Review

Membership and Consent: Actual or Mythic? A Reply to David A. Martin

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David Martin's review of our book, *Citizenship Without Consent: Illegal Aliens in the American Polity*, represents a serious, thoughtful, and constructive effort to take up our challenge to reconsider the prevailing view of birthright citizenship. But despite Professor Martin's scrupulous fairness, readers of his review may well form misconceptions about our arguments on several points—misconceptions for which we acknowledge some responsibility. We write in order to correct them and to note that Professor Martin's analysis ultimately underscores the essential message of our work.

The misconceptions are three-fold. First, Professor Martin interprets our argument that Congress possesses *power* under the Constitution to decide on birthright citizenship for children of illegal and temporary aliens as a *policy* recommendation that Congress refuse to grant such citizenship. Our book, however, reviews several of the pros and cons but takes no stance on that policy issue, maintaining that in "the current state of knowledge, it is not at all obvious" what American policy should be.[1] Second, Martin describes our position as "aggressively consensualist," mitigated only by considerations that he suggests may be merely "expedient."[2] We noted frequently, however, that while we do favor making choices governing citizenship more self-conscious and explicit, we also regard commitments to fundamental human rights as authoritative and would restrain consensualism to preserve them.[3] Finally, Professor Martin presents an alternative, Burkean understanding of consent

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1. P. SCHUCK & R. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 120 (1985) [hereinafter cited by page number only].

2. Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L L. 278, 290 (1985).

3. *See, e.g.*, pp. 30, 36-37, 41, 48-49, 55, 87, 101, 134, 148 n.18.

that he thinks we have slighted. He does not, however, mention our several discussions and criticisms of that outlook—criticisms that his arguments exemplify. We believe that such a Burkean position renders consent more mythic than real, and that Professor Martin's use of it implies that individuals cannot be trusted to decide for themselves on citizenship issues.

I.

In attacking the ascriptive conception of citizenship and the traditional interpretation of the fourteenth amendment's citizenship clause that it has nourished, we have sought to advance public debate on what is perhaps the most fundamental issue in any polity—the nature of political membership and the manner in which it may be attained. Although that issue has been widely considered closed for a century or more, the recent increase in the influx of illegal aliens has given it renewed saliency. We demonstrate, apparently to Professor Martin's satisfaction, that the citizenship clause is ambiguous concerning the scope of constitutionally mandated birthright citizenship.[4] We then argue that the clause can best be made to accord with American constitutional theory and the nation's laws of citizenship by interpreting it in light of the more Lockean understanding of birthright citizenship advanced by certain influential writers on international law, especially Vattel and Burlamaqui. That interpretation would empower Congress to decide, as a policy matter, whether the nation should extend birthright citizenship in the future to children born in the United States whose parents have never been granted permanent resident status. If we are right about Congress' authority in this regard, then a choice on this matter cannot be evaded: to refuse to choose, of course, is to choose the status quo. Because that status quo is unsatisfactory, as Professor Martin agrees, we proceed to review a number of considerations that Congress should ponder in designing policy on this score.[5]

Professor Martin neither recounts nor responds to our contention that our view of birthright citizenship, grounded in the theories of Vattel and Burlamaqui, describes consensual membership better than the common law rule of *jus soli*. He similarly ignores 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. Instead, his criticisms center on what he takes to be our

4. Martin, *supra* note 2, at 280-81.
5. *Id.* at 288.

proposal for how Congress should legislate with regard to the children of illegal aliens and on our general philosophic conception of consent.

While the first line of attack is misguided, since we do not advise Congress to adopt such a policy, we acknowledge that our text is sometimes confusing on this point.[6] And we regard as quite premature Professor Martin's claim that the "practical disadvantages" accompanying attempts to address illegal immigration via citizenship rules are "so overwhelming that they should remove this option from consideration."[7] In the end, we and Congress might well agree that this is so. But because of the prevailing, unquestioned interpretation of the citizenship clause, the issue has not yet even been discussed. Some of Professor Martin's arguments against such a policy have merit. Yet he fails to note that in the final ten pages of our book we consider all those arguments, as well as a number of others—and we show repeatedly that, however forceful they might be as policy claims, they do not justify denying Congress the constitutional *power* even to explore such measures. (We even called this section "a reply to critics").

