BIRTHRIGHT CITIZENSHIP AND THE CONSTITUTION

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The United States Constitution's citizenship rule, which grants citizenship to, among others, the American-born children of illegal aliens, has come under attack. Professor Eisgruber defends the Constitution's birthplace rule against calls for its amendment and against arguments in favor of a parentage rule. He proposes the Responsiveness Principle as a competitor to a consent or reliance theory to provide the normative justification for a rule of citizenship. Under this principle, a government should be responsive to the interests of all those over whom it exerts general jurisdiction. Professor Eisgruber argues that the current birthplace rule is the best way to implement the Responsiveness Principle because it makes it likely that those subject to the laws will have an effective voice in determining their content. He also cautions that an amendment modifying the birthplace rule would likely affect the interpretation of other constitutional provisions by compromising the Constitution's commitment to political justice.

INTRODUCTION

The United States Constitution guarantees citizenship to almost every child born in the United States.[1] Apart from an exception for children born to foreign diplomats,[2] the Constitution's birthplace principle applies without regard to the ethnicity or legal status of a child's parents—so, for example, children born in the United States to illegal

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

[2] The exception flows from the Fourteenth Amendment's jurisdictional proviso, which limits birthright citizenship in the United States to persons "subject to the jurisdiction thereof." Id. The Supreme Court has construed the exception to apply both to the children of diplomats and to Native Americans born under the jurisdiction of Indian law, but Congress has by statute extended birthright citizenship to American-born Indians. For further discussion, see infra Part I.B.

aliens are American citizens. This is an arresting rule. Until recently it has also been remarkably little known. Many lawyers (and some law professors) are surprised to learn that the Constitution confers citizenship upon the American-born children of illegal aliens. With few exceptions,[3] the vast literature on constitutional theory has largely ignored the principle.[4]

Recently, however, politicians have discovered the Fourteenth Amendment's Citizenship Clause and have attacked it. A House of Representatives subcommittee has held hearings on an amendment that would deny citizenship to the American-born children of illegal aliens.[5] A similar proposal was temporarily included as a plank in the Republican Party's 1996 presidential platform,[6] and anti-immigration groups mounted a substantial (albeit unsuccessful) campaign in California on behalf of an advisory referendum endorsing such an amend-

[3] The only study which takes up at length the theoretical problems surrounding birthright citizenship in the United States is Peter H. Schuck & Rogers M. Smith, Citizenship Without Consent (1985). Gerald Neuman's superb new book on immigration and the Constitution takes up birthright citizenship in chapter nine, offering pragmatic and historical arguments in favor of the Fourteenth Amendment's rule. See Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 165-87 (1996) [hereinafter Neuman, Strangers to the Constitution]. Schuck and Smith provoked a number of interesting book reviews, including Joseph H. Carens, Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States, 37 U. Toronto L.J. 413, 414 (1987); David A. Martin, Membership and Consent: Abstract or Organic?, 11 Yale J. Int'l L. 278, 279 (1985); Gerald L. Neuman, Back to *Dred Scott*?, 24 San Diego L. Rev. 485, 486 (1987) [hereinafter Neuman, Back to *Dred Scott*?] (arguing that "[t]here are serious flaws, both logical and historical, in the authors' effort to read their theoretical conclusions into the fourteenth amendment"); David S. Schwartz, The Amorality of Consent, 74 Cal. L. Rev. 2143, 2143 (1986). A recent student note has addressed the theoretical problems raised by birthright citizenship. See Note, The Birthright Citizenship Amendment: A Threat to Equality, 107 Harv. L. Rev. 1026, 1028 (1994) (arguing that Congress and states should reject proposed citizenship amendment because it conflicts with principle of equality). Other works have examined limited aspects of the issues considered here. See, e.g., Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876, at 151-59 (1985) (historical study discussing Supreme Court's interpretation of Fourteenth Amendment and citizenship in 1870s); Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution 51-57 (1989) (discussing the interpretive significance of the Citizenship Clause). See generally James H. Kettner, The Development of American Citizenship 1608-1870 (1978) (historical study focusing on sources of American citizenship).

[4] For example, Laurence Tribe's magisterial treatise does not even cite the *Elk* or *Wong Kim Ark* cases discussed infra notes 33-48 and accompanying text. See Laurence Tribe, American Constitutional Law (2d ed. 1988).

[5] See, e.g., Neil A. Lewis, Bill Seeks to End Automatic Citizenship for All Born in the U.S., N.Y. Times, Dec. 14, 1995, at A26. For discussion, see Neuman, Strangers to the Constitution, supra note 3, at 180 (analyzing proposed amendments).

[6] See Robert Pear, Citizenship Proposal Faces Obstacle in the Constitution, N.Y. Times, Aug. 7, 1996, at A13.

ment.[7] Earlier, during the summer of 1993, California Governor Pete Wilson proposed a similar amendment.[8]

The purpose of this Article is to investigate the theoretical foundations of the Constitution's treatment of birthright citizenship. I will seek to answer two questions. First, what rule ought to govern birthright citizenship in the United States? I will defend the Fourteenth Amendment's birthplace rule. Second, what consequences would follow if the Constitution were to depart from the birthplace rule for determining citizenship? I will argue that it would, in theory, be possible to quarantine the effects of an undesirable amendment, but that such quarantines are, in practice, fragile.

I
BIRTHRIGHT CITIZENSHIP: CONCEPTS AND PRECEDENTS

A. Conceptual Traps

1. Defining Citizenship

Trying to analyze birthright citizenship can be like trying to grab a fog bank: the target appears solid enough but dissolves as one reaches to grasp it. To begin with, it is far from easy to define the package of rights and responsibilities at issue when we speak of "citizenship" or even "democratic citizenship." A crucial minimum is the right to stay within the polity if one wishes; aliens can be deported, but citizens, if they can be expelled at all, must be exiled, which is likely to be a more difficult procedure for the nation to undertake.[9] But one cannot make the definition much more precise without invoking contested political principles. So, for example, one might suppose that citizenship entails the right to vote. A series of constitutional amendments has given effect to this judgment, thus narrowing the gap between the set of

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[7] Proponents of the referendum failed to obtain the signatures necessary to place it on the ballot. See Patrick J. McDonnell, Follow-Up to Prop. 187 Dies, L.A. Times, Feb. 22, 1996, at A3.

[8] See, e.g., Seeking to Deny Citizenship to Some, N.Y. Times, Aug. 11, 1993, at A10 (reporting that "Gov. Pete Wilson of California has urged the Federal Government to deny citizenship to American-born children of illegal immigrants").

[9] See, e.g., Thomas Alexander Aleinikoff & David A. Martin, Immigration: Process and Policy 858 n.6 (1985) (describing progressively tighter constitutional limitations imposed by Supreme Court on Congress's power to expatriate). Nor, incidentally, can one assume that only citizens are immune from deportation. For example, persons born to noncitizen parents in the territories of American Samoa and Swains Island are, by statute, American nationals but not American citizens. See Immigration and Nationality Act of 1952 § 101(a)(29), 8 U.S.C. § 1101(a)(29) (1994), discussed in Aleinikoff & Martin, supra, at 833 n.2, 945.

citizens and the set of voters.[10] Over the course of American history, however, citizens have been denied the vote in a wide variety of ways—by racial and sexual qualifications, poll taxes, literacy tests, and property qualifications[11]—and even today some citizens (e.g., convicted felons) lack the right to vote.[12] Nor is there anything in the Constitution that precludes the states from granting the franchise to noncitizens, and states have done so.[13] Likewise, military service might seem to be the special responsibility of citizens, but, in fact, the United States has conscripted resident aliens to serve on its behalf in wartime.[14]

We might be tempted to include equal access to political office among the privileges of citizenship, but, of course, the Constitution itself bars naturalized citizens from becoming President.[15] Obviously, the matter only becomes murkier when we consider grander rights, like the ones Bushrod Washington mentioned in his famous *Corfield*

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10 See U.S. Const. amend. XV, § 1 (abolishing use of race to qualify voters; ratified in 1870); id. amend. XIX, § 1 (abolishing use of sex to qualify voters; ratified in 1920); id. amend. XXIV, § 1 (abolishing use of poll taxes to qualify voters; ratified in 1964); id. amend. XXVI (abolishing use of age to qualify voters aged eighteen and older; ratified in 1971).

11 See, e.g., Minor v. Happersett, 88 U.S. (21 Wall.) 162, 162, 170, 173-75 (1875) (rejecting woman's Fourteenth Amendment challenge to Missouri constitutional provision limiting vote to male citizens); C. Vann Woodward, Origins of the New South 1877-1913, at 331-32 (1951) (discussing literacy tests and property qualifications); J. Morgan Kousser, The Undermining of the First Reconstruction: Lessons for the Second, in Minority Vote Dilution 27, 34 (Chandler Davidson ed., 1984) (describing efforts to deny vote to African Americans).

12 See Andrew L. Shapiro, Note, Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy, 103 Yale L.J. 537, 538-39 (1993) (stating that today all but three states deprive incarcerated offenders of the vote, and 14 states disenfranchise ex-offenders for life).

13 Some localities continue to do so. See Neuman, Strangers to the Constitution, supra note 3, at 70 (providing examples). Neuman's book contains an excellent general discussion of alien suffrage. See id. at 63-71, 139-49. Other relevant articles include Jamin B. Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage, 141 U. Pa. L. Rev. 1391, 1394 (1993) (stating that "the ideological traditions of both liberalism and republicanism make available compelling arguments for the inclusion of noncitizens as voters in local elections"), and Gerald M. Rosberg, Aliens and Equal Protection: Why Not the Right to Vote?, 75 Mich. L. Rev. 1092, 1093 (1977) (discussing alien suffrage of the past and stating that "constitutional right of at least some aliens to vote does not seem . . . at all unthinkable").

14 See, e.g., James B. Jacobs, Socio-Legal Foundations of Civil-Military Relations 36-38 (1986) ("[W]hen the United States armed forces have needed to conscript personnel, the net has been cast wide enough to include aliens, even those with no intention of ever becoming United States citizens, and even those who entered or remained in the country in violation of immigration laws.").

15 See U.S. Const. art. II, § 1, cl. 5. The implications of this provision are discussed infra text accompanying note 106.

v. Coryell[16] opinion. On the one hand, citizenship might not carry with it all (or, indeed, any) of the benefits Washington described. On the other hand, if citizens do have a right to those benefits, they might have them by virtue of their status as residents or human beings, rather than by virtue of their citizenship. If that were so, resident aliens would share these rights despite their lack of citizenship. It is thus entirely possible that laws like California's Proposition 187, which denies welfare services, nonemergency medical treatment, and public schooling to foreigners illegally residing in the state, are unconstitutional even if the United States remains entirely free to deport those whom it may not otherwise disadvantage.[17]

One might readily believe that the important questions are best expressed without reference to citizenship: Who has the right to enter, remain in, and leave a polity? Who bears responsibility for defending a polity in times of military crisis? Who may (or must) vote? Who has the responsibility to pay taxes? Who may own land in the polity? Who may share its educational, health care, and welfare benefits? Bundling two or more of these questions together under the label "citizenship" risks confusion, and it is not obvious what we gain from the concept.[18]

We are thus confronted with an issue where conceptual precision is both elusive and essential. In the argument that follows, I will assume the following, rather minimal, definition of citizenship: a resident of a polity is a citizen if and only if the resident is not subject to deportation and is entitled to vote after reaching adulthood. Neither the dictionary nor American history compels us to accept this connection between citizenship and the franchise. Nevertheless, it seems clear enough that in the United States today citizens are presumptively entitled to vote and noncitizens cannot vote. When we ask what rule ought to govern birthright citizenship in the United States, we are asking (at a minimum) about who may stay and who may vote.

