PROSPECTIVE ALLEGIANCE

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What normative principles animate our laws on the conferral of citizenship? The present literature is divided between two competing ideas: the Consent Principle, which holds that citizenship stems from the mutual consent of the prospective citizen and the existing polity; and the Responsiveness Principle, which holds that citizenship is extended by the government in fulfillment of its duty to be responsive to the governed. In this Note, I argue that the Consent Principle is best understood as a background political theory and the Responsiveness Principle as an interpretive theory of law, and that thus understood, these principles are functionally complimentary rather than competitive. I then contribute a third idea called the Allegiance Proviso. The Allegiance Proviso says that, notwithstanding any affirmative obligations to the contrary, a government may withhold citizenship if it reasonably believes that a prospective citizen will not undertake the duties of citizenship—obedience to the laws and assistance in the common defense—in good faith. Taken together, the Consent Principle, Responsiveness Principle, and Allegiance Proviso form a coherent theory that fits our intuitions and illuminates the hard issues of citizenship today.

INTRODUCTION

United States citizenship is a privileged status. It entitles its bearer to reside without fear of deportation,[1] to travel to 169 countries without a visa,[2] to receive public assistance,[3] to obtain federal employ-

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[1] The government must prove alienage in order to obtain an order for deportation. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153 (1923) ("It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact."), *overruled on other grounds by* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). An "alien" is defined as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2006). U.S. citizens cannot be deported. *See* Mathews v. Diaz, 426 U.S. 67, 80 (1976) ("[T]he reservation of the power to deport ha[s] no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry.").

[2] *International Visa Restrictions*, HENLEY & PARTNERS, http://www.henleyglobal.com/citizenship/visa-restrictions/ (last visited Mar. 23, 2012). Citizens have a constitutional right to international and interstate travel. Kent v. Dulles, 357 U.S. 116, 125–26 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.").

[3] Citizens are eligible for a wide range of federal public benefits, including Medicaid, 42 U.S.C. §§ 1396–1396W-5 (2006 & Supp. 2010), and food stamps, 7 U.S.C.

ment,[4] to hold elected federal office,[5] and, of course, to vote.[6] Historically, efforts to expand the citizenry have drawn intense national scrutiny. Blacks were granted citizenship only after the Civil War and ratification of the Fourteenth Amendment in 1868;[7] Asians were barred from naturalizing from 1790 until 1952.[8] Today, it is the status of illegal immigrants and their children that draws the fiercest debate.[9]

Underlying these debates are competing principles governing the conferral of citizenship. Two of these are the subject of this Note. The first principle, advocated by Peter Schuck and Rogers Smith, grounds citizenship in the *mutual consent* of the citizen and the polity.[10] Since the polity is constituted by a social contract, an alien is entitled to citizenship only if she and the existing citizens agree. The second prin-

§§ 2011–2036A (2006 & Supp. 2010). Noncitizens are ineligible for federal public benefits unless they meet specific statutory criteria. 8 U.S.C. §§ 1611–1612 (2006).

[4] *See* Exec. Order No. 11,935, 5 C.F.R. § 7.4 (1976), *redesignated by* Exec. Order No. 13,197, 5 C.F.R. § 7.3 (2004) (barring noncitizens from competitive federal service with limited exceptions). States may also require U.S. citizenship for certain types of public employment. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 447 (1982) (upholding California statute requiring U.S. citizenship to be a state peace officer).

[5] *See* U.S. CONST. art. I, § 2 (citizenship required for U.S. House); *id.* art. I, § 3 (citizenship required for U.S. Senate). The presidency additionally requires "natural born" citizenship. *Id.* art. II, § 1.

[6] The link between federal citizenship and voting rights is a modern development. Because the Constitution leaves voter qualifications to the states, states have sometimes been under-inclusive (by instituting poll taxes or property requirements) and sometimes over-inclusive (by permitting alien suffrage). *See generally* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993). Today, federal law prohibits noncitizen voting in federal elections, 18 U.S.C. § 611 (2006), and some states bar citizen voting based on felon status. *See* BRENNAN CTR. FOR JUST., CRIMINAL DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES (2011), *available at* http://www.brennancenter.org/page/-/d/download_file_48642.pdf.

[7] U.S. CONST. amend. XIV. The Amendment repudiated *Scott v. Sandford (Dred Scott Decision)*, 60 U.S. 393, 404–05 (1857), which held that people of African descent could not be U.S. citizens.

[8] The nation's first immigration law limited naturalization to "free white person[s]." Naturalization Act of 1790, § 1, 1 Stat. 103, 103, *repealed by* Naturalization Act of 1795, ch. 20, 1 Stat. 414; *see also* United States v. Thind, 261 U.S. 204, 213–14 (1923) (holding that Asians could not naturalize because they were not "free white persons"). This language remained operative against Asians until the Immigration and Nationality Act, Pub. L. No. 82-414, § 311, 66 Stat. 163, 239 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537, 1422 (2006)).

[9] *See, e.g.*, Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 13 (2009) (arguing that birthright citizenship for children born on U.S. soil to illegal immigrants is neither constitutionally required nor desirable on policy grounds); Jessica Sharron, Comment, *Passing the DREAM Act: Opportunities for Undocumented Americans*, 47 SANTA CLARA L. REV. 599, 642 (2007) (arguing for passage of a modified DREAM Act, which would create a path to naturalization for some illegal immigrants who entered the United States as minors).

[10] PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT 28, 36 (1985).

ciple, advanced by Christopher Eisgruber, grounds citizenship in the obligation of a government to be *responsive* to the governed.[11] To the extent that a person is subject to the legal power of a political community, she is entitled to membership in it.

These are, or aspire to be, constitutional principles. They delineate (among other things) the scope of the Fourteenth Amendment's provision of birthright citizenship and Congress's power to create naturalization law.[12] But although their ultimate legal claims are clear, the Consent and Responsiveness Principles have ambiguous philosophical roots.[13] Each can be understood as either a background rule of political theory or as an interpretive theory of law. I argue that the Consent Principle is best understood as a background rule and the Responsiveness Principle as an interpretive theory, and that when thus unified, their apparent tension disappears.

The unified account is more doctrinally satisfying but remains incomplete. The Responsiveness Principle tells us when we should give citizenship to a prospective member but not when we may legitimately refuse.[14] I therefore propose a revision to the Responsiveness Principle that is grounded in the citizen's duty of allegiance. I argue that because citizens must obey the law and, when necessary, assist in the common defense, a political community may properly refuse citizenship to a prospective member who it reasonably believes would not perform those functions. A nation, like any other community, is not bound to accept those who will break its rules.

My account is limited in at least three ways. First, it is directly applicable only to the United States. While I think the principles articulated are relevant at least to other representative democracies, the history, values, and laws I draw upon may have no clear analogy elsewhere. Second, my account concerns only the conferral of citizenship. A fuller account would say not only when a polity should offer membership, but under what conditions it may withdraw it.[15] Third,

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[11] Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 72 (1997).

[12] *See infra* notes 17–26 and accompanying text (discussing birthright citizenship and naturalization law).

[13] I borrow the terms "Consent Principle" and "Responsiveness Principle" from Christopher Eisgruber, *supra* note 11. Eisgruber uses the fomer term to refer to Schuck and Smith's theory of citizenship by consent, and the latter to refer to his own account. *Id.* at 66–67, 72. I shall use these terms in the same way.

[14] Eisgruber offers two provisos that limit the scope of the Responsiveness Principle, but these are problematic. *See infra* notes 77–83, 115–17, and accompanying text (discussing and critiquing the Consent and Wrongdoing Provisos).

[15] The Supreme Court has held that the government enjoys no right of denationalization. A citizen may leave the polity, but the polity may not remove a citizen. *See* Afroyim v. Rusk, 387 U.S. 253, 268 (1967) ("Our holding [gives the] citizen . . . a constitutional right

my account is about citizenship as a legal status. There may be other dimensions of citizenship—ideological, psychological, or cultural—that are not captured in its formal legal attribution.[16]

I proceed as follows. In Part I, I describe the current law of citizenship and propose an analytic framework to assess its underlying normative principles. I also introduce, by way of background, the two major efforts to specify these principles of citizenship—Schuck and Smith's Consent Principle and Eisgruber's Responsiveness Principle. In Part II, I assess the Consent and Responsiveness Principles against the analytic framework of Part I and find that each fills conceptual gaps in the other. But I also find that the unified theory suffers from flaws of its own, and so in Part III, I modify the Responsiveness Principle to account for the requirement of allegiance. I conclude by showing how this Allegiance Proviso fits our intuitions and illuminates the hard issues of citizenship law today.

I

THE NORMATIVITY OF CITIZENSHIP

United States citizens acquire their status in one of three familiar ways. The vast majority—ninety-three percent of the 2009 total[17]—are citizens by operation of the Fourteenth Amendment's birthright citizenship clause.[18] This famous rule grants citizenship, with rare excep-

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to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."). Nevertheless, the termination of citizenship remains a subject of much scholarly debate. *See, e.g.*, T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1482 (1986) (calling *Afroyim*'s reasoning "remarkably . . . confusing").

[16] Linda Bosniak, for instance, argues that citizenship can be viewed "as a status, as a set of entitlements, . . . as a mode of political participation and activity, . . . [and as a] people's collective experience of themselves." Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 479 (2000).

[17] *See* THOMAS A. GRYN & LUKE J. LARSEN, U.S. CENSUS BUREAU, NATIVITY STATUS AND CITIZENSHIP IN THE UNITED STATES: 2009, at 2 (2010), *available at* http://www.census.gov/prod/2010pubs/acsbr09-16.pdf. This percentage is calculated by dividing the number of U.S.-born citizens by the total number of U.S. citizens. The numerator does not include U.S. citizens born in Puerto Rico, Guam, and the Virgin Islands, who fall outside the Fourteenth Amendment's grant of birthright citizenship. *See* Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1034, 1037–42 (2008) (discussing cases that establish that the Fourteenth Amendment does not apply to persons born in Puerto Rico and other U.S. territories). However, persons born in these territories receive U.S. citizenship by statute. 8 U.S.C. §§ 1402, 1406(b), 1407(b) (2006) (granting citizenship to persons born after 1899 in Puerto Rico, after 1917 in the Virgin Islands, and after 1899 in Guam, respectively).

