

## *Two Yale professors argue against the concept of...*

# Citizenship Without Consent

by Peter Schuck  
and Rogers Smith

*Introduction by Wayne Lutton*

To many Americans, it has long seemed irrational to award auto-matic citizenship to children born of parents who are in the United States in direct and knowing violation of laws intended to keep them out. In a book first published in 1985, Yale professors Peter Schuck and Rogers Smith argue that the offspring of illegal aliens are not entitled to birthright citizenship.

Schuck and Smith trace the history of the United States concept of citizenship back to its English Common Law

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antecedents. They identify two strands of thought and practice on citizenship: one based on ascriptive principles that support a birthright standard, and another based on the consent of both the potential citizen and the community into which s/he hopes to become a member. The authors conclude that while the two strands have coexisted in the past, the time has come to move toward a more consistent legal standard based on the consensualist viewpoint.

Now that the "citizen-child" loophole has emerged as a public policy issue, the arguments raised by Professors Schuck and Smith deserve a serious hearing.

In this article adapted from their book, following a description of citizenship as subjectship under a monarchy, the authors point to the work of John Locke in his *Two Treatises on Government* and indicate that "historian James Kettner views Locke as the theorist who best exemplified the transition from ascriptive subjectship to consensual citizenship."

Locke's familiar doctrine of government by consent, with its attendant right of revolution, was based on his radically new view of the relationship of children to their parents and to the polity — a

view that stemmed in turn from a thoroughgoing rejection of the medieval portrait of society as a natural, organic hierarchy. To Locke, the most fundamental fact about children was that they were creatures of God, intended to occupy that equal and independent status that is the natural condition of mature, rational beings. This fact, for Locke, defined the limited nature of parental and political authority. Locke agreed that the family was a natural social unit and that parents properly possessed some dominion over their offspring during minority. He maintained, however, that this authority rightfully belonged to both parents, not simply to the patriarchal father. And he insisted, even more vehemently, that parents possessed only limited, tutelary authority over their children, and possessed this authority only while the latter remained incapable of rational self-governance.

The state also possessed a limited jurisdiction over children, for its duties stemmed not only from the consensual will of its citizens. It also had to conform to the obligations imposed by the natural human rights that Locke held to be the inviolable and inalienable endowment of all persons. As an authorized executor of the law of nature,

the state thus had to protect the child's right to life, property, and education should the parents arbitrarily violate their duties to the child. A child, however, could not be a government's subject because subjectship must be based on the tacit or explicit consent of an individual who had reached the age of rational discretion. Locke insisted: "*A Child is born a subject of no Country and Government. He is under his Father's Tuition and Authority, till he come to Age of Discretion; and then he is a Free-man, at liberty what Government he will put himself under; what body politick he will unite himself to.*"

Locke reveals most of the attractions and limits of the consent principle. Its attractions are considerable: indeed, leading contemporary writers on citizenship and international law insist even more strongly than Lockean Enlightenment and public law writers did that only consent is an appropriate basis for political membership. Consensualism encourages genuine personal commitment and development, permitting affirmation of one's values through voluntary affiliation with others. At the same time, as the political philosopher Michael Walzer has argued, permitting a democratic community the power to shape its own destiny by granting or refusing its consent to new members is essential if the community is to be able to protect its interests, maintain harmony, and achieve a unifying sense of shared values. When it is combined with liberalism's stress on universally held natural rights,

moreover, the consent principle recognizes the aspirations and dignity of all humanity, for it urges a world in which all will be linked politically only by bonds of mutual agreement. Because these values of personal autonomy and communal self-definition are so widely shared in American society today, a morally credible doctrine of civic membership must give central importance to membership based on actual, mutual consent.