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[16] 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). Bushrod Washington stated:

> [T]he privileges and immunities . . . which belong, of right, to the citizens of all free governments . . . [include p]rotection by the government . . . with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Id. at 551-52.

[17] See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (prohibiting Texas from denying public education to illegal alien children who could have been deported by United States). An excellent study of how the Equal Protection Clause applies to discrimination against aliens is Linda S. Bosniak, Membership, Equality, and the Difference that Alienage Makes, 69 N.Y.U. L. Rev. 1047 (1994).

[18] See Stephen H. Legomsky, Comment, Why Citizenship?, 35 Va. J. Int'l L. 279, 285-87 (1994) (addressing question whether citizenship concept is necessary at all).

2. *Pursuing Equality*

It is tempting to think that a rule which (like the Fourteenth Amendment) makes birthright citizenship contingent upon the place of a child's birth is somehow more egalitarian than a rule that would make birthright citizenship contingent upon the legal status of the child's parents. The latter approach might seem predicated upon an arbitrary bias against foreigners and their descendants.[19] But the idea that birthplace is an especially egalitarian criterion for determining citizenship can easily lead us astray. Birthplace has its own arbitrariness: why should the law deny citizenship to an infant carried across the Rio Grande at the age of one month (or one day) while granting it to a child born only days after her mother entered the United States? Indeed, why should a child's access to the benefits of membership in the community turn upon whether or not her mother happened to cross into Texas at all rather than staying in Juarez (and, of course, for these purposes Juarez is no different than Guadalajara or, for that matter, Beijing)? Geographical borders are inevitably products of historical accident; any selective principle of birthright citizenship will reflect that arbitrariness.

Nor does it help much to transfer our focus from individual equality rights to democratic structure by claiming, for example, that birthplace citizenship is essential in order to avoid the creation of an enduring caste of second-class persons within our society. If the point of this claim is merely that illegal aliens, unlike foreigners, live in our midst, then we must ask why we should care more about people simply because they live in our country. Why isn't it equally problematic that we effectively create a second-class caste (by comparison to Americans) in other countries by closing our borders to them?[20] In-

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19 See, e.g., Note, supra note 3, at 1035-39 (arguing that denying citizenship to children of illegal aliens would offend equality principles). The instinct behind such equality arguments is, I think, fundamentally sound. Later in this Article I defend the Constitution's birthplace rule by reference to the idea that a government should be responsive to the interests of all its subjects, which is a kind of equality principle. See discussion infra Part II.B. For the reasons indicated in the text, the question is a subtle one.

20 Gerald Neuman's arguments on behalf of the birthplace rule are vulnerable to the question posed in the text. See Neuman, Strangers to the Constitution, supra note 3, at 183. Neuman maintains that "[w]ithdrawal of birthright citizenship would aggravate [a] caste division" within American society and produce "tragedies" akin to those resulting from the German treatment of Turkish guestworkers. Id. at 184-85. Yet, it is not obvious that the harms caused to native-born children by the denial of citizenship are worse than the harms caused to foreign-born children by exclusive immigration policies. If the difference between the two grows out of harms to the structure of American society, rather than out of individual injuries, then we must address a further question about how to balance those harms against the damage done if the birthplace citizenship rule encourages illegal immigration—which, Neuman admits, it might do. See id. at 182-83. Neuman suggests

deed, illegal aliens and their children may well be better off in the United States, even without citizenship, than they would have been had they never entered the country. If, on the other hand, somebody maintains that the children of illegal aliens do not merely reside in our midst but instead belong to our society in some deeper sense, then the argument risks begging the crucial question. Our search for a rule of birthright citizenship is an effort to specify who is entitled to membership in our society, and one cannot conduct the search by assuming an answer.

Moreover, a constitutional rule about birthright citizenship can coexist with a variety of attitudes toward immigration and aliens. A nation might embrace the birthplace rule but strictly patrol its borders to keep foreigners from entering. Indeed, the birthplace rule effectively forces a nation to implement its decisions about membership "up front" by controlling the flow of aliens into the country, since, once the aliens are present, the nation will be powerless to exclude their American-born children. Conversely, a nation might make birthright citizenship contingent upon parental citizenship but nevertheless open its borders by inviting foreign adults to become permanent residents or naturalized citizens. Xenophobic politicians are not the only people who have taken issue with the birthplace rule; its critics include others—such as Professors Peter Schuck and Rogers Smith of Yale University—whose overall approach to immigration policy is liberal.[21] If hospitality and fairness toward aliens were the benchmarks against which we should judge principles of birthright citizenship, then the birthplace rule would by no means be a clear winner.

Nevertheless, as we shall see, there is much to be said for the intuition that the Fourteenth Amendment's birthplace rule serves our

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that these incentives are relatively unimportant, and I tend to agree with him; nevertheless, that empirical speculation seems an uncertain foundation upon which to rest the constitutional principle that both Neuman and I defend.

[21] In their book, Professors Schuck and Smith recommended eliminating birthright citizenship for the children of illegal aliens, but they also argued for an "expan[sion of] statutory citizenship" and an "increase [in] the number of aliens admitted under legal quotas." Schuck & Smith, supra note 3, at 138-39. Their generous spirit is nicely illustrated by Peter H. Schuck, Alien Rumination, 105 Yale L.J. 1963 (1996) (reviewing Peter Brimelow, Alien Nation: Common Sense About America's Immigration Disaster (1995)) (criticizing proposals to curtail legal immigration radically). In December 1995, Schuck testified before the Subcommittee of the House Judiciary Committee and argued *against* denying birthright citizenship to the children of illegal aliens. Schuck made his argument on policy grounds, not constitutional grounds. Statement of Peter H. Schuck Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution, Comm. on the Judiciary, U.S. House of Representatives (Dec. 13, 1995) (on file with the *New York University Law Review*).

constitutional commitments to equality and democracy. Making sense of that intuition will, however, require considerable work.

B. Precedents

1. Historical Antecedents

The most important discussion of American citizenship prior to Reconstruction and the Fourteenth Amendment occurred in *Scott v. Sandford*.[22] Chief Justice Taney, apparently writing for the Court,[23] concluded that the Constitution precluded both Congress and the states from conferring citizenship upon native-born descendants of slaves. Taney did not say whether Congress or the states had any discretion to determine the citizenship of native-born white persons.[24] The Chief Justice relied on originalist arguments about framers' intent to justify his position.[25]

Justice Curtis, dissenting, said that the citizenship of native-born Americans was entirely a matter of state law, unrestricted by the national Constitution. Curtis derived his rule by arguing that state sovereignty presupposed the authority to decide which of its residents was a citizen; he thought it obvious that the Constitution had not specified any rule that might supersede the authority of the states in this sphere.[26] Justice McLean, the other dissenter, anticipated the rule eventually incorporated into the Fourteenth Amendment, saying that any native-born free person was an American citizen.[27] McLean gave no reasons for his conclusion.

Commentators have generally favored Curtis's interpretation of antebellum law.[28] The doctrinal record, however, is remarkably thin. Although both state and federal law made frequent references to citizenship, neither the states nor the federal government devoted much

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22 60 U.S. (19 How.) 393 (1857).

23 Counting votes in *Scott* is not easy. For a brief primer on the constitutional and jurisprudential issues posed by *Scott*, see generally Christopher L. Eisgruber, *Dred* Again: Originalism's Forgotten Past, 10 Const. Commentary 37 (1993). For a superb historical study, see generally Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (1978).

24 See *Scott*, 60 U.S. (19 How.) at 404-05, 411, 426-27 (interpreting words "people" and "citizens" in Constitution).

25 See, e.g., id. at 410, 426 (drawing on documents, laws, and attitudes from framers' era to interpret "people" and "citizen" in Constitution). For discussion of the opinion's originalist underpinnings, see Eisgruber, supra note 23, at 46-48.

26 See *Scott*, 60 U.S. (19 How.) at 581-82, 585-86 (Curtis, J., dissenting).

27 See id. at 531 (McLean, J., dissenting).

28 For example, Justice Field said that Curtis's opinion was "generally accepted by the profession of the country as . . . containing the soundest views of constitutional law" pertaining to citizenship prior to the Fourteenth Amendment. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 94 (1872) (Field, J., dissenting).

effort to defining who qualified for citizenship.[29] Whether or not the states had authority to substitute a different rule, they appear to have assumed the existence of a rule like the one eventually constitutionalized by the Fourteenth Amendment: all free, native-born persons subject to the jurisdiction of American law were citizens of the United States and of the state in which they resided.[30] The most striking applications of this rule came from Southern state courts that occasionally invoked it to affirm the citizenship of free blacks.[31]

Matters began to change in the second quarter of the nineteenth century as Northern and Southern positions about slavery hardened. Southern courts abandoned doctrines that had once allowed free blacks to become citizens.[32] Chief Justice Taney's doctrine in *Scott* extended and assisted the exclusionary thrust of pro-slavery state court decisions.

If indeed Justice Curtis was right about the antebellum law of American citizenship, the states had wide discretion to deny citizenship to their native-born inhabitants, white or black. It is then quite striking that this discretion apparently went unused. The doctrines directed at free blacks in the South were singular exceptions. In general, Justice McLean's principle—namely, that all free native-born persons were citizens—seems to have captured the spirit of American law, and that principle was powerful enough to govern even some Southern courts dealing with free blacks.

2. *Current Law*

The Citizenship Clause of 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." The Clause poses one interpretive puzzle about the qualifications for citizenship: what is the meaning of the Clause's jurisdictional proviso, which limits citizenship to persons who

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[29] To make matters more complicated, the Constitution refers to both national citizenship and state citizenship without providing many clues about the relation between the two. See, e.g., U.S. Const. amend. XIV, § 1 (stating that persons "are citizens of the United States and of the State wherein they reside").

[30] For a discussion, see Kettner, supra note 3, at 287-88, 311-24 (discussing conflict between Northern and Southern states over status of free blacks). As Kettner notes, the recognition of tribal sovereignty complicated application of this principle to American Indians. See id. at 288-300; see also the extensive discussion in United States v. Wong Kim Ark, 169 U.S. 649, 658-66 (1898) (surveying early American case law).

[31] See, e.g., State v. Manuel, 20 N.C. (4 Dev. & Bat.) 20, 24-25 (1838) (recognizing citizenship of native-born slave who had become free by manumission). Not all Southern courts were so generous. See Kettner, supra note 3, at 316-24 (discussing course of Southern decisions).

[32] See Kettner, supra note 3, at 320-24.

are "subject to the jurisdiction" of the United States? As Professors Schuck and Smith observe, "Without that phrase, the clause would appear to demand a universal application, for it speaks of *all* persons, not some, and it employs a geographical referent (birth 'in the United States') rather than a legal one."[33]

Who is "born . . . in the United States" without being "subject to the jurisdiction thereof"? Indians might fit that description; some understandings of tribal sovereignty would suggest that Indians born on reservations live under the jurisdiction of tribal laws, even though they also live within the borders of the United States. The Supreme Court addressed this possibility in *Elk v. Wilkins*,[34] decided in 1884. *Elk* involved an Indian plaintiff who sought to claim American citizenship after leaving his tribe. The Supreme Court ruled against the plaintiff, holding that he had not been born under the jurisdiction of the laws of the United States. Justice Harlan dissented, castigating the Court for creating

> a despised and rejected class of persons, with no nationality whatever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States.[35]

Harlan's protest has never received judicial vindication; the Court has not overruled *Elk*. Congress has, however, provided statutory rights to Indians seeking citizenship. A person born in the United States to a member of an Indian tribe is now entitled to American citizenship.[36] We are thus unlikely to find out whether *Elk* would withstand review by a modern Court.

