

# The Worth of Citizenship in an Unequal World

*Ayelet Shachar\**

*In today's world, one's place of birth and one's parentage are — by law — relevant to, and often conclusive of, one's access to membership in a particular political community. Birthright citizenship largely shapes the allocation of membership entitlement itself (the "gate-keeping" or demos-demarcation function of citizenship). But no less significantly, it also distributes opportunity unequally (the "wealth-preserving" function of citizenship). This makes citizenship a matter of inherited entitlement. In a world in which membership in different political communities translates into very different starting points in life, upholding this legal connection between birth, political membership, and life opportunities raises important questions of distributive justice. These questions are particularly pressing given that the vast majority of the world's population — 97 out of every 100 people — acquire political membership via circumstances beyond their control, that is, according to where and to whom they were born. While we find vibrant debates in the literature about the legitimacy of citizenship's demos-demarcation function, the perpetuation of unequal starting points through intergenerational transmission of membership has largely escaped scrutiny. It is this omission that this Article aims to address.*

---

\* Leah Kaplan Visiting Professor in Human Rights, Stanford Law School; Canada Research Chair in Citizenship and Multiculturalism, Faculty of Law, University of Toronto. I am grateful for the comments that I received on an earlier draft from the participants of the Why Citizenship? workshop, especially from Rainer Bauböck, Linda Bosniak, Tsilly Dagan, Karen Knop, Guy Mundlak, Yoav Peled, Kim Rubenstein, and Leti Volpp. Special thanks are due to Ran Hirschl for his invaluable contribution to developing the argument presented here. This research was generously supported by the Social Sciences and Humanities Research Council of Canada and the Leah Kaplan Chair at Stanford Law School.

## INTRODUCTION

Ever since the French revolution, citizenship has been associated with the fight to break down barriers of legal inequality. From the abolition of the privileged orders to the removal of race and gender-based criteria for participation in the political process, citizenship has played a vital role in leveling rights and political voice in the modern political landscape. Ironically, at the dawn of the 21st century, the transmission of citizenship on the basis of *birth-right*, which is enforced worldwide, now serves as a formidable barrier to both mobility and opportunity. The vast majority of the world's population — 97 out of every 100 people alive today — acquire political membership solely via circumstances beyond their control, that is, according to where and to whom they were born. This makes citizenship primarily a matter of *inheritance* rather than a result of processes of cross-border migration, culminating in naturalization.<sup>1</sup>

While much attention has been paid to immigration, it is by means of ascriptive birthright that the majority of the global population acquires political membership. Given this reality, it is time to shift our attention from the immigrant back to the citizen and to critically evaluate the prevailing legal principles governing the allocation of political membership — and the normative questions that follow.

The discussion here intentionally differs from the standard accounts of political membership, which focus almost exclusively on the situation of *non-citizens*: specifically, those who reside in the state but do not enjoy full membership. A typical example is found in Seyla Benhabib's *The Rights of Others* (2004), which opens with the following definition: "[b]y political membership, I mean the principles and practices for incorporating aliens and strangers, immigrants and newcomers, refugees and asylum seekers, into existing polities."<sup>2</sup> Undoubtedly, this is a crucially important topic, which has received excellent treatment in Behnhabib's book and in other recent works.<sup>3</sup> Yet, as an analytical matter, to frame the question of

---

1 See GLOBAL COMMISSION ON INT'L MIGRATION, *Annex II: Migration at a Glance*, in *MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION* (2005), available at <http://www.gcim.org/attachements/GCIM%20Report%20Annex%20II.pdf>.

2 SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* 1 (2004).

3 See, e.g., LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006); PHILLIP COLE, *PHILOSOPHIES OF EXCLUSION: LIBERAL POLITICAL THEORY AND IMMIGRATION* (2001); MATTHEW J. GIBNEY, *THE*

political membership in this way is to omit something important. It is not enough to focus only on the situation of those who do not belong, leaving untouched the *basis* for entitlement of those who "naturally" belong. But how is full membership acquired in the absence of migration? Upon what basis is the coveted entitlement to citizenship conferred upon some, while denied others? Who benefits and who loses when birthright principles are entrenched into citizenship laws? These are the fundamental questions that will concern me in the discussion that follows.

In today's world, one's place of birth and one's parentage are — by law — relevant to, and often conclusive of, one's access to membership in a particular political community. In this way, birthright citizenship largely shapes the allocation of membership entitlement itself (the "gate-keeping" function of citizenship). But no less significantly, it also distributes opportunity unequally (the "wealth-preserving" function of citizenship). In a world in which membership in different political communities translates into very different starting points in life, upholding the legal connection between birth and political membership benefits the interests of some (heirs to membership titles in well-off polities), while providing little hope for others (those who do not share a similar "birthright"). The use of ascriptive criteria to systematically exclude people from the advantages of citizenship raises important questions of distributive justice. And, whereas we find vibrant debates about the legitimacy of citizenship's *demos*-demarcation (or "gate-keeping") function, the perpetuation of unequal starting points through the intergenerational transmission of membership has largely escaped scrutiny. It remains conveniently concealed under the current system of *entailed* citizenship transmission. It is this omission that this Article aims to address.

My working assumption is that for the foreseeable future each political unit is likely to retain broad discretion in shaping its own membership boundaries.<sup>4</sup> This recognition does not relieve us, however, from the task of exposing the crucial role played by birthright principles in allocating membership titles that preserve unequal access to voice, power, and opportunity on a global scale. Such differential distribution of life prospects finds little, if any, justification in considerations such as need, merit, consent, fair-admission rules, or even reward for risk-taking.<sup>5</sup> Instead,

---

ETHICS OF POLITICS AND ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES (2004).

4 Some minimal limitations on this discretion are already in place; I assume that they will remain in force. For a concise overview, see Diane F. Orentlicher, *Citizenship and National Identity*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 296, 296–301 (David Wippman ed., 1998).

