schuck and Smith’s discussion and their proposal with respect to illegal aliens is the notion that consent is mutual. The consent principle, in its purest form, means not only individual freedom to withdraw consent from a polity and hence terminate membership, but also the polity’s authority to refuse membership to individuals and perhaps even to withdraw it from members who fail to live up to certain requirements or expectations. Although Professors Schuck and Smith apparently consider this notion central to the consensualist vision, they candidly point out that many of the consensualist writers they review did not clearly embrace this conclusion. Most were preoccupied with the practical and conceptual difficulties that consensualism posed from the point of view of the individual and avoided the question of whether society maintained an equivalent and reciprocal power. 37

Although it is evident from the earliest pages of the book that the authors decidedly favor the consensual principle, they are careful to outline its disadvantages. For example, the sensitive, touchy, sovereign individual portrayed by Godwin, always ready to take offense at some societal action and hasten into a withdrawal of consent, hardly presents an attractive (or even realistic) image. In its extreme forms, Professors

37. Pp. 26-31, 47, 62. Professors Schuck and Smith briefly mention a group of writers in the tradition of “Atlantic Republicanism,” including Montesquieu, Rousseau, and Harrington. Their works are far more congenial to the mutual consent notion, as they were deeply concerned about preserving the homogeneity and cohesion of democratic polities. They considered, however, that such cohesion—and hence democracy—could be achieved only in small republics. See pp. 27-29.
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Schuck and Smith thus point out, consensualism tends toward a "narrow, dessicated rationalism" that ignores affective attachments to family, community, and state. Moreover, by keeping questions of affiliation and loyalty continually open to question, aggressive consensualism potentially undermines the stability and legitimacy of any social institution.

The governmental power to withhold or withdraw consent also carries disadvantages. Although it can be employed affirmatively, to further cohesion or patriotism, or to shape the community in accordance with its members' beliefs and preferences, it can also find troubling uses. The book properly portrays in this light two disheartening historical episodes: the exclusion of Indians from U.S. citizenship under the Supreme Court's decision in *Elk v. Wilkins* and of blacks under *Dred Scott v. Sanford*. Both actions were justified by versions of consensualist theory. Moreover, if consent is not a one-time-only phenomenon, the consent principle in pure form doubtless entails a governmental right to withdraw consent and involuntarily expatriate individuals whose behavior is disapproved. As the authors acknowledge, the Supreme Court, after years of division and confusion, finally struck down all such involuntary expatriations in *Afroyim v. Rusk* and *Vance v. Terrazas*—cases usually regarded as enlightened advances in the protection of individual rights. Professors Schuck and Smith discuss these troubling elements of consensualist theory and forthrightly recognize "consensualism's exclusionary, repressive potential."

III.

One would wish that the authors maintained the same evenhandedness in their policy prescriptions. To be sure, some features of their proposal for changes in the law bear the mark of compromise, in order to overcome consensualism's more problematic implications. Nonetheless the
two central features of their proposal remain so troublesome that only an unexpected swerve into a rather dogmatic consensualism can account for them. This is especially surprising in a book otherwise usually marked by balance and sound judgment.

The first major element of the authors' proposed policy is the denial of automatic citizenship to children born here to illegal aliens. Such a change would better honor society's right to consent—or not—to the membership of newcomers. Illegal migration, the authors reason, constitutes a "convulsive violation of consensually based political community."49 I accept the characterization and the seriousness of the problem. As indicated above, however, the practical disadvantages that accompany attempts to address this issue through citizenship rules are so overwhelming that they should remove this option from consideration.

The second major element in Professors Schuck and Smith's policy proposal is designed to honor more completely the individual's right to grant or withhold consent, by "render[ing] the right of expatriation more meaningful."50 Although one can now choose to expatriate, Professors Schuck and Smith believe the process is not sufficiently accessible. Ordinarily one must travel overseas to renounce American citizenship. In addition, the renouncer may have difficulty finding another country of residence once his automatic right to U.S. residence has been forsworn along with citizenship. The authors would change this by establishing procedures for renunciation in this country and allowing renouncers to remain here indefinitely as permanent resident aliens. Even more pointedly, Professors Schuck and Smith would mandate a notice to all citizens upon reaching eighteen, specifically informing them of this right of expatriation.51 The notice, however, would "stress the implications of such a choice,"52 presumably meaning the negative consequences. If the individual did nothing, U.S. citizenship would continue.