On other points, the jurisdictional proviso's meaning is more clear. The Supreme Court ruled in 1898 that the Fourteenth Amendment conferred citizenship upon the American-born children of aliens resident in the United States. The case, *United States v. Wong Kim Ark*,[37] involved children of parents legally present in the United States; the American government unsuccessfully contested the citizen-

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[33] Schuck & Smith, supra note 3, at 76.

[34] 112 U.S. 94 (1884).

[35] Id. at 122-23 (Harlan, J., dissenting).

[36] See Immigration and Nationality Act of 1952 § 301(b), 8 U.S.C. § 1401(b) (1994) (conferring citizenship upon every "person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property"). Congress first explicitly granted citizenship to all native-born Indians in 1940. See Aleinikoff & Martin, supra note 9, at 850.

[37] 169 U.S. 649 (1898).

ship claim by invoking an 1868 treaty with China and later agreements which restricted the power of the United States to naturalize Chinese immigrants. *Wong Kim Ark* suggested that the jurisdictional proviso should be read narrowly. The majority was of the view that

> [t]he real object of the Fourteenth Amendment of the Constitution, in qualifying the words, "All persons born in the United States," by the addition, "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words, (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law,) the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State—both of which . . . had been recognized exceptions to the fundamental rule of citizenship by birth within the country.[38]

As one might infer from this passage, it is generally accepted that the jurisdictional proviso excludes from citizenship children born to foreign diplomats in the United States. That result seems reasonable since diplomats enjoy special immunity from domestic law and reside in the United States only to serve a foreign sovereign.[39]

In a footnote in *Plyler v. Doe*,[40] the plurality read the *Wong Kim Ark* rule to benefit the children of illegal as well as legal aliens.[41] That is the prevailing interpretation of the Citizenship Clause. Professors Schuck and Smith, however, argue that the Citizenship Clause's jurisdictional proviso excludes the native-born children of illegal aliens from the ambit of the clause.[42] In their view, the point of the jurisdiction requirement is to demand "a more or less complete, direct power by government over the individual, and a reciprocal relationship between them at the time of birth, in which the government consented to the individual's presence and status and offered him complete protection."[43] They argue that the Fourteenth Amendment's "guarantee of citizenship to those born 'subject to the jurisdiction' of the United States should be read to embody [this] conception 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."[44]

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38 Id. at 682.

39 See, e.g., Schuck & Smith, supra note 3, at 85 (making same point).

40 457 U.S. 202 (1982).

41 See id. at 211 n.10 (stating that "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between" legal and illegal aliens).

42 See Schuck & Smith, supra note 3, at 116.

43 Id. at 86.

44 Id. at 116.

Professors Schuck and Smith recognize that their interpretation departs markedly from existing law.[45] Much of the argument in their book is historical in character. As they point out, however, the historical evidence yields no clear conclusions about the implications of the Fourteenth Amendment for the children of illegal aliens;[46] indeed, Congress did not begin restricting immigration into the United States until after the Fourteenth Amendment was enacted.[47] Moreover, the reading proposed by Schuck and Smith is hardly the most textually obvious one—the children of illegal aliens are certainly "subject to the jurisdiction of the United States" in the sense that they have no immunity from American law. As Schuck and Smith appear to realize,[48] their argument rests ultimately on normative considerations, not historical and textual ones. The next Part, which takes up the theoretical foundations of the Fourteenth Amendment, assesses the arguments of Schuck and Smith in detail.

II

WHAT IS THE BEST RULE OF BIRTHRIGHT CITIZENSHIP FOR THE UNITED STATES?

Who is entitled to American citizenship? In a way, that question is about a complex kind of property right: it is a question about who should share in the benefits of a common social, political, and economic enterprise. Our answers to it will likely turn upon our beliefs about when people can justifiably claim that the success of their enterprise is the result of effort rather than chance and when they can claim that the relevant efforts are theirs rather than someone else's. We should expect our inquiry into these topics to be difficult; claims about moral responsibility and desert are always problematic.

Nevertheless, some minimal principles about citizenship seem obvious. First, the government ought to have the power to offer citizenship to any foreigners whom it wishes to admit to the polity; the formal consent of the United States should be sufficient, if not necessary, to make a person eligible for citizenship. Second, people ought to have the right to renounce their citizenship should they wish to do

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[45] See, e.g., id. at 119 (urging Supreme Court to respect interests of potential citizens who have relied on more generous interpretation of Citizenship Clause that now prevails).

[46] See, e.g., id. at 129-30. For an impressive argument that history is inconsistent with the interpretation offered by Schuck and Smith, see Neuman, Back to *Dred Scott*?, supra note 3, at 489-97.

[47] See Schuck & Smith, supra note 3, at 92-93.

[48] See id. at 129-35.

so. This second principle was controversial when the nation was founded, but not today.[49]

Yet, neither of these two principles tells us much about birthright citizenship. Indeed, they leave open the possibility that everybody, no matter where or to whom they were born, should be able to claim American citizenship. An "open borders" policy of this sort may be impractical, but it is notoriously difficult for liberal political theory to justify restrictions upon immigration. By closing their borders, wealthy countries impose harms upon prospective citizens who, through no fault of their own, must live in harsh conditions while their neighbors across the border flourish in luxury.

In this Article, I will assume that there is some satisfactory argument that permits states to control their borders.[50] If that is so, then any acceptable theory of birthright citizenship will have to deny American citizenship to most of the people in the world; it will identify a small subset of the world's people as American at birth. To make progress toward constructing such a theory, we will have to attend to two distinct features of the rules governing birthright citizenship. The first is the *principle*—for example, consent or reliance—that provides the normative justification for using a particular rule. The second is the *criterion*—for example, birthplace or parentage—by which the rule identifies citizens.

The plan of my argument is as follows. I will defend the Birthplace Criterion on the ground that it is justified by what I will refer to as the "Responsiveness Principle"—justified, in other words, by the idea that the laws of a constitutional democracy ought to reflect and serve the interests of the people who are subject to those laws. Rather than beginning with the Responsiveness Principle, however, I will introduce the relevant issues by taking up the best developed critique of the Birthplace Criterion.

A. The Consent Principle and the Parentage Criterion

Professors Schuck and Smith are among the few scholars who have attempted to justify criteria for determining birthright citizenship; they argue for a rule that makes parentage, not birthplace, the key criterion. Schuck and Smith distinguish between two forms of community, the *ascriptive* community and the *consensual* community. According to Schuck and Smith, communities founded on the Ascrip-

[49] See Kettner, supra note 3, at 268-84 (discussing controversies over right to renounce citizenship in early American history); Schuck & Smith, supra note 3, at 86-89 (describing contemporary consensus that all U.S. citizens have right to renounce citizenship).

[50] I do not regard it as at all obvious that this assumption is true.

tive Principle presuppose that "one's political identity is automatically assigned by the circumstances of one's birth."[51] The bond between citizen and sovereign is, on this view, analogous to the bond between child and parent.[52] As such, the Ascriptive Principle assumes that birth, not choice, makes people citizens and that they must remain citizens (just as they remain children of particular parents) whether they like it or not.[53] By contrast, communities founded on the Consent Principle presuppose that "subjectship must be based on the tacit or explicit consent of an individual who had reached the age of rational discretion."[54] According to Schuck and Smith, this is a two-way street: "consent must be mutual, and members of an existing community could properly refuse consent to the membership of those who would disrupt their necessary homogeneity."[55] The Consent Principle recommends "a world in which all will be linked politically only by bonds of mutual agreement."[56]

Schuck and Smith endorse the Consent Principle: "Because . . . 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."[57] They maintain that "other ascriptive legal statuses have been utterly discredited and . . . consent has become the most important, durable legitimating principle in American political life."[58] According to Schuck and Smith, the triumph of consent over ascription entails that citizenship should depend upon parentage rather than birthplace.[59] Adults would not consent to becoming citizens themselves unless their (perhaps unborn) children were guaranteed the option of becoming citizens as well; for that reason, we should regard citizenship for the children of citizens as a term of the tacit social contract that constitutes the consensual community.

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51 Schuck & Smith, supra note 3, at 12-13.

52 See id. at 16.

53 As Schuck and Smith explain:

> [N]o right to disobey or to expatriate oneself could arise. Indeed, expatriation and denationalization—termination of the allegiance between a natural-born subject and his sovereign by either the individual or the government—were considered contrary to natural law and therefore impossible for either party. A birthright subject was perpetually bound to his birthright sovereign regardless of his parentage, his own desires, or even those of his king.

Id. at 17-18.

54 Id. at 25.

55 Id. at 28.

56 Id. at 36.

57 Id.

58 Id. at 90.

59 See id. at 116.

But citizenship for the children of illegal aliens is inconsistent with the Consent Principle since the community has never consented to the presence of the aliens, or their children, within the polity; for that reason, the Birthplace Criterion is inconsistent with the consensual interpretation of the American community.

Schuck and Smith deserve considerable praise for their pioneering attention to the question of birthright citizenship, and they are correct that consent's connection to personal autonomy and community self-definition make it an attractive foundation for understanding the nature of the American polity. Ultimately, however, I find their conclusions puzzling, for their version of the Consent Principle ignores the consent of the excluded. In a world without scarcity, that omission might be excusable. We might imagine individuals banding together voluntarily in a Lockean wilderness, free to take what they wanted so long as they honored the Lockean proviso's instruction to leave "enough and as good . . . for others."[60] In such a world, I could not object if you refused to admit me into your society. You could demand that I find friends of my own and form another society elsewhere—and the demand that I go elsewhere would not be onerous since, by hypothesis, elsewhere would be "enough and as good" as what you have. But ours is a world of scarcity; after Americans claim their nation's bounty, there is not "enough and as good" left for the rest of humanity. When we exclude others, they do have reason to complain.

The argument offered by Schuck and Smith misperceives the legitimating force of consent. Consent principles contribute to liberal political theory in two ways. First, when an individual has actually consented to some responsibility or burden, that individual's consent will usually be sufficient to legitimate government action that enforces the responsibility or imposes the burden. Second, when an individual has not actually consented to government action, we will hold the government to some other, relatively demanding standard of legitimacy, and we may even insist that the government should be able to show the individual would have consented if given an appropriate opportunity to do so. But it is *individual consent* (and, in particular, the consent of the burdened or excluded individual) that plays this powerful legitimating role in American political life; liberal political theory does not generally maintain that the government can excuse itself from obligations it would otherwise owe to individuals simply by

[60] John Locke, Second Treatise on Civil Government, in The Second Treatise of Civil Government and A Letter Concerning Toleration 3, 15 (J.W. Gough ed., Basil Blackwell 1946) (1690).

pointing out that it, the government, never consented to take on those obligations.[61] Indeed, that approach would quickly vitiate the importance of individual consent; the government would rarely have to justify itself by reference to the individual's consent, actual or implied, because the government could claim instead that it had never agreed to respect the right asserted by the individual (or, perhaps, the individual asserting the right).