5 This is not a conclusive list; it merely highlights several possible grounds for

extant citizenship laws confer immense benefits upon a predetermined set of recipients: those who, by reliance on birth, "naturally" belong to the polity. As long as this fixed and rigid allocation system persists, I argue that those conferred automatic citizenship in a well-off polity by virtue of inherited entitlement should be obliged to fund some form of development assistance to those who do not enjoy a similar opportunity because of the current reliance on unchosen, unalterable and morally arbitrary birth-based circumstances in restricting — for the vast majority of the world's population — access to and transmission of such coveted membership titles.<sup>6</sup> To support this conclusion, I offer a new perspective from which to conceptualize birthright citizenship laws, one that focuses on how these laws construct and govern the transfer of membership entitlement as a form of inherited property. Thinking about *citizenship as inherited property* provides a new prism through which to understand the "worth" of citizenship in an unequal world.

### I. THE BIRTH CIRCUMSTANCES THAT COUNT: DESCENT AND TERRITORY

When we talk about birth as a source of citizenship, we must distinguish between two governing principles that define membership in a state in the modern era: *jus soli* (Latin: "the law of the soil") and *jus sanguinis* ("the law of blood"). While *jus soli* and *jus sanguinis* are typically presented as opposites, it is important to note that both rely upon and sustain a conception of bounded membership. They share the basic assumption of *scarcity*: only a limited pool of individuals can automatically acquire citizenship in a given polity. Once the idea of scarcity is introduced, we are faced with the dilemma of allocation, or boundary-definition: is a given person to be inducted into the circle of membership, or left outside? Both *jus soli* and *jus sanguinis* resolve this dilemma in a similar fashion: by reliance on the presumably apolitical regime of *birthright transfer of entitlement*. The distinction between the two principles is limited to the preference for one type of birth-right entitlement over another: the one relies on territory; the other on descent. As Chris Eisgruber observes, it is tempting to think that a rule that makes birthright

---

allocating membership titles that do not fall into the trap of ascriptive reliance on birthright principles.

<sup>6</sup> The account developed here rests on the assumption that the fact that we owe special duties to fellow-citizens does not imply that we owe nothing to those outside our circle of members. For a related line of argument, see Bhikhu Parekh, *Cosmopolitanism and Global Citizenship*, 29 REV. INT'L. STUD. 3 (2003).

citizenship "contingent upon the place of a child's birth is somehow more egalitarian than a rule that would make birthright citizenship contingent upon the legal status of the child's parents."<sup>7</sup> But this distinction can easily lead us astray. *Both* criteria for attributing membership are arbitrary: one is based on the accident of birth within particular geographical borders while the other is based on the sheer luck of descent.

It seems unlikely that circumstances of birth alone would serve as the core determinants of entitlement to full and equal membership within a *demos* (the citizenry body). And yet, reliance upon the accident of birth is inscribed in the laws of all modern states, and applied everywhere. The almost casual acceptance of ascription as a basis for assigning political membership represents a "blind spot" in contemporary citizenship theory: the assumption that reliance on birth is somehow a "natural" and "apolitical" event.<sup>8</sup> This (misguided) assumption is in part to blame for the scant attention that has been paid to the puzzle of birthright citizenship even by progressive scholars interested in "rethinking" the political community.<sup>9</sup>

The relationship between birth and political membership may not be a significant source of concern in a hypothetical world of little mobility and approximate equality between different political units. But in a world such as our own, in which existing state borders divide "not simply one jurisdiction from another, but the rich from the poor as well,"<sup>10</sup> this situation can lead to serious injustices. By legally identifying *birth*, either in a certain territory, or to certain parents, as the decisive factor in the distribution of the life-long good of membership, the territoriality and parentage principles render citizenship an ascriptive status for the vast majority of the world's population. It is in this way that citizenship may be thought of as the quintessential *inherited entitlement* of our time.

Another way to illuminate the shortcomings of both the *jus soli* and *jus sanguinis* principles is to question the well-established distinction between "civic" and "ethnic" nationalism.<sup>11</sup> Civic nationalism, it is often argued, refers

---

7 Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 59 (1997).

8 An exception to this blindness is found in the formative writings of Joseph Carens. E.g., Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987). Carens, however, focuses his critique on the injustice of restrictive immigration laws rather than targeting birthright citizenship per se.

9 See, e.g., RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY (Daniele Archibugi et al. eds., 1998).

10 See Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF. 257, 257 (2002).

11 The civic-ethnic dichotomy is used by many well-known authors on nationalism.

to a political community of equals that is created by the free consent of the governed. Accordingly, inclusion in the state must rest upon the individual's choice to become a member of the polity. Those who are governed must have equal access to political participation and an equal right to determine how sovereign power is exercised.<sup>12</sup> Ethnic nationalism, on the other hand, reflects an understanding of the political community as a natural order, under which a citizen's attachment to a specific political community is inherited, not chosen. This attachment provides the ties that connect the past to the future, permitting the community to preserve its distinct cultural or national character. Citizenship, by this account, establishes a legal mechanism for a society to achieve regeneration — passing down a legacy from one generation to another indefinitely, while asserting a link back to time immemorial.<sup>13</sup>

With this typology in mind, we might expect to find two very different legal procedures for establishing membership in these distinct kinds of political communities. In a "civic" nation, we might expect *choice* and *consent* to play a key role in the acquisition of membership. In an "ethnic" nation, on the other hand, we might expect intergenerational continuity to figure prominently in the reproduction of the collective. In the "ethnic" nation, *ascriptive* membership-attribution rules that express the idea of citizenship as an inherited status are to be expected. These rules reflect a logically consistent manifestation of a "diachronic" dimension of nationhood, which privileges the children of current members (while excluding all others) by automatically entitling them to participate in the political enterprise of their forefathers.

Clearly, the idea of allocating resources, opportunities, and access to political rights on the basis of a natural lottery is at odds with the foundations of civic nationalism, which stresses the value of choice and consent by the governed. Yet, counter to what this theoretical account might lead us to predict, even countries that are viewed as archetypes of the civic model (such as the United States and Canada) fail to establish choice and consent

---

*See, e.g.,* ANTHONY SMITH, NATIONAL IDENTITY (1991); *see also* LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY (1992). For a more journalistic account, *see* MICHAEL IGANTIEFF, BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM (1993).