Here too, pragmatic concerns about the consequences of such a procedure simply cry out for greater attention. A fair weighing would find

49. P. 3.
50. P. 122.
51. Indeed, at times they seem to say that all children, even those born to citizens or lawful permanent resident aliens, would be considered only "provisional" citizens until the time of their majority. See pp. 117-18. That terminology is not as threatening as it might appear, however. It signifies no societal power to refuse graduation to more secure citizenship; it merely reinforces the message that youth need not consider birthplace fully determinative of the citizenship question. (The term also echoes the view of children's citizenship status adopted by some of the consensualist writers, principally Burlamaqui and Vattel. See pp. 44-47.) One leaves the provisional category, as I understand the proposal, simply by failing to renounce U.S. citizenship after having received the prescribed notice at age eighteen.
52. P. 123.
that the disadvantages overwhelm the supposed advantages. For example, do we really want eighteen-year-olds to make such a portentous decision? The context seems to encourage disaffiliation, especially since the notice would arrive during a stage of development, adolescence, when the recipients may be most disposed toward renunciation. This is not to say that all should be coerced into staying, if they truly desire to expatriate. The totally disaffected, however, already enjoy the expatriation option. They need simply take the trouble to learn about the procedures and then travel overseas to perform them. Surely the difficulties and expense of such travel are more likely to impress on renouncers (young or old) the realistic consequences of disaffiliation than does renunciation dressed in the deceptively cost-free garb Professors Schuck and Smith would apply. Eighteen-year-olds not so completely disaffected ought instead to be encouraged to find other outlets for their displeasure—for example, political efforts meant to change the features of American life they dislike. Why they should be asked so bluntly to consider exit before most have any extensive experience of a struggle for political change escapes me.

Moreover, what is an eighteen-year-old who chooses not to renounce supposed to conclude from the experience? The argument for this procedure apparently presupposes that explicit consent (or at least inertia when one is told explicitly that withdrawal is now possible) will somehow tighten the bonds of cohesion that link citizen and polity. Whether this is psychologically plausible is not extensively discussed. In any event, consent and cohesion are more complicated phenomena.

As a final pragmatic objection, why should renouncers retain residence rights? Although this feature makes withdrawal of consent a more accessible option from the individual's point of view, it seems unfair to the polity. Professors Schuck and Smith's own premises about the mutual right of consent, so weighty when they consider illegal aliens, include societal authority to withhold consent to membership, at least under some circumstances. If the individual has voluntarily withdrawn from political membership, why should the polity be denied the right to refuse further consent to the social membership represented by continued residence? The case for the polity's right here seems stronger than it does for the children of illegal aliens. Moreover, permitting continued residence threatens to compound the problem discussed above, by adding yet

53. For a stimulating exploration of the choice between political efforts (voice) and the exit option in a wide variety of settings, see generally A. Hirschman, Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States (1981).

54. See infra text accompanying notes 64-69.
another category to a growing class of disaffected residents ("alienated" in the most literal sense). 55

IV.

The authors' embrace of aggressively consensualist positions on these matters is simply puzzling. Most of the time, they are refreshingly undogmatic and candid, especially when describing the advantages and disadvantages of the ascriptive and consensual principles, or when anticipating and discussing possible objections to their proposals. Even the actual design of their policy prescriptions reflects an occasional acceptance of compromise—or "asymmetry," as they call it 56—which would permit the survival of a few ascriptive practices. For example, they reject involuntary expatriation visited by the government upon unwilling citizens, thus accepting the nonconsensualist outcomes of Tarrazas and Afroyim. 57

For some reason, however, this pragmatism does not carry over into the design and evaluation of the two central proposals. On these points, the authors write as partisans of a consensualism that is dogmatic and abstract. They write as if only the most explicit and self-conscious consent 58 will work to achieve—well, to achieve what, exactly? Whence comes this passion for greater (albeit uneven) consensualism?