Professor Martin does cite our contention that a denial of birthright citizenship to children of illegal and non-immigrant aliens is conceivable only as a small part of a broader, coordinated immigration strategy that would involve inclusive as well as restrictive measures. He nevertheless contends that it is wholly unthinkable, since if these measures do not work, an underclass of disadvantaged children would grow up in this country.[8] This presumes, of course, that the package of reforms that we describe would be ineffective. Yet Professor Martin neither explains why this should be so nor suggests any alternative approach. He also neglects our observations that the children of illegal aliens would still be entitled to due process and equal protection guarantees, that they would almost always have a nationality elsewhere that they could assume, and that in any case Congress could admit to permanent residence or citizenship all who proved to be stateless or otherwise seriously in need.[9] We state specifically that "if the nation adopted these measures but found that they did not diminish the number of children born of illegal alien parents who had spent most of their lives here and had acquired humanitarian claims

6. For example, on p. 136, we contrast "our proposal" to "the current birthright citizenship rule." The discussion indicates that the "proposal" in question is our suggestion that we view the Constitution as giving Congress the *authority* to render citizenship policy "as generous (or as niggardly) as Americans self-consciously decide to make it." But these passages may easily be misread as endorsing a *policy* proposal in opposition to the status quo.

7. Martin, *supra* note 2, at 288; *see also id.* at 282-84.

8. *Id.* at 281-82.

9. Pp. 100, 165 n.15.

to membership, Congress would retain the power to extend a generous amnesty or naturalization policy toward them," and that in principle, "we strongly favor such an 'amnesty' for long-term resident illegal aliens and their families."[10]

Professor Martin can only object, then, that if such policies did not work, he would expect Congress to reject these measures and to treat illegal aliens cruelly. As we argue in the book, we believe instead that such an expectation betrays "lack of confidence in the justice of consensual political self-definition," and that "contemporary Americans will decide generously."[11] He would have us maintain a constitutional guarantee that Americans never explicitly considered, much less consensually adopted, rather than risk allowing Congress the power that it now exercises with respect to all other classes of aliens.

Professor Martin's major example of the difficulties our approach might entail shows that his fears about the trustworthiness of individual choices extend to aliens as well as to citizens. He notes that many European countries have long had "guest worker" programs without automatically providing citizenship either to those workers or to any children born during their stay. He further observes that many of those guest workers and their children remain in their host nations for long periods, and that although the countries are encouraging them to naturalize, few are choosing to do so.[12] Professor Martin apparently concludes that it would be better if they did not have to *choose* to become citizens. He does not contend, however, that they agree. It may well be that ignorance or other obstacles are preventing these persons from accepting the offers of naturalization available to them. By itself, however, their failure to do so hardly justifies ascribing citizenship to them.

II.

Perhaps reflecting his worries about how people may choose, Professor Martin denigrates our stress on actual consent as "dogmatic consensualism," and he observes that while "[c]onsent *is* basic to . . . especially American democracy, it is not the only principle."[13] We agree, as our repeated insistence upon human rights indicates. We noted, moreover, that there is a recurring, fundamental tension in America's liberal democratic constitutional traditions. As predominantly Lockean liberals,

10. Pp. 99-100, 135, 137.

11. Pp. 119, 121. Admittedly, this is an article of faith but it is one, we think, that Professor Martin generally shares—and in any event does not dispute.

12. Martin, *supra* note 2, at 282-83.

13. *Id.* at 288, 292 (emphasis in original).

Americans have always "wished to base governmental legitimacy on consent, yet they also wished to insist that there were minimal but fundamental human rights that could never be legitimately violated."[14]

Professor Martin is clearly disturbed about the possibility of such violations, but he wholly ignores this aspect of our argument. It is true that we do not discuss the complex topic of basic human rights at great length. We thought it sufficient for our purposes to observe that America's constitutional traditions (and most writers on human rights) identify those rights as including the sorts of minimal guarantees included in the Declaration of Independence, and the due process and equal protection clauses of the Constitution. They are rarely said to include natural rights to membership in specific polities,[15] nor do we understand Professor Martin to be arguing otherwise.

We also recognized the validity of concerns about protecting innocent children. We showed that children should and already do possess "certain procedural and substantive rights" so that they could not in any case "be treated as the *Dred Scott* decision treated blacks."[16] But we also observed that, except for those children whose long residence had made them "part of the actual, organic community that is produced by shared experiences," it simply did not follow "that *citizenship* as distinguished from mere nondiscrimination, should be the prize" to which their human rights entitle them.[17] That is why we concluded, following Locke, Vattel, and certain other liberal theorists and legal writers, that Americans should seek in this area to harmonize consent and human rights by recognizing our powers of deliberative collective choice and employing them in humane ways.[18]

Professor Martin might dispute these arguments by contending that human rights *do* include rights to citizenship in a particular polity, and at one point he appears about to do so.[19] But he foregoes any explicit endorsement of this position, for he acknowledges the legitimacy of consensually setting some limits on claims to membership.[20] Instead, he neglects our analysis of rights and balances his own commitments to con-

14. P. 30.

15. Pp. 24-25, 48-49, 98, 100-01, 137.

16. Pp. 98-100, 137. For this reason, Professor Martin's suggestion that our position might prove repressive and harmful in the manner of *Dred Scott*, *see* Martin, *supra* note 2, at 295, is wholly unwarranted and, for Professor Martin, uncharacteristically hyperbolic.