12 They must also acquire basic protections against abuse of power by the state, including the security that their membership will not be unilaterally revoked by the government, no matter how critical they are of their government's actions.

13 The diachronic dimension of citizenship law is elegantly captured by Donald Galloway, *The Dilemmas of Canadian Citizenship Law*, 13 GEO. IMMIGR. L.J. 201, 201-31 (1999).

as the guiding principles for their citizenship laws. Recall the proclamation of the American Constitution's Fourteenth Amendment: "[a]ll 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."<sup>14</sup> Similarly, the Canadian Citizenship Act states that a citizen is a person "born in Canada." That is, birth on Canadian soil is a necessary and sufficient condition for becoming a natural-born citizen.<sup>15</sup> In addition, neither Canada nor the United States distribute the good of political membership solely (or even primarily) according to anyone's willingness to consent to the authority of their democratic governments, nor do they admit as members all those who identify with their political ideals of freedom and liberty. Instead, just like ethnic nations, they acquire the bulk of their population through inherited membership entitlement rather than by individual merit or active choice.

Still, it might be argued that birth is a relevant criterion (even in a world fraught with deep inequality), so long as it serves as a tool to predict who might potentially be entitled to full membership in the polity. But if that were the rationale for extant *jus soli* rules, then we would expect to find the use of supplementary measures (residency requirements, for example) to define who belongs to the political community, over and above the arbitrary event of birth in the territory. In practice, however, civic nations do not require continued residence or any other measure of implied consent on the part of those who are automatically ascribed membership at birth. In fact, the reverse is true.<sup>16</sup> Even if a natural-born citizen has left the country and no longer has any effective ties to the polity, there is no corresponding loss of the rights and benefits of citizenship. This is surprising: it is yet another

---

14 U.S. CONST. amend. XIV, § 1.

15 See Citizenship Act, R.S.C., ch. C-29, § 3(1)(a) (1985) (Can.). Canada here followed the English common-law tradition of *jus soli*, codifying into legislation (the original 1946 Citizenship Act, and the current 1997 Citizenship Act) the common law principles set out in *Calvin's Case*, (1608) 77 Eng. Rep. 377 (K.B.) (Eng.). For detailed discussion, see Ayelet Shachar, *Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws*, in NOMOS: CHILD, FAMILY, AND STATE 345 (Iris Marion Young & Stephen Macedo eds., 2003).

16 This is an absolute rule in Canada or the United States. The United Kingdom, Australia, and most recently, Ireland, have modified their versions of the birthright principle to apply automatically only to children of citizens and permanent residents. Children of undocumented migrants may gain full membership based on a combination of birth and residence criteria established through statutory provisions. See Bernard Ryan, *The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland*, 6 EUR. J. MIGRATION & L. 173 (2004).

example of the relative importance of inheritance, as opposed to choice, where stakeholder status is concerned.

The absence of an "affirmation" requirement is all the more glaring when we compare the natural-born citizen with the naturalized immigrant. The latter acquires admission to full political membership in the state only after proving, through the volitional actions of migration and resettlement, that he or she has rightly earned such status. Acquisition of *post*-birth citizenship (through naturalization) demands not only the screening of the would-be-citizen's background and qualifications by the relevant governmental agencies, but also explicit and active participation (e.g., through swearing allegiance) on the part of the immigrant.<sup>17</sup> Furthermore, we find explicit consent requirements in the immigration laws of *jus soli* states (while there are none with regard to citizenship); this fact further undermines the claim that the consent of the governed can be tacitly attributed. According to the tacit-consent theory, choice is *de facto* reduced to a matter of passive consent: a manifestation of free will is (presumably) implied by non-action, i.e., by remaining subject to the jurisdiction of the government under which one is born. But if this is true for the natural-born citizen, why doesn't the same theory apply to others? For example, should this not apply to those, such as legal immigrants, who have expressed their will through the act of seeking entry and establishing residency in the admitting country? Clearly, these individuals and families have made a serious commitment to the new home-country by submitting themselves to the authority of its laws, while at the same time risking the loss of their former "inherited" membership. If anything, *their* implied consent seems to be *stronger* than that of the natural-born citizen who has never made any life-transforming decisions about country of residence. Yet it is only the immigrant who must undergo a ceremonial "rite of passage" in order to acquire full membership, whereas the citizen passively receives his or her inherited entitlement.

A defender of the birthright attribution of citizenship in civic nations might, however, assert that choice is indeed present in a *jus soli* system: a natural-born citizen may renounce his or her citizenship. (This process usually requires the individual to submit a formal expatriation request to an authorized government agency.)<sup>18</sup> Unlike the standard defense of consent theory, however, choice is not here a condition for *admission into* political

---

17 Some may object to such expressions of loyalty for reasons of religion or conscience, in which case specific clauses need to be established (as in the case of military exemptions). Any exemptions represent the exception, however, rather than the rule.

18 In the rare instances in which citizens specifically declare an intention to give up citizenship, such formal renunciation usually requires approval by the political

membership. Rather, it protects only the legal *right to exit* the community (with the important caveat that a citizen cannot, at least in principle, renounce political membership for the sake of evading taxes or avoiding the reach of the law).<sup>19</sup> To define consent as tacit (i.e., through "non-exit") might provide a convincing argument in a world with minimal differences in life chances across political units, but this is not the world in which we really live. With disparities between countries so great that about half of the population of the world lives, according to the World Bank, "without freedom of action and choice that the better-off take for granted,"<sup>20</sup> it seems disingenuous to suggest that "non-exit" suffices for consent. Even where members of less well-off countries do manage to leave their home communities in search of a better future elsewhere, no country has an obligation in international law to provide such individuals with the right of entry (unless they are refugees seeking asylum from persecution). This is because, according to the extant world system of birthright citizenship laws, the right of entry is reserved exclusively to *insiders*, i.e., those born on the territory or whose parents are themselves members.<sup>21</sup>

Thus — rhetoric to the contrary notwithstanding — in both *jus soli* and *jus sanguinis* countries it is blood and soil, not choice and consent, that play a decisive role in establishing personal entitlement to the specific political membership that the individual possesses from the cradle to the grave. Both parentage and territorial principles rely upon circumstances of birth as the main criteria for distinguishing insiders from outsiders. In other words, both membership-transfer principles are ascriptive in nature.<sup>22</sup>

---

community before it takes effect. The approval process is handled by the relevant government agencies within the country or by its representatives abroad.

