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**CHILDREN OF A LESSER STATE:  
SUSTAINING GLOBAL INEQUALITY THROUGH  
CITIZENSHIP LAWS**

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# CHILDREN OF A LESSER STATE: SUSTAINING GLOBAL INEQUALITY THROUGH CITIZENSHIP LAWS

Ayelet Shachar\*

## I. INTRODUCTION

Imagine a world where there are only five continents. Each represents a separate political entity. Also assume that in this alternative world, there is zero human mobility across continent-states. There are also no class, ethnic, national, cultural, or social conflicts in this world, and nothing to be gained by tampering with the existing continent-state structures. In short, there is no motivation for change or migration in this fully stable world system. Each continent-state operates as an autonomous unit, where people live, love, work, and eventually, pass away. Assuming there are no natural disasters, children and grandchildren are likely to pursue the same path as their progenitors. In such a world, it does not matter to which continent-unit a child belongs, because she enjoys equal opportunities regardless of the specific entity into which she happened to be born.

When we relax these assumptions to fit them more closely to the reality of our own world, with its omnipresent social, economic, and national struggles – a world where political instability, human mobility, and inequality among individuals and nations continue to persist – things begin to look quite different. In our world, membership in a *particular* state (with its specific level of wealth, degree of stability, and record on human rights) has a significant impact on the well-being of children, as do government decisions that shape marriage and divorce law, welfare entitlement, public education, health care, environmental protection, investment in infrastructure, national security, and the like. But perhaps the most dramatic consequences for children’s lifelong prospects follow from the basic determination that any political community must make: defining *which* children that polity views and protects as its “own.”

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According to the current governing norms of international law, countries are free to define the outer limit of the circle of their citizens.<sup>1</sup> The right to define who is “inside” and who is “outside” the political community is rooted in the concept of sovereignty: the exclusive power held by a legitimate government to exercise its authority over a bounded territory and the permanent population that resides on that bounded territory.<sup>2</sup> Indeed, distribution of what Michael Walzer calls “the most important good” can be seen as the key expression of the power of sovereignty: how we distribute membership in our human communities.<sup>3</sup> At present, different states have different rules governing the entry and stay of those defined as “aliens.” However, most countries make determinations concerning who is automatically included as a citizen by creating a formal, legal connection between *entitlement to membership* and *circumstances of birth*, thus inviting some children into a world of immense opportunity and condemning others to a life with little hope.

Specifically, two legal principles govern the automatic attribution of citizenship to children: birth to certain parents (*jus sanguinis*), or birth in a certain territory (*jus soli*).<sup>4</sup> Both the *jus soli* and the *jus sanguinis* principles rely on (and sustain) a prior conception of closure and exclusivity; if everyone had access to the benefits of full membership in any polity of their choice, then there would be no need to formally distinguish “insiders” from “outsiders” since both would be able to enjoy the benefits of citizenship.<sup>5</sup>

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<sup>1</sup> Art. I of the 1930 Hague Convention on Certain Questions Relating to Conflict of Nationality Laws, Apr. 12, 1930, art. I, 178-179 L.N.T.S. 90, 99, provides that “[i]t is for each State to determine under its own law who are its nationals.” For further discussion, see William Rogers Brubaker, “Citizenship and Naturalization: Policies and Politics,” in *Immigration and the Politics of Citizenship in Europe and North America*, ed. William Rogers Brubaker (Lanham: University Press of America, 1989), pp. 99-127.

<sup>2</sup> This definition is an adaptation of the provisions encoded in the 1933 Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. I, 49 Stat. 3097, T.S. No. 881.

<sup>3</sup> See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), p. 29.

<sup>4</sup> Most countries use a combination of these two principles in assigning political membership by virtue of birthright.

<sup>5</sup> While international law and regional covenants may force governments to respect a baseline of fundamental negative rights towards *all* persons within their jurisdiction (for example, prohibition against torture), as a formal status, citizenship creates a host of positive rights and obligations that are enforceable first and foremost between the state and its members. For example, only citizens have an unqualified right

While a growing body of scholarship describes the different principles involved whenever immigrant populations apply for political membership, less attention has been paid to principles of *jus soli* and *jus sanguinis*, which attribute citizenship at birth. There have also been scholarly efforts to correlate different citizenship regimes with different understandings of national identities (the “civic-ethnic” divide), yet there is almost no literature dealing with the understanding of *birthright identities*. This has been ignored in spite of it being the principle that underpins the decision, for the vast majority of the world’s population, as to who is entitled to rights, opportunities, and wealth. What is missing from the current literature is a critical evaluation of how existing birthright rules contribute to defining and solidifying political membership boundaries between peoples, translating them into seemingly invisible (and thus uncontroversial) mechanisms for securing the property-like entitlement of citizenship and its accompanying benefits to “natural-born” members – at the expense of excluding all non-right holders from claiming access to equivalent entitlements and benefits. National affiliations, guaranteed or denied on the basis of considerations such as ancestral pedigree or the brute and random luck of birthplace, should no longer be taken for granted, however.<sup>6</sup>

In this article, I will risk opening a Pandora’s Box by scrutinizing the connection between birth and political membership in a given state. We reject heredity as a determining factor in almost any other admission criteria (such as those concerning competitive job offers or selective university programs). However, family ties and birthright entitlements still dominate our imagination and our laws when it comes to articulating principles for allotting membership in a state. It is particularly important to re-examine rules in current citizenship laws that govern membership attribution in light of the growing realization that in spite of economic predictions that a move towards reducing national barriers (to trade and commerce, for example) would guarantee a larger slice of the piece to all (including members of the least well-off countries), the

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to enter, and remain in, their home country – and this is the case even in polities that extend various civil, economic, and political rights to their non-citizen residents.

<sup>6</sup> The paucity of scholarship addressing this question may partly be explained by the fact that debates over the question of “who belongs” usually arise in the context of disagreements about immigration, not about citizenship.

distribution of such global gains is still extraordinarily unequal.<sup>7</sup> If greater disparities in the “wealth of nations” are indeed the trend of the foreseeable future, then access to the rights, goods, opportunities, and resources offered to individuals on the basis of their national political membership may become more, not less, significant in our increasingly “global” world.<sup>8</sup>

My motivation in pursuing this discussion is not to call into question the rights and benefits that children (including those born to undocumented migrants) currently enjoy in many democratic countries. If anything, I would urge an expansion of these entitlements. But the desire to ensure equality among all children who reside *within* the same polity still does not relieve us of the moral responsibility to address the basic question of why *these* children deserve such entitlements, whereas others are deprived of them. In posing these questions, I am also not challenging the crucially important role that most families perform in creating a web of relationships and a context of meaning for their members. This context is often more important than any formal, legal connection between the child and the state. Instead, my purpose is to show how membership status

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<sup>7</sup> The data on this issue is too vast to cite. But some figures are pertinent: the aggregate average income in the wealthiest twenty countries is more than 37 times greater than the average income in the world’s twenty poorest countries – a gap that has doubled in the past forty years. Of the world’s 6 billion people, almost half (2.8 billion) live on less than \$2 a day, and a fifth (1.2 billion) live on less than \$1 a day. In rich countries, less than one in a hundred children die before the age of five, while in the poorest countries, as many as a fifth of children do not live to that age. Varying infant mortality rates across the world also correlate to income disparities (the ratio of infant mortality rate per 1,000 live births is approximately 1:15 between the richest to the poorest countries). In rich countries, less than 5% of all children under five are malnourished. In poor countries, on the other hand, as many as 50% are malnourished. See The World Bank, *The World Development Report 2000/2001, Attacking Poverty: Opportunity, Empowerment, and Security*, pp. 3-4, available at <<http://www.worldbank.org/poverty/wdrpoverty/report/overview.pdf>>

<sup>8</sup> Clearly, even optimal citizenship and immigration policies would not serve as a panacea for these much broader issues of economic inequality. Economists tend to stress the need to develop appropriate forms of international cooperation, stronger and more effective forms of foreign and developmental aid, and policies promoting high levels of economic growth as important potential substitutes for immigration, by redistributing resources and opportunities to individuals across national lines. For a lucid analysis of the relationship between national and global welfare perspectives on immigration policy, see Michael J. Trebilcock, “The Case for a Liberal Immigration Policy,” in *Justice in Immigration*, ed. Warren F. Schwartz (Cambridge: Cambridge University Press, 1995), pp. 219-246. While the salience of economic analysis in the immigration debate is well established, it still does not resolve the basic legal and moral questions surrounding birthright citizenship: why do some people “naturally” belong to the developed countries of the world, while others who may equally wish to hold such privileged status are not entitled to it by reason of birthplace or genetic inheritance?



