

# Book Review

## BACK TO *DRED SCOTT*?

CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY. By Peter H. Schuck<sup>1</sup> and Rogers M. Smith.<sup>2</sup> New Haven and London: Yale University Press. 1985.

*Reviewed by Gerald L. Neuman\**

### I.

Our society has long regarded American citizenship as “a most precious right.”<sup>3</sup> At various times, diverse conclusions have been drawn from this characterization — sometimes it is too precious to be denied without the highest justification;<sup>4</sup> sometimes it is too precious to be bestowed on the unpopular.<sup>5</sup> In the infamous *Dred Scott*<sup>6</sup> decision, Chief Justice Taney read the Constitution as making citizenship too precious to be shared with Americans of African descent. After a bloody war between the friends and foes of that decision, Congress drafted a constitutional provision to mandate forever a contrary rule. The first sentence of the fourteenth amendment reads: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States

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1. Professor of Law, Yale University.
2. Associate Professor of Political Science, Yale University.
3. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963).
4. *See, e.g., Vance v. Terrazas*, 444 U.S. 252 (1980) (lawfully conferred American citizenship can only be lost by voluntary renunciation); *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (requiring judicial resolution of claims of citizenship in deportation proceedings).
5. *See, e.g., United States v. Schwimmer*, 279 U.S. 644, 649 (1929) (pacifist ineligible for naturalization), *overruled by* *Girouard v. U.S.*, 328 U.S. 61, 69 (1946).
6. *Scott v. Sandford*, 60 U.S. 393 (1857).

and of the State wherein they reside.”<sup>7</sup>

In their recent book *Citizenship Without Consent: Illegal Aliens in the American Polity*, Peter H. Schuck and Rogers M. Smith seek to overturn the traditional interpretation of this citizenship clause, which extends American citizenship to all children born to aliens or citizens within our territory, with a few minor exceptions.<sup>8</sup> A principal goal of the book, emphasized in its title, is to legitimate repudiation of the children born in this country to undocumented alien parents. The authors argue that Congress must be permitted to restrict American citizenship to the children of American citizens and of aliens legally admitted as permanent residents of the United States.

Given the potentially dramatic consequences of such a reversal, it is imperative to examine the authors' reasoning. Schuck & Smith argue that American citizenship law is founded on outmoded feudal notions of citizenship by *ascription* rather than citizenship by the *mutual consent* of the individual and the state. The main thrust of the book is a historical and political discussion of the character of citizenship under these opposed regimes. The authors' theoretical treatment of this subject is admirable in many respects, although their analysis is controversial and has already drawn criticism.<sup>9</sup> Whatever view one takes of this work as an exercise in policy analysis<sup>10</sup> and political theory, one must also question whether the authors can justify a revision of positive constitutional law. There are serious flaws, both logical and historical, in the authors' effort to read their theoretical conclusions into the fourteenth amendment.

The book begins by describing two different conceptions of citizenship: citizenship by *ascription*, in which objective characteristics of individuals result in their assignment to a polity, without regard to the consent of the individual or of the polity, and citizenship by *consent*, a mutual, voluntary relationship depending on the consent of both the individual and the polity. The authors observe that this dichotomy is more fundamental than the contrast between two commonly employed ascriptive rules, the Anglo-American *jus soli* (citi-

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7. U.S. CONST. amend. XIV, § 1.

8. See *infra* text accompanying notes 24-28.

9. See Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L L. 278 (1985); Helton, Book Review, 19 N.Y.U. J. INT'L L. & POL. 221 (1986) (reviewing P. SCHUCK & R. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985)).

10. In a recent clarification, Professors Schuck & Smith assert that their book has been misunderstood by those who interpret it as arguing that such a restriction of citizenship would necessarily represent sound public policy. Schuck & Smith, *Membership and Consent: Actual or Mythic? A Reply to David A. Martin*, 11 YALE J. INT'L L. 545 (1986). While surprised by this clarification, and agreeing with the authors that their book "may easily be misread as endorsing a *policy* proposal," *id.* at 547 n.6 (emphasis in original), I write on the assumption that they have not yet decided whether it would be expedient for Congress to exercise the power that they would grant.

zenship defined by birth within the territory of the state) and the continental *jus sanguinis* (citizenship defined by descent from a citizen father, or possibly mother) (p. 9).<sup>11</sup>

The authors recount Coke's classic exposition of the English law of ascriptive citizenship in *Calvin's Case*.<sup>12</sup> The common law recognized as subjects of the King all those born within his realm and subject to his laws, even the children of aliens.<sup>13</sup> Coke justified this as the result of a personal relationship of allegiance owed to the sovereign under natural law because of his protection of an infant at its birth. This natural debt bound the subject for life. The correlation between natural allegiance and *jus soli* was not perfect, however. If alien armies should occupy English soil, their children would not be under the protection of the king and would not be subjects. Also, the king's protection extended to children born to his ambassadors abroad.