19 This emphasis on the right of exit is highly formalistic. It ignores concerns about societal factors that may make "exit" almost impossible for some, such as family ties, economic needs, linguistic barriers, or cultural know-how, to name but a few examples. For further discussion, see AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* 36-44 (2001).

20 See THE WORLD BANK, *THE WORLD DEVELOPMENT REPORT 2000/2001: ATTACKING POVERTY 1* (2001).

21 Unless they are subject to persecution in their home country and thus fit the Geneva Convention definition of refugee status. This demands that a host country provide them with a temporary shelter, and provides that they may not be returned home if such a step would place them in real danger — the right of non-refoulement.

22 As previously mentioned, the only place where consent theory can apply coherently is in explaining the rules that govern *immigration* policy in *jus soli* and *jus sanguinis* countries: where the individual must come forward and express her willingness to accept the host country's political norms, often under oath. The ceremony of naturalization culminates in a mutual consent between the individual and the

But *jus soli* and *jus sanguinis* do diverge on at least one critical issue: the status of children born to non-citizens who have made the host country their permanent home (the "second generation" problem). Traditionally, *jus soli* countries have addressed this problem more adequately. In the United States and Canada, for example, children born to unauthorized migrants within the nation's borders are automatically entitled to unconditional membership.<sup>23</sup> Differently put, the parents' lack of membership status is not transmitted to the next generation. Other civic nations that also follow the *jus soli* tradition — such as the territoriality principle's country of origin, England, as well as Australia, New Zealand, and Ireland — have in recent years adopted a more qualified approach. They do not automatically attribute membership at birth to children of unauthorized migrants. Instead, a child born within their borders, but to parents who lack membership status in the state, is granted citizenship status only after she has resided in the country for at least the formative years of her life.<sup>24</sup>

In the maze of citizenship laws, we clearly need to keep track of each country's distinct rules and procedures. But it is just as important to recognize that consent and choice are not automatically associated with the *jus soli* model. If anything, it appears that the choice to commit oneself to citizenship is more commonly developed in *jus sanguinis* countries, at least as far as the determination of membership status for children born on native soil to foreign parents is concerned. Although we may still find differences in the membership-attribution laws of *jus soli* and *jus sanguinis* countries (and also among countries that share the "civic" or "ethnic" traditions) the basic claim that such distinctions can be explained on the basis of the dichotomy between "consent vs. ascription" is largely refuted by the legal reality.

## II. BIRTHRIGHT CITIZENSHIP AND GLOBAL INEQUALITY

The reliance on birth-based principles in defining access to membership in particular political communities closely correlates with strikingly different

---

political community: the state must approve the individual's candidacy and the individual must pledge allegiance to her new home country, its constitution, and governing political principles. No similar act of explicit consent and "re-birth" is ever demanded of individuals who happen to be born into the political community.

<sup>23</sup> See *supra* notes 14-15 and accompanying text.

<sup>24</sup> In the United Kingdom, for example, the child must live in the country until the age of ten in order to gain a lifetime entitlement to register as a British citizen. A similar ten-year residence period applies in Australia.

prospects for well-being, security, and freedom to individuals, based merely upon considerations of bloodline or birthplace. For most legal scholars (as well as most political philosophers), however, the question of *which* state would guarantee membership to a particular individual has been seen as largely irrelevant. In this respect, notes Benedict Kingsbury, "[t]he system of state sovereignty has hitherto had the effect of fragmenting and diverting demands that international law better address inequality."<sup>25</sup> This may explain why theories of law and morality have too long been blind to the dramatically unequal voice and opportunity consequences of birthright citizenship, but it does little to justify it. Even thinkers who justify a moral or basic human right to membership typically do so at a general, abstract level, while relegating "the specific content of the right to citizenship in a specific polity . . . [to the] specific citizenship legislation of this or that country."<sup>26</sup> This division of labor may well be motivated by the idea of sovereign autonomy or democratic self-determination. However, it unwittingly strengthens the notion that all that matters is that one gain a right to membership "in this or that country" — instead of insisting that it is important that one gain membership in a country that can provide one's basic needs and generate conditions that permit the fulfillment of one's capacities. It is this slippage between an abstract right to membership and its concrete materialization that demonstrates how the focus on formal equality of status makes invisible the *inequality of actual life chances* attached to membership in specific political communities.

For those granted a head-start simply because they are born into a flourishing political community, it may be difficult to appreciate the extent to which others are disadvantaged due to the lottery of birthright. But the global statistics are strikingly clear and consistent.<sup>27</sup> Children born in the poorest nations are five times more likely to die before the age of five. Those who survive their tender years will in all likelihood lack access to

---

25 For a detailed exploration of this theme, see Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT'L L. 599, 600 (1998).

26 See BENHABIB, *supra* note 2, at 141.

27 For an overview of these statistics concerning the global fragmentation of opportunity with reference to democracy and participation, economic justice, health and education, as well as peace and security, see THE WORLD BANK, *WORLD DEVELOPMENT REPORT: EQUITY AND DEVELOPMENT 2006* (2006); THE UNITED NATIONS DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORT 2005* (2005); UNICEF, *THE STATE OF THE WORLD'S CHILDREN 2006: EXCLUDED AND INVISIBLE* (2006); THOMAS W. POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* (2002); RAPHAEL KAPLINSKI, *GLOBALIZATION, POVERTY, AND INEQUALITY: BETWEEN A ROCK AND A HARD PLACE* (2005); JEFFREY D. SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* (2005).

basic subsistence services such as clean water and shelter and are ten times more likely to be malnourished than children in wealthier countries. Also significantly increased are the odds that they will either witness or themselves suffer infringements of basic human rights. What is more, these conspicuous disparities cannot be attributed to random misfortune or "fate"; they represent a pattern of *systematic* inequality in the distribution of basic social conditions throughout the globe.