(or lack thereof) can exert an impact on a child's life chances, particularly in terms of citizenship as an *inherited entitlement*.

The time is ripe for us to reconsider the justifications for allotting citizenship (the basic “right to have rights”<sup>9</sup>) according to birthright, because such attribution has served too long as a veil – shielding questions about the distribution of power and wealth from the realm of *demos* definition. I hope to invoke such a discussion by recognizing the property-like qualities of citizenship status, which secures the ability of its holders to enjoy a share in specific rights, protections, and wealth-creating assets held in common by those who count as members, while excluding all others (i.e., those deemed as “non-citizens” by the state's membership rules) from such control-powers and use-privileges.

My aim throughout this article, then, is to destabilize and “de-naturalize” the entrenched normative concept (and legal practice) of allotting full membership in democratic polities on the basis of birthright ascription, as manifested in existing citizenship laws. The discussion of these highly sensitive and topical issues proceeds in three main steps. First, I introduce the basic principles of birthright citizenship attribution: *jus soli* and *jus sanguinis*. I elucidate their basic governing rules, as well as the problems of over- and under-inclusiveness that each principle engenders, drawing on a set of examples taken from recent American, Canadian, German, and Israeli case law and legislation. This is followed by a brief exploration of the rules governing naturalization. Second, I explore the prevailing assumption that “civic” and “ethnic” nations follow fundamentally distinct rules and principles in allocating membership to their citizens. If this were the case, then we could reasonably expect to find that civic nations allot membership in their polities based on substantively different criteria to those of ethnic nations. However, in practice, the supposed distinction between the principle of *jus soli* (generally associated with civic nationalism) and *jus sanguinis* (often described as a manifestation of ethnic nationalism) is not borne out. Like their ethnic counterparts, civic polities tend to reserve a privileged place for the criteria of blood and soil – not consent and choice – in attributing membership to the vast majority of their permanent members.

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<sup>9</sup> *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren J., dissenting).

Third, I examine critically prevalent defenses of the *jus soli* and *jus sanguinis* principles, including arguments premised on democratic self-governance, administrative convenience, and respect for constitutive relationships and distinct cultural identities. While we might want to retain some of the insights drawn from these approaches, they fail to address the detrimental effects that current membership rules impose on the life chances of children (across national borderlines) “because of birthright” – involuntary circumstances that none of us control. Ultimately, extant theories of law and morality fail to provide justifiable grounds for upholding apportionment criteria of membership that currently limit the opportunities open to the vast majority of the world’s population simply on the basis of considerations as arbitrary as ancestry or birthplace.

In light of my critique of prevalent *jus soli* and *jus sanguinis* citizenship rules, the concluding section of this article offers a more radical, alternative understanding of the persistence of birthright citizenship principles. It reconceptualizes membership status in affluent political communities as a complex form of property right that perpetuates not only privilege but also access to a disproportionate accumulation of wealth and opportunity, while at the time insulating these important distributive decisions (through reliance on birthright) from considerations of justice and equality.

## II. HOW DOES A CHILD BECOME A MEMBER OF A POLITICAL COMMUNITY

As stated above, two dominant legal principles govern citizenship-attribution rules in the world today: *jus soli* and *jus sanguinis*.

### A. Jus Soli

This principle, which originates in the common law tradition, implies a *territorial* understanding of birthright citizenship. It recognizes the right of each person born within the physical jurisdiction of a given state to acquire full and equal membership of that polity. The present-day *jus soli* principle finds its basis in the feudal system of medieval England, where “ligeance” or “true and faithful obedience” to the Sovereign was owed by a subject from birth.<sup>10</sup> In the landmark *Clavin’s case*, decided in 1608, Lord Coke

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<sup>10</sup>See Michael Robert W. Houston, “Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children born of Illegal Immigrants,” Vol. 33 *Vanderbilt Journal of Transnational Law* (2000), pp. 693-738, at 698-701.

employed the concept of ligeance to explain the mutual relationship that is created for life between the monarch and all subjects born in the king's dominion.<sup>11</sup> In its modern variant, *jus soli* no longer refers to a connection between a monarch and his subjects. Instead, it refers to the political relationship between governments and their citizens. Nevertheless, this principle continues to emphasize *place of birth* as the definitive criterion for allocating or withholding birthright membership. In its purest form, *jus soli* is blind to any considerations *but* birthplace. Accordingly, any child born under the jurisdiction of a given polity must automatically acquire citizenship – regardless of the circumstances of the parents' entry into the country, their legal (or illegal) residence, the child's length of stay in the state, effective ties to the polity, and so on. The only relevant factor is the question whether the child was born *within* the territory over which the state maintains (or in certain cases has maintained or wishes to extend) its sovereignty.<sup>12</sup>

Assuming that the rationale for attributing citizenship on the basis of territoriality is to serve as a proxy for those who actually live in a given country, *jus soli* may prove to be over-inclusive. We repeatedly find in American literature that argues against the pure application of *jus soli* the example of a Mexican woman who crosses the border illegally just as she is about to give birth, in order to ensure that her child is born on American soil. In this way, she secures for her child the advantages of being a U.S. citizen.<sup>13</sup> The

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<sup>11</sup> *Calvin's Case*, 77 Eng. Rep. 377 (K.B. 1608). A detailed analysis of this case is offered by Polly J. Price, "Natural Law and Birthright Citizenship in *Calvin's Case*," Vol. 9 *Yale Journal of Law and the Humanities* (1997), pp. 73-145.

<sup>12</sup> See Patrick Weil, "Access to Citizenship: A Comparison of Twenty-Five Nationality Laws," in *Citizenship Today: Global Perspectives and Practices*, ed., T. Alexander Aleinikoff and Douglas Klusmeyer (Washington DC: Brookings Institution Press, 2001), pp. 17-35 [hereafter Weil, "Comparison of Nationality Laws"].

<sup>13</sup> As Carens points out, this example is often given by those who wish to *restrict* the application of the territorial birthright principle in the United States to children of citizens and legal residents aliens (thus excluding children born to undocumented migrants from automatic entitlement to American citizenship). See Joseph H. Carens "Who Belongs? Theoretical and Legal Questions about Birthright Citizenship in the United States," Vol. 37 *University of Toronto Law Journal* (1987), pp. 413-443, at 413 [hereafter Carens, "Who Belongs"]. Similar pressures emerged in Canada, and were actually enforced in the United Kingdom, when the British Nationality Act, 1981 (Eng.) changed the previous common law rule (where the place of birth was the sole determination in citizenship) to a birthright principle that now takes into consideration the parents' residency status. For further discussion of British nationality law, see Ann Dummett and Andrew Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (London: Weidenfeld & Nicolson, 1990).

mother might later return to Mexico with her newborn child, but that does not change the fact that that child is *already* entitled to full membership in the U.S. polity (by virtue of the U.S. Constitution Citizenship Clause).<sup>14</sup> Criteria such as residency, need, consent, or effective ties to the polity are not part of the American *jus soli* principle. Instead, the arbitrary fact of birthplace is elevated to an *absolute norm*: if the accident of birth occurs within the territory, then that child is one of us; if not, she is a total stranger, an outsider, a non-citizen. Under these conditions, “[w]ho could blame the Mexican mothers for what they do? ... [T]hey seek to improve the life chances of their children,” often at considerable cost and risk to themselves.<sup>15</sup>

From a global welfare perspective, one which weights equally the capacities and well-being of all persons (whatever country they reside in), it could even be suggested that this “abuse” of the American *jus soli* principle by the Mexican mother is in fact no abuse at all.<sup>16</sup> Such actions improve the odds that at least some Mexican children might be able to enjoy greater access to resources and opportunities (in employment, education, and the like) that would otherwise be withheld from them simply because they were born on the “wrong” side of the border.<sup>17</sup>

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<sup>14</sup> This provides that “[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.” U.S. CONST. amend. XIV, § 1.

<sup>15</sup> See Carens, “Who Belongs,” *supra* note 13, at 413. Carens concludes that the ascriptive principle is morally defensible, as long as it is accompanied by adequate legal measures to naturalize long-term residents (whether or not they entered the country legally in the first place). Carens seems to be more concerned with the question of equalizing the status of non-members who are already resident within the host society, than with scrutinizing the ethical and legal assumptions sustaining a global regime of birthright ascriptions of citizenship, as I hope to do in this article.