Building on James Kettner's study of American nationality law before the fourteenth amendment,<sup>14</sup> Schuck & Smith describe the emergence of a contrary, consensual theory of citizenship in Anglo-American thought. They emphasize Locke as an exponent of the view that citizenship depended on the explicit or tacit consent of the adult individual, who remained free to withdraw that consent and take on another allegiance (pp. 25-26). Continental writers like Rousseau, Montesquieu, and Vattel also linked citizenship to consent, but they emphasized more than Locke had that the consent must be mutual—the existing body of citizens had a right to decide whom they would welcome into the polity. Even children born within the state to citizen parents were citizens only because of the state's presumed consent (pp. 27-28, 46-48). As Schuck & Smith observe, this makes consent a double-edged sword since the state's power to withhold or withdraw consent might be abused (p. 37).

The existence of both these traditions created an inherent tension in the notion of American citizenship. As a nation that had thrown off its former sovereign and also purported to claim the undivided

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11. Parenthetical citations in the text are to P. SCHUCK & R. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

12. 7 Co. Rep. 1b. *Calvin's Case* clarified the status of persons born in Scotland after the accession of James I to the crown of England.

13. *Id.* at 6a ("[F]or [the alien] owed to the King local obedience, that is, so long as he was within the King's protection; which local obedience being but momentary and uncertain is yet strong enough to make a natural subject, for if he hath issue here, that issue is a natural born subject.").

14. J. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608-1870* (1978).

allegiance of naturalized immigrants, the United States had need for consensual theories. American citizenship law, however, largely followed the ascriptive common law tradition. The situation was further complicated by uncertainty concerning the degree to which American citizenship was defined by federal, as opposed to state law (pp. 50-54). The consensual strand realized its dangerous potential in the *Dred Scott* decision, in which Chief Justice Taney expounded American citizenship as a club open only to whites. "By making Dred Scott's citizenship turn upon the putative will and intention of the Framers to exclude all blacks from the American political community, Taney seemed to embrace the consensual conception of citizenship, subordinating the conventional ascriptive view" (p. 72).

The citizenship clause of the fourteenth amendment, like its verbally different but essentially equivalent predecessor in the 1866 Civil Rights Act,<sup>15</sup> was adopted to overturn the *Dred Scott* decision by reaffirming the citizenship of native-born blacks (pp. 73-75). Schuck & Smith argue, however, that the legislative history of these enactments demonstrates an acceptance of both the ascriptive and consensual traditions. The authors focus especially on the denial of citizenship to Indians living under tribal authority. This exclusion was made express in the 1866 Civil Rights Act, but appears in the citizenship clause only as a consequence of the limitation of citizenship to those born "subject to the jurisdiction" of the United States. Schuck & Smith conclude that this phrase added "a transforming consensual conception of the necessary connection between an individual and his government . . ." (p. 85), one that permits Congress to withhold American citizenship from certain groups to whose membership the nation does not wish to consent. In the authors' view, this interpretation is more consistent with our nation's republican ideals.

The authors conclude that the Constitution mandates citizenship for children born within United States territory to parents who are citizens or permanent resident aliens. The logic behind this mandate is that admitting the parents as lifelong members entails the nation's tacit consent to citizenship for their future offspring (pp. 117-18). No such guarantee is made to children of aliens admitted temporarily, or of undocumented aliens, to whose presence the nation has never consented (pp. 118-19). The authors propose that the Supreme Court revise its interpretation of the fourteenth amendment, so that Congress may exercise the power to deny American citizenship to these groups in the future.<sup>16</sup> Schuck & Smith claim that mandating

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15. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27. Section one of that Act stated: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."

16. The authors argue that such a change should be made prospective only, and

citizenship for undocumented children impairs the nation's right of political self-definition (p. 99). Further, they argue that our present welfare state makes the rewards of unconsented membership too alluring to aliens and too costly to the nation (pp. 103-115). They urge that withholding citizenship would contribute to restored control over our borders, since ascriptive citizenship "can only operate, at the margin, as one more incentive to illegal migration . . ." (p. 94).

I regard the authors' recommendation as resting upon a tragic moral misjudgment, but I do not intend to address the proposal as a simple matter of public policy. To do so would concede their argument more ground than it deserves. Before they can balance the claims of undocumented children against the interests of the nation, Schuck & Smith must demonstrate that the Constitution leaves the issue open to the ordinary political process. They have failed to do this.

Perhaps Schuck & Smith have identified a strategy by which a court, determined to deny citizenship to American-born children of undocumented aliens, could justify such a holding without exhibiting flagrant disregard for the text of the fourteenth amendment. When viewed from a less instrumental perspective, however, their approach to the citizenship clause runs into major difficulties. First, their affirmative argument for reading "consensual" discretion into the constitutional language employs questionable reasoning. Second, it ignores the manifest tenor of the very legislative history on which they found their argument. Third, the authors' account is incompatible with an accurate portrayal of the immigration background against which the fourteenth amendment was drafted.