The standard response of liberal and democratic theory to the inequality of opportunity caused by ascriptive factors is to work hard to ensure that "no child is left behind." While this slogan has never fully materialized in any country, it reflects an aspiration to overcome social hierarchies and economic barriers that are caused by morally arbitrary circumstances or structural patterns of disadvantage. It is therefore surprising and disturbing that the opportunity-enhancing function of birthright membership has largely escaped critical scrutiny. This paucity of analysis is explained at least in part by the fact that the study of citizenship has traditionally been the province of domestic and often parochial scholarship, which tends to concern itself with the particular features of its own country's norms and procedures for defining membership and admission. International law, for its part, has focused primarily on attempts to resolve the problem of statelessness. This account calls our attention to the fact that it is better for the individual to enjoy a special attachment to any given polity than to remain with no state protection at all. This is clearly a potent argument. However, this formulation focuses only on *formal equality of status*. It says nothing about rectifying inequalities in the actual life opportunities of individuals.

Moreover, the standard focus on formal equality of status (requiring that all individuals belong to one state or another) itself relies on a schematic picture of an orderly world comprised of clearly delineated political communities. This conception of the world is described by Rainer Bauböck as having "a quality of simplicity and clarity that almost resembles a Mondrian painting. States are marked by different colors and separated from each other by black lines. . . . [This] modern political map marks all places inhabited by people as belonging to mutually exclusive state territories."<sup>28</sup> In such a world, with its clear and exhaustive division of the global political landscape into mutually

---

28 See Rainer Bauböck, *Citizenship and National Identities in the European Union* 1 (Harvard Jean Monnet Working Paper Series, Paper No. 4/97, 1997). As Bauböck points out, this Westphalian image of the world cannot account for the political significance of transnational connections and affiliations that many individuals now bear toward their (old and new) home countries, nor can it satisfactorily address the reality of dual nationality.

exclusive jurisdictions, it appears "axiomatic that every person ought to have citizenship, that everyone ought to belong to one state."<sup>29</sup> By focusing on the formal equality of citizenship, it becomes possible to emphasize the artificial symmetry between states (represented as different color-coded areas on the world map) while ignoring inequalities in the actual life prospects of citizens who belong to radically different (yet formally equal) state units.

In practice, however, entitlement to membership "in this or that country" has profound consequences for individuals, not only in terms of their identity but also for other life circumstances; these include their prospects of survival and well-being, the level of human rights protections they can expect, the legal mobility that they can enjoy across borders, and the life opportunities that they can realistically anticipate. The data here is, as I have just mentioned, revealing: membership in affluent polities grants its holders better, longer, healthier, safer, and more resourceful lives. The wealth, standard of living, personal safety, quality of services, and range of opportunities, freedoms, and choices that are enjoyed by the vast majority of members of flourishing polities lie well beyond the wildest dreams of most members of poor polities, many of whom do not enjoy even the basic preconditions for a decent life.<sup>30</sup>

My intention is not to belabor the familiar argument that such extreme inequality of actual life chances is morally and ethically disturbing. Rather, the point here is more subtle: I wish to call attention to the crucial role played by the extant system for allocating entitlement to political membership, which is codified and enforced through birthright citizenship laws, in defining who is likely to gain access to what rights, voice, and opportunity. I further wish to destabilize the notion that such reliance is "natural" and, in this sense, apolitical. This latter notion serves to legitimize (and make invisible) the significant inter-generational transfers of wealth and power, as well as security and opportunity, which are currently maintained under the seal of the birthright regime of *jus soli* and *jus sanguinis* membership allocation.

In short, the general well-being, quality of services, safety, and scope of freedoms and opportunities enjoyed by those born in affluent polities

---

29 ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 31 (1992).

30 Defining the precise perimeters of the "preconditions for a decent life" is a matter in dispute among many an economist and philosopher. Without attempting to resolve this long-standing debate, I here follow Martha Nussbaum's definition in MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).

are all far greater, *ceteris paribus*, than the opportunities of those born in poor countries.<sup>31</sup> It is in this context that the relationship between *birthright citizenship* and *inequality of opportunity* comes to the fore. While extant citizenship laws do not create these disparities, they perpetuate and reify dramatically differentiated life prospects by reliance on morally arbitrary circumstances of birth, while at the same time camouflaging these crucial distributive consequences by appealing to the presumed "naturalness" of birth-based membership.

But there is nothing apolitical or neutral about these birthright regimes: they are constructed and enforced by law, advantaging those who have access to the inherited privilege of membership, while disadvantaging those who do not — just like regimes of automatic property transmission in the past preserved wealth and power in the hands of the few.<sup>32</sup>

### III. BIRTHRIGHT CITIZENSHIP AS INHERITED PROPERTY

We can now see membership boundaries in a more complex light: not only are these boundaries sustained for symbolic "identity" and "belonging" purposes (as the conventional argument holds), they also serve a crucial role in preserving restricted access to the community's accumulated wealth and power. The latter is jealously guarded at the juncture of transfer of "ownership" from the present generation of citizens to its progeny. In other words, birthright citizenship mechanisms provide cover through their presumed "naturalness" for what is essentially a major (and currently untaxed) property/estate transmission of wealth from one generation to another. Ours is a world of scarcity; when an affluent community systemically delimits access to membership and its derivative benefits on the basis of a strict heredity system that effectively resembles an "entail" structure of preserving privilege and advantage in the hands of the few, those who are excluded have reason to complain.