If one focuses upon the connection between individual consent and governmental legitimacy, then the Consent Principle buttresses, rather than undermines, the Fourteenth Amendment's birthplace rule. That rule makes it more plausible to impute tacit consent to the children of illegal aliens; when those children reach maturity, we can legitimate the use of force against them by saying that it would be reasonable for them to consent to obey the laws in exchange for the benefits that citizenship confers. More generally, the argument of Schuck and Smith suffers from a gaping version of the fallacy of the excluded middle. The Ascriptive Principle they describe is decidedly unattractive because it precludes people from renouncing their citizenship. If we were compelled to choose between that principle and the competing principle of mutual consent, we might well opt for mutual consent. Schuck and Smith make much of this putative dilemma.[62] But our choices are considerably richer; we might believe, for example, that an individual's consent is a necessary prerequisite to imposing upon that individual the responsibilities of citizenship, but that polities must accept as citizens any of their residents who elect to join.

In the end, the Consent Principle is too coarse grained to help us with the problem of birthright citizenship. Insofar as we are talking about *actual consent*, the principle is too demanding to apply as a condition of democratic legitimacy. Most people subject to American law, including most American citizens, have not consented in any meaningful way to their status as citizens and subjects.[63] On the other hand, if we are talking about *hypothetical consent*, then all the work remains to be done. We must decide *whose* consent is necessary to

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[61] Joseph Carens makes the same point in his excellent review of Schuck and Smith's book. See Carens, supra note 3, at 416 (distinguishing between "mutual consent" and "individual consent").

[62] See, e.g., Schuck & Smith, supra note 3, at 20-21, 86-89 (arguing that deficiencies of ascriptive view make modification of birthright citizenship desirable). Carens has criticized this feature of the argument offered by Schuck and Smith. See Carens, supra note 3, at 425.

[63] Aliens who freely chose to immigrate to the United States are an exception; hence the argument, infra text accompanying note 72, that governments may legitimately deny citizenship to permanently resident immigrants.

create the social contract, and *what* terms should reasonably be regarded as having been accepted. Neither of those questions can be answered by reference to the idea of consent.[64]

Yet, while I think that Schuck and Smith have misused the idea of consent, we might be able to preserve the substantive intuition behind their idea of "government consent" if we appeal to a different idea, the idea of reliance. We might say that government ought to respect the reasonable expectations which it engenders in those subject to its laws; I shall refer to this claim as the "Reliance Principle." In one important respect, obligations flowing from the Reliance Principle are similar to those that flow from the government's consent: the principle permits the government to disavow obligations on the ground that it never made the affirmative commitment necessary to create them. People commonly believe that the government has some obligations of this sort, obligations that come into being only after the government affirmatively encourages citizens to rely upon their existence. For example, the Supreme Court in *Casey v. Planned Parenthood*[65] predicated the existence of a constitutional right to choose whether to have an abortion largely upon reliance concerns.[66]

Reliance, of course, is a notoriously slippery idea. It has a nasty tendency to become circular: what the Reliance Principle protects depends upon what reliance is reasonable, and what reliance is reasonable depends upon what the Reliance Principle protects.[67] But we can escape these circles. We can do so by assuming that people can reasonably rely upon government to respect only two sets of rights: first, a rather minimal set of human rights to certain negative liberties (e.g., the right to be free from physical torture) that government must honor with respect to every person in the world, and, second, other rights which exist with respect to particular governments and particu-

64 Again, Carens makes the same point. See Carens, supra note 3, at 421-22, 424-25 (arguing that "consent" does not justify conclusions Schuck and Smith offer). I am in general skeptical about using consent, actual or hypothetical, to answer fundamental questions about the American Constitution. See Christopher L. Eisgruber, The Fourteenth Amendment's Constitution, 69 S. Cal. L. Rev. 47, 57-62 (1995) (examining problems with treating Constitution as either actual contract among persons or as hypothetical contract among states).

65 505 U.S. 833 (1992).

66 See id. at 855-56 (discussing reliance interests related to abortion right).

67 On the other hand, the Consent Principle favored by Schuck and Smith also has a tendency to become circular. Professor Neuman points out that no matter what birthright citizenship rule the United States chooses to incorporate into its Constitution, it consents to that rule by the very act of constitutionalizing it. Therefore, it makes no sense to criticize potential rules as more or less consensual—at least if one is worried, as Schuck and Smith are, only about the consent of the included. See Neuman, Strangers to the Constitution, supra note 3, at 169.

lar subjects only to the extent that the government in question has deliberately committed itself to those rights. More specifically, nobody has a reasonable expectation of citizenship except insofar as some government has deliberately encouraged such an expectation. Thus, no child has a reasonable expectation of citizenship by virtue of birth alone (certainly none has an expectation of citizenship *at birth*). Certain parents may, however, have an expectation of citizenship for their children at birth. We might say, for example, that government pervasively and continuously creates such expectations by encouraging parents to contribute to the commonweal for the benefit of their posterity. By contrast, we might say, government encourages fewer such expectations among illegal aliens, since it tells such aliens in various ways (including deportation and criminal sanctions) that they are unwelcome.

Of course, insofar as a government has actually encouraged illegal aliens to enter the country or has for some time granted citizenship to the children of illegal aliens, that government may have generated reasonable expectations with respect to citizenship on the part of its alien population. The Reliance Principle thus generates a raft of empirical questions about what expectations the government of the United States has "deliberately encouraged." It is possible that we might accept the Reliance Principle and still conclude that illegal aliens in the United States reasonably expect that their native-born children will be American citizens.

Nevertheless, the Reliance Principle provides a way to explain why we might prefer the Parentage Criterion to the Birthplace Criterion. It also enables us to develop grounds for the nuanced refinements to the Parentage Criterion favored by Schuck and Smith.[68] The Reliance Principle, however, puts these arguments on very different grounds from those advanced by Schuck and Smith. We can no longer pretend, for example, that the Parentage Criterion can be defended by reference to the legitimating power of individual consent—on the contrary, those burdened by the Parentage Criterion have not consented, and would not consent, to its application. Nor need we choose between the Parentage Criterion on the one hand and the silly idea that people cannot renounce their citizenship on the other. We have instead rested the Parentage Criterion on a potentially controversial normative principle, the Reliance Principle. Our task now is to identify potential competitors to that principle.

[68] For example, Schuck and Smith would apply their preferred Parentage Criterion only prospectively, and they would continue to grant citizenship to the native-born children of permanent resident aliens. See Schuck & Smith, supra note 3, at 118.

B. The Responsiveness Principle and the Residence Criterion

1. The Responsiveness Principle

We can begin by reflecting on the special nature of the power that government exercises over its subjects. When a government asserts sovereign power over the people living within a particular territory, it shapes their environment pervasively. Through their armies and police forces, governments monopolize the power to seize and incarcerate their subjects. These violent encounters back up more peaceful forms of regulation: governments control (or choose not to control) taxes, utilities, highways, courts, and schools. They define who owns what. Government regulations limit not only what people can do but also what they can imagine doing.[69]

This is an extraordinary kind of power. To the extent that people are subject to such power but lack control over it, they are vulnerable to severe exploitation and oppression. For that reason, we might reasonably insist upon a kind of reciprocity: the exercise of sovereign power over a person is legitimate only if that person shares in the political enterprise. More precisely, the interests of all those living in a polity ought to be taken into account in the making, interpretation, and application of its laws. I will call this idea the "Responsiveness Principle."

This principle does not require that government be responsive to the interests of every person affected by its actions. Many people living outside the United States are affected by its policies. To name only a few examples: the United States polices its borders; it applies some laws outside American territory; American foreign policy is a powerful influence upon the fate of other countries; American pollution alters the global environment; and American corporate law creates powerful entities capable of acting across national boundaries.

The American government may have some obligation to care for the interests of foreigners affected by its power. For purposes of this Article, I think it is possible to remain agnostic about the scope of such international obligations. The Responsiveness Principle emphasizes the special character of the relationship between a government and its subjects. The principle insists that government must be attentive to the interests of all who are subject to its general jurisdiction. Government is accordingly illegitimate if it subordinates one group of subjects to favor another.

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[69] Hence the venerable idea that distinct political regimes tend to produce distinct characters in their citizens. For discussion, see, e.g., Martin Diamond, Ethics and Politics: The American Way, in The Moral Foundations of the American Republic 39, 41-42, 63 (Robert Horwitz ed., 3d ed. 1986).

The Responsiveness Principle generates a fairly simple argument on behalf of one criterion for determining birthright citizenship. At a minimum, sharing in the benefits of a political enterprise means having the right to stay within the polity. But presence within the polity is not sufficient to ensure that a person will benefit from government power in the way envisioned by the Responsiveness Principle. We might reasonably suppose that there is no effective way to guarantee that government policy will be sensitive to a particular person's interests unless we grant that person the right to vote. The franchise alone may well be insufficient to implement the Responsiveness Principle; it may be necessary to supplement the franchise with other institutional mechanisms, such as a robust judiciary empowered to protect minority rights. But extending the right to vote to all residents would appear to be an essential minimum if we are to take the Responsiveness Principle seriously. If some group—say, aliens—is denied the franchise, then it is entirely predictable that this group will become the target of hostile legislative majorities, and it is unlikely that countermajoritarian institutions will long stand up to electoral sentiment.

2. *The Residence Criterion*

We might thus arrive at the following conclusion: the Responsiveness Principle requires that every adult resident of the United States be entitled to the right to remain in the United States and the right to vote and, hence, by the definition stated in Part I.A.1., that every resident of the United States be entitled to claim American citizenship.[70] Not every resident need actually become a citizen; there is no offense to the Responsiveness Principle if some resident elects, because of her own interests, not to become a citizen, so long as she is free to lay claim to citizenship if she wishes it.

The argument on behalf of this criterion has, I think, considerable force. We should be troubled by any set of constitutional principles that would enable a polity routinely to use police force against a disenfranchised population within its borders, and the virtue of the Residence Criterion is that it provides a self-executing deterrent to any such practice.[71]

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[70] In a sense, the Residence Criterion effectively does away with birthright citizenship: one becomes entitled to citizenship by residence, and it does not matter who one's parents were or where one was born.

[71] For a thoughtful argument on behalf of the Residence Criterion, see Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 52-69 (1983); see also Carens, supra note 3, at 428-29.

Nevertheless, the Residence Criterion sweeps too broadly. It would, for example, deny constitutional democracies the power to admit permanent resident aliens without allowing such aliens to claim citizenship. From the standpoint of contemporary American law, this result is less dramatic than it might at first seem; it is now relatively easy for permanent residents to become citizens.[72] Yet, American policy aside, an individual's actual consent should suffice to legitimate the use of government force against that person. When people choose to come to the United States under the laws governing permanent resident aliens, we have proof enough that such laws are in their interest: they have consented to live in the United States and to do so without the full protections of American citizenship. We might, I suppose, worry that the laws would become less favorable to their interests during their residency in the United States, or that they had no real choice about coming to America because they were so badly off in their prior home that they had to emigrate. The risk of adverse legal change, however, may not be particularly great in practice (especially if the resident alien is free to return to her country of origin), and the idea of duress seems inapt with respect to resident aliens arriving from, say, Canada or Sweden. Indeed, it would require a rather expansive notion of duress to undermine the significance of the choice made by economic refugees from Mexico or China.[73]

Were we to reject this reasoning and instead embrace the Residence Criterion with respect to permanently resident aliens, then we might have to extend the Criterion to temporarily resident aliens as well. It is easy enough, of course, to carve out an exception for tourists. They are presumably coming to have a look at the society—to *tour* it—rather than to live in it, and it seems fair enough to say that what they see is what they get ("When in Rome . . .," we might reasonably advise them). But it is not obviously fair to apply the same logic to temporarily resident aliens, whose relationships, expectations, and experiences are for a period of years immersed in and developed out of the society in which they are living as aliens. If things in the United States go sour for any visiting resident alien, even a temporar-

[72] Legally resident aliens become eligible for citizenship after five years of residence in the United States, see Aleinikoff & Martin, supra note 9, at 859-61; through the 1970s, more than 97% of petitions for citizenship were approved, see id. at 868-69, and the "overwhelming majority of the denials were based on two reasons: lack of prosecution, or withdrawal of the petition by the petitioner," id. at 869.