***"... permitting a democratic community the power to shape its own destiny by granting or refusing its consent to new members is essential..."***

But like ascription, consent also poses serious problems. Although some of these problems can be resolved or minimized without great difficulty, others are more troubling. First, of course, there is a problem of proof. Especially after the fact, it will often be hard to determine who has and has not consented to membership in a particular regime, expressly or tacitly. Second, there is a problem of unjust exclusion. As most liberals have accepted, consent 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. But this requirement might imply

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. As

noted above, the tension between government by consent and full protection of inalienable rights, visible in liberal theory almost from its inception, is dramatically evident if a

democratic government denies all obligation to those who are compelled to turn to it but who are not admitted to be its citizens.

The difficulty points in turn to a third, related problem. The notion of consent is far from being a self-defining concept. It necessarily requires assumptions about several highly controversial questions, such as the scope of free will, the nature of informed choice, and the availability of alternatives. By relying upon notions such as tacit agreement, it may even smuggle in elements of ascription. In the context of consensual citizenship, moreover, the requirement of mutuality may seem to render individual

consent hollow in practice because those to whom a state refuses consent may have no practical option to go elsewhere. Persons faced with a choice of only limited, exceedingly harsh alternatives may be more aptly described as compelled than free to choose. More generally, no clear, unproblematic boundary exists between the realms of consent and coercion.

Fourth, there is a problem of unlimited expatriation. The consensual principle in its purest form is literally anarchical, jeopardizing all memberships and allegiances. Although some liberals insist that rational individuals can recognize the imprudence of promoting social instability, political societies probably could not survive if their citizens felt free to renounce their memberships unilaterally whenever it seemed convenient to do so. A fifth and related problem of pure consensualism is its narrow, desiccated rationalism. By limiting moral obligations only to those incurred by rational choice, it denies the validity of widespread beliefs that individuals owe something to their family, community, state, and other social groups, and that these groups owe something to their members. The reality of these affective attachments calls into question the adequacy of basing obligation on rational consent alone.

Both the ascriptive and consent principles are thus attractive and problematic in their pure forms. It is tempting, then, to think that the best features of each can be

integrated into a coherent law of citizenship without sacrificing some values that we cherish. Doubtless, that hope explains why American law has combined the two and has varied the mix of ascriptive and consensual elements especially of birthright citizenship and the right of expatriation — over time. But American law has never adequately reconciled these elements; no combination of consent or ascription that is either theoretically satisfying or practically efficacious, especially in light of current conditions, has yet been achieved. For example, two recent and somewhat related developments have begun to place far greater strain on the ideological compromises between ascription and consent in America's citizenship law. The massive increase in illegal migration to the United States and the equally dramatic rise of the welfare state have transformed perhaps the greatest advantage of birthright citizenship from a modern liberal viewpoint — its automatic inclusiveness — into something of a disadvantage. By underscoring the growing practical importance of consent as the chief constitutive political principle of a liberal society, these developments invite us to reconsider birthright citizenship on legal and policy as well as philosophical grounds. They lead us to reject the traditional rule and to propose a more consensualist law of citizenship in which ascribed status at birth plays a correspondingly reduced role.

When the framers of the 14th

Amendment's Citizenship Clause adopted (in a significantly compromised form) the common-law rule of birthright citizenship, immigration to the United States was entirely unregulated. In 1980, the number of illegal aliens in the United States was conservatively estimated at between three and a half to six million, with the number increasing by two hundred thousand annually. Approximately two million of these people will eventually receive legal status under the 1986 amnesty law, but many others did not qualify or have arrived in the years since 1982, the amnesty cutoff date.

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If mutual consent is the irreducible condition of membership in the American polity, questions arise about a practice that extends birthright citizenship to the native-born children of such illegal aliens. The parents of such children are, by definition, individuals whose presence within the jurisdiction of the United States is prohibited by law and 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 have consented to that of their children who happen to be born while their parents are here in violation of American law.

urban areas.

Congress has the power to respond to this infringement of consensualism if it so desires. Although the Citizenship Clause of the 14th Amendment has been assumed to guarantee birthright citizenship to such children *ex proprio vigore*, the

question of the citizenship status of the native-born children of illegal aliens never arose during its adoption for the simple reason that no illegal aliens existed at that time, or indeed for some time thereafter.