<sup>16</sup> For defense of the argument that we need to move toward a global perspective on the social welfare function in evaluating immigration policy, see Gillian K. Hadfield, “Just Borders: Normative Economics and Immigration Law,” in *Justice in Immigration*, ed. Warren J. Schwartz (Cambridge: Cambridge University Press, 1995), pp. 201-211. Hadfield, like Carens, focuses on immigration policy, not on citizenship law *per se*.

<sup>17</sup> While the NAFTA could have expanded the scope of citizenship rights by providing a common citizenship to the residents of Canada, the U.S. and Mexico, it still remains primarily a trade agreement and not a common citizenship project. See Christopher J. Cassise, “The European Union v. the United States under the NAFTA: A Comparative Analysis of the Free Movement of Persons Within the Regions,” 46 *Syracuse Law Review* 1343 (1996).

At present, however, domestic citizenship laws are clearly not designed to correspond with a global welfare matrix. Rather, a main function of these laws is to create a wall that clearly marks off those who are members from those who are not. These distinctions are usually articulated as a means to protect and enhance the interests of insiders, irrespective of the effects of the state's citizenship attribution rules on those deemed "outsiders." Canadian immigration law, for example, explicitly states that determinations concerning who belongs are "designed and administered in such a manner as to promote the domestic and international interests of Canada"<sup>18</sup> – not in a manner to promote the well-being of the world's population. Canada is by no means alone in holding this perspective, which is the *sine qua non* of the existing global system of state-based citizenship laws.

As well as the problem of over-inclusiveness demonstrated by the example of the Mexican mother and child, *jus soli* may also lead to under-inclusiveness. For example, citizenship is withheld from "alien" children raised in the United States by American families if they happen to be born outside the territory. The most glaring illustration of this problem occurs in the case of foreign-born adoptees who are brought into this country by their adoptive American parents only days or weeks after their birth. Because of the United States territorial-based rule of citizenship attribution, foreign-born adopted children are not automatically entitled to citizenship – even if they arrive in their earliest days of infancy and subsequently spend the rest of their lives in the United States. Even for children who gain lawful residency status ("green card" holders), the lack of full membership status has potentially detrimental effects, ranging from exclusion from certain educational loans or federal employment opportunities, to the threat of expulsion from the country.<sup>19</sup>

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<sup>18</sup> See Immigration Act, 1976-77, R.S.C., ch. I-2, § 3 (1985) (Can.).

<sup>19</sup> Until 1996, § 244(a)(1) of the Immigration and Nationality Act (INA) allowed aliens who lived in the United States continuously for at least seven years, with or without documents, to obtain permanent residency through a form of relief called "Suspension of Deportation." The standard for granting suspension was a high one, yet it was not impossible to meet, particularly for young adults who came to the United States as children and had no other way to legalize their status. Immigration judges, and even INS attorneys, were often sympathetic to the plight of individuals who came to the United States at a young age, raised essentially as Americans, and then subjected to being deported to countries of which they had no memory or experience. See Jonathan Montag, *Involuntary Migrants Face Harsh Consequences of Immigration Law Reforms* < <http://www.ilw.com/cgi-shl/pr/pl>>. The 1996 immigration reform laws

Reliance on a pure *jus soli* rule therefore carries its own exclusionary and punitive elements. To overcome some of the more troubling effects of the territoriality principle, the United States Congress recently enacted the Child Citizenship Act of 2000.<sup>20</sup> The new Act confers U.S. citizenship automatically and retroactively on certain foreign-born children adopted by citizens of the United States. In other words, the United States now attributes “birthright” citizenship to foreign-born adopted children *as if* they were born to American parents. This creates a legal fiction that erases the distinction between biological and adopted children by introducing a parentage component (of *jus sanguinis*) into the otherwise *jus-soli*-dominated regime of citizenship attribution professed by the United States.

### B. Jus Sanguinis

Complex demarcation patterns also inform the second principle of birthright attribution of citizenship, *jus sanguinis*. Unlike *jus soli*, however, *jus sanguinis* does not elevate the first fact of birthplace into a guiding constitutional principle. Instead, *jus sanguinis* confers political membership on the basis of *parentage* and *family links*: it automatically defines children of current members of the polity as the future citizens of that community. Whereas *jus soli* is traditionally followed in most common-law countries, *jus sanguinis* is the main principle associated with the citizenship laws of continental European countries.

The modern inception of *jus sanguinis* came with the post-French Revolution Civil Code of 1804, which broke away from the territoriality principle. The French Civil Code held that *as citizens*, parents (specifically, fathers) had the right to transfer their status of political membership to their offspring at birth, regardless of whether the child was born in France or abroad.<sup>21</sup> During the Napoleonic period, the concept of attributing

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changed this legal situation, however, by diminishing these exemptions. Specifically, the “Suspension of Deportation” was replaced with a new form of relief, entitled “Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents,” found in INA § 240A(b), 8 U.S.C. § 1229b (1997) which set stricter provisions that came into force in 1996.

<sup>20</sup> See Child Citizenship Act of 2000, H.R. 2883, Public Law 106-395, amending §320 of the INA, signed into law on October 30, 2000 (effective date February 27, 2001).

<sup>21</sup> See Weil, “Comparison of Nationality Laws,” *supra* note 12, at 19.

membership on the basis of descent was considered fresh and radically egalitarian. As Patrick Weil explains, the *jus sanguinis* principle broke away from the feudal tradition of *jus soli*, which linked subjects to a particular land (and to the lord who held the land).<sup>22</sup> In contrast, *jus sanguinis* linked citizens to each other (and to their joined political enterprise) through membership in the state. Together, they constituted “a class of persons enjoying common rights, bounded by common obligations, formally equal before the law.”<sup>23</sup> Through codification and imitation of this French reform, the nineteenth century saw the adoption of the *jus sanguinis* principle by many other European countries, including Austria, Belgium, Spain, Prussia, Italy, Russia, the Netherlands, Norway, and Sweden.<sup>24</sup> European colonial expansion further spread the *jus sanguinis* principle to countries outside Europe.<sup>25</sup>

Today, however, *jus sanguinis* has exclusionary overtones often associated with ethnic and national favoritism. It has been argued that *jus sanguinis* serves as a camouflage for discrimination against certain sections of the population by denying them full access to the rights and benefits of citizenship due to a criterion they cannot choose or change – their ancestry. Under such conditions, *jus sanguinis* constitutes an unjustifiable system of legalized ascriptive hierarchy. The under-inclusiveness feature of *jus sanguinis*, i.e., the situation where not all persons residing within a territory are eligible to become members because of their ancestral heritage, has led several scholars to associate this membership attribution rule with an ethnocultural perception of citizenship.<sup>26</sup>

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<sup>22</sup> *Id.* at 19.

<sup>23</sup> See Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, MA: Harvard University Press, 1992), p. 39.

<sup>24</sup> See Weil, “Comparison of Nationality Laws,” *supra* note 12, at 21.

<sup>25</sup> Various countries outside Europe sought expert legislative advice from leading continental countries. For example, this process of legal imitation is considered one of the main sources for Japan’s current reliance on the principle of *jus sanguinis*. See Chickako Kashiwazaki, “Citizenship in Japan: Legal Practice and Contemporary Development,” in *From Migrants to Citizens: Membership in a Changing World*, ed. T. Alexander Aleinikoff and Douglas Klusmeyer (Washington DC: Brookings Institution Press, 2000), pp. 434-471, at 437-439.

<sup>26</sup> This problematic aspect of *jus sanguinis* has manifested itself, for instance, in the citizenship laws adopted by the post-communist states of Estonia and Latvia in 1991 and 1992 respectively. These

Perhaps the most famous example of perpetual intergenerational exclusion (through *jus sanguinis*) of long-term permanent residents from full membership in the polity can be seen in German citizenship law (prior to its reform in 2000).<sup>27</sup> Historically, German citizenship law attributed membership based exclusively on the basis of descent. Non-citizens (and their children) were thus precluded from becoming citizens. Naturalization was considered exceptional: it was granted only when the applicant was considered to be culturally integrated into German society, and even then, only where there was a public interest in approving such naturalization.<sup>28</sup> Thus even long-term permanent residents born and bred on German soil had no legal right to become full members of the body politic because of their “bloodline” or lack thereof. Their non-citizenship was perpetuated over generations as the result of an unchangeable, inherited status: once the parents were excluded from membership, neither they nor their children could alter this designation through residency, consent, or voluntary action. This policy created a class of second- and third-generation children of immigrants who were deprived of German citizenship because of their ancestry.