[18] U.S. CONST. amend. XIV, § 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.").

tions, to every child born on U.S. soil.[19] A far smaller proportion—just under six percent[20]—are citizens by naturalization.[21] This statutory procedure, created by Congress pursuant to its constitutional power,[22] gives citizenship to foreigners lawfully admitted for permanent residence.[23] Finally, less than one percent are citizens by descent.[24] This statutory commitment, present in some form since 1790,[25] provides citizenship to children born abroad to at least one citizen parent.[26]

To be sure, this quick summary of citizenship law glosses over difficult questions of interpretation and policy. Debate rages over the proper scope of the Fourteenth Amendment (should the children of illegal immigrants receive birthright citizenship?) and the future direction of immigration law (should illegal immigrants who arrived as minors be offered a path to citizenship?).[27] But these issues, hard as they are, raise even harder and more fundamental questions. Why is

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[19] The main exception today is for children of foreign diplomats. *See infra* notes 59–60 and accompanying text (discussing limitations to the Fourteenth Amendment's grant of birthright citizenship).

[20] *See* GRYN & LARSEN, *supra* note 17, at 2. This percentage is calculated by dividing the number of naturalized U.S. citizens by the total number of U.S. citizens.

[21] Generally, immigrants lawfully admitted for permanent residence may naturalize after five years. 8 U.S.C. § 1427(a)(1) (2006). Once they have naturalized, these citizens have the same rights as their native-born counterparts, except that they are not eligible for the Presidency. U.S. CONST. art. II, § 1; Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 827–28 (1824) ("[The naturalized citizen] is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction."); *cf.* Schneider v. Rusk, 377 U.S. 163, 168 (1964) (rejecting "the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born").

[22] U.S. CONST. art. I, § 8 (Congress may "establish an uniform Rule of Naturalization").

[23] Although they do not share in all of the privileges, legal permanent residents have most of the same obligations as citizens, including taxes and selective service registration. Jury service may be the only exception. *See* 50 U.S.C. App. § 453(a) (requiring selective service registration of all male residents, including noncitizens); Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. L. 195, 210 n.73 (2000) ("[C]itizenship, at least in the U.S., entails few special legal . . . duties other than jury duty and military service. . . . [However,] the U.S. conscripted aliens into its military before it abolished the draft in the 1970s."); *cf. In re* Griffiths, 413 U.S. 717, 722 (1973) ("Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society.").

[24] *See* GRYN & LARSEN, *supra* note 17, at 2. This percentage is calculated by dividing the number of U.S. citizens by descent by the total number of U.S. citizens.

[25] *See* Rogers v. Bellei, 401 U.S. 815, 823–26 (1971) (discussing statutory history of citizenship by descent).

[26] 8 U.S.C. § 1401(c)–(e), (g) (2006). Although acquired at birth, citizenship by descent is not mentioned in the Constitution and is thus considered a species of naturalization. *See* Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237, 249 n.25 (1994).

[27] For my answers to these questions, see *infra* Part III.B.

citizenship conferred only by positive (and in particular, constitutional or congressional) law? Should we err on the side of over- or under-inclusion when interpreting a citizenship-granting provision? And most broadly: To whom should we offer citizenship at all?

These are urgent questions. Citizens are full members of our political community, entitled to the full sweep of legal and political rights.[28] Noncitizens are not. And so the laws we use to distinguish insider from outsider, citizen from noncitizen, stand in special need of justification. They stand in need of principle. In this Part, I will try to show that hard questions of citizenship *law* turn on our choice of citizenship *principle*, and in the process, sketch the contours of the discussion to come. In particular, I will distinguish between three kinds of principles: constitutive, interpretive, and prescriptive. I will then use this analytic framework to assess the substantive principles offered in the present literature.

A. A Typology of Principles

I have begun speaking of principles of citizenship but have not yet said what I take the term to mean. Stated generally, a principle of citizenship is a part of a normative story of how an outsider becomes a full member of our political community. Such a story will have at least three parts, and accordingly, three principles. First, the story will identify the conditions of citizenship as a legal status and explain why these conditions are important. I shall call this part of the story a *constitutive* principle. Second, it will tell us how we should interpret difficult provisions of citizenship law. I shall call this part of the story an *interpretive* principle. And finally it will tell us, in the unbounded domain of legislative policy, to whom we should offer citizenship. I shall call this part of the story a *prescriptive* principle.

1. Constitutive Principles

Let me begin with an observation. Each of the three avenues for U.S. citizenship—birthright citizenship, naturalization, and citizenship by descent—depends explicitly upon constitutional or statutory law. At first glance, this reliance on constitutional and statutory law may seem unsurprising: Citizenship is a legal status, and so it stands to reason that it finds some basis in law. But it is not clear why citizenship must be grounded in *positive* law. Other rights, like those to

[28] *See* Minor v. Happersett, 88 U.S. 162, 165–66 (1874) ("The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. . . . [T]he word[ ] . . . 'citizen' . . . is understood as conveying the idea of membership of a nation, and nothing more.").

"Life, Liberty, and the Pursuit of Happiness" made famous by the Declaration of Independence,[29] are commonly understood as *natural* rights, conferred by nature and not by man-made law.[30] It is at least conceivable that citizenship (or more precisely, the bundle of rights that the status entails) could also be understood in such a way.

In fact, colonial America did view one species of citizenship—birthright citizenship—as a natural right. *Calvin's Case*,[31] decided by a prominent panel of English jurists in 1608, held that all persons born within English territory were subjects of the King. Lord Coke reasoned that every child born under the protection of the King owed a corresponding duty of perpetual allegiance,[32] "and the reason hereof is . . . the law of God and nature is one to all. By this law of nature is the faith, ligeance, and obedience of the subject due to his Sovereign or superior."[33] The result of this decision, Polly Price points out, was that the "acquisition of and rights associated with citizenship in the . . . American colonies[ ] were considered not to be the subject of municipal or positive law-making."[34] Even after the Revolution, the United States continued to recognize the rule of "natural" birthright citizenship in its common law,[35] tracing its ancestry directly to *Calvin's Case*,[36] until the rule was codified in the Fourteenth Amendment in 1868.[37]

Notice carefully the structural role that natural law plays in *Calvin's Case*. The principle identifies the general condition of citizenship (protection by the sovereign) and offers a normative account of

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[29] THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

[30] Hamilton famously opposed the Bill of Rights because it codified natural rights, which might be understood as limiting those natural rights *not* enumerated. *See* THE FEDERALIST NO. 84 (Alexander Hamilton) (E.H. Scott ed., 1898) ("I go further, and affirm that bills of rights . . . are not only unnecessary . . . but would even be dangerous. They would . . . afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?").

[31] (1608) 77 Eng. Rep. 377 (K.B.).

[32] *Id.* at 382. For a broader discussion of the feudal conception of allegiance, see generally Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 YALE J.L. & HUMAN. 73 (1997).

[33] Calvin's Case, 77 Eng. Rep. at 392. Although post-Revolution America rejected the feudal term "subject" in favor of "citizen," the terms are analogous for present purposes. *See* Price, *supra* note 32, at 86–89.

[34] Price, *supra* note 32, at 116.

[35] *Id.* at 138 ("Until the late nineteenth century in the United States . . . the common law—not a statute or a constitutional provision—was the source of the rule of territorial birthright citizenship.").

[36] *See* Inglis v. Trs. of the Sailor's Snug Harbor, 28 U.S. (3 Pet.) 99, 155, 167 (1830) (Story, J., dissenting) (citing *Calvin's Case* for general principles of birthright citizenship).

[37] *See* Price, *supra* note 32, at 140 ("[T]he common-law rule articulated in *Calvin's Case* became the basis for the view that the intention of the first section of the Fourteenth Amendment must have been to constitutionalize birthright citizenship.").

why this condition matters (the law of God). It serves a *constitutive* function in Lord Coke's overall theory of citizenship, identifying, in general terms, the members of the political community and the source of their rights and obligations. Notice also, however, that the principle is of fairly limited scope. Although it identifies protection as a condition of citizenship, natural law makes no recommendation as to when that condition should be created. It does not say, for example, whether the King should expand his territory, protect more newborns, and thereby make more citizens. Thus, we might say that a constitutive principle is a political theory that justifies the franchise of citizenship, but does not say what we should do with it.

Despite its historical prominence, natural law is probably not a constitutive principle of modern American citizenship. Although the Fourteenth Amendment reaffirmed Lord Coke's rule of birthright citizenship, it did so by codifying the rule as positive law. And in common discourse about citizenship, this fact of codification takes on an air of special and perhaps overwhelming importance. If asked why they are citizens by territorial birth, I suspect most Americans would answer: "Because the Constitution says so"; few, if any would mention "God," "natural law," or "faith, ligeance, and obedience." As one moves from birthright citizenship to the heated debates over naturalization, the emphasis on positive law becomes even more pronounced. Even as Janet Napolitano, Secretary of Homeland Security, promoted the DREAM Act,[38] which would create a path to naturalization for some illegal immigrants who entered the country as children, she emphasized that "[o]nly Congress can address this."[39]

To be clear, I do not mean to suggest that natural law is incompatible with positive law in the abstract. A divine command can be written down. But natural law applies whether it is written down or not, and so does nothing to explain the centrality of positive law to our ordinary conversations about citizenship. Today, every U.S. citizen claims that status by reference to the Fourteenth Amendment or a congressional statute, and this reference imparts a powerful sense of legitimacy. Democrats and Republicans may argue over whether citizenship should be expanded to illegal immigrants, but they agree that no illegal immigrant can become a citizen without a statute at all.

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[38] Development, Relief, and Education for Alien Minors Act, S. 3992, 111th Cong. (2d Sess. 2010). This statute is commonly known as the DREAM Act. For discussion of the proposed legislation, see *infra* Part III.B.2.

[39] Jackie Ogburn, *Napolitano Discusses National Security Challenges*, DUKE SANFORD SCH. PUB. POL'Y (Oct. 21, 2011), http://news.sanford.duke.edu/news-type/news/2011/napolitano-discusses-national-security-challenges.

Positive law, it seems to me, is the modern condition of citizenship. Any persuasive constitutive principle must explain why.