[73] If we accept the Responsiveness Principle, however, immigrants escaping human rights violations may deserve a claim not only to sanctuary but to citizenship in the United States.

ily resident alien, the alien, unlike a tourist, will be unable to "cut the trip short and go home" without considerable injury and dislocation.

The Residence Criterion may actually disserve the interests of potential immigrants by precluding polities from granting aliens limited residence rights that would be in the interest of both the polity and the alien. This is a feature of any expansive approach to citizenship rights: an inclusive rule about citizenship gives a polity incentives to adopt an exclusive approach to immigration, since newcomers, once inside the polity, are entitled to stay and join the community.[74] The only permissible way to police membership is to police residence. This sort of constraint on international mobility is an inevitable incident of fidelity to the Responsiveness Principle, but it is also a reason to avoid adopting a citizenship criterion that goes beyond what the principle actually requires.

With respect to illegally resident aliens, another problem arises. We may continue to ask, as we did above, whether the Responsiveness Principle is rendered inapplicable by virtue of the fact that the aliens have chosen to enter the United States. But we may also raise the possibility of a second constraint upon the Responsiveness Principle—namely, the idea that wrongdoers ought to be held responsible for harms that come to them by virtue of their own wrongdoing. So we might say that if the laws of the United States do not reflect the interests of illegal aliens resident in the country, that is their own fault; they are subject to those laws by virtue of their own illegal act. We might also adopt a gentler version of this idea and say that even if illegal aliens are not responsible for whatever harms American law does to them, they are, nevertheless, not entitled to benefit from American law. In other words, while American law must respect certain basic rights that illegal aliens have by virtue of their status as human beings, those aliens have no claim to have their interest reflected in the law in the same way that citizens and legally resident aliens do. Wrongdoers have no title to profit from their wrongs.

Can we modify the blunt Residence Criterion to accommodate these objections? We might imagine a constitutional provision that reads "All long-term residents of the United States, other than those who chose to enter the United States unlawfully, shall be entitled to citizenship of the United States and the state in which they reside." This provision does not solve completely the problems posed by the Residence Criterion. For example, it prohibits the United States from

[74] Michael Walzer recognizes this point and takes it on board; he says that "neighborhoods can be open only if countries are at least potentially closed." Walzer, supra note 71, at 38.

admitting permanent resident aliens unless it is willing to offer citizenship to them. Moreover, the provision's reference to "long-term" residence would raise problems of interpretation, and it seems to require the creation of procedures to assess whether a particular person has established long-term residency. For these reasons, the provision's effect would probably depend upon congressional implementation.[75] Nevertheless, unless we can identify a better alternative, the modified Residence Criterion might be the best constitutional mechanism for ensuring compliance with the Responsiveness Principle.

C. *The Birthplace Criterion*

From the standpoint of the Responsiveness Principle, the unmodified Residence Criterion appears overinclusive. In particular, it confers citizenship upon persons who voluntarily choose to enter the United States without benefit of citizenship; that voluntary choice is reason enough to assume either that living under American law is in the immigrants' interest or that the immigrants should be held responsible for subjecting themselves to laws that do not reflect their interests. Neither of these arguments apply, however, to children who are American residents by virtue of their parents' choices. These children did not decide that living in America would improve their lives, nor did they decide to violate American law. A cardinal constitutional principle, moreover, prohibits imputing responsibility to children for their parents' choices. A bevy of provisions, ranging from the prohibitions upon Titles of Nobility[76] and Corruption of Blood[77] to the Due Process Clauses and the Equal Protection Clause, reflect the fact that in the United States responsibility and guilt are traced to individual action, not ancestral pedigree.

So we might conclude that the Responsiveness Principle compels us to confer citizenship upon children who become long-term residents of a polity by virtue of their parents' choice. That conclusion, however, generates an administrative problem. Which children came here because of their parents' decision, and which bear responsibility themselves (in whole or in part) for coming to the United States? These are not easy questions to answer. One does not have to be very

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[75] One could redress this problem by incorporating a time period directly into the constitutional provision: for example, "All persons, other than those who chose to enter the United States unlawfully, who reside in the United States continuously for a period of at least five years shall be entitled to citizenship of the United States and the state in which they reside."

[76] See U.S. Const. art. I, § 9, cl. 8 (prohibiting granting Titles of Nobility by United States).

[77] See id. art. III, § 3, cl. 2 (prohibiting conviction of treason from resulting in Corruption of Blood or in forfeiture beyond life of person convicted).

old to run across the border or to understand what is at stake in changing countries.

One baseline is, however, easy to identify. Children who are born in the United States do not enter the country by virtue of their own decision. So the Responsiveness Principle justifies something like the Birthplace Criterion as a constitutional minimum: all long-term residents of the United States who became long-term residents through no choice of their own ought to be entitled to vote upon reaching maturity and immune from deportation; therefore, all native-born children who become long-term residents of the United States ought to be eligible for citizenship.

Of course, the Constitution's version of the Birthplace Criterion is simpler: it makes no mention of "long-term" residence. Every baby born in the United States receives citizenship automatically—even if the baby and its family immediately depart for foreign soil with no intention of coming back. So the Birthplace Criterion, like the unmodified Residence Criterion, is overinclusive. Is this overinclusiveness a big problem? One might think not, since the affected class, by definition, leaves the polity. The overinclusiveness of the Birthplace Criterion does not compromise the polity's legitimate interest in regulating the citizenship of persons who continue to reside within its borders.

But the Birthplace Criterion, unlike the Residence Criterion, is also underinclusive. Tots and infants brought to the United States have not made responsible choices to leave the nation of their birth, and that will be true of many teenagers as well. So Congress should have the power, and the responsibility, to broaden the laws granting citizenship to embrace other long-term residents who did not benefit from the constitutionally inscribed Birthplace Criterion.

Of course, Congress might do a rather bad job regulating citizenship. If we thought Congress was likely to be hostile to legally resident aliens, we might prefer to constitutionalize the overinclusive Residence Criterion rather than the underinclusive Birthplace Criterion. The simple Residence Criterion, like the simple Birthplace Criterion, is self-executing: it does not depend for its enforcement on either a benevolent Congress or a courageous judiciary. Or, if we were confident that either Congress or the judiciary would see to its execution, we might think that the modified Residence Criterion would implement the Responsiveness Principle most precisely. Our decision about which criterion best serves the Responsiveness Principle will depend upon practical judgments about the institutional competence of Congress and the courts, and we might reasonably come out either way on those judgments. The case on behalf of the modi-

fied Residence Criterion is a strong one, and some readers will prefer it to the Birthplace Criterion.

Nevertheless, in contemporary American politics the Birthplace Criterion's principal competition comes not from the generous Residence Criterion but rather from more parsimonious criteria, like the Parentage Criterion, that link citizenship to ancestry. Unlike the Residence Criterion, the Parentage Criterion departs from the Birthplace Criterion at the level of political principle rather than at the level of institutional strategy. As we have seen, the Parentage Criterion, which makes citizenship dependent upon ancestry, is best understood as resting upon a competitor to the Responsiveness Principle, the Reliance Principle.

D. Choosing Between Responsiveness and Reliance

The Responsiveness and Reliance Principles offer two different standards against which to judge political action. The Responsiveness Principle is more demanding than the Reliance Principle, and it imposes greater restrictions upon the state's ability to deny citizenship to residents. Is there any philosophic ground for choosing between these two principles? I have tried, when presenting the Responsiveness Principle, to suggest why, in light of commonly held convictions about American politics, the principle might be thought attractive. I do not, however, think that I have proven that the principle is a good one; nor do I think any such demonstration is possible. Reasonable people might find the Reliance Principle more attractive.

Nevertheless, I do think that it is possible to say more about what is at stake in the choice between the two principles. In this section, I try to do so. My suggestion is that the two principles correspond to two different views of the nature of human liberty: the Reliance Principle correlates with a negative conception of liberty, and the Responsiveness Principle attaches to a modest version of positive liberty.

These connections arise because the Reliance and Responsiveness Principles presuppose different baselines against which to assess human autonomy. Under the Reliance Principle, polities need respect only the basic human rights that all people enjoy without regard to their membership in any political community. These rights largely, and perhaps entirely, involve negative liberties: the right to be free from torture and from unjust imprisonment; the right to free speech; the right to be free from religious persecution; and so on. Beyond this point, the Reliance Principle suggests that government has obligations only insofar as it affirmatively takes them on. As such, the Reliance Principle directs us to treat the benefits of political association as the

earned property of voluntary cooperation, which the association's members are free to use in whatever way they choose. Outsiders are responsible for their own welfare; they may form their own community, or they may petition to join an existing community, but so long as their basic human rights remain inviolate, they have no claim upon the fruits of communities formed by other free persons to care for their own welfare.

The Responsiveness Principle, by contrast, requires more from government. Every human being is entitled not only to the basic human rights that every government must respect, but also to effective representation within the particular government under whose jurisdiction that human being lives. All persons subject to law are entitled to laws that reflect their interests and to share in the benefits of political community. We should not exaggerate the value of this right. It involves no guarantee of a rich civic life replete with profound deliberation and patriotic fellowship, or of equal wealth or even Rawlsian shares in primary goods,[78] or of eligibility for high political office. Thus far, I have suggested only that the Responsiveness Principle ensures the right to vote and immunity from deportation. It is not clear how much more the principle demands—although we might plausibly believe that it also entails the right to compete on fair terms (though not necessarily successfully) for economic and political benefits.[79] The Responsiveness Principle would be consistent with political theories that recommend more robust conceptions of positive liberty, but the Principle itself requires us to accept only a relatively modest version of positive liberty.

Still, the difference between this vision of political society and the one sponsored by the Reliance Principle is important. The Responsiveness Principle, unlike the Reliance Principle, does not treat the benefits of political association as property earned by the voluntary cooperation of free individuals. Instead, the Responsiveness Principle regards individual responsibility as the product, rather than the source, of political association; individuals cannot claim responsibility for what they have (or deserve blame for what they lack) until they establish legal authority within the territory they inhabit. The community's discretion to administer its property is therefore conditioned

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[78] See John Rawls, A Theory of Justice 90-95 (1971) (explaining concept of "primary goods" as basis of expectations).

[79] It is hard to see how the laws could be sensitive to the interests of persons while denying them access to such competition. Thus, the Responsiveness Principle supports Judith Shklar's interpretation of American citizenship as structured around the twin pillars of voting and earning. See generally Judith N. Shklar, American Citizenship: The Quest for Inclusion (1991).

upon the community's recognition of its subjects' dependence upon one another. Citizenship, rather than mere freedom from restraint, is the birthright of every person.