When the long-awaited change in German citizenship law took effect in 2000, the approximately 100,000 children born annually in Germany of long-term permanent

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citizenship laws failed to recognize all persons who resided within the territory as citizens of the newly established states upon secession from the former Soviet Union. Instead, they privileged the descendants of the pre-Soviet Estonian and Latvian states, while imposing obstacles on long-term Russian residents, who were barred from simple registration for citizenship. Instead, they were required to naturalize, and even then under restrictive terms – the most significant of these being the requirement that they demonstrate a command of the Estonian or Latvian language as a precondition for entitlement to full membership. This exclusion from automatic citizenship, along with strict naturalization requirements, resulted in large numbers of people becoming stateless. Children of these stateless individuals were deprived of membership in the state as well, even if they were born after independence. International pressure eventually led to the adoption of less exclusionary provisions in the citizenship laws of Latvia and Estonia. For a detailed discussion of these citizenship laws, see generally see Lowell W. Barrington, “Understanding Citizenship Policy in the Baltic States,” in *From Migrants to Citizens: Membership in a Changing World*, ed. T. Alexander Aleinikoff and Douglas Klusmeyer (Washington DC: The Brookings Institution Press, 2000), pp. 253- 301.

<sup>27</sup> See Germany Information Center, *Citizenship Reform and Germany’s Foreign Residents* (June 1999), available at [http://www.germany-info.org/content/np\\_3c.html](http://www.germany-info.org/content/np_3c.html). Japan’s treatment of persons of Korean origin is another such example.

<sup>28</sup> See Kay Hailbronner, “Citizenship and Nationhood in Germany,” in *Immigration and the Politics of Citizenship in Europe and North America*, ed. William Rogers Brubaker (Lanham: University Press of America, 1989), pp. 67-79.



residents at last gained the right to acquire German citizenship based on their birth in the territory.<sup>29</sup> These children automatically acquire provisional membership in the polity (irrespective of the fact that their parents might not be entitled to gain full access to German citizenship). By the age of 23, these children must decide whether or not they wish to keep their German birthright citizenship, on condition that if they are dual citizens, they may retain their German citizenship only if they give up their second nationality.<sup>30</sup> As with the introduction of the Child Citizenship Act in the United States, which added a component of *jus sanguinis* into the American *jus soli* regime, the new German citizenship law represents a retreat from a pure model. In this case, the model of *jus sanguinis* is modified by a *jus soli* component.

The citizenship law of Germany, prior to its modification, exemplified some of the more problematic and blatantly exclusionary impacts of the principle of citizenship-attribution through parentage. However, *jus sanguinis* need not necessarily correlate with an ethnocultural conception of political membership. For instance, if a newly-established state is constituted by a diverse population, and each member of that population is recognized as a full citizen upon independence – then their children will count *equally* as members through *jus sanguinis* birthright attribution – regardless of their parents’ specific ethnic, cultural, linguistic, racial, or religious backgrounds.<sup>31</sup> Even where the “original” political community is largely homogeneous, a *jus sanguinis* citizenship regime combined with a relatively open immigration and naturalization policy can lead to the creation of a heterogeneous society, which in turn may “reproduce” its multi-ethnicity through a parentage-based birthright regime.<sup>32</sup> Maintaining cultural diversity through *jus*

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<sup>29</sup> See Germany Information Center, *supra* note 29, p. 1.

<sup>30</sup> The memory of the involuntary de-nationalization of certain classes of German citizens prior to and during World War II still looms large. This may make the decision to surrender their formal affiliation to another country harder for descendants of some immigrants (for example, those of Turkish origin).

<sup>31</sup> Weil, for instance, explains that the revived *jus sanguinis* principle in the post French-revolution era had few ethnic or other exclusionary overtones. See Weil, “Comparison of Nationality Laws,” *supra* note 12, at 18.

<sup>32</sup> Sweden represents a classic example of this type of model. See Brubaker, “Citizenship and Naturalization,” *supra* note 1, at 110.

*sanguinis* is therefore not necessarily a contradiction in terms, although it is not a common use of this membership attribution system either.

However, like *jus soli*, *jus sanguinis* can also lead to over-inclusiveness. According to a system where citizenship is transmitted by descent, the offspring of an emigrant parent gains automatic citizenship at birth to their parent's country of origin – regardless of the family's effective ties to the society they left behind. Such a child would then count as a full member of the parents' country, even though that child may never have set foot in this country, or have any substantive knowledge of its language, culture, history, or political structure. Depending on each country's specific citizenship laws, such membership may be attributed for only a limited number of generations, or in perpetuity.<sup>33</sup> *Jus sanguinis* can therefore lead to a situation where individuals enjoy the good of membership in a polity (and are thus entitled to all the rights and benefits accorded to this status), without sharing any of its obligations.

A recent illustration of this problem can be found in the case of *Sheinbein*, an American adolescent who was accused of a brutal 1998 murder in a Washington D.C. suburb, who also held Israeli citizenship through *jus sanguinis* (his father was an Israeli citizen).<sup>34</sup> Sheinbein had lived his whole life in the United States and had no viable ties to Israel. However, after being named a suspect in the murder case, he fled to Israel.<sup>35</sup> The United States requested his extradition, but according to Israeli law (which here follows the continental tradition), a citizen may not be extradited, not even to stand trial for crimes he is alleged to have committed in another country. The case soon reached the Israeli Supreme Court. Sheinbein's lawyers argued that the immunity from extradition

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<sup>33</sup> Many countries now limit the automatic attribution of citizenship *jure sanguinis* to one generation only, or impose minimal residency requirements on the child and the parent if the child was born abroad.

<sup>34</sup> C.A. 6182/98, *Sheinbein v. Attorney General* (decision given on Feb. 25, 1999 – not yet published) [Hebrew]; F.H. 1210/99, *State of Israel v. Sheinbein* (decision given on Mar. 18, 1999 – not yet published) [Hebrew].

<sup>35</sup> In this way, he escaped the threat of a heavier punishment, which would most likely have been imposed upon him in the United States. For example, Israeli law does not permit the death penalty for a convicted criminal offender, whereas various American states both allow and implement such punishment.

provided by Israeli law was absolute because it was status-based: it required no proof of real or effective ties to the state, once a child gained citizenship by birthright.<sup>36</sup>

In a narrow three-to-two decision, the Court accepted Sheinbein's position. However, Chief Justice Aharon Barak (in a minority opinion) ruled that the rights and protections associated with citizenship "can be claimed only by a citizen for whom 'Israel is the center of his or her life and who participates in its life and joins his or her destiny to that of the country.'"<sup>37</sup> In other words, the Chief Justice infused an element of *genuine*, meaningful membership in the polity into the legal understanding of status-based entitlement to the right of citizenship. The *Sheinbein* saga thus represents the flip side of the inclusiveness principle of *jus sanguinis*. Here, a person who had the most tenuous connection with a society was attributed membership solely because of the accident of his descent; he then abused this connection to avoid standing trial in the home country to which he formally and substantively belonged.

### C. Naturalization

The *only* legal method for acquiring citizenship other than through birthright is naturalization.<sup>38</sup> When we speak of naturalization, we refer to the final step in the process of acquiring citizenship *after* birth. Whereas birthright attribution of citizenship is, as we have seen, involuntary and ascriptive, naturalization is a voluntary process. It requires agency, action, and expressed consent by the individual, as well as acceptance by the political community into which he or she emigrates.

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<sup>36</sup> In all likelihood, Sheinbein would *not* have been entitled to receive Israeli citizenship by virtue of the Law of Return, because section 2(B) of that law was interpreted to bar admissibility on grounds of criminality that might endanger the public welfare. See the Israel Supreme Court decision in H.C. 442/71, *Lansky v. Minister of the Interior*, 26(2) P.D. 337 [Hebrew]. For further discussion, see Ayelet Shachar, "Whose Republic?: Citizenship and Membership in the Israeli Polity," Vol. 13 *Georgetown Immigration Law Journal* (1999), pp. 233-272, at 240-241.

<sup>37</sup> In light of the Israel Supreme Court decision, and to the dismay of the United States Justice Department, Sheinbein was not extradited to the United States. Instead, his trial for murder took place in Israel. He pleaded guilty and was sentenced to 24 years in prison. He is now serving his term in an Israeli prison.

<sup>38</sup> See *United States v. Wong Kim Ark*, 169 U.S. 569, 702 (1898) (holding that there are "two sources of citizenship, and two only: birth and naturalization").