2. *Interpretive Principles*

If I am right that positive law is integral to any account of citizenship, then we are certain to encounter difficult issues of interpretation.[40] Sometimes a citizenship law may appear clear but be susceptible to multiple interpretations when applied to a particular case. And sometimes a law will simply be puzzling on its face. To decide how we come out, we might utilize an interpretive principle that meets Ronald Dworkin's requirements of fit and justification.[41] To fit, our principle must be descriptively consonant with the plain language of the law and its political, judicial, and legislative history. As Dworkin says, "History matters because that . . . principle must justify the standing as well as the content of [our] past decisions."[42] And to be justified, our principle must be normatively compelling in its own right, such that it can lend real weight to the history and interpretation it serves.[43]

An interpretive principle of citizenship is thus a normative theory, just as is a constitutive principle. But the two cover different ground. A constitutive principle identifies the conditions of citizenship and why they matter, but it does not tell us whether, in close cases, those conditions are met. We need an interpretive principle to help us decide.

To better see the distinction between constitutive and interpretive principles, consider the Fourteenth Amendment's grant of birthright citizenship. The first line of the Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction

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[40] Although I take positive law to be the condition of modern American citizenship, interpretive issues can arise even if we assume a natural law regime. Consider, for example, birthright citizenship in *Calvin's Case*. Lord Coke held that territorial birth (and more precisely, sovereign protection) was the condition of citizenship, see *supra* notes 31–33 and accompanying text, but this does not tell us whether a child born in disputed territory is a citizen of England or France. Natural law might justify the rule that territorial birth matters but does not help us define "territory." For that we need interpretation.

[41] *See* RONALD DWORKIN, LAW'S EMPIRE 225–58 (1986) (describing the process of fit and justification). Following Dworkin, my Note assumes that normative principles have a central role in justifying the law. Not all philosophers agree. Legal positivists insist that the law is obligatory regardless of moral justification. For an overview of the debate, see Leslie Green, *Legal Positivism*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2009), *available at* http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/.

[42] DWORKIN, *supra* note 41, at 227.

[43] *See id.* at 249 (discussing the role of political morality in choosing between competing principles).

thereof, are citizens of the United States and of the State wherein they reside."[44] The rule clearly grants citizenship to every child born on U.S. soil, so long as they are "subject to the jurisdiction thereof." But what exactly does this jurisdictional proviso mean? Does it exclude the children of tourists, who might arguably be under the jurisdiction of their home countries rather than the United States?[45]

A constitutive principle cannot answer these kinds of questions. We might adopt a constitutive principle that grounds political obligation in communal consent and on this basis say that a constitutional amendment ratified by the community can properly confer citizenship. But this does not tell us whether the jurisdictional proviso to our (now-justified) amendment applies in any particular case. To decide whether the U.S.-born children of tourists are citizens under the Fourteenth Amendment, we need an interpretive principle that fits our history and is justified in its own right. Such a principle might declare, for example, that government should be responsive to the governed. Since even a temporarily present child is governed by our laws, this interpretive principle would suggest that we read the Fourteenth Amendment's grant of birthright citizenship broadly. Or we might declare, as an alternative principle, that our political obligations extend only to our existing citizenry. Such a principle would suggest that we read the Fourteenth Amendment more narrowly. Our choice of interpretive principle can thus determine the practical application of our citizenship law.

3. Prescriptive Principles

We are not, however, entirely free to choose our interpretive principles. Because interpretive principles are bound by the requirements of fit and justification, a judge cannot ignore relevant cases or history and select a wholly novel principle, however elegant. Nor can she select a historically attuned principle that is patently unjust unless no other interpretation is fairly possible. But a legislature is not bound by fit or justification. Congress may limit naturalization to "free white persons" (as it did in 1790)[46] or reject racial immigration requirements (as it did in 1952),[47] even though the initial limitation might violate justified principles of racial equality, and the latter repeal might contradict a century-long precedent.

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[44] U.S. CONST. amend. XIV, § 1.

[45] For an argument along these lines, see *infra* notes 63–71 and accompanying text (discussing the Consent Principle).

[46] *See supra* note 8 (discussing the Naturalization Act of 1790).

[47] *See supra* note 8 (discussing the Immigration and Nationality Act of 1952).

Still, it seems to me that Congress does not actually legislate at random but rather in accord with principles applied to facts. In 1790, for example, Congress might have thought it best to protect social stability by requiring that new citizens look like the existing populace.[48] Today, immigration policy might be driven by principles favoring family reunification and economic welfare.[49] I call these kinds of rationales prescriptive principles because they recommend the best direction of our citizenship policy. Of course, Congress as a body, and even we as individuals, may harbor many competing prescriptive principles at the same time. We may believe that we should take only those immigrants who will add to our economic welfare. Yet we may also maintain that those who flee persecution should always have a place here, regardless of their wealth or skills. When we come to a decision and say that our immigration laws should be directed in some particular way, we make a claim about these principles' relative priority and weight. This is how we debate policy. This is how legislators decide law.

A discussion of prescriptive principles is thus an exploration of policy, and a full account of the policy of citizenship is beyond the scope of this Note. But I do want to pay attention to one set of prescriptive principles—namely, those that are interpretive principles too. Interpretive principles, after all, undergo the searching tests of fit and justification, and we might reasonably think that the kind of principle that fits the history of the law, and is justified in its own right, is just the kind of principle that we find compelling today. If, for example, we believe that the Fourteenth Amendment reflects a justified principle of benefiting the existing citizenry, then we might wish to implement that principle in our immigration laws too. This is not to say that every interpretive principle is a desirable prescriptive principle; nor is it to say that our legislature is bound by the past. We can and sometimes should change course. Rather, it is simply to suggest

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[48] For example, the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (repealed 1952), had this explicit purpose. Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1637 (2007) ("[T]he Johnson-Reed Act of 1924 . . . restricted immigration so that immigrants would racially replicate the current U.S. population and thus maintain a population that was of primarily northern European descent.").

[49] In 1965, Congress replaced the national origins system with "admissions categories based on family relationship and employment potential." Abrams, *supra* note 48, at 1637. In 2010, sixty-six percent of those receiving legal permanent resident status were admitted as family-sponsored immigrants and fourteen percent were admitted for employment reasons. RANDALL MONGER & JAMES YANKAY, DEP'T OF HOMELAND SEC., U.S. LEGAL PERMANENT RESIDENTS: 2010, at 3 tbl.2 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2010.pdf.

that the principles that best explain the history of our laws may help us to direct their future.

B. Current Scholarship

I now want to turn away from principles of citizenship in the abstract and introduce the two specific principles that will feature in this Note. In 1985, the legal scholar Peter Schuck and the political scientist Rogers Smith published their groundbreaking book, *Citizenship Without Consent*.[50] Schuck and Smith explored the legal and political history of American citizenship, particularly birthright citizenship, and offered, for the first time, a comprehensive theoretical analysis of the subject. The Consent Principle that emerged from their study—that citizenship is grounded in the mutual consent of the citizen and polity[51]—drew immediate and sustained interest from scholars, judges, and politicians.[52] Conservatives, in particular, rallied around the Consent Principle, seeing in it an avenue to criticize policies perceived to encourage illegal immigration.[53]

For over a decade, liberal scholars rejected Schuck and Smith's account,[54] but none offered a comprehensive alternative.[55] Finally, in 1996, Christopher Eisgruber re-examined the history and justification of American citizenship and drew a profoundly different conclusion.

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[50] SCHUCK & SMITH, *supra* note 10.

[51] *See id.* at 28.

[52] *See, e.g.*, Joseph H. Carens, *Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States*, 37 U. TORONTO L.J. 413 (1987) (reflecting on the role of normative theory in constitutional interpretation); Eisgruber, *supra* note 11; Gerald L. Neuman, *Back to* Dred Scott*?*, 24 SAN DIEGO L. REV. 485 (1987) (challenging Schuck and Smith's historical analysis); David S. Schwartz, *The Amorality of Consent*, 74 CAL. L. REV. 2143 (1986) (criticizing Schuck and Smith's moral case). For a summary of the judicial and legislative response, see *infra* note 53.

[53] As described *infra* notes 61 and accompanying text, Schuck and Smith argue that the Fourteenth Amendment should not be read to confer citizenship to the children of illegal immigrants, though the Supreme Court has suggested otherwise. Many conservative judges and politicians agree. Citing Schuck and Smith, Judge Richard Posner argues that the present broad reading of the Fourteenth Amendment "makes no sense." Oforji v. Ashcroft, 354 F.3d 609, 621 (7th Cir. 2003) (Posner, J., concurring). Each year from 1993 to 2009, Congress considered legislation limiting birthright citizenship to the children of citizens and legal permanent residents. *See* Rogers M. Smith, *Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008*, 11 U. PA. J. CONST. L. 1329, 1332 (2009). And in January 2011, a fourteen-state coalition of legislators announced an effort to force Supreme Court review by introducing similar bills in state legislatures. Brian Bennett, *Lawmakers Group Seeks Immigration Showdown*, CHI. TRIB., Jan. 6, 2011, at 14.

[54] *See supra* note 52 (describing scholarship criticizing Schuck and Smith).

[55] A 1994 *Harvard Law Review* Note criticized Schuck and Smith's conclusion on equal protection grounds but did not advance equality as a principle of citizenship in its own right. Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026 (1994).

Citizenship, Eisgruber argued, is simply a manifestation of the government's obligation to be responsive to the governed.[56] Because it takes an expansive view on who is governed, Eisgruber's Responsiveness Principle is more inclusive than the consent-based view.[57]

Although the Consent and Responsiveness Principles articulate broad visions of political membership, Schuck and Smith and Eisgruber designed their principles with a practical interpretive issue in mind. Recall that the Fourteenth Amendment grants birthright citizenship to every child born on U.S. soil except those not "subject to the jurisdiction thereof."[58] In 1898, the Supreme Court interpreted this puzzling proviso to exclude only the children of Native Americans, foreign diplomats, and invading armies,[59] and this near-universal grant of birthright citizenship remains the conventional interpretation of the Fourteenth Amendment today.[60] Using their Consent Principle, Schuck and Smith challenge this conventional interpretation, arguing that the jurisdictional proviso should be read to also exclude the children of illegal immigrants, tourists, and other temporary visitors.[61] Eisgruber, citing his Responsiveness Principle, disagrees.[62]

How do these scholars reach such different conclusions? For Schuck and Smith, the story of American citizenship is the story of the American Revolution. The Founders faced a doctrinal legal problem: According to *Calvin's Case*, the colonists were natural-born subjects of the King and owed him a duty of perpetual allegiance.[63] To justify their break with England, the Founders needed to reject natural law,

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[56] Eisgruber, *supra* note 11, at 72.

[57] *See infra* notes 81–83 and accompanying text (discussing Eisgruber's interpretation of the Fourteenth Amendment).

[58] U.S. CONST. amend. XIV, § 1.