The Responsiveness Principle is thus consistent with a view about citizenship often articulated in the first century of this nation's history—namely, the idea that "[t]he most general and appropriate definition of the term citizen is 'a freeman.'"[80] Modern readers are likely to interpret this definition as a statement that freedom is a sufficient qualification for citizenship, and, indeed, when Justice McLean invoked the definition in his *Scott* dissent, that was exactly the conclusion he had in mind. But it is also possible, and illuminating, to read the equation in the other direction, as affirming that citizenship is a necessary condition of freedom.[81] That interpretation of freedom involves a version of positive liberty: the mere absence of unjust restraints is not sufficient to enable individuals to take responsibility for their lives; people must first have the benefits of membership in a political community, even if those benefits consist of a rather thin package, such as police protection and the opportunity to participate in economic markets.

So my suggestion is this: in choosing between the Responsiveness Principle and the Reliance Principle, we are choosing between two different conceptions of liberty, or, in other words, two different views about when it is appropriate to hold people responsible for how their lives go. Building a community around the Reliance Principle requires that we assume people can be held responsible for how their lives go if and only if certain basic negative liberties remain inviolate. Building a community around the Responsiveness Principle involves a different, inconsistent assumption—namely, that people can be held responsible for how their lives go if and only if they are members of a political community.

The choice between these views of human nature will turn upon moral intuitions rather than psychological or sociological observation; responsibility is a moral idea. Most of us subscribe to notions of human dignity that will require us at some point, under some conditions, to hold people responsible for how their lives go. To figure out what that point is and what conditions must apply, we would have to

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[80] Scott v. Sandford, 60 U.S. (19 How.) 393, 531 (1857) (McLean, J., dissenting).

[81] This interpretation of Justice McLean's maxim finds support in the political theory of his fellow Republican, Abraham Lincoln. Harry Jaffa argues persuasively that Lincoln reformulated the Declaration of Independence's concept of equality, interpreting it as a goal toward which government should aim rather than as a fact about human nature that government must respect. See Harry V. Jaffa, Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates 318-21 (1959).

explore our intuitions about particular moral problems. So we might discuss, for example, specific questions about property rights: the nature and extent of the government's authority to tax and regulate; what sorts of luxuries people should feel free to consume and enjoy; and when people can be said to have earned something. We will, of course, differ about these examples, and about the conceptions of human moral responsibility that we draw from them. Nevertheless, I expect most readers of this Article will find themselves drawn to some, more or less modest, conception of positive liberty; after all, there are relatively few laissez-faire capitalists around today, and even most laissez-faire capitalists trace the legitimacy of property rights to the existence of competitive markets. If that assumption is correct, most readers will have a good reason for preferring the Responsiveness Principle and the Birthplace Criterion to the Reliance Principle and the Parentage Criterion.

E. Necessity

The Responsiveness and Reliance Principles derive rules about citizenship from convictions about when it is legitimate for government to use force against individuals. That analytic strategy presupposes that we can identify the criteria that define citizenship by reflecting upon the state's obligations to the people over whom it exercises authority. Many readers may, however, feel that we should approach the issue by asking a different question—a question not about what government must do for individuals, but rather about what sort of community we want to have.

Indeed, the most familiar arguments in favor of restricting citizenship focus not on individual rights or political legitimacy, but on the features of a successful political community. So, for example, some traditional views about citizenship analogize polities to families and insist that citizenship should follow ancestral pedigree in order to ensure that citizens share the proper sort of fellow feeling for one another.[82] Other arguments maintain that no polity can establish a desirable welfare system unless it is free to limit citizenship to the children of citizens; otherwise, the argument continues, the system will be bankrupted by the demands of newcomers.

Yet, if the principles that legitimate the state's use of force against individuals entail particular conclusions about who is a citizen, we can-

[82] A venerable statement of the model is Jean Bodin, The Six Bookes of a Commonweale (Kenneth Douglas McRae ed., Harvard Univ. Press 1962) (Richard Knolles trans., 1606). For discussion of the theory's modern form in German law, see generally Rogers Brubaker, Citizenship and Nationhood in France and Germany (1992).

not adjust those conclusions to fit our preferences about what sort of community we would like to have. Once we have endorsed a specific principle of legitimacy, such as the Responsiveness Principle, that principle will constrain our ability to tailor rules about citizenship to fit our conception of the good community.

Our vision of the good community may, however, compete with legitimacy principles, including the Responsiveness Principle, at a prior stage in the analysis—not by altering the effects of the Responsiveness Principle (or any other legitimacy principle), but by causing us to question our commitment to that principle. We might characterize the problem as follows: When selecting a constitutional theory, including a set of rules or principles to govern citizenship, we must bring into equilibrium a variety of convictions that we have, including both convictions about the rights of individuals and convictions about what a good society is.[83] The latter category will include convictions that value certain forms of community for instrumental reasons (e.g., the view that a community should inculcate virtue in its citizens because otherwise the vulgar electorate will overwhelm constitutional institutions and violate the rights of individuals). The question we must ask is this: What convictions about community might unhinge our commitment to the Responsiveness Principle and so undermine the case for the Birthplace Criterion?

Start with a disturbing hypothesis. No community, we might conjecture, can preserve its commitment to individual rights if it cannot control its membership effectively and efficiently. This point is most often made with respect to economic rights: a nation may struggle to provide a basic level of well-being or opportunity to its own citizens, but it cannot subsidize the well-being of the entire world. But the point might be given a broader application. The willingness of citizens to respect the rights of others might be contingent upon their sense that their own property is secure and upon their conviction that they (or their children) will be the beneficiaries of the political and economic institutions they must work to maintain. If that is so, then a nation's regard for individual liberty may depend in part upon its ability to exclude economic refugees. Or, to take a final possibility, a nation's ability to honor the Responsiveness Principle, or anything like it, may depend upon the existence of commonalities of interest among its members, and those commonalities may in turn depend upon the nation's ability to preserve homogeneity by excluding outsiders.

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[83] My formulation of this problem was inspired by arguments discussed in a rather different setting by Ronald Dworkin, Liam Murphy, and Larry Sager, all of whom will probably wish to disclaim any responsibility for the use to which I have put their insights.

Moreover, a nation as large as the United States cannot put walls around its perimeter. No matter how much money it invests in border control, aliens will be able to enter illegally. The prospect of achieving birthright citizenship for their children will help to lure illegal aliens into the United States and, once they are here, it will make them more difficult to deport. We should therefore reject the Birthplace Criterion. We should, however, guarantee citizenship to the children of those who are already American citizens. By doing so, we will reinforce the incentives for Americans to preserve their political institutions since they will know that their children will be among the beneficiaries of those institutions in the future. We should therefore accept the Parentage Criterion.

Arguments of this sort are probably the best way for liberal political theory to make sense of communitarian views about citizenship that restrict citizenship in order to preserve cultural solidarity and the integrity of peoples. Of course, other political traditions have defended communitarian attitudes toward citizenship more directly, for example, by analogizing the polity to the family. From the standpoint of American constitutional law or liberal political theory, however, such organic theories of the state appear inegalitarian, if not racist.[84] If we are to make cultural solidarity a respectable virtue, we must treat it as strategically, rather than intrinsically, important. We must, in other words, regard it as a necessary practical precondition for the successful operation of a political enterprise dedicated to liberal principles.

Strategic arguments of this sort depend upon a host of complicated empirical judgments: Does the Birthplace Criterion in fact add to the already powerful economic incentives attracting aliens to enter the United States illegally? How costly would it be for the United States to close its borders? To what extent does illegal immigration sap the American people's willingness or ability to support basic rights?

Unfortunately, we have no philosophic ground for dismissing these troubling empirical questions as irrelevant. If we find the Responsiveness Principle attractive because of the image of liberty attached to it, we must nevertheless consider whether that principle is within reach of the American community. What has been said about politics in general is certainly true of constitutionalism in particular: it

[84] See Richard H. Fallon, Jr., What Is Republicanism and Is It Worth Reviving?, 102 Harv. L. Rev. 1695, 1733-34 (1989) (noting that classical republicanism may work best in homogeneous societies). It is no accident that Chief Justice Taney's opinion in *Scott* analogized the American polity to a family in order to justify a racist reading of the Constitution. See *Scott*, 60 U.S. (19 How.) at 406-07, 417-18, 422.

is a practical art, and it presupposes not only that people are responsible for their actions, but also that wisely designed institutions can secure fidelity to principle in practice. If we doubt that any constitutional plan is capable of rendering American behavior consistent with the Responsiveness Principle over the long haul, that conviction might legitimately dislodge our allegiance to the Responsiveness Principle and cause us to embrace the Reliance Principle as an alternative premise for the constitutional system.

About the empirical questions, I can offer only two modest observations. First, the United States may enjoy a peculiar ability to accommodate new citizens without diluting shared cultural values. We are a nation of immigrants. To the extent Americans share common values at all,[85] those values reflect the opportunities—such as the opportunity to find jobs and to escape religious and political persecution—that brought immigrants to the United States in the past. The people who come today often come for very similar reasons. They and their immediate descendants may be *more*, not less, American than people who trace their ancestry to the Pilgrims.

Second, empirical claims about how immigration endangers the American political enterprise are controversial and speculative. That may be reason enough to reject the argument from necessity. Our task is to bring into equilibrium our views about what sorts of communities are possible and our views about what sorts of communities are desirable. Our views about what is possible may accordingly dislodge our attraction to demanding moral principles, but the reverse is true as well. If the effects of the Birthplace Criterion on civic culture are exceedingly unclear, that is reason enough to allow intuitions about individual rights to dictate our path unmodified by considerations of political sociology. We must be prepared to temper constitutional principles in light of sober judgments about the limits of human nature. But we should not be in any hurry to make compromises not proven essential.

F. Summary

Here, then, is the case for the Birthplace Criterion. The criterion is one way to implement the Responsiveness Principle, which demands that the making, application, and interpretation of laws be responsive to the interests of those governed by the laws. The

[85] I think they do. See Christopher L. Eisgruber, The Constitutional Value of Assimilation, 96 Colum. L. Rev. 87, 90-91 (1996) (offering preliminary list of shared values); Christopher L. Eisgruber, Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence, 43 Duke L.J. 1, 18-27 (1993) [hereinafter Eisgruber, Justice and the Text] (describing how Constitution perpetuates shared values).

Birthplace Criterion helps to ensure fidelity to that principle by making it likely that those subject to the laws will have an effective voice in determining their content. The Residence Criterion is another means for implementing the Responsiveness Principle. The choice between the Birthplace Criterion and the Residence Criterion depends upon strategic considerations. I think the choice is a close call.

Of course, the Responsiveness Principle is not the only possible principle of legitimacy. We have given considerable attention to a competing principle, the Reliance Principle, which makes fewer demands upon government. I suggested that we should prefer the Responsiveness Principle because it correlates with an attractive view of human freedom: the principle treats human beings as responsible for their own destiny, but it recognizes that the benefits of membership in a political community are a necessary precondition to the existence of this freedom. That cannot be the end of the story, however. Even if we found the Responsiveness Principle, and the conception of human freedom attached to it, attractive from a moral perspective, we might decline to embrace it as the foundation for American politics if we thought the principle so demanding that the American people would sustain severe damage by honoring it. Whether or not the Responsiveness Principle is a prudent basis for constitutional politics depends largely on speculative empirical judgments. Yet, the difficulty of these empirical questions may itself be reason enough to put them aside. The demands of necessity may be a legitimate constitutional reason for abandoning otherwise attractive principles; but we should be reluctant to let prudence compromise our commitment to principle absent compelling evidence that such a course is in fact necessary.

III

How Would the Constitution Change If We Abandoned the Birthplace Criterion?