It is hard to find here a satisfying answer. One can consider the possibilities. At one point, noting that modern U.S. citizenship doctrine has elements of both ascription and consensualism, the authors suggest that the mix has been based largely on "expediency." Furthermore, the "price we pay for that inconsistency may be increasing." 59 This warning would carry more impact if it did not turn out that their solution is also a mix (an expedient mix?) of ascription and consent, although placing more emphasis on consensualism. In any event, when they come to consider at length those mounting costs in Chapter Four, the only concrete discussion relates to illegal immigration. For reasons indicated earlier, little of the societal cost stemming from such migration should be

55. Professors Schuck and Smith evidently believe that adequate notice of the full implications of renunciation will avert the worst results—that is, that few persons will accept the invitation and renounce their citizenship, at least without moving away. Pp. 123-24. Even if one shares that belief, resting policy on such guesswork is a risky way to proceed.

56. P. 125.

57. Id. See supra notes 45-46 and accompanying text.

58. P. 131.

59. P. 71.
attributed to the birthright citizenship rules, and little of it will be cured by greater consensualism in the form they advocate.\footnote{60}

At another point, the authors suggest that “discriminatory impulses and measures” aimed at immigrants or their descendants may be “partly fueled by the belief that many [in such groups] should not have been allowed to become citizens in the first place.”\footnote{61} Perhaps. But there is no direct evidence of such a fuel line. In any case, people stirred by such bitter impulses would probably maintain their resentment even if one could point to a congressional statute that manifested some more explicit consent to those groups’ citizenship. The discriminator’s objection to such groups’ membership, one senses, is more basic.

Perhaps the best explanation for the book’s strong tendency toward consensualism can be found in the passages that open and close its pages. The consensual ideal of citizenship, the authors assert, would be “more likely to generate a genuine sense of community among all citizens than the existing scheme.”\footnote{62} Later they write that the United States, under more thoroughgoing consensual rules, “could more persuasively invoke what it now can only baldly assert—a legitimacy grounded in a fresh, vital, and always revocable consent.”\footnote{63} To my ear, these passages have an anachronistic ring. They seem to express sentiments more appropriate to the fractious years of the 1960’s or early 1970’s, when Dahl wrote, than to Ronald Reagan’s 1980’s.

V.

Anachronism or not, there is a more fundamental objection. The quoted passages reflect an incomplete view of the wellsprings of both community and legitimacy. Both may be nurtured by consent, but they do not rest exclusively on consensualism.\footnote{64} Perhaps Professors Schuck and Smith have been overly captivated by the demands of the duality—ascription versus consent—with which they begin. That dichotomy is a

\footnote{60. At times, the book is surprisingly candid about this: “[T]he role of birthright citizenship for the children of illegal and nonimmigrant aliens—the decision either to grant or withhold it—is obviously only a small piece of that [immigration policy] structure.” P. 119 (emphasis added).}
\footnote{61. P. 122.}
\footnote{62. Pp. 4-5.}
\footnote{63. P. 140.}
\footnote{64. For discussions of the extent to which community rests on common purposes and devotion to the same principles (roughly speaking, a consensual basis) or rather derives from a shared history or coincidence of sentiment fostered by organic growth (something of an ascriptive notion), see H. Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy 134-39 (1980); Friedrich, The Concept of Community in the History of Political and Legal Philosophy, in II Nomos: Community 3-24 (C. Friedrich ed. 1959); Karst, Equality and Community: Lessons from the Civil Rights Era, 56 Notre Dame Law. 183, 183-86 (1980).}
useful analytical construct, but it does not divide the universe as sharply and abstractly as the authors would sometimes have us believe.

Consent is basic to certain aspects of democracy, and especially American democracy, but it is not the only principle, and in any event it is more complex and nuanced than the authors acknowledge. Alexander Bickel, in his DeVane Lectures, published under the title The Morality of Consent, reflected on this theme. In the excerpt below, he focussed specifically on the inadequacy of periodic elections as a complete reflection of the sort of consent that underlies any institution's legitimacy. Change the meaning slightly—assume that the key words connote the "election" Professors Schuck and Smith would thrust upon eighteen-year-olds, to decide whether or not to retain membership in the polity—and it may be read as a potent objection to the proposals in this book:

The fundamental point was, and remains, that consent and stability are not produced simply by the existence and function of popularly elected institutions, although absolute power may be. Elections, even if they are referenda, do not establish consent, or do not establish it for long. They cannot mean that much.