## II.

The authors' argument for a "consensual" interpretation of the citizenship clause rests on a feat of legerdemain, performed on pages 85-86. They observe that in the course of the Senate debates, the amendment's framers sought to exclude from its scope a few groups (identifiable as not *subject to the jurisdiction* of the United States) whom they did not regard as part of their society. Based on the Senate debates the authors conclude that the framers subscribed to a consensual approach to citizenship, and that jurisdiction for citizenship clause purposes can be equated with "a more or less complete,

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that Congress should not (even if it could) strip American citizenship from children already born on our soil (pp. 98-99).

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" (p. 86). They conclude that the phrase "subject to the jurisdiction thereof" authorizes further specification of groups whose children can be denied citizenship. Ultimately, the authors describe Congress as having continuing authority to decide which native-born persons, other than those born to citizens or to permanent resident aliens, shall be eligible for citizenship (p. 132-33).

This reliance on the legislative history of the citizenship clause is crucial to Schuck & Smith's argument. The word "jurisdiction" has various meanings in American law, but it has never been defined in terms remotely resembling the elaborate construct that Schuck & Smith have fashioned. The standards for legitimacy of constitutional interpretation expressed elsewhere in their argument indicate that interpretation is constrained by the range of rationally defensible meanings attributable to the constitutional text (pp. 5-6, 166 n.23). Therefore, their effort to justify their proposal as "judicial reinterpretation . . . of ambiguous language"<sup>17</sup> turns on their claim that in employing the terminology of jurisdiction, the framers of the citizenship clause meant to express, however inelegantly, this "consensual" approach.

The gap spanned by this interpretive trick is a wide one. True, the drafters of the citizenship clause understood that they were free to decide who would receive citizenship. It was, after all, a constitution they were amending. But once one accepts that citizenship can be defined by positive law,<sup>18</sup> there is an inherent ambiguity in the notion of a "consensual" approach to citizenship. *Any* freely adopted rule of citizenship expresses the consent of the society that adopts it. That consent can be embodied in a constitution as easily as in a statute, and it may define the relevant classes by using traditional "ascriptive" categories as well as those that Schuck & Smith would approve

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17. The authors state: "[A] judicial reinterpretation is possible where, as here, its original reading of ambiguous language reflected policies and principles at variance with most contemporary views of American constitutional theory and with current national policy objectives" (p. 117) (footnote omitted). *See also* Schuck & Smith, *supra* note 10, at 546 ("our claim that this interpretation best fits the language of the clause and the ways in which American lawmakers have defined the statuses of Native Americans and permanent resident aliens.").

18. *Cf. United States v. Wong Kim Ark*, 169 U.S. 649, 668 (1898) ("Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."). The Court coupled this positivist assertion, however, with a holding that the fourteenth amendment had put it beyond the power of Congress to withhold citizenship from children born to Chinese aliens residing in the United States. *See infra* notes 30-45 and accompanying text.

as "consensual." A constitution that identifies the category of persons who are citizens need not confer on a court or legislature discretion to reject citizens on the basis of its own views regarding the appropriate objects of consent.

The failure of the original Constitution to define citizenship opened the door to the *Dred Scott* decision, and the Reconstruction Congress sought to remedy that omission. Senator Howard, the author of the citizenship clause, introduced it with the following explanation: "It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. This has long been a great desideratum in the jurisprudence and legislation of this country."<sup>19</sup> This language hardly suggests a delegation of open-ended discretion to Congress. Yet Schuck & Smith struggle to read the citizenship clause more narrowly, claiming that correct political theory requires that the polity have ongoing power to define who its members will be (p. 132).<sup>20</sup> They argue that it is inappropriate to treat the qualifications for birthright citizenship as an issue of constitutional dimension. The framers of the fourteenth amendment had strong reason to believe otherwise. They had just overthrown a system founded on denial of full membership to an alien race. Furthermore, the citizenship clause was designed to forestall future controversies, not only to stabilize the resolution of the African slavery question. For example, Senator Cowan, a vehement opponent of both the Civil Rights Act and the fourteenth amendment, predicted increasing difficulty over the Chinese on the Pacific coast. In response the supporters of the citizenship clause expressly confirmed their intent to recognize the American citizenship of children born there to Chinese parents.<sup>21</sup> They refused the invitation to

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19. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866); see also *id.* at 3148 (remarks of Rep. Stevens presenting Senate amendments to the House, stating: "[t]he first section is altered by defining who are citizens of the United States and of the States. This is an excellent amendment, long needed to settle conflicting decisions between the several States and the United States").

20. It need hardly be mentioned that the People of the United States retain the power to change the definition of citizenship contained in the fourteenth amendment by following the process of constitutional amendment prescribed by article V. Schuck & Smith, however, insist that it would "deny to the American community the essence of a consensual political identity" to deprive them of the easier route of ordinary legislation (p. 99).

21. CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (colloquy of Sens. Trumbull and Cowan regarding Civil Rights Bill); *id.* at 2890-92 (colloquy of Sens. Cowan and Conness regarding fourteenth amendment). Sen. Conness of California recalled the depredations against the Chinese in his state in recent years, and declared himself ready to accept equal rights for the children of Chinese parents. See generally McClain, *The*

create an hereditary caste of voteless denizens, vulnerable to expulsion and exploitation.<sup>22</sup> While Schuck & Smith appear to view this danger as exaggerated (pp. 136-37), others do not,<sup>23</sup> and it is at least defensible as a matter of political theory to guard against such a possibility by constitutionally requiring citizenship for all children born within the community.

The legislative history and the received judicial construction of the citizenship clause confirm that the framers of the fourteenth amendment did deny constitutionally mandated citizenship to a few categories of children, whom they regarded as not "subject to the jurisdiction" of the United States. These were the common law exceptions for aliens closely associated with a foreign government, and an American addition — Indians living under tribal quasi-sovereignty.<sup>24</sup> The common law exceptions concern children born on foreign public vessels or to ambassadors of foreign nations, both situations in which comity principles of international law restrain the state's exercise of lawmaking power, and children born to parents accompanying an invading army, which was not physically subject to the power of the state at all (p. 154 n.46).<sup>25</sup> Denial of citizenship to Indians living within their own self-governing quasi-sovereign societies reflects the framers' view that such Indians were not fully subject to the legislative power of the United States, as evidenced by the practice of negotiating treaties with Indian tribes as sovereign powers.<sup>26</sup> The effective independence of many Indian tribes from state or federal governance made the notion of Indian tribes as separate, though domestic, nations more realistic in 1866 than it subsequently became.<sup>27</sup> Thus, "jurisdiction" can be given a natural reading as actual subjection to the lawmaking power of the state; this interpretation fulfills the framers' intentions and echoes the common law notion of the

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*Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529 (1984).

22. Senator Cowan's position must be read to be believed: "I do not know how my honorable friend from California looks upon Chinese, but I do know how some of his fellow-citizens regard them. I have no doubt that now they are useful, and I have no doubt that within proper restraints, allowing that State and the other Pacific States to manage them as they may see fit, they may be useful; but I would not tie their hands by the Constitution of the United States so as to prevent them hereafter from dealing with them as in their wisdom they see fit." CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866).

23. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 218-19 (1982).

24. *Wong Kim Ark*, 169 U.S. at 693; *Elk v. Wilkins*, 112 U.S. 94 (1884).

25. See *Wong Kim Ark*, 169 U.S. at 682; *Inglis v. Sailors' Snug Harbor*, 28 U.S. (3 Pet.) 99, 126, 155-56 (1830). The example repeatedly used in the congressional debates was the children of ambassadors. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2897 (remarks of Sen. Williams).

26. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866) (remarks of Sen. Howard); see also *Elk v. Wilkins*, 112 U.S. 94 (1884).

27. Under current conditions, exclusion of Indians from citizenship would seem highly offensive, and by statute all Indians born in the United States are now citizens, regardless of their tribal status. 8 U.S.C. § 1401(b) (1982).



king's "protection."<sup>28</sup>

Schuck & Smith draw wholly different conclusions from this legislative history. They treat it as making *jurisdiction* a euphemism for *consent to citizenship*, that is, "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" (p. 86). The authors deduce a broad license to deny citizenship on "consensual" grounds to classes distinguishable by their notions of consent, even if indistinguishable in terms of any reasonable conception of *jurisdiction*. Such violence to the text is not required by the legislative history, since the exceptions that the framers identified can be justified on jurisdictional grounds. Schuck & Smith, however, argue for additional exceptions that cannot be similarly justified. In particular, they agree that the Constitution mandates citizenship for children born in the United States to lawfully admitted permanent resident aliens, even those who are themselves ineligible to naturalization and who maintain ties with their country of nationality. Yet they maintain that constitutionally guaranteed citizenship should be denied to children born to aliens who have been lawfully admitted on a less permanent basis, because the United States has not tacitly consented to citizenship for such children (p. 118). This result is rationalized by making consent to citizenship for these children an element of jurisdiction and then asserting that the nation has implicitly given its consent to permanent, but not temporary, resident aliens.

Why do the authors resort to this fatally circular argument?<sup>29</sup> The

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28. This is the same explanation given by the Supreme Court in *United States v. Wong Kim Ark*, 169 U.S. 649, 680-86 (1877).