To frame citizenship in terms of inherited property is to expose the existing system of distribution to critical assessment. Modern theories of property

---

<sup>31</sup> Obviously, inequalities within political communities are of significance here too, and are connected (at least in part) to broader questions concerning the relationships between economic globalization and the limits of poverty alleviation within the domestic realm. For a thoughtful reflection on these complex questions, see PRANAB BARDHAN ET AL., *GLOBALIZATION AND EGALITARIAN REDISTRIBUTION* (2006).

<sup>32</sup> For a comprehensive discussion of this analogy, see Ayelet Shachar & Ran Hirschl, *Citizenship as Inherited Property*, 35 *POL. THEORY* (forthcoming 2007).

extend the concept beyond concrete and tangible objects (my car, your house) to refer to a host of more abstract entitlements (shares in a company, intellectual property in the form of patents and copyrights, professional licenses, genetic information, even folklore practices). Changes in human relations and social values constantly modify our understanding of what counts as protected property. Important questions of allocation come up when we begin to categorize certain relationships as legal property: *who* owns it, and on *what* basis? Ownership and possession of property affects people's livelihood, opportunities, and freedoms.<sup>33</sup> Conflicting interests concerning access, use, and control of property are therefore likely to arise, particularly with respect to things which are scarce relative to the demands that human desires are likely to place upon them.<sup>34</sup> It is here useful to rely on Jeremy Waldron's formulation that we understand property as offering a "system of rules governing access to and control of [scarce] resources."<sup>35</sup>

When applying these understandings of property to "citizenship," perhaps the most obvious parallel is that birthright (as well as naturalization) laws create precisely such a system of rules governing access to and control over scarce resources, that is, membership rights and their accompanying benefits. I label this access-defining feature of citizenship its *gate-keeping function*. This function is well-recognized in the literature on political membership: "Every modern state formally defines its citizenry, publicly identifying a set of persons as its members and residually designating all others as noncitizens. . . . Every state attaches certain rights and obligations to the status of citizenship."<sup>36</sup> Even in today's world of increased globalization and privatization, determining who shall be granted full membership in the polity still remains an important prerogative of the state, although unlike in the past, it is no longer seen as an impenetrable bastion of sovereignty.

While there is a lively discussion among citizenship theorists about the expansion of rights accorded to non-citizens (post-national citizenship), the

---

33 On property's connection to freedom of autonomy, see the classic elaborations by IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Cambridge Univ. Press 1996) (1797); G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* (T.M. Knox trans., Oxford Univ. Press 1967) (1820). For contemporary accounts, see Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964); Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982); Jeremy Waldron, *Property, Justification, and Need*, 6 *CAN. J.L. & JURISPRUDENCE* 185 (1993).

34 See Jeremy Waldron, *Property Law*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 5 (Dennis Patterson ed., 1996).

35 Jeremy Waldron, *What is Private Property?*, 5 *O.J.L.S.* 318 (1985).

36 See BRUBAKER, *supra* note 29, at 21.

embryonic development of regional citizenship (the EU is the prime case study in the literature), and the normative vision of global (or cosmopolitan) citizenship, it is all too easy to ignore the facts on the ground: gaining full membership status remains crucially important for defining our scope of opportunity, security, and sense of belonging. This observation, which highlights the continued importance of bounded citizenship in today's world, is fully compatible with acknowledging that at some point in the future, we might have a different system of dividing political and juridical authority over people and territory, a system that will not be so closely tied to state membership.<sup>37</sup> Even enthusiastic advocates of post-Westphalian citizenship such as Richard Falk concede that, at present, "[d]espite globalization in its various impacts, the individual overwhelmingly continues to be caught in a statist web of rights, duties, and identities."<sup>38</sup> For instance, international travel still depends on passports issued by sovereign states, "borders are exclusively managed by governmental authority; and an abuse of rights in a foreign country is almost always dealt with by seeking help from one's country of citizenship." Even "[m]igration, to the extent that it is 'legal,' rests on [bounded] notions of territorial sovereignty."<sup>39</sup> In short, while recent years have witnessed a surge in competing and overlapping sources of political authority (both "above" and "below" the national level), when it comes to citizenship, states have retained a relatively strong hold over the regulation of their membership boundaries.<sup>40</sup> This observation holds true even if we take up the challenge of confronting the most difficult case that seems to contradict our focus on bounded membership, namely, the introduction of "European citizenship." Here, too, a closer look reveals a surprising fact: access to membership at the regional or supranational (EU) level is exclusively defined at the member-*state* level.<sup>41</sup>

---

37 For an optimistic vision of this transformation of citizenship, see Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447 (2000).

38 See Richard Falk, *An Emergent Matrix of Citizenship: Complex, Uneven, and Fluid*, in *GLOBAL CITIZENSHIP: A CRITICAL INTRODUCTION* 21 (Nigel Dower & John Williams eds., 2002).

39 *Id.* at 20.

40 On the conception of citizenship at the EU level, see Rainer Bauböck, *Why European Citizenship? Normative Approaches to Supranational Union*, 8 *THEORETICAL INQUIRIES L.* 453 (2007). On the broader debate over whether the state has "lost" or "retained" control over its borders in the age of globalization, see, for example, SASKIA SASSEN, *LOSING CONTROL?* (1996); Virginie Guiradon & Gallya Lahav, *A Reappraisal of the State Sovereignty Debate: The Case of Migration Control*, 33 *COMP. POL. STUD.* 163 (2000).

41 See Consolidated Version of the Treaty Establishing the European Community, art. 17, 2002 O.J. (C 325) 33: "Citizenship of the Union is hereby established. Every

Returning to our analogy to property, when we explore the realm of citizenship, we soon recognize that what each citizen holds is not a private entitlement to a tangible thing, but a *relationship* to other members and to a particular (usually a national) government that creates enforceable rights and duties. From the perspective of each member of the polity, re-conceptualizing his or her entitlement to citizenship as a complex type of "property" fits well within the definition of *new property*, a phrase famously coined by Charles Reich, referring to public law entitlements as serving the traditional private law purposes of ensuring security and independence to citizens under market-based economies.<sup>42</sup> Unlike traditional forms of wealth, which were held as private property, valuables associated with the public title of citizenship derive specifically from holding an entitlement-status that is dispensed by the state, an entitlement that bestows a host of exclusive goods and benefits to its beholders.