To become eligible for naturalization, a person must first be legally admitted as a long-term resident into another polity. In a world of regulated borders, this may prove harder than is commonly thought: each polity is obliged to allow entrance only to its *own* citizens. An outsider has no similar right.<sup>39</sup> Global inequality patterns also make their mark here: citizens of countries perceived to be poorer or less stable are often subjected to more stringent requirements when they seek admission to more affluent countries.<sup>40</sup> These inequalities are felt even when the outsiders are seeking temporary entrance rights only, let alone permanent residence status.<sup>41</sup>

A person seeking to establish lawful permanent residency in another country must apply for immigration status with the relevant state authority (for example, the Immigration and Naturalization Service in the United States). Such an application generally requires the provision of detailed information to the host country about one's finances, education, family, and other personal details. It also involves a medical examination by a state-approved doctor, and often requires that applicants undergo an intrusive interview prior to obtaining an immigration visa. Even then, the final decision concerning acceptance or rejection of one's permanent residency status occurs at the point of entry, i.e., the border itself, where an immigration official still has the discretion to deny such status.

Each country imposes a further set of requirements on persons who wish to take up membership in its political community, but who are not natural-born members. In the

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<sup>39</sup> The exception here is the obligation that nations that signed the 1951 Hague Convention have taken upon themselves to provide a safe haven to persons who qualify as refugees. Even then, the receiving country is obliged to provide temporary shelter only, not necessarily long-term residency. See the 1951 Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 137 as amended by the Protocol Relation to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267.

<sup>40</sup> Although racial, ethnic, national-origin, and similar distinctions may not be taken into account in immigration decisions, since they were expunged from the law books in the late 1960s, the anxieties surrounding "old" distinctions still linger. For further exploration of this "phantom distinction" theme in the American context, see, for example, Ian F. Haney López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 1996); for a comparative perspective, see Stephen Castles and Alastair Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging* (New York: Routledge, 2000), pp. 54-83.

<sup>41</sup> For comprehensive research examining these trends, see National Intelligence Council, *Growing Global Migration and Its Implications for the United States* (Washington DC: NIE 2001-02D Publication, March 2001). This report can be found at <[http://www.odci.gov/nic/nic\\_homepage/nic/publications/index.htm](http://www.odci.gov/nic/nic_homepage/nic/publications/index.htm)>.

United States, for example, the most basic requirement for naturalization is that the applicant must have been admitted as a legal permanent resident – that is, the applicant must first pass through the initial “gate” of screening by the country’s immigration officials.<sup>42</sup> However, gaining permanent residency status is not enough. The applicant must also have resided continuously in his or her polity of choice for several consecutive years (the United States currently follows a five-year rule, whereas Canada requires only three years of permanent residency before it will consider applications for adjustments of status).<sup>43</sup> If the foreign-born person seeking naturalization is a spouse of a citizen (i.e., the “outsider” is already involved in a legally recognized relationship with an “insider”), then the continuous residency requirement is usually reduced in length. This once more shows the significance of family ties in gaining access to membership in the body politic, this time in relation to a chosen partner, rather than a biological (or adopted) child.

Persons who seek to naturalize *without* resting their case on family ties must qualify independently for naturalization. As such, they must be at least eighteen years of age. They must also establish their legal residency and physical presence in the country,

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<sup>42</sup> Naturalization is generally open only to those who have already passed the initial (and more difficult) stage of entry by gaining lawful admission and establishing permanent residency status. Tomas Hammar identifies three “entrance gates” through which an immigrant must pass in order to become a citizen: (1) lawful admission to the territory; (2) permanent residency; and (3) naturalization. (Exceptions to this three-fold process are found in amnesty programs that allow illegal immigrants to adjust their status). See Tomas Hammar, *Democracy and the Nation-State: Aliens, Denizens and Citizens in a World of International Migration* (Aldershot: Avebury, 1990), pp. 16-18.

<sup>43</sup> The specific requirements for naturalization in Canada are specified in the Citizenship Act, R.S.C., ch. C-29, § 5(1) (1985) (Can.) which stipulates that an applicant must be 18 years of age or older, have been lawfully admitted into Canada for permanent residency, have accumulated at least three years of residence in Canada, have adequate knowledge of one of the official languages (English or French), have adequate knowledge of Canada and the responsibilities and privileges of citizenship, and not be under a deportation order. Australia also imposes related admission criteria, (i.e., the requirement that an applicant must be 18 years of age or older; have basic knowledge of the English language; be of good character; have an understanding of the obligations of Australian citizenship; and have lived in Australia as a permanent resident for at least two years). An applicant for Australian citizenship must also renounce “all other allegiances.” See Citizenship Act, 1948 (Cth), §13(1) (Austl.). For further discussion of the Australian Oath of Allegiance, see *Sykes v. Cleary* (1992) 176 C.L.R. 77. In the United States, an applicant for citizenship must be eighteen years or older, have been lawfully admitted as a permanent resident, must have resided in the United States for the five years immediately prior to filing a petition for naturalization, must be able to speak and understand simple English, as well as read and write it, must show good moral character, and prove that he or she is “attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.” The applicant must also take an oath of renunciation and allegiance in open court. See INA, §§ 334(b)(1), 316(a), 312(1), 316(a), 337(a), 8 U.S.C. §§ 1445, 1427, 1423, 1448 (1952).

besides demonstrating a basic knowledge of their new home country's language, political system, and forms of government. In Canada, would-be citizens must also prove that they have no criminal convictions for indictable offenses. In the United States, the more vaguely-defined requirement of "good moral character" must be demonstrated by the applicant. While these requirements are not always simple or straightforward, naturalization operates as an "as-of-right" system in both countries.<sup>44</sup> That is, once the applicant has met these requirements, state officials have little discretion to decline a request for naturalization.

But not all countries follow the as-of-right model. Most European countries follow much stricter policies concerning full access to the commonly-held resource of citizenship. This more restrictive approach may translate into longer residency requirements before gaining eligibility for naturalization (such as eight or ten years versus three or five years; a higher degree of language competency; proof of economic self-sufficiency; and, in most cases, a "deeper" integration of the newcomer into the host society). More importantly, even when these requirements are met, the immigrant still has no guaranteed right to citizenship. Instead, the state maintains full discretion over whether to confer or decline access to membership, whenever a non-native-born person seeks to acquire (through naturalization) what she failed to gain at birth: entitlement to share in the political community. The naturalization process usually culminates in a symbolic public ceremony, where applicants pledge allegiance to their new home country and salute its flag.<sup>45</sup> In certain polities, they must also renounce their previous citizenship. Taken together, these acts are designed to mark the immigrant's "rebirth" into a new political community.

Naturalization, then, serves as a procedure for the acquisition of membership in the state for those who were not born into it. Unlike a natural-born citizen, however, the immigrant is carefully monitored before he or she actually acquires the valued prize of citizenship. In theory, naturalization might be viewed as an ideal route for allowing

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<sup>44</sup> I borrow this term from Rogers Brubaker. See Brubaker, "Citizenship and Naturalization," *supra* note 1, at 108.

<sup>45</sup> The symbolic meaning of such acts is discussed by Sanford Levinson in "Constituting Communities through Words that Bind: Reflections on Loyalty Oaths," 84 *Michigan Law Review* 1440 (1986).

human mobility and choice, overcoming many of the problems ingrained in the concept of birthright citizenship. Yet we have just seen how selective this process is in practice, and how value-laden it inevitably becomes. Moreover, the data concerning the number of people who actually acquire membership in the state through the consensual process of naturalization rather than birthright is itself enlightening. The latest figures published by the United Nations Population Division show that only a minuscule percentage of the world's population has managed to acquire citizenship through naturalization. The data shows that less than *two per cent* of the global population has had citizenship conferred in this way.<sup>46</sup> While these figures do not reveal the causes for this low rate of voluntary membership acquisition, they clearly establish that in the world today, the vast majority of people still acquire citizenship as a function of passive birthright, and not as a result of active adult consent.

### III. CIVIC AND ETHNIC NATIONALISM: THE POWER OF FALSE DICHOTOMIES

As we have seen, both *jus soli* and *jus sanguinis* base legal and political decisions with far-reaching implications on details of the same event – birth. The territorial principle asks where the child was born, and based on this criterion determines eligibility for citizenship status. The parentage principle investigates the child's family lineage as the basis for full membership. In light of the brief legal survey offered in the previous section, and assuming that we accept the proposition that citizenship is an important good that may dramatically affect a child's life prospects, we must still ask: what, if anything, justifies the intimate alliance between birthright and political membership?