The debates also establish that the framers of the Citizenship Clause had no intention of establishing a universal rule of birthright citizenship. To be sure, they intended to do more than simply extend citizenship to native-born blacks by overruling the reasoning and result in *Dred Scott*. But they also intended, through the clause's jurisdiction requirement, to limit the scope of birthright citizenship. The essential limiting principle, discernible from the debates (especially those concerned with the citizenship status of Native Americans) was consensualist in nature. Citizenship, as qualified by this principle, was not satisfied by mere birth on the soil or by naked governmental power or legal jurisdiction over the individual. Citizenship required in addition the existence of conditions indicating mutual consent to political membership.

Our interpretation certainly does not imply that children of illegal aliens are not entitled to

any constitutional protection. Indeed, those children (and perhaps their parents as well) may have legitimate moral or humanitarian claims upon American society. We may be said to have incurred moral obligations to illegal aliens by encouraging them to migrate here, by enriching ourselves through their labor, by absorbing them into our communities, by inviting legitimate expectations of humane treatment, and by other behavior. But even if moral obligations to illegal aliens exist and are compelling, they by no means imply *birthright entitlement* to American citizenship. Again, that does not mean that policy toward illegal aliens is morally unconstrained. For children who have already been born here of illegal alien parents, for example, a retroactive change in the law depriving them of their citizenship status would violate important expectation and reliance interests and create great confusion and uncertainty.

But these concessions to prudence, fairness, and humanitarianism should not be taken to deny to the American community the essence of a consensual political identity — the power and obligation to seek to define its own boundaries and enforce them. If Congress should conclude that the prospective denial of birthright citizenship to the children of illegal aliens would be a valuable adjunct of such national self-definition, the Constitution should not be interpreted in a way that impedes that effort. Citizenship status is not necessary to afford

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***“The number of births in the U.S. to illegal alien parents is not trivial...”***

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The present guarantee under American law of *automatic* birthright citizenship to the children of illegal aliens can operate, at the margin, as one more incentive to illegal immigration and violation by non-immigrant (temporary visitor) aliens already here of their time-limited visa restrictions. When this attraction is combined with the powerful lure of the expanded entitlements conferred upon citizen children and their families by the modern welfare state, the total incentive effect of birthright citizenship may well become significant. In addition to anecdotal evidence that many aliens do cross the border illegally to assure United States citizenship for their soon-to-be-born children, a recent study illuminates two features of this phenomenon. First, the number of births in the United States to illegal alien parents is not trivial — a conservative estimate places the number as in excess of seventy-five thousand each year. Second, these births — and the public costs that they entail — are disproportionately concentrated in a relatively few

illegal aliens and their children at least minimal legal protection and public benefits. They do and should possess certain rights by reason of their presence within the United States. Protection against any risk of statelessness can be assured by statute. Thus, the Constitution need not and should not be woodenly interpreted either to guarantee their children citizenship or to cast them into outer darkness.

In the end, the question of birthright citizenship for the children of illegal and nonimmigrant aliens should be resolved in the light of broader ideals of constitutional meaning, social morality, and political community. These ideas militate against *constitutionally* ascribed birthright citizenship in these circumstances. Beyond the issue of the Citizenship Clause's intent, it is morally questionable to reward lawbreaking by conferring the valued status of citizenship, and it is even more questionable to plant that guarantee in the Constitution. This is true even though some of the lawbreakers are individuals whose ambition, resourcefulness, and family values most Americans would admire. Those characteristics might lead Congress to confer citizenship broadly and easily, but as a matter of informed choice, not constitutional inadvertence.

Three basic steps are required to achieve a law of citizenship at birth that is theoretically consistent, practical for addressing current policy problems, and consonant with the nation's fundamental claim

that its government rests on the consent of the governed. The first step requires a reinterpretation of the Citizenship Clause of the 14th Amendment. Its guarantee of citizenship to those born "subject to the jurisdiction" of the United States should be read to embody the principle of consensual membership, and therefore to refer *only* to children of those *legally* admitted to permanent residence in the American community — that is, citizens and legal resident aliens.