The people, as [Edmund] Burke used the term, was a body in place, gathered, led, manifesting its temper in many ways and over a span of time as a whole, or as one or another sizable community within the whole body, not speaking merely on occasion in momentary numerical majorities. The influence of the people, so conceived, must be a dominant one because their consent is essential. That consent may be withdrawn regardless of elections; it must be preponderant, not merely majority consent, and is yielded not only and not even chiefly to the electoral verdict, but to institutions validated by time and familiarity.

Time and familiarity weave their way into the complex relationship we call citizenship. Their significance fits comfortably with ascriptive citizenship rules, at least as long as ascription is not irrevocable. Most of us were simply born into our most basic affiliations—family, religion, nation. Those ties are not only objects of choice; to a significant extent they are constitutive of one's basic identity, anterior to choice. They help shape the characteristics of mind, preference, and perception that one brings to any particular consensual decision. Later we may exercise a "consensual" power to change some of those affiliations or preferences, but such choices reflect an organic process, not the radical act of a

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sovereign individual able to sweep away all such prior attachments by one magisterial act of consent or non-consent.

Ascriptive citizenship rules, especially generous ones, recognize this reality. They anchor choice—the consensualist political process—in a realistic and protective framework. One does not come into the political world as a naked and lonely individual, wholly dependent for the honoring of one's claims on consensual arrangements that might or might not be worked out with other contracting individuals or associations. Ascription, as the authors occasionally seem ready to recognize, serves to protect fundamental human rights. Indeed, the very notion of basic human rights applicable to all, alien or citizen, is fundamentally ascriptive; it suggests a list of entitlements that one may claim simply by reason of birth as a human being and not by reason of compact. The concept of human rights thus places certain claims beyond the reach of other individuals' refusals to consent.

Certainly, after a person's basic affiliative foundation is established, consent plays a significant role. Consent guards the outer boundaries of legitimacy, even if it does not initially give birth to that sentiment, by providing a fundamental check against abuses by the polity of which one finds oneself a member. Consent can be withdrawn either collectively through revolution or individually by renunciation of citizenship and removal from the society. However, it is illusory to think that such a radical withdrawal of consent can be made so rationalistic and apparently cost-free.

Professors Schuck and Smith sometimes disparage the ascriptive principle as "medieval," "feudal," a "bastard concept," or a "vestigial remnant." Ascription without an individual right to withdraw consent may deserve those epithets. But American citizenship rules had worked free of that taint at least as early as 1868. Modern citizenship rules, through a painful process of trial and error in Congress and the Supreme Court, have sought to accommodate the realities of human nature while safeguarding the principles of consent and self-determination.

For a vision of the dangers once the anchor of such citizenship comes loose, see H. Arendt, The Origins of Totalitarianism 293-302 (1966). Even the Declaration of Independence, invoked by the authors as a consensualist document, reflects a much more measured view of the role of consent and the appropriate occasion for its withdrawal. After the famous passage stating that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed," the Declaration continues: "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." The Declaration of Independence para. 2 (U.S. 1776).
Court, have now crystallized in a humane mixture of ascription and consent. The ascriptive elements that survive do so for good and protective reasons.

VI.

Professors Schuck and Smith's strong tendency toward consensualism underestimates the value of ascription rightly applied. They write in the context of a debate over illegal migration, however, that often tends to undervalue consent—societal consent. Although I disagree with the authors' precise recommendations, I applaud them for a courageous effort to argue that society deserves to make choices about future members—and should be making them now in a calm and serious way, lest we find ourselves forced to make harsher decisions in future years, in a more alarmist atmosphere.

It is not wrong, the authors say, for a democratic polity to make deliberate decisions about new membership applications from outside, most fundamentally to preserve the degree of cohesion required by the democratic process itself, but also (and more problematically) to preserve the character of the kind of community we have chosen and are choosing to be.70 The authors are right to insist on the legitimacy of deliberate choice.

