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Birthright of a Nation

By PETER H. SCHUCK

DESPITE persistent calls for comprehensive immigration reform, the hot debate today is about an old issue: birthright citizenship.

The citizenship clause of the 14th Amendment, adopted in 1868, provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States..." This language has traditionally been interpreted to give automatic citizenship to anyone born on American soil, even to the children of illegal immigrants.

Congress plans to hold hearings this fall on a constitutional amendment to change that language, something even moderate Republican senators like South Carolina's Lindsey Graham support. With a new study showing that undocumented mothers account for a disproportionate number of births, even some Democrats might find it hard to stand opposed to altering the citizenship clause.

Fortunately, the history of the clause suggests an effective, pragmatic solution that should appeal to both parties.

The clause's purpose was to guarantee citizenship for former slaves — a right Congress had enacted in 1866 — and to overrule the infamous Dred Scott decision, which had denied blacks citizenship and helped precipitate the Civil War.

But the clause also excluded from birthright citizenship people who were not "subject to the jurisdiction thereof." This exclusion was primarily aimed at the American-born children of American Indians and foreign diplomats and soldiers, categories governed by other sovereign entities.

The citizenship clause reflected a new American approach to political membership. Under common law dating back to the early 17th century, national allegiance had been perpetual, not consensual. Our country contested this assumption during the War of 1812 after the British impressed Americans into the Royal Navy, insisting that they remained the king's subjects.

By 1868, Congress had come to view citizenship as a mutual relationship to which both the nation and the individual must consent. This explains why it passed — one day before the citizenship clause was ratified — the Expatriation Act, allowing Americans to shed their American or foreign citizenship.

Particularly relevant to today's controversy was the floor debate on the citizenship clause. It suggested that the American-born children of resident aliens would indeed be citizens, a suggestion confirmed in an 1898 Supreme Court decision involving the son of a resident Chinese couple.

Congress did not, however, discuss the status of children of illegal immigrants — at the time, federal law didn't limit immigration, so no parents were here illegally.

Nevertheless, it is hard to believe that Congress would have surrendered the power to regulate citizenship for such a group, much less grant it automatically to people whom it might someday bar from the country. The Supreme Court has never squarely held otherwise, although it did assume, without explanation, in a brief 1982 footnote that the American-born children of illegal immigrants were constitutional citizens. This history suggests that Congress can act on birthright citizenship without a constitutional amendment.

Fast-forward to today to an America with 11 million illegal immigrants. If the Constitution permits Congress to regulate their children's citizenship by statute, what should that statute provide?

This question is much harder than the zealots on both sides suggest. The argument against any birthright citizenship is that these children are here as a result of an illegal act and thus have no claim to membership in a country built on the ideal of mutual consent.

In the extreme case of "anchor babies" — children born after a mother briefly crosses the border to give birth — the notion of automatic citizenship for the child strikes most people as not only anomalous but also offensive. No other developed country except Canada, which has relatively few illegal immigrants, has rules that would allow it.

At the same time, we rightly resist punishing children for their parents' crimes. Without birthright citizenship, they could be legally stranded, perhaps even stateless, in a country where they were born and may spend their lives. And because more than a third of undocumented parents have a least one American child, ending birthright citizenship would greatly increase the number of undocumented people in the country.

Fortunately, these strongly competing values, combined with the notion of mutual-consent

citizenship, suggest a solution: condition the citizenship of such children on having what international law terms a "genuine connection" to American society.

This is already a practice in some European countries, where laws requiring blood ties to existing citizens have been relaxed to give birthright citizenship to children of illegal immigrants who have lived in the country for some time — Britain, for example, requires 10 years and no long absences from the country.

Congress should do likewise, perhaps conditioning birthright citizenship on a certain number of years of education in American schools; such children could apply for citizenship at, say, age 10. The children would become citizens retroactively, regardless of their parents' status.

Other aspects of the larger immigration debate would continue, of course. But such a principled yet pragmatic solution to the birthright citizenship question could point the way toward common ground on immigration reform.

Peter H. Schuck, a professor of law at Yale, is a co-editor of "Understanding America: The Anatomy of an Exceptional Nation."