29. The circularity is more extreme than lay readers may realize, since Schuck & Smith never inform the nonspecialist reader that a "permanent resident alien," unlike a citizen, does *not* have irrevocable permission to live in the United States. Immigration practitioners may well wonder how the authors can maintain that a distinction between children born to permanent resident aliens and children born to all other aliens is "less arbitrary" than the traditional rule (p. 137). Such distinctions in immigration status did not exist until the twentieth century, which produced a bewildering array of status categories that must complicate any "consent" analysis. Not even the modern permanent resident is guaranteed lifelong membership; all aliens remain vulnerable to expulsion due to future changes in immigration policy. See *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889). *But see, e.g., Martin, Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 211-12 & n.172 (1983) (urging modification of this doctrine). The category of permanent residents includes permanent residents whose U.S. citizenship is imminent, permanent residents who retain close ties to their native states and have no desire for American citizenship, permanent residents who have already rendered themselves deportable, and permanent residents not presently exposed to deporta-

need arises from a desire to reconcile their “consensual” theory with *United States v. Wong Kim Ark*,<sup>30</sup> a pillar of American citizenship law. In *Wong Kim Ark* the Supreme Court held that a child born in San Francisco to Chinese parents legally residing there was an American citizen, notwithstanding the fact that the Chinese had always been excluded by Congress from eligibility for naturalization, and notwithstanding the subsequent impact of anti-Chinese feeling on federal immigration legislation. This does not look like a “consensual” holding, and in fact the *dissent*<sup>31</sup> in that case closely parallels Schuck & Smith’s political theory: citizenship determined by birthplace was a feudal anachronism inappropriate for a society that had thrown off the chains of monarchy (p. 2); Vattel and other writers on international law had correctly explained citizenship as dependent on descent from citizens and tacit consent (pp. 42-49, 117-18);<sup>32</sup> this country had never sought the Chinese as citizens, but had barred them from citizenship as effectively as it could by legislation and treaties.<sup>33</sup> Accordingly, children born to Chinese parents, even in San Francisco, cannot be citizens of the United States.<sup>34</sup> The majority, however, rejected this logical “consensual” argument. The majority agreed that the Chinese were barred from naturalization, but insisted that the fourteenth amendment had placed the citizenship of native-born children beyond the power of Congress.<sup>35</sup> The citizenship clause codified the common law rules of citizenship by birth within the territory, with the single additional exception of Indians in tribal

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tion but legally ineligible for citizenship. *See, e.g.*, 8 U.S.C. §§ 1251, 1424, 1425, 1426, 1427(a). Can it really be said that Congress inherently promises citizenship to the children of all of these aliens because their residence is labelled “permanent,” but denies it to every child of aliens whose residence is labelled “temporary?” The “temporary” label applies, for example, to refugees who cannot return to their native lands, and who are permitted to live in American society as asylees, parolees, aliens whose deportation is being withheld, or aliens granted “extended voluntary departure,” *see* 8 U.S.C. §§ 1158, 1182(d)(5), 1253(h); 8 C.F.R. § 244.2 (1986); each such status is subject to review, but may be renewed indefinitely. Discretionary enforcement of the immigration laws also produces classes of aliens whom the federal government has resolved not to deport — they may remain here forever in a twilight status, though not as permanent residents. *See, e.g.*, *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977). It is hard to believe that the technicalities of immigration status can have the deep significance in political theory that Schuck & Smith attribute to them. I suspect rather that “consent” comes in degrees, which shade imperceptibly from the permanent resident who will be naturalized tomorrow, to the student facing deportation for overstaying his visa, and perhaps all the way to the migrant laborer whose employment Congress refused for decades to prohibit.

30. 169 U.S. 649 (1898).

31. *Id.* at 707-09 (Fuller, C.J., dissenting).

32. *See Id.* at 708.

33. *Id.* at 730-31.

34. *Id.* at 731-32. The dissent followed “consensual” logic further than Schuck & Smith would; it would have limited citizenship at birth under the fourteenth amendment to children of citizens. *Id.* at 724-25.

35. *Id.* at 694, 701.

status.<sup>36</sup> Children born to foreigners outside the diplomatic or military context, whether temporarily or permanently sojourning, became citizens at common law.<sup>37</sup> In fact, legislative history of the fourteenth amendment demonstrated Congress' awareness that one effect of the rule would be to confer citizenship on children born to the Chinese in California.<sup>38</sup>

Schuck & Smith shrug off *Wong Kim Ark* as an "[e]xpansive, but not universal," use of ascriptive citizenship in the fourteenth amendment (p. 79), and would limit it to children of lawfully admitted permanent resident aliens (p. 118). This compromise ignores the havoc that *Wong Kim Ark* wreaks upon their theory of citizenship.<sup>39</sup> The Court's courageous recognition of citizenship for Americans of Chinese descent was an extreme illustration of the irrelevance of "consent;" not only were affirmative manifestations of consent outside the citizenship clause itself unnecessary, but the Court overrode strong indications of unwillingness to admit the Chinese to the American polity. The United States had wanted Chinese labor, and had not yet perfected the technique of importing temporary workers. It denied the immigrants any opportunity for citizenship,<sup>40</sup> then attempted to prevent more laborers from arriving,<sup>41</sup> forbade their reentry if they left the country,<sup>42</sup> and began expelling those who had not

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36. *Id.* at 693.