This is sometimes a hard message for Americans to accept. We are continuously reminded that we are a nation of immigrants. Most current members of the polity descend from people who established their membership under a set of rules that consented to virtually unlimited immigration. Such a tradition generates a vague feeling of guilt whenever serious immigration enforcement is contemplated or carried out. It has helped block the adoption, to date, of careful legislative proposals to curb illegal migration. It contributes to paralyzing swings in policy between toughness and leniency, and it sends mixed signals to the demoralized agency that is asked to carry out America's uncertain policy.71 At times, it seems, we cannot quite bring ourselves to affirm that we are entitled to close the doors to some who want to come—that is, to withhold consent to the membership applications of aspirants who fail to meet our

70. For discussion of these points, see T. ALEINIKOFF & D. MARTIN, supra note 16, at 61-80; M. WALZER, supra note 2, at 61-62.

established criteria—even when, in a broader perspective, our provisions for legal admissions remain quite generous. Consensualism’s “exclusionary, repressive potential” is most pronounced when society excludes those who realistically have no home elsewhere and therefore deserve the status of member in the only national society to which they are connected. This was the essential vice of Elk v. Wilkins and Dred Scott. A cutback in birthright citizenship, as Professors Schuck and Smith advocate, risks inflicting the same kind of harm. There are, however, other ways of implementing society’s membership choices.

Michael Walzer, in a penetrating essay on the relationship of justice to membership decisions, has pointed out that such decisions operate at two levels. “First admissions” occur at the point when outsiders enter for a (relatively) permanent stay, de facto or de jure. They become, for some purposes at least, functioning members of the society. “Second admissions” are admissions to full political membership—the kinds of admissions governed by naturalization rules rather than by immigration rules. Society’s asserted power to withhold consent to membership is far less disturbing if it results only in a deliberate effort to “exclude” from permanent membership those born elsewhere, already enjoying another national affiliation—and before the time when lengthy presence generates significant affiliative ties to this country. Societal consent, in short, should take effect through a firm insistence on choice at the point of initial entry for residence purposes, not at the point of political

73. P. 63. See supra note 48.
74. In the course of discussing the legitimacy of guest worker programs, Walzer elaborates:

[T]he principle of political justice is this: that the processes of self-determination through which a democratic state shapes its internal life, must be open, and equally open, to all those men and women who live within its territory, work in the local economy, and are subject to local law. Hence, second admissions (naturalization) depend on first admissions (immigration) and are subject only to certain constraints of time and qualification, never to the ultimate constraint of closure. When second admissions are closed, the political community collapses into a world of members and strangers, with no political boundaries between the two, where the strangers are subjects of the members. Among themselves, perhaps, the members are equal, but it is not their equality but their tyranny that determines the character of the state. Political justice is a bar to permanent alienage—either for particular individuals or for a class of changing individuals. At least, this is true in a democracy.

M. WALZER, supra note 2, at 60-61 (footnote omitted).
membership—at the point of "first admissions" rather than the "second admissions" stage represented by citizenship.\textsuperscript{75}

American immigration law manifests that approach in theory. It concentrates controls at the immigration stage and opens naturalization on routine and generous terms for those who choose to seek it after five years of lawful residence. In application, however, American law fails to carry through on this promise, precisely because of societal ambivalence about immigration controls.

If we are not to choose a regime of open borders, we need to overcome that ambivalence. In the pessimistic view, such a change will not come unless crisis provokes a harsh backlash and a draconian enforcement regime. I would like to think that a more optimistic possibility exists. Perhaps the American ambivalence could be tamed by reflection on the nature of societal consent and the foundations of its validity in the crowded world we now inhabit, at least if any withholding of consent is enforced humanely and at the proper stage. Patient explorations of the legitimacy of societal choices about membership, like that offered in this book, may contribute toward that end.

\textsuperscript{75} At times, Professors Schuck and Smith are certainly cognizant of this point of view. See, e.g., p. 40. They, too, would emphasize better policing of first admissions. P. 5.