If indeed departures from the Fourteenth Amendment's Birthplace Criterion would be bad from the standpoint of political justice, then proposals to change the Constitution's birthright citizenship rule raise interesting and relatively unexplored questions in what we might call the theory of constitutional amendment. Suppose that Americans amended their Constitution to depart from the Birthplace Criterion by carving out an exception for the children of illegal aliens. Would the resulting change be a relatively minor revision, localized to a small set of issues about nationality? Or would the amendment have a larger ripple effect, causing global changes to constitutional meaning?

A. Theoretical Justifications for Interpretive Quarantine

I will argue that if a constitutional amendment makes an unjustified exception to a moral principle expressed elsewhere in the Constitution, then there is only one way to preclude it from having global effects on the constitutional treatment of liberty: judges (and other constitutional interpreters) must self-consciously treat the exception as a mistaken judgment about the entailments of justice. If judges refuse to take such an aggressive attitude toward the amendment, then making exceptions to constitutional principles will either divest the Constitution of its principled character or pollute the meaning of the principles in all their applications. This argument is quite general and has implications that run well beyond issues specific to citizenship: it applies with equal force, for example, to proposed amendments that would exempt flag-burning laws from the free speech principle, or that would exempt school prayer from the antiestablishment principle.

These suggestions may seem too pessimistic. Unprincipled exceptions to constitutional norms would no doubt be lamentable blemishes upon the Constitution, but is there really any reason to think they might metastasize and spread throughout the body of the Constitution? But imagine for a moment the interpretive challenges facing a Supreme Court Justice in the wake of such an amendment. How should the Justice go about interpreting a Constitution that includes a "Children of Illegal Aliens Amendment" or a "Flag-Burning Amendment"? One option would be to seek a principled account of the Constitution as a whole, one that made sense of both the Birthplace Criterion and the specific exception for the children of illegal aliens, or, in the case of the Flag-Burning Amendment, of both the free speech principle and the flag-burning exception. If the Supreme Court Justice were to select this interpretive strategy, the exception would alter the meaning of the rest of the Constitution. We could not, for example, read the Constitution as a whole to embrace the Responsiveness Principle because that principle could not explain the exception governing the citizenship of the children of illegal aliens. We would be drawn instead toward something like the Reliance Principle. Or, if the Constitution contained a Flag-Burning Amendment, we could not interpret the First Amendment as predicated upon a general conviction that offensive speech should be met with reason rather than violence, for that principle would be inconsistent with another constitutionally inscribed principle. In this way, the exceptions would pollute the meaning of the more general principles they modified.

"But that's obvious," you might reply with a hint of exasperation. "If we treat the 'unprincipled exceptions' as constitutional principles,

and give them force equal to other constitutional norms, *of course* the exceptions will alter the meaning of the Constitution as a whole. We should instead treat them in exactly the spirit they are offered: not as principles, but as brute political decisions, reflecting the interests of those who framed them and accordingly limited to the specific applications they had in mind. That is the way to confine the effects of the exceptions."

So suppose that our hypothetical Supreme Court Justice takes this tack, regarding the new amendment as a mere rule limited by the intentions of those who legislated it into being. Unfortunately, this decision, too, has implications for the Constitution as a whole. The Justice has now decided that the Constitution is *not* a statement of principles that regulate American political relationships; instead, it is a record of legislated decisions that might or might not have a principled core.[86] You might object that, in fact, the Justice has only decided that *one* constitutional provision is a legislative record rather than a statement of principle. But, once we concede that one provision is not a statement of principle, how are we to decide whether the others are? Not by reference to the purposes of having a Constitution, for our attitude toward the Children of Illegal Aliens Amendment shows that there is nothing inherent in the role of the American Constitution which transforms its provisions into statements of principle. Presumably the principled or unprincipled character of any provision will depend upon the intentions of those who framed it. No other approach is possible once we have decided that intentions can render some provisions (at least one provision) unprincipled.

Thus, if we treat the Children of Illegal Aliens Amendment as an unprincipled political decision, it becomes a question of historical fact whether the Fourteenth Amendment is likewise an unprincipled political decision. Would that change much constitutional jurisprudence? Perhaps not; the leading positivist historical authority on the amendment maintains, in effect, that the framers and ratifiers of the Fourteenth Amendment intended, as a matter of historical fact, to confer policymaking discretion upon the judiciary,[87] a conclusion that neatly

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[86] Any interpreter must begin her reflections on the Constitution by considering its political function: we cannot begin to figure out what the Constitution means unless we have some view about the purposes it serves. See Eisgruber, Justice and the Text, supra note 85, at 4-5. I have argued elsewhere that the Constitution's purpose generates an inherent connection, not dependent upon the intention of its framers, between constitutional meaning and political justice. See Christopher L. Eisgruber, The Living Hand of the Past: History and Constitutional Justice, 65 Fordham L. Rev. (forthcoming Mar. 1997).

[87] See generally William E. Nelson, The Fourteenth Amendment (1988) (asserting that framers of Fourteenth Amendment failed to give it precise content, leaving that task to courts).

justifies most (if not all) of what has since been done in the amendment's name. But this is not the only view of the amendment's history.[88] And, more generally, using the intentions of the framers to limit the meaning of an illegal aliens exception would preclude constitutional theorists from arguing, as many of us are now inclined to do, that it is wrong *in principle* (rather than because of historical circumstance) to use original intention to limit the meaning of the Fourteenth Amendment.

There is also another and deeper problem that renders it impossible to cabin the force of constitutional exceptions by treating them as brute political decisions. That approach, like any version of originalism, makes a mistake about the Constitution's purpose. It supposes that the point of the Constitution is to enable supermajorities to impose their will and preferences on their successors. If that were so, the Constitution would be an odd and lamentable political device. In fact, the Constitution is designed to serve a very different purpose: not to give special power to transient supermajorities, but to discipline majorities and their representatives to act in the interests of justice. The Constitution may, of course, fail to serve those purposes, and so particular amendments, including the proposed birthright citizenship amendment, might serve the interests of powerful majorities at the expense of justice. Nevertheless, the Constitution's purposes require that we read its provisions, even its ugly ones, as efforts to achieve justice rather than as brute political decisions.

I have written on this topic elsewhere,[89] and I will not repeat my arguments here. Instead, I will offer an observation designed to underscore the sociological implausibility (rather than the normative impossibility) that a vital originalist school of constitutional interpretation would develop in response to an exceptional amendment. The observation is this: there are virtually no originalists in America. More precisely: very few constitutional interpreters, in the academy or on the bench, consistently read the Constitution as a jumble of political decisions, some of which happen to be just and others of which happen to be unjust. There are, of course, interpreters who, like Robert Bork, invoke originalism to defend a program of judicial

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[88] See, e.g., Michael J. Klarman, *Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev. 1881, 1884-914 (1995) (arguing that school desegregation cases cannot be reconciled with intentions of framers of Fourteenth Amendment).

[89] See Eisgruber, supra note 86. My argument in that article modifies positions I took in earlier works, including Eisgruber, supra note 23, at 63, and Eisgruber, supra note 64, at 57-62.

restraint,[90] or who, like Justice Antonin Scalia,[91] invoke originalism to defend a libertarian jurisprudence. But, so far as I can tell, Bork prefers a Constitution that emphasizes judicial restraint, and Scalia prefers a Constitution that authorizes the judiciary to protect certain libertarian rights.[92] Neither is likely to call for amending the Constitution because both in fact believe that the Constitution states a good set (close to the best set) of principles of political justice.[93] So neither Bork nor Scalia has had to put his originalist rhetoric to the test. Were they forced to do so, I think their originalism would yield, precisely because there is no good reason to make the intentions of dead people sovereign with respect to our most fundamental political issues.[94]

The effort to use originalism to cabin the effects of a Children of Illegal Aliens Amendment to the Citizenship Clause would thus be doomed to gradual erosion and ultimate failure. Analogies to the treatment of illegal alien children would seep into constitutional jurisprudence and ordinary political debate. Accusations of unjust discrimination would be met with the question, "How is this any different from the way we treat the children born to illegal aliens in the United States?" In some cultures, it might be possible to rebuff this inquiry by saying, "Well, that's just the way illegal aliens are treated, isn't it? They're just different, aren't they?" In the rationalist precincts of the United States, however, the analogy would demand a substantive an-

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[90] See generally Robert H. Bork, The Tempting of America: The Political Seduction of the Law (1990).

[91] Justice Scalia, like Bork, defends originalism on the ground that it promotes judicial restraint. See Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 863 (1989) (arguing that main danger in judicial interpretation is that judges will mistake their predilections for law). Scalia's opinions, however, have often departed rather vigorously from the path of judicial restraint. See, e.g., Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting) (criticizing restraints on campaign finance); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring) (criticizing affirmative action programs).

[92] See, e.g., Bork, supra note 90, at 352-53 (praising democratic decisionmaking and wisdom of framers). For evidence of Scalia's satisfaction with the Constitution, see sources cited supra note 91.

[93] See sources cited supra note 92. Likewise, Henry Monaghan criticizes "perfectionist commentators" who believe that the Constitution incorporates all of the rights most cherished by liberal democratic theory. See Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 396 (1981). But, in Monaghan's view, this fact is no cause for lament. On the contrary, Monaghan believes that wise constitutionalists leave the government flexible enough to accommodate changing views about moral issues. See id. at 361-63. So Monaghan, like those whom he criticizes, believes the Constitution is, if not perfect, then at least very good—he simply embraces a different view about what makes a constitution good.

[94] Cf. Scalia, supra note 91, at 864 (confessing that, if confronted by case in which originalism would require him to do serious injustice, he might abandon originalism).

swer. That cultural trait is, I think, very much to our credit. But it would inevitably, slowly but surely, push constitutional interpretation back toward the first strategy, back toward looking for a principled construction of the constitutional whole that would use the exception to interpret the more general norm.

Yet, as I suggested at the beginning of this section, there is another alternative. We need not choose between treating a noxious amendment as a brute political decision or as an authoritative interpretation of general principles. We can instead treat it as a *mistaken* interpretation of those principles. The Constitution's purpose may be to discipline political bodies to act in the interests of justice, but it does not follow that constitutional institutions—including those that have power to amend the Constitution—always succeed; sometimes, they may carry out their constitutional tasks poorly. It is therefore entirely possible that judges and other interpreters may have to recognize particular constitutional provisions as mistakes. That does not, of course, entitle them to ignore the provisions in question; their literal terms must be honored. But, if the provisions are mistakes, they should not be permitted to alter the meaning of other, better principles contained elsewhere in the Constitution.

So it is possible to put an interpretive quarantine around a disagreeable constitutional provision by invoking political theory rather than originalism. The strategy outlined in the preceding paragraph does not depend in any way upon a claim that the framers of the noxious amendment intended it as a limited exception to a more general principle. The strategy uses the amendment's relationship to injustice, not its relationship to framers' intention, as a ground for circumscribing its interpretive significance. For that reason, the strategy would apply with equal force even if the framers of a birthplace citizenship amendment considered it an interpretation of the Equal Protection Clause and hoped that it would have a global impact upon the Constitution's meaning.