37. *Id.* at 657.

38. *Id.* at 697-98.

39. The holding is also inconsistent with the authors' odd suggestion that the relevant notion of "jurisdiction" may require complete absence of allegiance to any other sovereign (pp. 83, 86). If that is what jurisdiction means, then *Wong Kim Ark* and the authors are wrong, and only the children of citizens are entitled to citizenship.

The notion derives from remarks of Senator Trumbull, who stated as his personal opinion that Indians maintaining tribal relations were not fully "subject to the jurisdiction" of the United States for two reasons: (1) because they owed allegiance to the tribe as well as to the United States, and (2) because (in his opinion) the independent lawmaking authority of the Indian nations left them not fully subject to the legislative power of Congress. CONG. GLOBE, 39th Cong., 1st Sess. 2893-94 (1866). Schuck & Smith fail to recognize (p. 83) that Senator Howard, the draftsman of the citizenship clause, associated himself with Trumbull's second reason but not his first. *Id.* at 2895; *accord id.* at 2897 (remarks of Sen. Williams).

40. Not only was naturalization restricted to "free white persons" until 1870, *see, e.g.*, Act of March 26, 1790, ch.3, 1 Stat. 103 (1870), but in 1870, after a bitter debate with much vilification of the Chinese, the Senate rejected Senator Sumner's effort to eliminate racial qualifications for naturalization (*see* CONG. GLOBE, 41st Cong., 2d Sess. 5121-25, 5148-77 (1870)), and extended eligibility only to "aliens of African nativity and to persons of African descent." Act of July 14, 1870, ch. 254, § 7, 16 Stat. 256 (1870).

41. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

42. *See id.*

secured certificates demonstrating the legality of their presence.<sup>43</sup> If the phrase “subject to the jurisdiction” left Congress any flexibility for consent-based restrictions at all, surely the Court could have read it as leaving aliens whose reception was so chilly still “subject to the jurisdiction” of their native land, and not of the United States. The result, not just the reasoning, of *Wong Kim Ark* is incompatible with the authors’ “consensual” interpretation.

Nor could *Wong Kim Ark* have turned on some supposedly fundamental distinction between permanent residents and temporary residents. The modern status of “alien lawfully admitted for permanent residence” did not even exist at the time of the fourteenth amendment or of *Wong Kim Ark*. Until the twentieth century, federal immigration statutes did not distinguish between admission of aliens for temporary residence and admission as permanent residents. Aliens were either admitted or not. Correspondingly, the Court’s phraseology in *Wong Kim Ark* wanders unpredictably, failing to maintain any consistent distinction between parents residing here permanently and parents temporarily present.<sup>44</sup> The decision rests squarely on the wording of the citizenship clause and the common law tradition that it incorporated, not on any special privileges of permanent residents.

In short, the authors’ reading of the phrase “subject to the jurisdiction thereof” cannot be seriously defended as an exercise in interpretation of the constitutional text. Rather, they seek to *replace* the constitutional language with a meaning that they discern in the legislative history. According to Schuck & Smith, the framers desired to free themselves from the common law approach and to incorporate modern “consensual” principles into the formula for constitutional citizenship. But this is an impossible characterization of the legislative history. Nothing is clearer than that the framers of the fourteenth amendment did not view themselves as adopting revolutionary new principles of citizenship by consent. Taney had done that in the *Dred Scott* decision, denying blacks citizenship on the ground that whites did not consider them appropriate partners in the political community.<sup>45</sup> The framers sought to overturn Taney’s innovation, and to reaffirm on a racially neutral basis the same principles that had always governed American citizenship for persons of European descent.<sup>46</sup> They did not see their object as charting a new, mod-

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43. See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

44. See, e.g., *Wong Kim Ark*, 169 U.S. at 655 (“aliens in amity, so long as they were within the kingdom”); *id.* at 658, 687 (“residing”); *id.* at 674, 688 (“native-born children of foreign parents”); *id.* at 693 (“children here born of resident aliens”).

45. *Scott v. Sandford*, 60 U.S. 393, 407-09 (1857).

46. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (remarks of Sen. Howard); *id.* at 3031-32 (remarks of Sen. Henderson); *Wong Kim Ark*, 169 U.S. at 688.

ern course for citizenship law, nor did the language they chose inadvertently impose such a course.

### III.

Failure to address the details of nineteenth century immigration law undermines the authors' argument in other respects as well. Schuck & Smith claim that the framers of the fourteenth amendment could not have contemplated conferring citizenship on children of illegal aliens "for the simple reason that no illegal aliens existed at that time, or indeed for some time thereafter" (p. 95). They paint a picture of an era of wholly unrestricted immigration, with the attendant implication that the fourteenth amendment could have nothing relevant to say about the children of aliens whose entry into the country was unlawful (pp. 92, 95, 129-30). The authors have the facts wrong.