Although the value of citizenship is communally generated, the entitlement conferred upon each member is individually held. This combination of individual and collective aspects is part of what makes citizenship such a complex type of property, with "priceless benefits," as the U.S. Supreme Court memorably put it, adding that "it would be difficult to exaggerate its value and importance."<sup>43</sup> On this account, the state operates as a trustee for these citizenship titles, with their critical enabling implications on the life opportunities of its individual members.<sup>44</sup> Each insider differs from outsiders by virtue of his or her share in the protection conferred only on those counted as citizens, and their right not to be deprived of the valuable good of membership itself.<sup>45</sup> For each member, citizenship further entails a share of "ownership" and governance of that polity's communal and pooled resources. As such, citizens stand in a special relation to each other and to the collective that they govern.

Alas, for the vast majority of the world's population, gaining access to ownership of membership titles in well-off polities is beyond reach: for these

---

person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship."

42 See Reich, *supra* note 33. Reich referred to governmental largesse, such as welfare entitlements, jobs, and subsidies. He also used the example of occupational licenses as a form of new property, which creates enhanced earning potential for its holder.

43 See *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

44 On the distinction between "private" and "communal" property, see, for example, J.W. Harris, *Private and Non-Private Property: What is the Difference?*, 111 L.Q. 421 (1995); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163 (1999).

45 See Harris, *supra* note 44.

entitlements are transmitted almost exclusively by birthright, sculpting the body politic primarily through intergenerational transmissions. It is clearly not open to anyone who voluntarily consents to membership, or is in dire need of its associated benefits.<sup>46</sup> Once this broader perspective is taken into account, the existing correlation between inherited citizenship and general well-being is impossible to ignore: the quality of services, safety, and scope of freedoms and opportunities enjoyed by those born in affluent polities are all far greater, *ceteris paribus*, than the opportunities of those born in poorer or less stable countries. These dramatically differentiated life prospects should disturb not only egalitarians, but also free-marketers who believe in rewarding effort and distributing opportunity according to merit, rather than on the basis of station of birth. This problem of unequal allocation and transfer, which has gained plenty of attention in the realm of property, is, as I have shown here, far more extreme in the realm of birthright entitlement to citizenship.

Remarkably, in spite of the conceptual affinity between the intergenerational transfer of property and birthright citizenship, and regardless of the thousands of pages devoted to debating the justifications for inheritance in property theory, there have been few, if any, scholarly attempts to scrutinize the justifications for automatic inheritance of citizenship by birth. Political and legal theory's silence with respect to the intergenerational transfer of citizenship by the random location or station of birth becomes all the more astonishing considering that the incredible gaps in life opportunities created and perpetuated by extant *jus soli* and *jus sanguinis* regimes are far deeper and infinitely more multifaceted than the material inequalities perpetuated

---

<sup>46</sup> At present, the admission of immigrants in most liberal-democratic countries is based on a combination of need (as in the case of asylum seekers) and choice (for most employment-based immigrants), but it also relies heavily on family ties (in the various "preference" categories in the U.S., or family sponsorship admission in Canada). Even in self-defined immigrant-nations, the percentage of the foreign-born population has never much exceeded ten to twenty percent of the total population — and these figures refer to the crests of high waves of international migration. We are currently in the midst of such a historical crest. Today's foreign-born population in the United States accounts for 12.3% of the population, and in Canada for 19.3%. Of these "newcomers," most are in fact *long-term* residents who have already naturalized in their adoptive countries. A recent OECD study found that the percentage of non-citizens (i.e., people who have not naturalized) is lower in each of these countries, estimated at 6.6 percent of the total population in the United States and 5.3 percent in Canada. See OECD, *Counting Immigrants and Expatriates in OECD Countries: A New Perspective*, in *TRENDS IN INTERNATIONAL MIGRATION — ANNUAL REPORT, 2004 EDITION* 120 (2004).

through intergenerational transfer of fungible wealth. By drawing the analogy of inherited citizenship to intergenerational transfer of wealth and property, a new space is opened up for the development of just such debate.

If we were to look for a pattern that closely resembles the structure of birthright transmission of entitlement, we would find it — somewhat surprisingly — in the inheritance regimes of property that date back to medieval England.<sup>47</sup> There, we find the institution of the *fee tail* (or "entail"). In the language of the early common law, fee tail involved a landed estate that automatically descended from A "to B and the heirs of his body" and continued so passing through the descending line in order to keep the landed estates squarely in the hands of a small echelon of powerful and wealthy families.<sup>48</sup> Whereas the archaic institution of hereditary transfer of entailed estates has been discredited in the realm of property, in the most unlikely of places, we still find a structure that resembles it: that is, in the conferral of citizenship. Inherited entitlement to citizenship not only remains with us today; it is by far the most important venue through which individuals are "sorted" into different political communities. Birthright principles strictly regulate the "entail" of political membership for the vast majority of the global population. They secure the transmission of membership entitlement to a limited group of beneficiaries — those who gain access to the property on the basis of bloodline or birthplace. These beneficiaries, in turn, gain the right to pass it on to the next generation by inheritance, and these children will then pass it on to their children, and so forth: this structure effectively recreates the "fee tail" in the transmission of citizenship.<sup>49</sup>

---

<sup>47</sup> Importantly, I am *not* relying here on the historical precedent of treating ownership of real property as a precondition for full membership in the polity. As is well recorded, such reliance has worked to drastically restrict access to citizenship, excluding the vast majority of the population from full inclusion as equals. My focus is different: I am exploring the conceptual and functional analogies between the regimes of protected property and bounded citizenship. On the troubling historical record of exclusion, see, for example, ROGERS SMITH, *CIVIC IDEALS* (1997); DEREK HEATHER, *A BRIEF HISTORY OF CITIZENSHIP* (2004); IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* (1998).