[59] United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898). Congress later provided for birthright citizenship for Native Americans by statute. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2006)).

[60] *See The Birthright Citizenship Amendment*, *supra* note 55, at 1026–27 & n.11 (discussing history and present understanding of birthright citizenship).

[61] *See* SCHUCK & SMITH, *supra* note 10, at 118–19. Although the Supreme Court has not directly answered the question, it has suggested in dicta that the children of illegal immigrants are citizens. In a footnote in *Plyer v. Doe*, the Court stated: "[G]iven the historical emphasis on geographic territoriality, . . . no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful." 457 U.S. 202, 211 n.10 (1982). And in *INS v. Rios-Pineda*, the Court noted that the respondent, an illegal alien, "had given birth to a child, who, born in the United States, was a citizen of this country." 471 U.S. 444, 446 (1985).

[62] *See* Eisgruber, *supra* note 11, at 76–78 ("[A]ll native-born children who become long-term residents of the United States ought to be eligible for citizenship.").

[63] *See supra* notes 31–36 and accompanying text (describing the natural law reasoning in *Calvin's Case*).

and they did so by embracing John Locke's vision of a consensual political community.[64] Government, they declared, derives its just powers from "the *consent* of the governed";[65] a person enters the social contract not by the will of the sovereign but by his own free choice. Later theorists clarified that the consent had to be mutual. Just as a political community could not force a prospective member to join, neither could a prospective member force a political community to accept him.[66] Taking the social contract model to its logical extreme, some even argued that either party should be free to end the relationship at any time.[67]

In a bold move, Schuck and Smith argue that this Lockean vision of consensual citizenship is not only a matter of political theory, but also a principle of legal interpretation. They argue that the Fourteenth Amendment's jurisdictional proviso is actually an expression of the Consent Principle: "Jurisdiction," in their view, means "a reciprocal relationship between [government and individual] at the time of birth, in which the government consented to the individual's presence and status and offered him complete protection."[68] Citizen-parents are understood to have obtained citizenship for their children as a condition of their own membership, and legal permanent residents are understood to have obtained citizenship for their children as a condition of their own entry.[69] Since tourists come to visit but not to stay, they do not request, and the government does not consent to give, citizenship to their children.[70] And since the government does not consent to presence of illegal immigrants at all, it cannot be said to consent to the citizenship of their children.[71]

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[64] *See* SCHUCK & SMITH, *supra* note 10, at 49–50 (describing prominence of Lockean ideas in early American political thought). Schuck and Smith do not claim that the rejection of natural law was complete. The nascent United States in fact endorsed natural law in the form of birthright citizenship, first at common law and then through the Fourteenth Amendment. As a normative matter, however, Schuck and Smith argue that birthright citizenship should now be understood on consensual rather than natural law grounds. *Id.* at 85–86.

[65] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added); *see also* SCHUCK & SMITH, *supra* note 10, at 50–51 (discussing consensualist views of Alexander Hamilton and Thomas Jefferson).

[66] *See* SCHUCK & SMITH, *supra* note 10, at 28 (citing views of Montesquieu and Jean-Jacques Rousseau that citizenship should be based on mutual consent).

[67] *See id.* at 47–48 (discussing Emmerich de Vattel's theory, which would allow for both an individual right of self-expatriation and a state right to "banish a member permanently").

[68] *Id.* at 86.

[69] *Id.* at 117–18.

[70] *Id.* at 118.

[71] *Id.* at 118–19.

Like Schuck and Smith, Eisgruber grounds his account of citizenship in the relationship between citizen and polity. But he begins, not with the origins of the American social compact, but rather its current state. Since the government exerts enormous coercive power over the people, Eisgruber argues, the people must have a right to reciprocal oversight: "The exercise of sovereign power over a person is legitimate only if that person shares in the political enterprise."[72] Though Eisgruber relies on general principles rather than constitutional text,[73] his idea finds support in the Constitution, which provides the right to vote for legislators (subject to further state qualifications) to a very broad class: "people."[74] It also finds support in the Declaration of Independence's famous phrase: government by "the consent of the *governed*."[75] This seems to encompass every person who is subject to the power of the state.

Eisgruber calls this obligation of reciprocal oversight the Responsiveness Principle. The Responsiveness Principle insists that all those subject to the territorial power of a political community should have a share in its governance, either through voting rights or through outright citizenship.[76] But as Eisgruber immediately recognizes, this rule is too broad: If territorial presence is the only condition of citizenship, then tourists, legal permanent residents, and illegal aliens must all be offered the franchise. Eisgruber accordingly offers two provisos to cabin the overbreadth. First, the Consent Proviso[77] says that when an individual *actually* agrees to obey without claiming citizenship, her choice should be respected.[78] This would exclude tourists and legal permanent residents, who both agree as a condition of entry to waive, at least for a time, any claim on citizenship. Second, the Wrongdoing

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72 Eisgruber, *supra* note 11, at 72.

73 *Id.* at 72–73.

74 U.S. CONST. art. I, § 2 (providing that the House of Representatives be selected by the "people"); U.S. CONST. amend. XVII (requiring that the Senate be selected by the "people"). For discussion of voter qualifications, see *supra* note 6.

75 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

76 Eisgruber, *supra* note 11, at 72. Although Eisgruber does not say that all those living within the territory must receive "citizenship," he does insist that they have the right to stay within the polity and the right to vote. *Id.* at 73. Since he also holds that the government may not "subordinate[ ] one group of subjects to favor another," *id.* at 72, I will take the Responsiveness Principle to indeed afford citizenship, or its substantive equivalent, to everyone present within the territorial boundaries of the state.

77 Although the terms "Consent Proviso" and "Wrongdoing Proviso" do not appear in Eisgruber's text, I think they fairly characterize the role that consent and wrongdoing play in Eisgruber's account. As described, Eisgruber uses "actual consent," *id.* at 74, and "wrongdoing," *id.* at 75, to constrain the sweep of the Responsiveness Principle. They are thus provisos in the functional sense.

78 *Id.* at 74.

Proviso[79] says that one who becomes subject to an exclusionary law on account of his own wrongdoing is not entitled to complain.[80] This would exclude illegal aliens.

Importantly, however, these two provisos would not exclude the *children* of illegal aliens, tourists, or legal permanent residents born on U.S. soil.[81] Children do not inherit responsibility for the wrongs of their parents, and newborns cannot consent to the country of their birth.[82] Eisgruber would therefore read the Fourteenth Amendment's jurisdictional proviso to the same effect as the Supreme Court, excluding only the U.S.-born children of diplomats and invading armies (who are not subject to the power of the state) from the constitutional grant of birthright citizenship.[83]

II
Consent and Responsiveness

We have, then, two principles of citizenship: Schuck and Smith's Consent Principle and Eisgruber's Responsiveness Principle. How do we assess these claims? First, we might ask whether the Consent and Responsiveness Principles really offer different answers to the same question or simply talk past each other. Then, we might ask whether each principle is persuasive on its own terms. In this Part, I blend both inquiries by applying the analytic framework offered in Part I, examining each principle's persuasiveness first as a constitutive principle and then as an interpretive principle. I argue that the Consent Principle is a viable constitutive principle (but not an interpretive one) and that the Responsiveness Principle is a viable interpretive principle (but not a constitutive one). Thus, consent and responsiveness are functionally complementary rather than competitive. However, I also identify a number of theoretical problems with the Responsiveness Principle, though I leave their repair to the next Part.

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[79] As described *supra* note 77, I use the term "Wrongdoing Proviso" to describe the role wrongdoing plays in Eisgruber's account. Eisgruber does not employ the phrase.

[80] Eisgruber, *supra* note 11, at 75.

[81] *Id.* at 76. It may seem odd to include the U.S.-born children of tourists in the constitutional grant of citizenship. Although they are not excluded by the Consent or Wrongdoing Provisos, most such children are short-term visitors and thus have a weak claim to government responsiveness. Eisgruber recognizes the problem but thinks it of limited significance since "the affected class, by definition, leaves the polity." *Id.* at 77.

[82] *See id.* at 77 ("Children who are born in the United States do not enter the country by virtue of their own decision.").

[83] *See id.* at 64, 77, 85 (reviewing and ultimately endorsing the Supreme Court's birthright citizenship jurisprudence).

A. The Consent Principle

Schuck and Smith argue that the Founders adopted a consensualist theory of political membership, and that this theory is also a principle of interpretation.[84] This interpretive move seems problematic to me for reasons I will shortly explain. But first, I want to defend the Consent Principle as a political theory. Despite its shortcomings, the social contract model remains the best normative account of how aliens to a polity acquire the rights and duties of citizenship. It is, in other words, a constitutive principle.

1. Consent as a Constitutive Principle

Schuck and Smith argue that consent is the "irreducible condition" of citizenship—that no one is a citizen unless both she and the existing citizens agree.[85] In practice, existing citizens consent by government action (typically a constitutional amendment or congressional act), while prospective citizens consent by explicit or tacit affirmance. Both these forms of consent are vulnerable to criticism.

The problem with government consent is that it does not obviously share the normative significance of individual consent. Joseph Carens points out that the purpose of a Lockean government "is simply to protect rights that individuals already enjoy in the state of nature, including property rights."[86] Being established for protection, Carens argues, such a government should have no right to refuse new protectees (who, after all, enhance the protection of existing members by promising to obey and support the government).[87] Christopher Eisgruber puts the same point a different way: "[L]iberal political theory does not generally maintain that the government can excuse itself from obligations it would otherwise owe to individuals simply by pointing out that it, the government, never consented to take on those obligations."[88]

I think this objection rests on a mistaken distinction between government and polity. It is true that the "government" has not consented to preserve the writ of habeas corpus in peacetime,[89] in the sense that the constitutional requirement was created contemporane-

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[84] *See supra* notes 63–71 and accompanying text (summarizing arguments for the Consent Principle).

[85] SCHUCK & SMITH, *supra* note 10, at 94.

[86] Carens, *supra* note 52, at 417.

[87] *See id.* ("[T]here are no grounds for refusing to let a person consent if he or she wishes to do so.").

[88] Eisgruber, *supra* note 11, at 69.

[89] U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

ously with the government itself. But the polity has consented, and thereby bound the government. Normatively, the government and polity are identical: When a representative government acts, it acts by authority of the individuals comprising its political community, and when it consents, it does so with their legitimizing force. Thus, the enactment of a congressional immigration act—or more directly, a constitutional amendment—is the normative equivalent of each citizen individually agreeing to accept the new members. Now, in some cases, the government may act unwisely: It may refuse entry to those who would, as Carens says, enhance the welfare of all involved. But unwise does not mean unenforceable. Just as individuals can enter into bad contracts, so too can governments. By collapsing the distinction between the consent of a government and the individuals it represents, we can give even unwise government decisions normative force.