One way to approach this question is to re-evaluate the well-established distinction between “civic” and “ethnic” nationalism.<sup>47</sup> Civic nationalism, it is argued,

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<sup>46</sup> See The United Nations Population Fund, *The State of the World Population 1999*, chap. 2, fig. 5 <<http://www.unfpa.org/swp/1999/chapter2d.htm>>.

<sup>47</sup> The civic-ethnic dichotomy is used by many well-known experts on nationalism. See, for example, Anthony Smith, *National Identity* (Harmondsworth: Penguin, 1991). See also Liah Greenfeld, *Nationalism: Five Roads to Modernity* (Cambridge, MA: Harvard University Press, 1992). For a more journalistic account, see Michael Igantieff, *Blood and Belonging: Journeys into the New Nationalism* (New York: Farrar, Straus & Giroux, 1993).

refers to a political community of equals that is created by the free consent of the governed.<sup>48</sup> Accordingly, inclusion in the state must rest on individual 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>49</sup>

Ethnic nationalism, on the other hand, reflects an understanding of the political community as a natural order, where 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, while asserting a link back into time immemorial and forward into an indefinite future.<sup>50</sup>

With this typology in mind, we might expect to find two very different legal procedures for establishing membership in these two different types 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 to intergenerational continuity to play a more central role in the reproduction of the collective. Here, ascriptive membership-attribution rules that express the idea of citizenship as an inherited status are predictable. These rules reflect a logically consistent manifestation of a “diachronic” dimension of nationhood, which privileges the children of current members (at the expense of all others) by automatically entitling them to participate in their forebears' political enterprise.

Clearly, the idea of allocating resources and opportunities, including citizenship itself, on the basis of a natural lottery is at odds with the central notion of civic nationalism, which stresses the value of choice by the governed. Yet, counter to what this

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<sup>48</sup> For a detailed discussion, see Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (New Haven: Yale University Press, 1985), pp. 9-22.

<sup>49</sup> 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.

<sup>50</sup> The diachronic dimension of citizenship law is elegantly captured by Donald Galloway, “The Dilemmas of Canadian Citizenship Law,” Vol. 13 *Georgetown Immigration Law Journal* (1999), pp. 201-231.



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 as the guiding principles for their citizenship laws. Recall, that the American Constitution's Fourteenth Amendment proclaims that "[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." Similarly, section 3 of the Canadian Citizenship Act ascends any person "born in Canada" to full membership status.<sup>51</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 vast bulk of their population through *inherited membership entitlement* rather than individual merit or adult choice.

While one might argue that these civic nations follow birthright citizenship rules on the pragmatic grounds of public choice considerations, such as the reduction of transaction costs (in terms of relocation and resettlement, language skills, and so on), rather than on normative principles, it would be difficult to defend the argument that a basic manifestation of sovereignty (determining "who belongs") is indeed determined in this fashion. Moreover, it is hard to sustain the public choice line of argument when we take into consideration the *global* welfare matrix. For example, it is estimated that the removal of limitations on the free movement of persons across national borders would result in a net *doubling* of the annual GNP worldwide, and that an optimal migration policy (according to neoclassical economic theory) would be not to have one at all.<sup>52</sup>

Still, it might be argued that birth is a relevant criterion (even in a world fraught with deep inequality), as 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 supplementary measures (residency requirements, for

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<sup>51</sup> See Citizenship Act, R.S.C., ch. C-29 § 3(1)(a) (1985) (Can.). Australia and the United Kingdom are also quintessential examples of the civic national model.

<sup>52</sup> For further discussion, see Michael Treiblcock, "The Fourth Freedom: Towards a Liberalized Immigration Policy," *American Journal of Law and Economics* (forthcoming).

example) being used to define who belong 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>53</sup> Even if a natural-born citizen has left the country and no longer bears effective ties to the polity, this would not imply a corresponding loss of the rights and benefits of citizenship. This is surprising: it yet again illustrates how civic nations fail to express in their citizenship laws the notion that *jus soli* citizens must accept or reject (rather than merely inherit) their status as stakeholders in the polity into which they have been born.

The absence of an “affirmation” requirement is all the more glaring when we compare the natural-born citizen and 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 they have rightly earned such status. As described above, naturalization in most civic nations demands not only the screening of the would-be-citizen’s background and qualifications by the relevant governmental agencies, but also requires explicit and active participation (e.g., swearing allegiance) on the part of the immigrant.<sup>54</sup>

Furthermore, the fact that we find explicit consent requirements in the immigration laws of *jus soli* states, while there are none with regard to citizenship, further weakens 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, those who have already taken volitional action in entering the country, such as legal immigrants? Clearly, the latter have made a serious commitment to the new home

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<sup>53</sup> This is an absolute rule in Canada and the United States. Interestingly, Australia and the United Kingdom have modified their versions of the birthright principle to apply only to children of citizens and permanent residents.

<sup>54</sup> 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.

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 natural-born citizens who have never faced the decision of whether to stay or to go. Yet it is the immigrant, not the citizen, who must undergo a ceremonial “rite of passage” in order to acquire full membership. On the other hand, neither volitional action nor a symbolic manifestation of choice of membership is required of the natural-born citizen.

A defender of birthright 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 that the individual submit a formal expatriation request to an authorized government agency.)<sup>55</sup> Unlike the standard defense of consent theory, however, choice is not conceptualized here as a condition for *admission into* political membership. Rather, it is understood as protecting 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).

Defining consent as tacit (through “non-exit”) might serve as a convincing argument in a world with minimal differences in life chances across political units (such as the hypothetical scenario described at the opening of this article) – but this is not the world in which we live. With disparities between countries so great that about half of the population of the world, according to the World Bank, lives “without freedom of action and choice that the better-off take for granted,” it seems disingenuous to suggest that “non-exit” implies content.<sup>56</sup> Even where members of less well-off countries manage to leave their home communities in search of a better future elsewhere, no other country has an obligation in international law to provide them right of entry (unless they are refugees seeking asylum from persecution) – because according to the extant world system of

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<sup>55</sup> In the rare instances where citizens specifically declare an intent to give up citizenship, such formal renunciation usually requires approval by the political community before it takes effect. The approval process is handled by the relevant government agencies within the country or its representatives abroad.

<sup>56</sup> See The World Bank, *The World Development Report 2000/2001, Attacking Poverty*, *supra* note 7, at 1.

birthright citizenship laws, right of entry is reserved exclusively for *insiders*, i.e., those born on the territory or to parents who are themselves members.<sup>57</sup>

Thus – rhetoric to the contrary notwithstanding – in both *jus soli* and *jus sanguinis* countries it is *birthright*, not choice, that plays a determining factor in establishing personal entitlement to the specific political membership the individual possesses from the cradle to the grave. Both parentage and territorial principles share a common reliance on the arbitrary condition of birth as their main criterion for distinguishing insiders from outsiders. In other words, they are both *ascriptive* in nature.<sup>58</sup> The “right to have rights” in civic nations, therefore resembles the inherited pattern of entitlement (usually attributed to ethnic nationalism) more closely than current theory suggests.<sup>59</sup>

But *jus soli* and *jus sanguinis* part company on at least one critical issue: resolving the status of children born of 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 illegal immigrants within the nation’s borders are automatically entitled to unconditional membership. Differently put, the parents’ lack of membership status does not pass on to the next generation. Other civic nations, such as Australia and Britain, which also follow the *jus soli* tradition, have in recent years adopted a more qualified approach. They do not automatically attribute membership at birth to children of illegal

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<sup>57</sup> 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.

<sup>58</sup> As just 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 the process of mutual consent between the individual and the political community: the state must approve her candidacy and she must pledge allegiance to her new home country, its constitution, and governing political principles. No similar act of explicit consent and “rebirth” is ever demanded of individuals who happened to be born into the political community.

<sup>59</sup> I explore this deep and inherent reliance on birthright *ascription*, rather than adult choice, as well as other complexities associated with the implied consent theory, in “The Thin Line Between Imposition and Consent: A Critique of Birthright Entitlements and their Implications,” in *Cycles of Hatred: Memory, Law, and Repair*, by Martha Minow, ed. Nancy L. Rosenblum (Princeton: Princeton University Press, forthcoming).

immigrants. Instead, a child born within their borders to undocumented parents is granted citizenship status only after she resided in the country for at least the first ten years of her life.