***“Even the citizenship law of the United Kingdom [on which ours is based] does not extend it to the children of either illegal aliens or temporary resident aliens. The same is true of other Western European countries.”***

On our consensualist reading, those born "subject to the jurisdiction" of the United States would be citizens at birth *provisionally*, in the sense that they would have the opportunity upon attaining majority to renounce that citizenship if they so desired. At no time, however, would they be vulnerable to any denial of consent to their membership on the part of the state. Native-born children of legal resident aliens would also be provisional citizens at birth and during their minority and would enjoy the same right to expatriation. Citizenship at birth

would not be guaranteed to the native-born children of those persons — illegal aliens and "nonimmigrant" aliens — who have never received the nation's consent to their permanent residence. Even the citizenship law of the United Kingdom, for whose antecedents our common-law citizenship was originally derived, and which continues to adhere to the birthright citizenship principle, does not extend it to the native-born children of either illegal aliens or temporary resident aliens. The same is true of other Western European countries.

Since the proposed doctrine would require a reinterpretation of the Citizenship Clause, the change should be made prospectively, assuring citizenship to those born in the United States while the current

understanding has been in effect.

Congress, which bears the ultimate responsibility for fashioning the structure of our immigration policy, would also decide the role of the birthright citizenship for the children of illegal and nonimmigrant aliens. That decision is obviously only a small piece of immigration policy. Congress must carefully weigh the moral claims of these children to membership relative to the claims of other groups, assessing the likely effects on illegal immigration of eliminating their present guarantee

of citizenship, and considering how such a change should relate to the more comprehensive, systematic measures for reducing illegal immigration. We are genuinely uncertain about how such an evaluation would or should come out. It is an issue on which reasonable people can differ.

***“Nondiscrimination does not necessarily imply the same rights and benefits that citizenship or legal residence status confers.”***

The second step necessary to realize a consistent, consensual law of citizenship at birth is to render the right of expatriation more meaningful. We propose that a formal procedure be established and publicized under which any citizen, at the age of majority, may expatriate himself (preserving citizens' rights to do so subsequently as well). Despite recurring calls for legislation fully prescribing formal expatriation procedures, there is no legislated procedure for expatriating oneself within the United States under normal circumstances. As a result, few know that an expatriation right exists, and it is procedurally difficult to exercise. In that sense, citizenship is more ascribed than consensual.

We would not only permit native-born citizens to seek another nationality, but would also guarantee them permanent residence in the United States if

they wished it. Our proposal would thus retain the asymmetry, created by Supreme Court rulings, between affirming the individual's right to self-expatriation, while denying the nation's power to denationalize those who are already members. Although a thoroughgoing commitment to pure consensual membership might seem to imply a national power to denationalize citizens at will, the existence of such a power might threaten the vigorous exercise of basic constitutional freedoms, such as First Amendment political rights, or might create a condition of involuntary statelessness and thus of acute human vulnerability.

In our book, we consider a number of objections to our proposal to reinterpret the constitutional guarantee of birthright citizenship. The most troubling objective is that our position does little to address the problem of the influx and status of illegal aliens. Indeed, by eliminating constitutionally mandated birthright citizenship for their native-born children, the proposal could (depending upon the magnitude of its countervailing disincentives to illegal migration) actually increase the number of individuals in illegal status. In this view, the current birthright citizenship rule has at least one virtue that our proposal lacks. It recognizes that in fact (due largely to ineffective immigration enforcement) many native-born children of illegal aliens, along with their parents, will manage

to remain here indefinitely. Denying birthright citizenship to those children would add one more obstacle and disadvantage, one more source of stigma and discrimination, to those they must endure as they continue living in American society, as many will be able to do. This dilemma is compounded by the fact that these children's life prospects would be clouded by the action of others over whom they have no control! — in this case, the illegal entry of their parents. Better (defenders of the current rule might argue) to eliminate their cruel disability at the moment of birth than to maintain it thereafter.