Consent to citizenship, however, must be mutual, and finding individual consent poses a more serious problem. While naturalized citizens swear an oath of allegiance, the vast majority acquire their citizenship status automatically at birth.[90] These citizens have never explicitly consented to their status at all. Schuck and Smith answer by relying, as they must, on tacit consent: They claim that the native born are provisional citizens until they reach adulthood, at which point they can choose to expatriate or stay.[91] But this does not solve the problem, for we might reasonably ask why *inaction* at adulthood should be equivalent to volitional *consent*. Expatriation—without becoming stateless—requires money, language ability, and a foreign government willing to accept the emigrant. Those born on U.S. soil may remain because they are incapable of leaving, not because they want to stay.

As a starting point, we should recognize that the plausibility of tacit consent will vary from case to case, depending on the actions the individual has taken that reflect—or deny—his assumption of citizenship. For most citizens, I think the tacit consent argument is quite strong. Most citizens affirm their status by voting, by accepting public assistance, by seeking a passport, or simply by checking the "citizen" box on any number of government forms.[92] These actions lend

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[90] *See supra* note 17 and accompanying text (ninety-three percent of citizens acquire their status by descent or by territorial birth).

[91] *See* SCHUCK & SMITH, *supra* note 10, at 123. Although Schuck and Smith's proposal would allow expatriating citizens to choose legal permanent resident status, they concede that this would, in practice, be an extremely difficult choice to make. *Id.* at 123–24.

[92] I have in mind the I-9 form ("Employment Eligibility Verification"). *See* U.S. Citizenship and Immigration Services, Form I-9, Employment Eligibility Verification (2009), *available at* http://www.uscis.gov/files/form/i-9.pdf.

credence to the conclusion that they have indeed consented, in some meaningful manner, to the status. Philosophers, of course, deal in hypotheticals, and I concede that the case would be harder for a person who was born in the country but at every opportunity rejected the privileges of citizenship. Such a person might have a fair argument for refusing the duties of citizenship as well, particularly the more burdensome ones of military and jury service. But I suspect that such a case is a true rarity, not least because one who denied his citizenship would also sacrifice his right to stay.[93]

And is expatriation so heavy a stick that it bludgeons any meaning out of tacit consent? I think not. *All* contracts have an element of coercion: Parties bind themselves because they believe they will benefit more than they will be harmed, which is just another way of saying that the alternatives would be worse. It is true that the stakes are much higher in the context of a political community, and that often, no real alternatives exist. Parties may be better off if they contract, but they ordinarily have a choice of contracting partners. Yet this too is not dispositive. If I lose a tooth, I have little alternative but to go to the nearest available dentist. Faced with the choice of either paying the dentist for his service or risking the permanent loss of my tooth, I may feel that my only real option is to pay. But that does not make my consent any less real or my agreement any less binding.

2. Consent as an Interpretive Principle

Thus far, I have defended the Consent Principle as a constitutive principle, or ultimate condition, of citizenship as a legal status. But Schuck and Smith go further, wielding consent not only as a constitutive principle but as an interpretive tool. They argue that the jurisdictional proviso of the Fourteenth Amendment requires us to engage in an exercise of hypothetical consent, so that we may determine whether the polity has agreed to the birthright citizenship of any particular class. But as Gerald Neuman observes, it is not evident why we must perform this exercise when we know that the polity has already consented to the Fourteenth Amendment as a whole:

> *Any* freely adopted rule of citizenship expresses the consent of the society that adopts it. . . . 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.[94]

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[93] *See supra* note 1 and accompanying text (U.S. citizens may not be deported).

[94] Neuman, *supra* note 52, at 490–91.

Neuman goes on to identify historical evidence suggesting that the drafters of the Fourteenth Amendment did not intend the jurisdictional proviso to require recurring consent.[95]

I agree with Neuman as far as he goes, but I disagree that his argument renders Schuck and Smith's Consent Principle "fatally circular."[96] The drafters of the Fourteenth Amendment *could* have intended the jurisdictional proviso to require continuing consent, just as Congress requires periodic reauthorization of the surveillance portions of the PATRIOT Act.[97] There is no logical inconsistency to requiring a second round of consent, even if the Consent Principle would have been satisfied with just one. Schuck and Smith offer some historical support for their view,[98] and a reasonable person could find their evidence persuasive.

I have a deeper worry. Schuck and Smith do not claim that the jurisdictional proviso requires actual consent, like periodic reauthorization, but rather that it should be interpreted to require hypothetical consent.[99] This kind of interpretation is a trap. When the language of the Constitution or a statute is clear, or even when the language is ambiguous but tends to favor a certain construction, there is no need for consent as an interpretive principle. It is enough to say that the weight of the evidence supports the favored construction, and that is (probably) what the polity actually consented to do. But when faced with a true ambiguity in the statutory language, hypothetical consent is too crude for the task. It cannot sift the good answers from the bad. Schuck and Smith suppose that most Americans would not consent to the children of illegal immigrants receiving birthright citizenship,[100] but I might reply that the lack of any legislative action to

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[95] *See id.* at 492–97 (discussing legislative history of the Citizenship Clause and subsequent judicial interpretation in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898)).

[96] *Id.* at 493 & n.29.

[97] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 (2001) (codified at scattered titles of U.S.C.), contained controversial surveillance provisions that originally expired in 2005. Since then, Congress has repeatedly renewed the provisions while retaining a sunset period. The latest extension was approved in 2011 and will continue to 2015. *See* EDWARD C. LIU, CONG. RESEARCH SERV., R40138, AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) EXTENDED UNTIL JUNE 1, 2015 at 2 & nn.11–12 (2011), *available at* http://www.fas.org/sgp/crs/intel/R40138.pdf (detailing statutory extensions).

[98] *See* SCHUCK & SMITH, *supra* note 10, at 76–87 (discussing legislative and judicial responses supportive of the Consent Principle).

[99] *See id.* at 117–18 (imagining whether the nation can be said to have consented to citizenship for the children of citizens, legal permanent residents, and temporary or illegal aliens).

[100] *See id.* at 94 (arguing that if society has not consented to extend membership to illegal aliens, then "it can hardly be said to have consented to that of their children").

that effect suggests otherwise.[101] Both of us may couch our interpretations in the language of hypothetical consent.[102]

I suspect that what Schuck and Smith are really doing is smuggling a different interpretive principle into their exercise of hypothetical consent. It may be that the jurisdictional proviso should be read to exclude the children of illegal immigrants because we believe constitutional rules should be read in a way that benefits existing citizens exclusively. Such a principle, of course, finds no support in the Constitution, and I do not mean to suggest that Schuck and Smith actually endorse it. But I do think that Schuck and Smith unconsciously adopt some principle like it, in the sense that it is not a variant of consent but a normative hypothesis in its own right. Such a principle is necessary if Schuck and Smith are to endorse some outcome of the hypothetical consent exercise over another.[103]

An analogy may help clarify the point. Let us assume that ordinary commercial contracts, like social contracts, take consent as their constitutive principle. Suppose then we have an ordinary contract that reads, "Lucy confers upon Alice the exclusive right to market Lucy's designs in consideration of fifty percent of Alice's profits from the venture."[104] Now suppose Lucy is unsatisfied with Alice's efforts and sues her for breach. The reviewing court must determine what, if anything, Alice has agreed to do, but the answer is, of course, unclear. Some judges may decide that Alice had an obligation to make reasonable efforts; some may decide that she had to maximize Lucy's profits; and some may decide that she had no obligation to do anything at all. What *is* clear, however, is that an exercise in hypothetical consent

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[101] In a recent article, Rogers Smith signaled tentative support for the view that the repeated failure to repeal birthright citizenship suggests the polity's consent to an expansive birthright citizenship. Smith, *supra* note 53, at 1334. Others continue to argue that the mutual consent principle mandates a more restrictive reading of the Fourteenth Amendment. *See, e.g.*, *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Security and Claims of the H. Comm. on the Judiciary*, 109th Cong. 69 (2005) (statement of John C. Eastman, Professor of Law, Chapman Univ. Sch. of Law), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg23690/pdf/CHRG-109hhrg23690.pdf (implicitly endorsing Schuck and Smith's original analysis); Graglia, *supra* note 9, at 10–12 (same).

[102] Other worries abound. Whose consent matters—the current polity, or the one at the time of the original statute or amendment? Does a constitutional amendment signal a higher threshold for hypothetical consent than an ordinary statute? What kind of evidence counts?

[103] In a similar vein, David Schwartz argues that Schuck and Smith fail to tell us who deserves the government's consent. Schwartz, *supra* note 52, at 2156. He suggests that Schuck and Smith implicitly assume a communitarian vision of national identity that shapes their answer to who should have birthright citizenship. *Id.* at 2159.

[104] Legal readers will recognize this example as a version of the famous contracts case *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917).

cannot supply the answer. Each judge will claim that her interpretation is what the parties really consented to do, but to reach that conclusion, each judge will draw upon some external interpretive principle, such as "parties to an agency relationship agree to maximize joint profits" or "parties do not mean to undertake any duties that they do not specify." This interpretive principle may reflect the judge's assessment of the actual probability that Lucy and Alice meant this or that, but it is more likely to be a normative hypothesis in its own right that says, in effect, how parties in an agency relationship ought to behave.

All of this is to say that in the citizenship context, consent tells only part of the story. Schuck and Smith are right to insist that no one is a U.S. citizen unless the Constitution or Congress says so.[105] But interpreting what the Constitution or Congress says is a different question to which hypothetical consent can provide no meaningful answer. When the language is ambiguous, we need an interpretive principle of citizenship to tell us whether we have consented. This is the task to which I now turn.