<sup>48</sup> On the deeply gendered aspects of these intergenerational transfers, see, for example, NANCY E. WRIGHT, *WOMEN, PROPERTY, AND THE LETTERS OF THE LAW IN EARLY MODERN ENGLAND* (2004).

<sup>49</sup> This perpetual structure of hereditary transfer also appears to violate the common-law rule against "perpetuities," which has been in effect for centuries, dating back to at least the 1682 decision in the *Duke of Norfolk's Case*, (1683) 22 Eng. Rep. 931 (Ch.). See also UNIF. STAT. R. AGAINST PERPETUITIES § 1(a), 8B U.L.A. 223 (2001).

To recognize the surprising similarities in form and function between birthright citizenship and inherited property of this particular kind is to identify a striking exception to the modern trend *away* from ascribed statuses. This birthright-transmission mechanism, which is still exercised today, cannot be dismissed as a mere historical accident, given that the question of legitimizing political authority and property is central to the liberal, democratic, and civic-republican intellectual traditions. This only makes the link that persists between *political membership and station of birth* — a connection that has been both ignored and taken for granted — ever more puzzling and in urgent demand of a coherent explanation.

#### IV. BIRTHRIGHT CITIZENSHIP AND WEALTH PRESERVATION

One possible explanation, which grows out of the analysis offered here, is that birthright citizenship remains in operation — despite its tension with the core tenets of the leading political theories of our times — at least in part because it permits the perpetuation of *unequal* "estates" in the descending lines of different political communities. Here, the presumably "natural" reliance on birthright entitlement contributes to camouflaging the dramatically unequal opportunity implications of this allocation system.

Whereas the delineation of enforceable membership boundaries (citizenship's gate-keeping function) has been challenged in recent years as an offense to the universality of our shared humanity, it is surprising that both proponents and opponents of bounded membership have paid scant attention to the crucial "wealth-preserving" aspect of birthright citizenship — the dramatically differential opportunity structures that individuals are entitled to, based on the allocation of political membership according to predetermined circumstances of birth. This is a blind spot — if not the "black hole" — of citizenship theory. Unlike the critical accounts of entailed property regimes, scholars of citizenship have to date failed to turn their gaze to the largely analogous form of strict intergenerational transfer that still persists in the realm of birthright transmission of membership entitlement. Such an inquiry is ever more urgent given that, in a world like our own, a transmission mechanism of this kind has particularly pernicious influences that interfere with the equality of starting points.

Thinking of citizenship as inherited property thus offers a core insight: it asks us to take account of the enormous impact of the extant legal practice of allocating political membership on the basis of birthright, forcing us to seek justification for such entitlement in the first place and highlighting the urgent need to address its resultant inequities, particularly

the way in which it locks in structures of privilege worldwide. Even if, for the sake of argument, we ignore the complex historical question of whether past generations in these polities have responsibly and justly earned their disproportionate economic and political power (the "unclean hands" objection), it is difficult to find a strong independent justification for establishing a connection between birthright accidents and citizenship entitlement even in contemporary property theories that generally *permit* a degree of unequal accumulation of power and wealth.

What then are we to make of this observation? Instead of recommending the re-distribution of the good of citizenship itself, at the potential cost of losing all the attendant value, the re-conceptualization of citizenship as inherited property allows us to begin to criticize the massively unequal consequences of the current system of birthright transmission of membership/entitlement. In this alternative account, the weight given by extant citizenship laws to circumstances of birth is problematic not only because of its arbitrariness but also because of the *lack* of social institutions — such as inheritance taxation of "birthright privilege" — designed to mitigate the unfair consequences of reliance on ascriptive criteria in the acquisition of citizenship.<sup>50</sup> In other words, the concept of citizenship-as-inherited-property compels us to see the need to amend the present system of heredity entitlement so as to include justice-based restrictions on its contribution to the unequal distribution of voice and opportunity on a global scale.<sup>51</sup>

While there is a long-standing tradition that urges wealthy nations to contribute to the welfare of those that are less fortunate, the significance of the citizenship-as-inherited-property analogy lies in developing an additional source for grounding such commitments: namely, treating birthright citizenship transfers as a complex form of unequal transmission of opportunity, which justifies "taxing" the windfall recipients to counteract the underserved privilege they have inherited under the current birth-based membership regime. Understanding the "worth" of citizenship in an unequal world, along the lines developed in this Article, offers yet another advantage: it permits shifting these commitments from the realm of charity to that of obligation. For it is only when we view citizenship as an *arbitrary* advantage obtained through the accident of birth, as codified in extant citizenship laws,

---

50 This proposal is developed in detail in Shachar & Hirschl, *supra* note 32.

51 For an initial exploration of this idea, see Ayelet Shachar, *Birthright Citizenship as Inherited Property: A Critical Inquiry*, in IDENTITIES, AFFILIATIONS, AND ALLEGIANCES 257 (Seyla Benhabib & Ian Shapiro eds., 2007).

that it makes sense to view the demand that recipients contribute toward the welfare of those excluded from the immense opportunities that attach to inherited membership in terms of obligation.

In re-conceiving citizenship as a special kind of inherited "property," the distributive implications of *jus soli* and *jus sanguinis* citizenship can no longer hide behind the "naturalizing" veil of birthright. Conceived as a scarce good subject to strict intergenerational property transmission, the more quantifiable benefits associated with inherited citizenship must become subject to redistributive considerations that exact a symbolic and actual "price" upon the transfer of unequal opportunity in allocating political membership according to archaic principles of birthplace and bloodline.<sup>52</sup>

---

52 For further elaboration of the deep-seated problems of birthright citizenship as well as possible remedies that address and redress some of these injustices, see AYELET SHACHAR, *CITIZENSHIP AS INHERITED PROPERTY: THE NEW WORLD OF BOUNDED COMMUNITIES* (forthcoming 2007).