17. Pp. 98, 134, 137.

18. Pp. 30, 48, 101.

19. Martin, *supra* note 2, at 293.

20. *Id.* at 294-95.

sent largely with "pragmatic concerns" that the political community or individual aliens might decide unwisely.[21]

It seems questionable, however, whether these pragmatic judgments are so compelling as to justify limiting the opportunities for choice that we defend for citizens and outsiders alike. In addition to criticizing our view of congressional power under the citizenship clause, Professor Martin also takes exception to our proposals that eighteen-year-olds be informed that they have a right of expatriation, and that they be permitted to exercise it while remaining in the country as resident aliens. His concern here parallels his fear regarding the children of European guest workers: even though they would lose much and gain only rather symbolic benefits, some eighteen-year-olds might still choose not to be citizens.[22] They can, it seems, be trusted to vote and at times be required to fight for their country, but they should not be encouraged to consider whether they wish to belong to it.

Again, Professor Martin's view displays a lack of faith in individual capacities to choose responsibly that strikes us as excessive. He questions whether it is "psychologically plausible" to believe that people regard explicit consent as more binding than tacit consent; and he worries again about permitting persons to reside in a country having chosen not to be its citizens.[23] These arguments, however, prove too much. They imply that we should make all within our borders citizens whether they want it or not. The proper term for the status based on that principle is subjectship, not citizenship.

III.

Finally, Professor Martin moves beyond his appeal to pragmatism to rest his objections on a "more complex and nuanced" conception of consent than we entertain.[24] Consent, he asserts, while citing Alexander Bickel and Edmund Burke, is not established by specific periodic choices so much as by feelings born of "[t]ime and familiarity."[25] Many of our affiliations are "constitutive" of ourselves, he points out, and while we may eventually change them, we do so through "an organic process, not

21. *Id.* at 288.

22. *Id.* at 288-89.

23. *Id.* at 289-90. We also considered and rejected a possible objection to our position based upon the notion of tacit consent, pp. 130-32, a discussion that Professor Martin fails to mention.

24. *Id.* at 292.

25. *Id.*

the radical act of a sovereign individual."[26] Such consent is "recogniz[ed]" and "anchor[ed]" by "ascriptive citizenship rules."[27]

This organic, communitarian conception of the self and political membership is also repeatedly mentioned in our book.[28] We do not simply dismiss it; indeed, as mentioned above, we urge Congress to extend citizenship to illegal aliens and their children whenever long residence has made them "organically part of and dependent upon the American community."[29] But we remain wary of giving legal recognition to claims that certain affiliations are "anterior to choice" and are to be altered not so much by specific concrete decisions of the polity and of the individual as by a rather mystical "organic process."[30] We would still prefer "to make the terms of national and individual consent as explicit as possible."[31] Professor Martin terms that goal "anachronistic,"[32] and he is right that it reflects in part our sense, reinforced during the 1960's and early 1970's, of how hollow claims of "tacit consent" can be under present arrangements. We see no reason, however, to rest satisfied with ascription simply because we now live in "Ronald Reagan's 1980's."[33]

While choice has its own real dangers, which we painstakingly document in our book,[34] appeals to "tacit" consent and "organic" affiliations have always been convenient vehicles for denying any genuine self-determination. If our various inherited and longstanding affiliations are so crucial to us—and we believe that they are—they will receive due weight in collective and individual deliberations over membership. Far from portraying any of these choices as "apparently cost-free," as Professor Martin avers,[35] we repeatedly stress the complexities and high risks attendant on almost any choice.[36] But again, choice cannot really be avoided; the proper response to these difficulties is more informed and reflective decisionmaking, not legal restrictions on opportunities to choose.

We believe that our view is consonant with the preponderance of democratic theory, Lockean liberalism, and American constitutionalism. Professor Martin disagrees. Significantly, he justifies this disagreement

26. *Id.* at 292-93.
27. *Id.* at 293.
28. *See e.g.*, pp. 20, 39-40, 98-99, 134, 143 n.23.
29. Pp. 98-99, 134.
30. Martin, *supra* note 2, at 292.
31. P. 131.
32. Martin, *supra* note 2, at 291.
33. *Id.*
34. *E.g.*, pp. 37-40, 42-43, 63-72.
35. *Id.* at 293.
36. *See, e.g.*, pp. 119-20, 123-25.

by appealing not to those traditions so much as to "pragmatic" concerns about human folly and to Edmund Burke. We respect his position. But in advancing it, we think Professor Martin's review reveals the validity of our basic contention—that the issues we raise compel Americans to revisit, to rethink, and to see in a new light the first principles we rely on in defining the basis of citizenship. And if, as his analysis suggests, rejection of our views requires one to abandon more explicit consent and Locke in favor of tacit consent and Burke, we remain confident that we have expounded a position that better resonates with the values of both American political theory and constitutional law.