B. The Responsiveness Principle

For Christopher Eisgruber, the basis of citizenship is not consent but responsiveness. The government has an obligation to be responsive to the governed and should therefore offer citizenship to every person within its territorial borders unless that person has consented to waive the status (the Consent Proviso) or has committed some wrong (the Wrongdoing Proviso).[106] But is this Responsiveness Principle a constitutive or interpretive principle? At times, Eisgruber suggests that it is both. He certainly thinks that it is interpretive, for he argues that specific rules for identifying citizens, such as the birthplace rule of the Fourteenth Amendment, should be evaluated by their consistency with the Principle.[107] Since the Responsiveness Principle does not itself generate rules, this account seems to require an independent constitutive principle like consent. Yet Eisgruber also argues that the Consent Principle is wrong. Crucially, he rejects it not just as an interpretive tool, but as a political theory, offering the Responsiveness Principle in its stead. If Eisgruber is right, then citizenship as a legal

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105 As observed *supra* Part I.A.1, this insistence tracks our reliance on positive law in our ordinary conversations about citizenship.

106 *See supra* notes 72–83 and accompanying text (summarizing Eisgruber's argument for the Responsiveness Principle).

107 *See* Eisgruber, *supra* note 11, at 66 (distinguishing between a "criterion," or rule for identifying citizens, and a "principle," which "provides the normative justification for using a particular rule").

status does not bottom out in consent, but rather in another constitutive principle that must be further defined.

1. Responsiveness as a Constitutive Principle

Two possibilities come to mind. First, Eisgruber might intend the Responsiveness Principle to be a constitutive theory in itself. On this account, reminiscent of national law notions of citizenship, anyone satisfying the Principle is immediately a citizen, regardless of the polity's action or inaction. Alternatively, Eisgruber might assume a constitutive theory that relies on positive law but makes no reference to consent. Under this reading, citizenship does require a constitutional or congressional act (to be interpreted by reference to the Responsiveness Principle), but that act does not have to be a manifestation of the polity's consent to a new member.

The first possibility—that responsiveness is itself a constitutive theory—seems implausible. It would obviate the Fourteenth Amendment's grant of birthright citizenship, for children born in the country would be able to rely directly on the Responsiveness Principle as a legal basis for citizenship. It would also sharply undercut Congress's naturalization power by giving automatic citizenship to all children in the country, since they as much as the newly born neither consent to the terms of their presence nor have committed a wrong. I think it simply goes too far to say that the Fourteenth Amendment has no legal significance or that Congress may not determine the naturalization of children. And indeed, I do not think that Eisgruber intends so aggressive a position. He argues that the Responsiveness Principle provides the "normative justification for using a particular rule," not that it displaces the rulemaking itself.[108]

The second possibility—that responsiveness bottoms out in a non-consensual constitutive theory—is probably what Eisgruber had in mind. He concedes that a constitutional amendment squarely incompatible with the Responsiveness Principle must still be honored, suggesting that positive law is the ultimate condition of citizenship.[109] But this leaves open the question of why positive law matters at all.[110] If Eisgruber rejects consent merely as a way of saying that non-consensual constitutive theories can exist, then I agree. But his refusal

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[108] *Id.*

[109] *Id.* at 90.

[110] What about the argument that the positive law is legitimate because the lawmaking process is responsive to the governed? This is applicable only to those who are *already citizens*. An immigration law that bars a noncitizen from citizenship is not responsive as to that person, because that person did not have the opportunity to vote (directly or indirectly) on the law.

to develop or even to cite to such a theory does his account a disservice. It is not enough to say who should be members of the polity in the abstract; we also must be able to explain why, in the world in which we live, we honor laws that give some people citizenship and leave others out. Since Eisgruber does not develop any such account, I will adopt the consensualist view.

2. *Responsiveness as an Interpretive Principle*

The failure of responsiveness as a constitutive principle does not detract from its overall elegance. In my view, it fits the history and tenor of American immigration law as a post–Civil War ideal if not reality. It provides normative justification for the Supreme Court's "courageous" extension of birthright citizenship to the children of Chinese laborers in 1898,[111] and it urges an inclusive, welcoming vision of citizenship that remains attractive today.[112]

Nevertheless, I have a quibble and a few concerns. I have already mentioned the quibble: Not only the newly born, but virtually all children present in the country fit the conditions of the Responsiveness Principle. They are persons subject to the territorial power of the state; they lack the capacity to consent to any restrictive terms of entry; and they are (mostly) too young to be responsible for any wrongdoing. Perhaps young tourists traveling with their parents might be excluded, since their brief stay demands limited government responsiveness.[113] But most resident children, at least, would have an immediate normative claim to citizenship. I do not think that such an outcome ought to be required.

It is conceivable, however, that some children *do* have a normative claim to citizenship. And so the quibble balloons into a larger concern: The Responsiveness Principle does not differentiate between those who meet its terms. The sixteen-year-old foreign exchange student, the twelve-year-old who arrived illegally at the age of six, and the U.S. military veteran who arrived illegally at the age of three—all have an equal claim to citizenship. This too seems problematic. The political capital necessary to expand citizenship is scarce, and we are

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111 *See* Neuman, *supra* note 52, at 495 (discussing *United States v. Wong Kim Ark*, 169 U.S. 649 (1898)).

112 I may be an optimist in this regard, but I agree with Charles Kesler's classic case for American citizenship as an increasingly inclusive circle. *See* Charles R. Kesler, *The Promise of American Citizenship*, *in* IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY 3 (Noah M.J. Pickus, ed., 1998) (describing American citizenship as becoming more heterogeneous and multicultural over time).

113 This conclusion dovetails with Eisgruber's acknowledgement that the U.S.-born children of tourists may not be entitled to citizenship under the Responsiveness Principle (though it may be administratively convenient to give it to them). *See supra* note 81.

likely to have to choose between deserving groups of candidates. My intuition is that most people would rank order the list just given in reverse, with the veteran receiving citizenship first and the exchange student last, if at all. But if this intuition is justified, the Responsiveness Principle does not say why.

A second, related concern bears mention. The Wrongdoing Proviso holds that illegal aliens have "no claim to have their interest reflected in the law in the same way that citizens and legally resident aliens do."[114] Illegal aliens, in other words, have no claim to citizenship. But again the lack of nuance is troubling: Surely there is a distinction between the foreign spouse who overstays her visa, the victim of gang violence who flees across the border, and the drug trafficker who bribes his way into the country. Although each has committed a "wrong," we might be willing to overlook the disqualifier for some but not others. Just as the Responsiveness Principle does not differentiate between those whom it includes, it also does not differentiate between those whom it excludes.

I have a third and final concern. Of the two limitations Eisgruber sets out, the Wrongdoing Proviso is by far the more significant. The Consent Proviso limits the citizenship claims of those present *legally*—that is, temporary visitors and legal permanent residents. But legal permanent residents can naturalize after five years,[115] and most temporary visitors (e.g. tourists) are likely uninterested in citizenship at all. The Wrongdoing Proviso, on the other hand, limits the citizenship claims of the estimated 10.8 million *illegal* immigrants[116]—individuals who are very likely to want citizenship indeed. For this reason, the Wrongdoing Proviso stands in special need of justification. Unfortunately, Eisgruber puts forward the Proviso by way of hypothesis and does not answer the most important justificatory questions. Why are aliens who break U.S. law "wrongdoers"? Unlike citizens, they have never consented to be bound by U.S. law in the first place. Is wrongdoing subject to the defenses of necessity or duress? And why is overstaying one's visa the kind of wrong that destroys an otherwise valid responsiveness claim?[117]

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114 Eisgruber, *supra* note 11, at 75.

115 8 U.S.C. § 1427(a)(1) (2006).

116 *See* MICHAEL HOEFER ET AL., DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 1 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

117 The Consent and Wrongdoing Provisos are also inconsistent with Eisgruber's criticism of Schuck and Smith. Eisgruber rejects Schuck and Smith's Consent Principle because it turns on government rather than individual consent. *See* Eisgruber, *supra* note 11, at 68–69. But Eisgruber's Consent and Wrongdoing Provisos are subject to the same critique.

These concerns weaken the Responsiveness Principle's plausibility as an interpretive principle. An account that cannot justify its treatment of illegal immigrants and does not distinguish between claims of varying strength is not persuasive. The account, however, is reparable. The root idea—that government should be responsive to the governed—seems to me entirely right. I would retain this core and replace the Wrongdoing Proviso with a new constraint based on the citizen's duty of allegiance. I take up this project in the next Part.

III
The Allegiance Proviso

It will be helpful to review the progress thus far. I have argued that a complete account of citizenship will include both a constitutive and an interpretive principle. A constitutive principle is a background political theory that explains why citizens have a legally enforceable status. An interpretive principle is a normative account of why some, but not others, should be given that status. An interpretive principle may also be a prescriptive principle. It tells us not only how we should interpret an ambiguous conferral of citizenship, but also how we can best legislate the subject in the future.

I have argued for consent as a constitutive principle and for responsiveness as an interpretive principle. The Consent Principle says that one is not a citizen unless both she and the existing citizens agree. The Responsiveness Principle says that we should give citizenship to all persons subject to the territorial power of the state. The unmodified Responsiveness Principle, however, is too coarse and does not adequately differentiate between those who meet its terms. The Wrongdoing Proviso cannot provide the necessary repair.

In this Part, I will develop a replacement for the Wrongdoing Proviso that explains why some prospective members have a stronger claim to citizenship than others. But I will begin not from the perspective of the prospective member, but from that of the citizen. I will argue that the same duty of allegiance that all citizens bear—the obligation to obey the law and, when necessary, assist in the common defense—also serves as a prospective screen. A political community is not obligated to offer membership to those who it reasonably expects will not honor their duty of allegiance. When paired with the broad vision of membership expressed by the Responsiveness Principle, this

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Although the Consent Proviso professes respect for the free choice of the alien, it is in fact the government that sets the terms of entry into the country. This is also true for the Wrongdoing Proviso, since illegal aliens are illegal precisely because the government refuses to consent to their presence.

Allegiance Proviso explains our intuitions and resolves our questions about the conferral of citizenship.

A. Prospective Allegiance

Recall that our constitutive principle grounds citizenship in the social contract. "[I]t is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[118] Citizenship thus involves a kind of exchange—in the words of the Supreme Court, "allegiance for protection and protection for allegiance."[119] The polity agrees to protect the citizen, and the citizen agrees to bear allegiance to the polity. Each is bound by his consent.[120]

Protection is straightforward enough, but what is allegiance? The term is notoriously elusive, full of "definitional problems and unwanted concepts."[121] Etymologically, it derives from the feudal concept of "liegance," the irrevocable duty of obedience owed to the sovereign.[122] In modern legal parlance, however, allegiance refers to a sentiment of loyalty or to specific commitments associated with the voluntary assumption of citizenship.[123]

We might next ask about the exact nature of those commitments. The oath of allegiance, required of naturalized citizens in the United States, may be of some help. It sets out four specific obligations: (1) loyalty to the Constitution and to the law; (2) obedience to the law; (3) willingness to participate in military service; and (4) renunciation of foreign allegiances.[124] The requirement of loyalty seems to refer to

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118 MASS. CONST. pmbl. (1780).