First of all, the authors dismiss too quickly the regulation of immigration by the states (p. 155 n.3). Several states with international seaports imposed inspection, taxation, and bond-posting schemes, targeted at paupers and other aliens who were likely to prove unable to support themselves.<sup>47</sup> The Supreme Court addressed commerce clause aspects of such regulation in *Mayor of New York v. Miln*<sup>48</sup> and *The Passenger Cases*,<sup>49</sup> both of which approved in dicta state use of the police power to exclude diseased or impoverished aliens.<sup>50</sup> It was only in 1876, after Congress had begun to restrict European immigration,<sup>51</sup> that the Supreme Court found state exclusion of aliens to be an interference with commerce.<sup>52</sup> This was, of course,

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47. Nineteenth century regulatory acts of California, Maryland, Massachusetts, and New York are reprinted in Reports of the Immigration Commission: Immigration Legislation, S. Doc. No. 758, 61st Cong., 3d Sess. (1911).

48. 36 U.S. (11 Pet.) 102 (1837).

49. 48 U.S. (7 How.) 283 (1849) (invalidating head tax on passengers in foreign commerce).

50. See *Miln*, 36 U.S. (11 Pet.) at 142. The Court invalidated a tax on incoming aliens in the *Passenger Cases*, but nearly every Justice expressly approved use of the police power to exclude diseased aliens or paupers. *Passenger Cases*, 48 U.S. (7 How.) at 406 (McLean, J.); *id.* at 414, 424 (Wayne, J.); *id.* at 456 (Grier, J.); *id.* at 465 (Taney, C.J.); *id.* at 509 (Daniels, J.); *id.* at 522 (Woodbury, J.).

51. See Act of March 3, 1875, ch. 141 18 Stat. 477 (1875).

52. *Henderson v. New York*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876). Even in those cases, however, the Court purported to leave open the existence of core police power authority in the states (See *Henderson*, 92 U.S. at 275; *Chy Lung* 92 U.S. at 280), and it subsequently upheld state quarantine laws against foreign commerce challenges. *Morgan's S.S. Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886); *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health*, 186 U.S. 380 (1902).

after the adoption of the fourteenth amendment. Schuck & Smith also ignore state quarantine laws, which prevented the landing of passengers with contagious diseases. Congress repeatedly recognized the authority of the states to adopt quarantine regulations, and directed federal officers to aid in their enforcement.<sup>53</sup> The same Congress that framed the fourteenth amendment enacted two such directives in the spring of 1866, to deal with an imminent cholera epidemic.<sup>54</sup>

More importantly, Schuck & Smith overlook the problem of the citizenship of children of illegally imported African slaves. Although Congress had promptly exercised its constitutional power to forbid all further importation of slaves as of 1808,<sup>55</sup> the shameful traffic continued.<sup>56</sup> Congress was forced to legislate repeatedly for its suppression up through the time of the Civil War.<sup>57</sup> But the borders of the United States proved as hard to patrol then as they are said to be today.<sup>58</sup> On a few occasions, the government successfully carried out the intent of the statute that slave ships be intercepted and their passengers returned to freedom in Africa.<sup>59</sup>

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53. See, e.g., Act of Feb. 25, 1799, 1 Stat. 619 (1799); Act of July 13, 1832, 4 Stat. 577 (1832); Act of Dec. 15, 1864, 13 Stat. 419 (1864).

54. Joint Res. of Mar. 24, 1866, 14 Stat. 351 (1866); Joint Res. of May 26, 1866, 14 Stat. 357 (1866). In the latter instance, after a debate concerning state and federal authority, the Senate rejected an effort to substitute a uniform federal quarantine system for the state laws. CONG. GLOBE, 39th Cong., 1st Sess 2581-89 (1866). Later epidemics eventually produced federal exclusion of aliens with dangerous contagious diseases. See Act of Mar. 3, 1891, 26 Stat. 1084 (1891).

55. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (1807); see U.S. CONST., art. I, § 9, cl. 1.

56. This traffic was repeatedly brought to Congress' attention. See, e.g., CONG. GLOBE, 36th Cong., 1st Sess. 2216 (1860) (resolution of Rep. Wells); CONG. GLOBE, 35th Cong., 1st Sess. 1362 (1859) (remarks of Rep. Covode). But cf. S. EXEC. DOC. No. 2, 36th Cong., 1st Sess. 5 (1859) (Annual Message of the President) ("After a most careful and rigorous examination of our coasts, and a thorough investigation of the subject, we have not been able to discover that any slaves have been imported into the United States, except the cargo of the Wanderer, numbering between three and four hundred"); see generally W.E.B. DUBOIS, THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES OF AMERICA 1638-1870 (1896) (LSU ed. 1969); W. HOWARD, AMERICAN SLAVERS AND THE FEDERAL LAW 1837-1862 (1963).