This modification of the territorial birthright principle, which takes into account the status of the parents in attributing citizenship to a child, is part of a growing trend of convergence between the *jus soli* and *jus sanguinis* traditions.<sup>60</sup> Another indication of this convergence is reflected in the infusion of a territorial component into the *jus sanguinis* tradition, as we have seen in our discussion of the recent reform in German citizenship law, which now allows the inclusion of children born in the territory to non-members, under a cumulative set of requirements that include long-term residency, cultural immersion, and the surrender of any other nationality at the age of majority (for dual citizens). In other words, these children must actively choose to become members, and must explicitly consent to the citizenship status conferred upon them at birth. Related provisions concerning a combination of birth, residency, and consent requirements are also found in other *jus sanguinis* countries, such as Belgium, Denmark, Sweden, Finland, Italy, and the Netherlands.<sup>61</sup>

In the maze of citizenship laws, we clearly need to keep track of each country's distinct rules and procedures. But equally, we need to recognize that it is misguided to simply assume that consent and choice are 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 by the dichotomy of "consent vs. ascription" is largely refuted by the legal realities we find in practice.

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<sup>60</sup> See Weil, "Comparison of Nationality Laws," *supra* note 12, at 20.

<sup>61</sup> *Id.*

## IV. WHY BIRTHRIGHT?

### EXTANT DEFENSES AND THEIR LIMITATIONS

Can we salvage the *jus soli* and *jus sanguinis* principles of ascriptive membership by thinking of them as an intergenerational mechanism for providing selective access to a bounded system of common meaning and shared history – in *both* civic and ethnic nations? Several arguments may be furnished to provide justifications for the right of each country to define (and police) its membership boundaries according to birthright rules. These arguments generally fall into three major categories: democratic self-government; administrative convenience; and respect for constitutive relationships and distinct cultural identities. The following section concisely evaluates these arguments. It also points to possible amendments or innovations in current citizenship practices designed to better reflect the principles in question, although, as I will argue, even these innovations have their limitations.

#### A. Democratic Self-Governance

Democratic self-governance as a justification of birthright membership speaks to the idea that the laws of a polity ought to serve and reflect the interests of all those who habitually reside within its territory and are subject to its authority.<sup>62</sup> An important manifestation of democratic self-governance is the power vested in the people to define the membership boundaries of their communal political enterprise. Such definitions of boundaries are usually codified in legislation soon after the community has achieved independence and established its own state. International law traditionally refrains from any intervention in the sovereign prerogative of the state in defining citizenship laws. However, this is no longer necessarily the case, as new countries tend to find themselves under international pressure to include long-term residents within their membership boundaries.

The more contemporary understanding of the democratic self-government argument goes beyond an emphasis on open elections, and tends to include equal

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<sup>62</sup> For a detailed account of the importance of self-governance (or the “responsive” principle) in justifying the United States *jus soli* rule, see Christopher L. Eisgruber, “Birthright Citizenship and the Constitution,” 72 *New York University Law Review* (1997), 54-96.

participation as a substantive element of democracy.<sup>63</sup> This creates a strong presumption in favor of including *all* long-term residents in the innermost circle of membership – citizenship. A “democratic legitimacy gap,” i.e., a situation where a country prevents some of its permanent residents from participating fully in the political process, is not a problem seen only in seceded states, however. It may also present itself in well-established democracies, for instance, in their treatment of permanent “guest workers.” This democratic legitimacy gap stems partly from problems associated with the over- and under-inclusiveness of both *jus soli* and *jus sanguinis* principles.<sup>64</sup> As we have seen, heredity citizenship may lead to a situation where persons with only minimal effective ties with the state are guaranteed all the rights and benefits of membership (over-inclusiveness), whereas others who participate in its daily economic and social life are excluded from similar entitlement (under-inclusiveness).

Yet if commitment to the democratic ideal of self-governance (conceived as equal participation) is to guide the attribution of political membership in the state, then we need to re-consider our current reliance on birthright entitlement. A principled answer to the question of “who belongs” would require a shift away from the present ascriptive principles of *jus soli* and *jus sanguinis* to a new “genuine connection” principle of citizenship acquisition, which we might label *jus connexio*. I introduce this term because, like *jus soli* and *jus sanguinis*, it conveys the core meaning of the method through which political membership is conveyed: here, *connexio* (Latin), meaning connection, union, linkage.

This new principle considers membership on the basis of a *tangible* connection between the individual and the state (as established by proof of residency, for example).

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<sup>63</sup> For further discussion, see Diane F. Orentlicher, “Citizenship and National Identity” in *International Law and Ethnic Conflict*, ed. David Wippman (Ithaca, NY: Cornell University Press, 2000), 437-39.

<sup>64</sup> Several scholars have pointed out the need to amend this “democratic legitimacy gap” in Western Europe and North America. Some have suggested extending the rights currently enjoyed only by citizens to permanent residents as well. Others have suggested adopting more generous naturalization policies that would facilitate adjustments of status to full membership. A more radical proposal is discussed by Ruth Rubio-Marin who defends the granting of *automatic* citizenship to legal and illegal long-term permanent residents after a period of ten years of continuous residence in their new political community. See *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge: Cambridge University Press, 2000).

*Jus connexio* allows greater democratic accountability and representation because it ensures that all long-term residents of a state are full members of its political community, irrespective of birthright. In theory, *jus connexio* might require some redrawing of membership boundaries from time to time.<sup>65</sup> The determination of who is and who is not a citizen would then be based on the *social fact of membership*, which requires a genuine, effective connection between the individual and the state that is *stronger than* the mere accident of birth.

The idea of using a “genuine link” test is not new.<sup>66</sup> It is recognized in international law as a means for distinguishing between “active” and “passive” citizenship (in cases where one person holds dual or multiple citizenship, for example). Various domestic laws also use a genuine link test, for instance, in determining a non-citizen’s duty to pay taxes. In the United States, for example, this is known as the “substantial presence test.”<sup>67</sup> Thus if the *jus connexio* principle was to be introduced in lieu of *jus soli* or *jus sanguinis*, a non-member could become a citizen based on habitual residency, just as a natural-born citizen could lose his or her citizenship if they effectively left the country for an extended period of time, i.e., if the natural-born citizen no longer complied with the “substantial presence test.”

Like *jus soli* and *jus sanguinis*, however, *jus connexio* has several serious drawbacks. Most notably, it lacks an intergenerational component for transferring citizenship to the descendants of members of the current political community. The feature of *jus connexio* can be judged both as a liability and as an asset. In comparison to existing birthright principles, however, a *jus connexio* residency-based attribution system would

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<sup>65</sup> A suitable opportunity for such a redrawing of boundaries based on *jus connexio* might be at every decadal census.

<sup>66</sup> See the Nottebohm case (*Liechtenstein v. Guatemala*), 1955 I.C.J. 4 (concerning whether the nationality conferred on Nottebohm by Liechtenstein could be validly invoked as against Guatemala in order to afford Nottebohm diplomatic protection).

<sup>67</sup> For a discussion and critique of the “substantial presence test” in the context of American taxation, see David Williams, II, “Back to the Future: A Time for Rethinking the Test for Resident Alien Status Under the Income Tax Laws,” 21 *Vanderbilt Journal of Transnational Law* 965 (1988); J. Scott Kircher, “The Substantial Presence Test Exemptions: Taxing Problems for the Alien,” 24 *San Diego Law Review* 531 (1987); Robert J. Missey Jr., “Simplifying International Jurisdiction for United States Transfer Taxes: Retain Citizenship and Replace Domicile with the Green Card Test,” 76 *Marquette Law Review* 73 (1992).



unequivocally *lack* the threads of continuity between past and future that are crucial to most current understandings of citizenship laws. Given the significance of the diachronic dimension of citizenship, it is unlikely that a *jus connexio* will be adopted any time soon by viable political communities that need to establish who belongs within their boundaries not just for today, but for tomorrow as well.

Another difficulty presented by a residence-based membership rule is that it still leaves unresolved the representation-of-interests problem, which arises from the fact that those *inside* the polity can impose potential harms (intentionally or not) upon those *outside* their *demos*. For example, a wealthy country like the United States may regularly undertake actions with negative environmental externalities that impose severe pollution and health risks upon those residing outside its geographical boundaries.<sup>68</sup> Imagine a sick child who, through no fault of her own, is excluded (by birth) from having a voice in the affluent neighbor country's decision-making processes, but who may nonetheless suffer the harsh consequences of environmental contamination caused by those on the other side of the border. The problem here is that the territorial boundaries that shape inclusion in and exclusion from the polity (and its democratic decision-making processes) fail to correlate with the spill-over effects of that polity's actions upon the citizens of another state. Existing birthright citizenship rules do nothing to ease such tensions, but a more democratic *jus connexio* membership principle would also assist little in resolving them.