119 Minor v. Happersett, 88 U.S. 162, 166 (1874).

120 I recognize, of course, that most citizens do not actively consent to a duty of allegiance. Instead, I rely on my earlier defense of tacit consent. *See supra* notes 90–93 and accompanying text.

121 William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221, 226 (2008).

122 *See id.* at 226–27 (discussing the etymology of "allegiance"); *supra* notes 31–33 and accompanying text (discussing the feudal duty of loyalty).

123 *See* Mayton, *supra* note 121, at 226 ("Allegiance as we know it refers to loyalty and commitments freely given.").

124 In its present form, the oath reads:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work

a particular sentiment (it would otherwise be redundant with the duty of simply obeying the law). It is a defensible obligation, but I think too abstract to bear much practical inquiry; it also raises the troubling specter of McCarthyism. Better, I think, not to go down that road.[125] I also set aside the requirement that citizens renounce their foreign allegiances; it is a negative duty and not an affirmative obligation in its own right. If renunciation is required, it is because the dual citizen cannot maintain his positive duties to both states.[126] That leaves us with two requirements of allegiance: (1) citizens should obey the law; and (2) be willing to assist in the common defense.[127] I think these are genuine obligations that most citizens believe they undertake.

These obligations are also integral to the functioning of the political community. Citizens join together, at a minimum, to provide for a common defense, to protect their property, and to live under mutually enforceable rules.[128] But there can be a common defense only if individuals serve. There can be protection of property only if each honors others' rights. And there can be the rule of law only if people actually obey it.

> of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

8 C.F.R. § 337.1(a) (2010). The military service provisions may be omitted by those who can show incompatible religious convictions. *See infra* note 127 (discussing the inclusive definition of military service).

125 In this same vein, the Supreme Court held in *Afroyim v. Rusk* that Congress could not strip a citizen of citizenship because he voted in a foreign election. 387 U.S. 253, 267 (1967).

126 Are multiple allegiances mutually exclusive? In some cases the answer is surely yes. South Korean law, for instance, requires its citizens to serve in its military, but U.S. law precludes its citizens from serving in a foreign military. *See* 18 U.S.C. § 959 (2006) (stating that U.S. citizens who serve in a foreign military are punishable by three years in prison); *Korea, South: Military*, CIA: THE WORLD FACTBOOK (Jan. 11, 2012), https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html (stating that South Korean citizens have compulsory military service). Even where there is not a direct conflict of law, one might worry about the persistent possibility of war, in which case the dual citizen must violate his duty to defend one country or the other. For more comprehensive discussions of dual citizenship, see generally Peter H. Schuck, *Plural Citizenships*, *in* CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 217 (1998); Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411 (1997); Karin Scherner-Kim, Note, *The Role of the Oath of Renunciation in Current U.S. Nationality Policy—To Enforce, To Omit, or Maybe To Change?*, 88 GEO. L.J. 329 (2000).

127 I say "assist in the common defense" because military service does not necessarily require combat. As the Supreme Court put it: "One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle." Girouard v. United States, 328 U.S. 61, 64 (1946).

128 *See* John Locke, *The Second Treatise of Civil Government*, *in* THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 3, 4, 60–62 (J. W. Gough ed., 1946) (1690) (describing the purposes of government generally).

If we believe that citizens have duties to the political community by virtue of their consent to joining it, and if we believe that those duties serve an important political function, then we can say that it is not only existing citizens but also prospective citizens who may be judged by those standards. Because citizens may not be removed, the political community has a crucial interest in making sure that prospective members will obey the law and assist in the common defense. This is true even if those prospective members do not, prior to becoming citizens, share those obligations. A Canadian residing in New York may not be obliged to defend this country from foreign attack, but his willingness to do so is surely relevant to whether we should give him citizenship.

We might call this kind of prospective scrutiny the Allegiance Proviso. The Allegiance Proviso says that a polity may refuse citizenship to a candidate if it reasonably believes that candidate will not obey the law or assist in the common defense. Like the Wrongdoing Proviso it replaces, the Allegiance Proviso cabins the Responsiveness Principle's overbreadth. But unlike the Wrongdoing Proviso, the Allegiance Proviso does not punish a prospective citizen for sins against a community she has not yet joined. Rather, it allows the polity to determine that a person who has violated the law or refused to assist in the common defense may do so again *after* she has joined the citizenry, and in violation of her new duties. The Canadian resident who refuses to serve, we might say, is a poor candidate for citizenship even though he may not have committed a wrong. In this way, the duties of citizenship can also be a screen.

In fact, we already screen prospective citizens in just this way. Legal permanent residents—who may ordinarily naturalize after residing in the United States for five years[129]—are deported if they commit "crimes of moral turpitude," aggravated felonies, or certain other offenses.[130] Moreover, legal permanent residents may not naturalize if they lack "good moral character."[131] On the other end of the spectrum, we sometimes expedite the citizenship of certain individuals whose allegiance is beyond question. Legal permanent residents who honorably serve in the military are exempted from the five-year residency requirement (and those who desert become permanently ineli-

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[129] *See* 8 U.S.C. § 1427(a) (2006).

[130] *Id.* § 1227(a)(2). These categories are ill-defined and are a source of much frustration for immigrants, judges, and practitioners alike. *See generally* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011) (analyzing case law on the meaning of "moral turpitude").

[131] "Good moral character" is shown by *not* committing any of a set of prescribed offenses. 8 U.S.C. § 1101(f) (2006).

gible for citizenship).[132] There is no better indication that a prospective citizen will assist in the common defense than the fact that she has already done so.[133]

The Allegiance Proviso lends support to this kind of screening in the naturalization process. We have good reason to believe that those who have engaged in, say, aggravated felonies may do so again after being given citizenship. We may decide, quite justifiably, to withhold citizenship on that basis. Similarly, we have good reason to believe that someone who has served in the military will honor her duties after becoming a citizen, and we might choose to expedite her candidacy for that reason. This is not to say that prospective members must affirmatively prove their allegiance: If they give us no reason to doubt it, and otherwise meet the requirements of the Responsiveness Principle, then they too are entitled to citizenship. But if access to citizenship is a scarce resource, the Allegiance Proviso suggests that we may take the veteran first.

The Allegiance Proviso also explains why the status of illegal immigrants raises such normative tensions. Since illegal immigrants reside in the United States and have significant social and economic ties, they have a strong claim to citizenship under the Responsiveness Principle. But illegal immigrants also break the law by the very presence that underscores that claim. This triggers the Allegiance Proviso, for one may think that a person who is willing to break the law before he becomes a citizen may also be willing to break it afterwards.[134] The persuasiveness of this argument depends on whether one thinks that crossing the border, or overstaying a visa, is really the kind of action that makes future law-breaking more likely. For some illegal immigrants—such as violent criminals or drug traffickers—the inference may be valid. For others—such as overdue foreign students—it may not. On the whole, I think it is reasonable to say that adult illegal immigrants, who have made a conscious decision to enter or remain illegally, raise sufficient issues of prospective allegiance that citizenship may be legitimately withheld. But this conclusion is not obvious and may differ for particular subgroups.

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132 *See id.* §§ 1425, 1439.

133 Military service is probably the oldest proxy for allegiance. Both Athens and Sparta regarded military service as essential to their citizen-soldier ideal. Peter Riesenberg, CITIZENSHIP IN THE WESTERN TRADITION 7–9, 15 (1992). Rome gave citizenship to her auxiliaries upon discharge. COLIN WELLS, THE ROMAN EMPIRE 137 (1st ed. 1984).

134 *See* JACK MARTIN, FED'N FOR AM. IMMIGRATION REFORM, ILLEGAL ALIENS AND CRIME INCIDENCE (2007), *available at* http://www.fairus.org/site/DocServer/crimestudy.pdf?docID=2321 (asserting a link between unlawful immigration status and criminality); *cf.* Rep. Lamar Smith, Letter to the Editor, N.Y. TIMES, Nov. 23, 2010, at A32 (arguing that the widespread presence of illegal immigrants undermines the rule of law).

The difficulty of this last example raises three related concerns. First, the Allegiance Proviso offers no guidance for assessing prospective allegiance beyond a reasonableness test—is it reasonable to believe that a particular group will not obey the law or assist in the common defense? As always, reasonableness may be in the eye of the beholder. Second, it seems that for any individual, the outcome of the Allegiance Proviso may be manipulated by scaling the size of the category considered. There may be a great difference between the prospective allegiance of "illegal immigrants," "illegal immigrants who are drug traffickers," or the individual herself. Third, because the Allegiance Proviso is an objective test, it may not yield to considerations of an individual's personal responsibility. It may not matter, for instance, that the drug trafficker had a terrible childhood that reduces his personal fault.

The first two of these concerns are less worrisome than they initially appear. It is true that reasonableness and category definition leave room for discretion, but that does not mean that the framework is standardless. Reasonableness *is* a standard. Judges regularly review motions to determine if "a reasonable jury" could reach a given outcome.[135] Similarly, it is possible to say that no observer could reasonably believe that a particular group—say, the U.S.-born children of citizens—will not obey the law or assist in the common defense. The determined categories, too, are less easily manipulated than one might imagine. As an initial matter, it should be clear that the danger is in too broad, rather than too narrow, a category: It does no injustice to assess each prospective citizen on his or her own merits. Rather, the risk of injustice arises when the categories are too sweeping, such that many who would otherwise be viable prospective citizens are rejected with others who are not. Again, we might observe that judges have some experience defining malleable categories—consider market defi-

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[135] *See* FED. R. CIV. P. 50(a)(1) (stating that court may grant judgment as matter of law if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party" on a controlling issue); *cf.* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745 n.11 (1983) ("[T]he 'reasonable jury' rule [is] applied on motions for directed verdict."). Consider too the reasonable person standard in the law of torts.