B. The Danger of Interpretive Infection

American constitutional history affords at least one example of interpretive quarantine. Chief Justice John Marshall treated the Eleventh Amendment as a regrettable limitation upon the judicial power. He asserted that Congress's motive for passing the amendment was "not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance" before a federal tribunal, but merely to "quiet the apprehensions" of states that their "debts

might be prosecuted in the federal courts."[95] The Supreme Court's recent decisions make clear that Marshall's efforts were only partly successful. In *Seminole Tribe v. Florida*,[96] Chief Justice Rehnquist insisted that it would be wrong to limit the Eleventh Amendment to its terms without connecting it to some broader constitutional principle.[97] Rehnquist maintained that the Eleventh Amendment articulated an implied constitutional commitment to state sovereignty.[98]

It is telling that even Rehnquist, who is an avowed positivist,[99] cannot resist the pull to treat constitutional provisions as references to general principles. Whether or not one subscribes to Ronald Dworkin's account of adjudication, it is hard to deny that, in practice, lawyers and judges generally try to allow legal materials, including constitutional provisions, to exercise a kind of "gravitational force" that goes beyond their literal terms.[100] That tendency threatens to frustrate, in practice, any interpretive quarantine we might wish to erect around a noxious constitutional amendment, even if we have a perfectly sound theoretical defense for the quarantine.

Thus, an unprincipled exception to the Birthplace Criterion might do more than add a dissonant but localized anomaly to the Constitution; it might instead affect the Constitution as a whole, either divesting it of its inherently principled character or (more likely) polluting the meaning of all its principles. It is worth asking how severe the resulting damage might be. Perhaps we can hope that judges would reconcile the Constitution's general norms with the new exception, but domesticate the effects of this process. For example, Professors Schuck and Smith have defended excepting the children of illegal aliens from the Birthplace Criterion on the ground that such an exception is *entailed by* the autonomy norms that undergird liberal constitutional theory.[101] If we agreed with Schuck and Smith, incorporating such an exception into the Constitution would reinforce, rather than pollute, ambitious, rights-protecting views of the Fourteenth Amendment. So perhaps we could advise our hypothetical Supreme Court

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95 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406-07 (1821).

96 116 S. Ct. 1114 (1996).

97 See id. at 1122 (noting that "'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms[,]'. . . that each State is a sovereign entity in our federal system" (citations omitted)).

98 See id. at 1127 (stating that "the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction").

99 See, e.g., William H. Rehnquist, Observation: The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 704-05 (1976) (arguing that laws "take on a form of moral goodness because they have been enacted into positive law," not because of "any independent virtue they may have").

100 See Ronald Dworkin, Taking Rights Seriously 111 (1977).

101 See Schuck & Smith, supra note 3, at 85-86.

Justice to assume that the arguments I offered above, arguments made in opposition to Schuck and Smith, were wrong.

Whether this strategy is tenable depends upon how *plausible* we find the argument we are asked to adopt. Sometimes we might think that some argument is, on balance, wrong, but nevertheless find ourselves able to think of the argument sympathetically if asked to do so. But, for me, the argument of Schuck and Smith is not of this variety. It rests, in my view, on a confusion about the role of consent in liberal political theory. If I were to adopt the theory in order to justify the government's denial of citizenship to American-born children of illegal aliens, I could not find any comprehensible stopping point that would preclude the idea of "government consent" or "consent of the majority" from legitimating all sorts of other invasions of liberty and equality. So I think that, in principle, it would be possible (and desirable) to domesticate an apparently unprincipled amendment to the Constitution by entertaining a dubious, but arguable, political theory. But I do not see this as a viable option in the case of the Birthplace Criterion, at least if the "second-best" argument we must adopt is like the one propounded by Schuck and Smith.

There is another, even more pessimistic response one might offer to the possibility of interpretive infection. "Even if your argument is right," somebody might say, "it doesn't matter. The Constitution is chock full of detailed provisions that obviously do not express any political principle, and, if one such provision would have dramatic effects, then the addition of another—such as the Children of Illegal Aliens Amendment—would be entirely superfluous. We are *already* stuck with a terribly polluted, unprincipled Constitution."

But are we really? What obviously unprincipled provisions does the Constitution contain? We can put aside the provisions which, like the Fugitive Slave Clause,[102] accommodated slavery before the Civil War; those provisions may indeed have strained the integrity of constitutional interpretation during the antebellum period, but they were stripped of significance by the Reconstruction Amendments.[103] Our search for unprincipled constitutional provisions must focus upon the Constitution as it exists today.

We might begin by considering some of the Constitution's more detailed rules, such as the Twentieth Amendment's scheme governing presidential succession or the Twenty-Fifth Amendment's procedures for ascertaining whether the President is medically able to continue in

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[102] U.S. Const. art. IV, § 2, cl. 3.

[103] See id. amend XIII, § 1 (abolishing slavery); id. amend. XIV, § 1 (extending citizenship and guaranteeing privileges and immunities, due process, and equal protection); id. amend. XV, § 1 (prohibiting use of race as basis for denying right to vote).

office. Surely the Constitution expresses no principle of justice when it stipulates that the "terms of the President and Vice President shall end at noon on the 20th day of January,"[104] or that the Vice President and the Cabinet have four days in which to contest a President's claim of fitness to continue in office.[105] No principle requires that the Constitution specify the 20th day of January rather than the 21st day of January or the 4th day of March, or that the Vice President have four days, rather than three or five, to answer a presidential communication.

The Twentieth and Twenty-Fifth Amendments, however, differ from the Children of Illegal Aliens Amendment or the Flag-Burning Amendment in this crucial respect: the details of the Twentieth and Twenty-Fifth Amendments may be unprincipled in the sense that they reflect arbitrary choices among equally good candidate rules, but they are not unprincipled in the deeper sense of detracting from or making exceptions to constitutional principles of justice. On the contrary, the arbitrary procedures specified by those amendments help to implement certain principles of justice—such as the principle that transfers of presidential power should be orderly and should conform to procedures settled in advance. We might think that the Children of Illegal Aliens Amendment could play an analogous role if we thought that the Birthplace Criterion were merely a bookkeeping measure, designed only to provide some clear way to identify which native-born persons were citizens and which were not. But, at this point, the argument of this section intersects with the argument of the preceding section. We have seen that the Birthplace Criterion (unlike, say, the choice of January 20th as the date upon which new Presidents take office) is not morally neutral; it connects up with the Responsiveness Principle and with the more general idea that citizenship is a necessary prerequisite to freedom.

We must look, then, for a constitutional provision which, unlike the Fugitive Slave Clause, retains some vitality today and which, unlike the Twentieth Amendment, contains details that demand an exception to some principle of justice. I think there is at least one candidate: Article II stipulates that "[n]o Person except a natural born Citizen . . . shall be eligible to the Office of President."[106] The Constitution thereby precludes foreign-born citizens from running for President. If any of the states were to put a similar restriction upon

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104 Id. amend. XX, § 1.

105 See id. amend. XXV, § 4.

106 Id. art. II, § 1, cl. 5.

state or local offices, it would certainly be unconstitutional under the Equal Protection Clause.

How should we think about the relation between Article II's nativism and the Fourteenth Amendment's egalitarianism? We should begin by considering how best to justify Article II's rule. Perhaps foreign birth is relevant to the merits of a presidential candidate. Voters have imperfect information about candidates and might reasonably predict that foreign-born politicians will sometimes be partial to the country or region where they were born. I do not think we would have any reason to condemn a voter who made predictions of that sort when deciding whether to support a foreign-born candidate.

But these predictions seem too doubtful to support an absolute, constitutionally inscribed prohibition upon the election of foreign-born Presidents. After all, many things (such as a criminal record) might inspire reasonable mistrust, and the Constitution permits voters to figure out for themselves how much weight to give such facts. Nor does it seem that foreign-born presidential candidates are likely to be unduly attractive to voters; on the contrary, such candidates are likely to be the target of prejudice rather than fawning admiration.

Of course, things might have seemed different in 1787. Americans living in a freshly minted polity might have worried that a dazzling foreign-born politician could seduce them—or, more likely, Virginians might worry that New Yorkers would be seduced, and vice-versa. Yet, if this is the explanation for Article II's nativism, then isn't it exactly the sort of rule that would corrupt the Constitution's principles: a strategic device that no longer serves any purpose and discriminates against one group of citizens?

If there is anything to be said against this objection, it flows from the singularity of the presidential office. For most people, losing their shot at the Oval Office doesn't mean much. Not many people can hope to become President, and, for those who can, there's plenty of other interesting work around. So, from a practical purpose, Article II's nativism might do minimal damage. Perhaps, then, its utility in the past would excuse the modest injustice it does in the present. One might, in fact, be impressed that the Constitution imposes no similar disqualification upon foreign-born citizens who aspire to serve in Congress, the judiciary, or the Cabinet. The existence of an express disqualification in Article II might be taken to eliminate the possibility

that naturalized citizens are subject to other, implied disqualifications, and the Supreme Court has used Article II in exactly that way.[107]

There are, of course, other provisions of the Constitution that might disturb us, including the Eleventh Amendment, which limits the range of remedies available to citizens injured by unlawful conduct, including unconstitutional conduct, on the part of the States.[108] Yet, I think it is possible to domesticate all of these provisions in one way or another, particularly if they predate the virulent, transformative effects of the Fourteenth Amendment.

We are fortunate that the Constitution contains relatively few rules that insist upon injustice. It may contain some such provisions; Article II's nativism is one example, and it threatens to taint the principles of the Equal Protection Clause.[109] We have not, however, been pushed beyond some point of constitutional-no-return. New exceptions to constitutional principle will create new problems. We have reason to fear amendments that, like the Children of Illegal Aliens Amendment or the Flag-Burning Amendment or the School Prayer Amendment, would carve out exceptions to the broad guarantees of the Fourteenth Amendment. The danger is not merely that one such amendment might erode reverence for the Bill of Rights and hence precipitate a tide of other, similar amendments. Instead, one such amendment might suffice to damage the Constitution more pervasively. It is possible, in theory, to place an interpretive quarantine around one unprincipled provision, but, in practice, such quarantines are likely to be fragile.

CONCLUSION

The Fourteenth Amendment's Birthplace Criterion is not a constitutional accident. It is a means for ensuring that American government is appropriately sensitive to the interests of all the people living within its jurisdiction. More specifically, the Birthplace Criterion insists upon a kind of reciprocity. It rests upon the idea that when the United States uses its sovereign power to organize residents' lives for

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[107] See Schneider v. Rusk, 377 U.S. 163, 165 (1963) (citing Article II's eligibility requirements to support proposition that naturalized citizens are equal to their native-born counterparts in all other respects).

[108] See U.S. Const. amend. XI (excluding from federal jurisdiction suits against state brought by citizens of another state or of foreign state). This amendment has been interpreted to exclude suits against a state by its own citizens. See Hans v. Louisiana, 134 U.S. 1 (1890). But see Ex parte Young, 209 U.S. 123 (1908) (permitting suits against state officials).

[109] See, e.g., Sugarman v. Dougall, 413 U.S. 634, 651-52 (1972) (Rehnquist, J., dissenting) (using Article II's "natural born Citizen" requirement to criticize idea that citizen/alien distinction should trigger strict scrutiny).

the common benefit, the people subject to that power deserve a fair share of the benefits that result from the collective enterprise in which they participate.[110] The amendment thereby forces the legal definition of the American people to coincide with the actual composition of American society.

110 For legal immigrants, whose entrance to the United States may have been conditional upon their willingness to accept a limited share of society's benefits, a "fair share" may be subject to special restrictions. Illegal aliens, who have violated the laws of the collective enterprise, may forfeit any claim to share in the common good. Neither the consent exception nor the wrongdoing exception can be sensibly applied to the native-born children of illegal aliens, however.