Although appealing, this argument from life prospects is ultimately unpersuasive. Our proposal to make one's national status turn, at least provisionally, on the national status of one's parents seems more morally acceptable and less determinative of one's life prospects than many other contingent factors — such as inherited wealth, upbringing, or genetic endowment — that are far more likely to shape those prospects in fundamental ways. Indeed, our proposal seems less arbitrary in terms of life prospects than the fundamental concept of birthright citizenship itself, which bases national status wholly upon the accident of geographical location at birth. And even if the innocence of the child and allied concern for his life prospects are accepted as morally or legally relevant, it does not follow that *citizenship*, as distinguished from mere nondiscrimination, should be the

prize for that innocence. Nondiscrimination does not necessarily imply the same rights and benefits that citizenship or legal residence status confers. These children and their parents, by being denied birthright citizenship, would not be treated as the *Dred Scott* decision treated blacks; they would not be denied the law's protection. They would instead be required to choose among continuing to live in illegal status, with more limited equal protection and due rights; seeking to obtain legal status; or returning to their home countries.

Our proposed interpretation would, moreover, produce at least one benefit. The government of a more truly consensual polity could more truthfully proclaim to citizens, resident aliens, and illegal aliens alike that American citizenship stands on a firm foundation of freely willed membership. It could more credibly claim the contemporaneous allegiance and, if necessary, the personal sacrifice of its citizens than it was able to do during the Vietnam War and other corrosive national conflicts. It could more persuasively invoke what it now can only baldly assert — a legitimacy grounded in a fresh, vital, and always revocable consent. □

*[Editor's note: A communication from Rogers Smith dated August 22, 1996 states: "Schuck and I have never endorsed actually denying birthright citizenship to children of illegal aliens. We have simply suggested that the Constitution is most coherently read as permitting Congress to decide*

*that question."*]

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Still available in print:  
*Citizenship Without Consent: Illegal Aliens in the American Polity*  
 by Peter H. Schuck  
 and Rogers M. Smith  
 New Haven: Yale University Press  
 173 pp., \$13.50 pb.

### Water may cause wars as growth hits cities

BEIJING — Water shortages created by the world's rocketing population and extravagant use could spark wars in the 21st century, the United Nations warned at a conference.

"Increasing concern [is] being voiced that the next century may be scarred by wars over water, even as this century has been devastated by wars over oil," Wally N'Dow, secretary-general of Habitat II, the UN Center for Human Settlements, said in a statement.

He called for water conventions to prevent future conflicts, warning that there was real cause for anxiety because many of the world's largest rivers flow across international borders.

"In the scramble for water, some of the drier countries of the world have already threatened water-rich nations," he said in a speech to the International Conference on Managing Water Resources for Large Cities and Towns.

But the high cost of implementing reforms often conflicts with the immediate interests of economic development, leaving governments and business reluctant to adopt water preservation measures, officials said.

Water already is scarce in many parts of the world, a problem exacerbated by the flow of population to urban centers, often in areas with scant water supplies, N'Dow said.

In the developing world, more than one billion people lack clean drinking water and 1.7 billion lack access to adequate sanitation facilities, UN statistics show.

Dirty water causes 80 percent of diseases in the developing world and kills ten million people a year.

Shortages are exacerbated by carelessness, with up to 60 percent of potable water in developing countries lost through leakage, UN statistics show. That figure is 12 percent in countries such as Britain and the U.S.

The earth's limited supply of fresh, clean water is further depleted by the pollution that industry spews out, N'Dow said.

About 95 percent of waste in developing countries — including most of the two million tons of human excrement produced daily and all toxic and hazardous by-products of industrial production — is discarded untreated, polluting soil, rivers, and aquifers, UN figures show.

The conference passed on its conclusions to the Habitat II City Summit held in Istanbul in June addressing the issue of urbanization and its environmental and social impacts.

— Reuters News Service, via the *Pittsburgh Post-Gazette*, March 20, 1996