I focus on judges here because they address interpretive principles head-on. The Responsiveness Principle, modified by the Allegiance Proviso, does not directly constrain legislators, who may be unreasonable in their determinations of prospective allegiance or create odd categories of prospective citizens. Nevertheless, the considerations here are still relevant because the Responsiveness Principle is a prescriptive as well as interpretive principle. It therefore allows us, as observers, to say that such legislative acts would be undesirable. For an overview of prescriptive principles, see *supra* Part I.A.3.

nition in the antitrust context[136]—and that some discretion is inevitable, even desirable. The Allegiance Proviso identifies the outer boundaries of our obligations to confer citizenship and helps us to understand, but does not dictate, our reasonable disagreements at the center.[137]

The third concern—that the Allegiance Proviso leaves no room for considerations of individual responsibility—is more worrisome. Few would argue that U.S.-born children with physical disabilities, such that they are unable to assist in the common defense, should be denied citizenship on that account. Nor would we deny asylum to adults with similar disabilities who flee persecution from their homes. I think such examples are justified because we have strong moral obligations—including shelter and, if return to a home country is impractical, perhaps even citizenship—to those in grave need; the strength of these obligations may exceed our right to demand allegiance. Yet I also think that such examples must be the exception and not the rule. In the main, citizenship is an exchange of privileges for duties, and a nation cannot long survive without the allegiance of the bulk of its citizens. And so when overriding necessity is not present, I think that we may withhold citizenship if the prospective citizen is unable to offer allegiance, even if that inability is through no fault of his own. The illegal immigrant drug trafficker, his troubled childhood notwithstanding, is out of luck.

A final point. Although I have grounded the Allegiance Proviso in the duty of *citizens* to obey the law, I do not mean to suggest that *noncitizens* are under no corresponding obligation. Illegal immigrants may not consent to a formal relationship with the polity, yet may nonetheless owe a natural duty to obey its laws.[138] Such a duty could be the basis for a revitalized Wrongdoing Proviso, but I have declined to take this approach for two reasons. First, any account of natural duty will have to explain why border controls are "just institutions" that demand the support of illegal immigrants.[139] Second, an account of wrongdoing does not explain why ineligibility for citizenship—as opposed to, say, prison—should be the penalty. The Allegiance Proviso does not evade the first of these questions, but it does bring

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[136] *See generally* Jonathan B. Baker, *Market Definition: An Analytic Overview*, 74 ANTITRUST L.J. 129 (2007) (describing judicial approaches to market definition in antitrust litigation).

[137] Of course, more precision in category definition and reasonableness could narrow the center of disagreement, and thus result in more guidance for judges. I defer that project for future scholarship.

[138] For a development of such an account, see generally Jeremy Waldron, *Special Ties and Natural Duties*, 22 PHIL. & PUB. AFF. 3 (1993).

[139] *Id.* at 4 (quoting JOHN RAWLS, A THEORY OF JUSTICE 115 (1971)).

the issue back to what is, at least in my mind, the relevant question in a consensualist community: "Will this person be a good citizen?" Or to put it another way: "Should we consent?"

B. Implications

The last pages have been rather abstract, and so I want to close by showing that the Allegiance Proviso has real application. I will first return to the interpretive issue of birthright citizenship that is central to the accounts of Schuck and Smith and Eisgruber. I will argue that the Responsiveness Principle, modified by the Allegiance Proviso, suggests that the Fourteenth Amendment grants birthright citizenship to the U.S.-born children of illegal immigrants, though it may not reach the U.S.-born children of temporary visitors, such as tourists. I will then argue that the Responsiveness Principle is also relevant as a prescriptive principle.[140] As a prescriptive principle, it suggests that we should favor the DREAM Act's proposed extension of legal status, and eventually citizenship, to some illegal immigrants who entered the country as minors.[141]

1. Birthright Citizenship

Does the Fourteenth Amendment's jurisdictional proviso exclude the children of illegal immigrants from birthright citizenship? As an initial matter, we should observe that the basic requirement of the Responsiveness Principle is met: All children born in the United States are, at the time of birth, subject to its territorial power. The only remaining question, then, is whether the children of illegal immigrants are excluded by operation of the Allegiance Proviso. In other words, we must ask whether there are particular facts about these prospective citizens that suggest they will not obey the law or assist in the common defense.

I can imagine no such inference. By hypothesis, most children of illegal immigrants grow up rather like other American children: They go to U.S. schools, join U.S. social institutions, find U.S. jobs, pay U.S. taxes, and so forth. If they grow up like other American children, then they should be just as likely to obey the law and assist in the common defense. I suppose that one might object that their parents, unlike most American parents, may be deported, and so some children of illegal immigrants may either wind up in a foreign country or become separated from their families. These risks are devastating and real, but

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[140] For discussion of prescriptive principles, see *supra* Part I.A.3.

[141] *See* Development, Relief, and Education for Alien Minors Act, S. 3992, 111th Cong. §§ 4(a), 6(d) (2d Sess. 2010).

I think the resulting threat to allegiance is minimal. Those born to citizen parents may also become orphaned, or move far away, yet few would suggest that such children will be worse citizens for it.

I should point out, however, that there are some groups that the Allegiance Proviso arguably *would* exclude from the Fourteenth Amendment's grant of birthright citizenship. Take the U.S.-born children of tourists. If Sally is born in New York to French parents who immediately take her back to Paris, where she spends her entire life (save for a few shopping excursions to the city of her birth), then perhaps we really do have reason to question her allegiance. Sally may not be particularly prone to breaking U.S. laws, but she may balk at assisting in the nation's defense. Without personal or economic ties to the United States, the children of tourists may indeed be a group whose allegiance could be discounted. Remember, too, that the U.S.-born children of foreign diplomats are already excluded by the Fourteenth Amendment's jurisdictional proviso,[142] and the children of tourists are in a rather similar position. It seems at least plausible to say that they should be excluded too.

The result of this analysis is a rather odd conclusion: The U.S.-born children of illegal immigrants should receive birthright citizenship, but the children of those present legally, albeit temporarily, should not. Theoretically, this makes sense because temporary visitors are just that—temporary. Their children will, if all goes to plan, grow up in their home countries, while the children of illegal *immigrants* will grow up here. But this distinction is easily blurred. Illegal immigrants may intend to return, and temporary visitors may intend to stay. Of course, the analysis does not really turn on parental intent, but rather the likelihood that the child will bear allegiance to this country. But parental intent will in large part determine whether the child grows up in this country, and that is surely relevant to allegiance. And it may be difficult, if not impossible, to assess such intent.

If a rule that distinguishes between the children of illegal immigrants and the children of temporary visitors is practically unenforceable, then we may have no choice but to treat both groups the same. Either we give citizenship to both sets of children, or we give citizenship to neither. Which way we come out will depend on the number of people affected and the weight we attach to their loss or gain. It seems to me that a rule giving citizenship to both sets of children will mostly benefit those who should be citizens in theory; that is, most children

142 *See* United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898) (excluding the U.S.-born children of foreign diplomats from the Fourteenth Amendment's grant of birthright citizenship).

born here, even to the combined category of illegal immigrants and temporary visitors, are here to stay. It also seems to me that depriving a child who should have citizenship is a greater loss than giving it to one who should not. But I recognize that this balance is not obvious and may change with the empirical facts on the ground.

2. The DREAM Act

Beginning in 2001, Senator Orrin Hatch has introduced and frequently re-introduced the Development, Relief, and Education for Alien Minors Act (DREAM Act).[143] The 2010 incarnation of the Act would grant permanent resident status to illegal immigrants who have (1) been continuously present in the country for at least five years; (2) entered the country before age sixteen; (3) graduated from a U.S. high school, obtained a general education development certificate, or been admitted to an institute of higher education; (4) are of good moral character; and (5) obtained a higher education degree, completed at least two years towards a bachelor's or higher degree, or served honorably in the military for at least two years.[144] After receiving permanent resident status, the now-legal immigrant could naturalize after the usual five-year residency period under existing law.

Is the DREAM Act in accord with the Responsiveness Principle and Allegiance Proviso, as a matter of prescriptive policy? Again, the basic requirement of the Responsiveness Principle is met: Since candidates must have resided continuously for at least five years, they are subject to the territorial power of the state. The dispositive question, then, is whether particular features about these candidates render them unlikely to obey the law or assist in the common defense.

Some might argue that as with adult illegal immigrants, the fact of illegal status is enough to indicate a propensity for law-breaking.[145] Even if the candidate was too young to be responsible for her initial entry, she surely became aware of her illegal status at some point between entering and graduating from high school; her failure to end that illegal status is the relevant propensity act. This argument, I think, goes too far. The failure of a minor—even a teenager—to pack up and "return" to a country she may barely remember has little inferential value. Moreover, the DREAM Act embeds its own criminal filters: By conferring permanent residency, rather than immediate citizenship, it

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143 *See* Sharron, *supra* note 9, at 601–02.

144 S. 3992 §§ 4(a), 6(d).

145 *Cf.* MARTIN, *supra* note 134, at 1 (asserting that unlawful status *adult* aliens have a criminal propensity).

subjects beneficiaries to the full bevy of deportable offenses and the requirement of "good moral character."[146]

There are also affirmative reasons to think that DREAM Act candidates will take their prospective duty of allegiance seriously. All candidates must either make significant progress towards a higher education degree or serve honorably in the military for at least two years.[147] There is of course every reason to think that veterans will be willing to assist in the common defense, and though higher education is no bar to criminality, it may be that those who have invested in higher education will have more to lose by breaking the law. But regardless of that hypothesis, such education will certainly not make these candidates *less* likely to obey the law, and that is all that the Allegiance Proviso demands.

Thus the Responsiveness Principle, modified by the Allegiance Proviso, passes favorably upon the DREAM Act. But let me be careful so as not to overstate my case. Legislators are not judges, and deciding future policy is different than interpreting historic laws. Faced with the decision of whether to extend citizenship, we necessarily balance many prescriptive principles, weighing humanitarian duties against foreign policy, responsiveness against economic need. No single principle is overriding. Even so, we may wish to pay special attention to the best interpretation of our citizenship laws, recognizing, without being bound by, the wisdom of polities past.

Conclusion

The Consent Principle, Responsiveness Principle, and Allegiance Proviso together paint a complete picture of American citizenship. We are, at bottom, a community constituted by choice, and as such cannot be compelled to confer citizenship without our consent. But though we retain the ultimate discretion to choose our members, we nonetheless bear a responsibility to use that discretion justly. We should, in accord with the spirit of our democracy, extend the privileges of liberty to those who will honor our laws, contribute to our safety, and live amongst our midst.

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[146] S. 3992 § 6(a); *see also supra* notes 130–31 and accompanying text (discussing the "good moral character" requirements for naturalization).

[147] *See supra* note 144 and accompanying text (detailing the requirements of the DREAM Act).