57. See, e.g., Act of Mar. 3, 1819, ch. 101, 3 Stat. 533 (1819) (requiring safe return of seized slaves to Africa); Act of Mar. 15, 1820 ch. 113, 3 Stat. 601 (1820) (increasing penalty for importation of slaves to death); Act of June 16, 1860, ch. 136, 12 Stat. 41 (1860) (seized slaves to be returned to Africa before captured vessels brought to port in United States). See also Act of Feb. 19, 1862, ch. 27, 12 Stat. 340 (1862) (prohibiting the "Coolie Trade").

58. Conservative estimates of the numbers of illegally imported slaves put them in the tens of thousands. See C. VANN WOODWARD, AMERICAN COUNTERPOINT 82 (1971); see also I R. FOGEL & S. ENGERMAN, TIME ON THE CROSS 23-25 (1974). If the statutes for the suppression of the slave trade were underenforced, if enforcement efforts were underfunded, if a segment of the population encouraged the illegal migration in order to benefit from the slaves' labor, the parallel with undocumented aliens today is merely all the stronger.

59. See, e.g., W.E.B. DUBOIS, *supra* note 54 at 121, 187.

Here, then, was a notorious category of "illegal aliens" whose presence in the United States was without the federal government's consent. If, as Schuck & Smith insist, "consent" does not extend to children of parents not lawfully admitted to the United States,<sup>60</sup> then the fourteenth amendment did not constitutionally mandate American citizenship for the children of illegally imported slaves. Yet there can be no doubt how a court in 1868 should have resolved any attack on the citizenship of former slaves whose parents or grandparents had been illegally imported.<sup>61</sup> Illegally imported slaves are not mentioned in the debates, but the framers made it clear that guaranteeing citizenship to *all* native-born blacks was their central purpose. Senator Trumbull's first draft of a citizenship provision for the 1866 Civil Rights Act stated "That all persons of African descent born in the United States are hereby declared to be citizens of the United States,"<sup>62</sup> and no one, including Schuck & Smith (p. 77), has ever suggested that the fourteenth amendment was intended to cover *fewer* of the freedmen.

This necessary conclusion cannot be reconciled with the authors' reading of the citizenship clause. The problem cannot be avoided by translating the framers' apparent solicitude for the freedmen directly into citizenship. As drafters of legislation and of the Constitution, they chose a form of words, and the consent must be sought in some tenable interpretation of the words. In fact, the consent of the *framers* is irrelevant: the authors (p. 86) and the courts agree that constitutional birthright citizenship extends only to those who were "subject to the jurisdiction" of the United States *at the time of birth*.<sup>63</sup> There is no consistent principle by which the citizenship clause can

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60. "It is enough to say that whatever the proper reach of the consent principle may be, it cannot logically be applied to include the native-born children of illegal aliens, to whom the nation's consent has been expressly denied" (p. 96); "citizenship at birth would not be guaranteed to the native-born children of those persons — illegal aliens and 'nonimmigrant' aliens — who have never received the nation's consent to their permanent residence within it" (p. 118).

61. The foreign-born freedmen, however, were in a more difficult position. As early as 1867, Senator Sumner's attention was called to the plight of an alien black who had been in the country for decades. See CONG. GLOBE, 40th Cong., 1st Sess. 728 (1867). But Sumner's efforts to extend naturalization to blacks did not succeed until 1870. See *supra* note 40.

62. CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866).

63. *Elk v. Wilkins*, 112 U.S. 94, 102 (1884) ("Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized"); *Wong Kim Ark*, 169 U.S. at 702-03. It was also the rule at common law that a natural-born subject must be within the king's protection at the time of birth. *Inglis v. Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 126 (1830).

be interpreted as simultaneously including all native-born former slaves and excluding all children of parents to whose entry into the country the nation has not consented.

It is thus far from ridiculous to suggest that the framers of the fourteenth amendment would have approved constitutionally mandated citizenship for children whose parents had come to our shores without the nation's consent. To the contrary, the Civil Rights Act and the citizenship clause embraced the descendants of tens of thousands of such parents, under criteria based on the *fact* of presence and subjection to United States law at birth, not on the *manner* of the parents' arrival.

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In summary, Schuck & Smith do not make out a persuasive case for rethinking the citizenship clause. Their argument is seriously flawed, and demonstrably unfaithful to the intent of the framers. The alternative approach they advocate is an uneven compromise lacking consistent justification.

The campaign for "control of our borders" is partly a struggle over the future racial, linguistic and cultural development of American society. Our nation has faced such a struggle before, and has concluded that it should not be waged through the high-stakes weapon of manipulating the citizenship of the native-born. Under provocation, the author of the citizenship clause expressed its purpose as "to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin."<sup>64</sup> Before we throw off that wise restraint and even consider sacrificing the undocumented children, greater justification will have to be shown than the complaint of "Citizenship Without Consent."

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64. CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866) (remarks of Sen. Howard, responding to Sen. Doolittle of Wisconsin).