#### B. Administrative Convenience

Efficiency offers a second possible line of defense for ascriptive citizenship (in either its territorial or parentage variant). This argument takes two different forms. First, it may be claimed that determining membership according to birthplace or family lineage offers a clear and relatively reliable international "filing system," in which people are automatically sorted into specific political units.<sup>69</sup> Since birth is usually a publicly

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<sup>68</sup> See Nick Johnstone, "International Trade, Transfrontier Pollution and Environmental Cooperation: A Case Study of the Mexican-American Border Region," 35 *Natural Resources Journal* 33 (1995); and Matthew Tuchband, "The Systemic Environmental Externalities of Free Trade: A Call for Wiser Decisionmaking," 83 *Georgetown Law Journal* 2099 (1995).

<sup>69</sup> I borrow the "filing system" metaphor from Rogers Brubaker; see "Citizenship and Naturalization," *supra* note 1, at 101.

recorded event, it provides an apparently non-controversial method of assigning individuals to states. Moreover, this international filing system (if properly managed) can ensure that *every* child acquires membership within some polity at the moment of joining the larger family of humanity. In theory, an ideal global birthright-attribution system should leave no one in the vulnerable position of statelessness; in practice, however, the combined operation of *jus soli* and *jus sanguinis* has never guaranteed this outcome in a world fraught with political instability and human mobility.

In addition, given that freedom of movement is still regulated across national borderlines, each country is compelled to define its membership boundaries in ways that clearly define who belongs and who does not – who may enter, and who may not. Citizenship attribution at birth, and the manifestation of this status through documents such as passports and identity cards render these distinctions both “legible” and enforceable in the eyes of immigration officials, customs agents, police officers, and so on.<sup>70</sup> Administrative convenience may therefore explain the prevalence of birthright citizenship rules, but it does not bear the weight of justifying them.

The second variant of this defense moves beyond pure administrative convenience and provides a stronger normative claim in support of ascriptive membership rules. Instead of criticizing the arbitrariness of birthright, this position suggests that we should *value* the contingency of existing citizenship laws. The thrust of the argument is this: by making the determination of political membership entirely independent of substantive considerations, we avoid the trap of moral judgment about who deserves to be a citizen. According to this view, it is better to exclude persons on the basis of territoriality and pedigree than on the basis of criteria such as political opinion, national loyalty, or suspected disagreement with the community’s basic governing norms. Bernard Yack, for example, claims that “[b]irthright citizenship can promote toleration precisely by removing the question of communal membership from the realm of choice and contention about political principles.”<sup>71</sup>

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<sup>70</sup> For a detailed discussion of the systems of identification developed by modern states to regulate and control who may and may not enter and leave their territory, see John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000).

<sup>71</sup> See Bernard Yack, “The Myth of the Civic Nation,” Vol. 10 *Critical Review* (1996), 193-211, at 208.

The idea that birthright-“blindness” is a blessing seems plausible only if we think of the problem in terms of ensuring *internal* equality among persons already residing within the same territory. On this account, the need to avoid hard decisions concerning who belongs (and why) is seen as so important that it justifies any presumably neutral rule for conferring the valuable status of citizenship in a “blind” way, such as according to the accident of birthplace. We need not know the gender, race, creed, or need of a child in order to determine eligibility for birthright membership if such membership is granted automatically. The only thing that matters is whether the child was born in the territory (under a *jus soli* rule), or whether one (or both) of her parents is already a member of the polity (under a *jus sanguinis* rule).

While this argument may seem compelling at first glance, *jus soli* and *jus sanguinis* can only artificially be conceptualized as removing the question of communal membership from the political realm. It would be more accurate to suggest that they represent a *pre-commitment* to following specific rules and criteria in determining who may become a citizen and who may not. And this pre-commitment is inevitably born out of specific political, contextual, and historical events that have led to the creation of particular communities that follow particular membership-attribution rules. In modern states, such regulation usually falls under the jurisdiction of national governments, and the laws and policies that they issue are always the outcome of human imagination, coordination, and agency – certainly not a pre-ordained “natural order” of things. It thus requires a great leap of faith to assume that exclusion according to pre-determined criteria (such as territoriality or parentage) necessarily translates into political toleration through the adoption of (allegedly “blind”) birthright membership rules.

Finally, the argument in support of the arbitrariness of birthright (as a means of avoiding substantive debates about belonging) loses much of its force when we think about the *external* impact of such membership rules. As Joseph Carens points out, existing citizenship-attribution principles uphold a sharp distinction between the children of members and the children of non-members. But unless we *presuppose* that people have a basic human right to membership in the community of their parents (or in the territorial community into which they happened to be born), we have only pushed the question of

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political membership back another level.<sup>72</sup> We have not yet provided satisfactory justification for the assertion that only some children may enjoy entitlement to the full rights and protections of membership in a stable, affluent, democratic polity, while other children do not deserve the same.

### C. Communities of Character and Constitutive Relationships

A relational approach to citizenship emphasizes the constitutive relationships that shape human communities, and the right of each polity to define and assert its own distinct cultural and historical character.<sup>73</sup> According to this defense of birthright entitlement, “[c]hildren are not born into the world as isolated individuals, but as members of established social networks.”<sup>74</sup> These social networks serve as the bedrock for establishing moral claims concerning political membership. Instead of focusing primarily on the vertical relationships between the individual and the state, this approach looks at the horizontal networks and webs of relationships that are created between persons in various public and private settings, including families. The communitarian variant of the relational approach holds that members of a political community have the right to both construct and reflect a shared culture in their joint enterprise as members of a particular state. Decisions about admission and exclusion are therefore viewed as powerful expressions of a community’s identity and autonomy, as well as a means of preserving those particular characteristics. Without control over such decisions, “there could not be

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<sup>72</sup> See Carens, “Who Belongs?” *supra* note 13, p. 423. In “Aliens and Citizens: The Case for Open Borders,” Vol. 49 *Review of Politics* (1987), 251-273, Carens makes a strong argument about the need to take specific contingencies into account. These include considerations of whether one is a citizen of a rich or poor country as well as whether one is already a citizen of a particular country (among other divisive issues that could set people at odds behind a Rawlsian veil of ignorance). Carens claims that a fair procedure for choosing principles of justice requires *exclusion of knowledge* of these circumstances, together with exclusion of knowledge of an applicant’s sex, race, or social class. Carens goes on to suggest that this would likely lead us to conclude that there are few restrictions on migration that are morally justifiable. Note, however, that Carens assumes that we need to adopt the perspective of the *alien* who may want to immigrate (as the person most disadvantaged by these restrictions), without challenging the basic distinction between citizen and alien.

<sup>73</sup> This approach is clearly articulated, for example, by Karen Knop, “Relational Nationality: On Gender and Nationality in International Law,” in *Citizenship Today: Global Perspectives and Practices*, ed. T. Alexander Aleinikoff and Douglas Klusmeyer (Washington DC: Brookings Institution Press, 2001), pp. 89-124.

<sup>74</sup> See Carens, “Who Belongs,” *supra* note 13, at 424.

*communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their communal life.”<sup>75</sup> Respecting familial, social, and historical ties by attributing membership at birth appears to play an important role in preserving such communities of character. Yet these communities may also turn out to be highly exclusionary, withholding membership from long-term residents, among others, because these “outsiders” fail to share a distinguishing “character” that is only possessed by those who belong to the community. The character argument thus runs the risk of becoming hopelessly circular: a person is deemed not to possess the special character that makes one a citizen because she does not belong to the state; but then again, she cannot belong to the state because she lacks the special character of membership.

Equally troubling, a relational-communitarian approach may come to serve as a justification for *overtly* discriminating between potential immigrants and citizens on the basis of their ethnicity, religious beliefs, and so on, because of the community’s desire to maintain a distinct cultural heritage or national identity by carefully selecting its members. While this may be a fair argument for a minority community to raise against the state, where that minority is struggling to preserve its identity in the face of severe assimilation pressures, it is far harder to justify the right of a state to exclude persons on the same basis. Taken to its ultimate logic, the communitarian variant of a relational approach suggests that the power of the polity to define its own human boundaries must trump considerations of fairness and equality. Michael Walzer explicitly makes this claim by suggesting that “[t]he distribution of membership is not pervasively subject to the constraints of justice,” because “the shape of the community that acts in the world, exercises sovereignty, and so on” is at stake.<sup>76</sup> Other political philosophers and legal scholars, however, have strongly contested this view.<sup>77</sup>

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<sup>75</sup> See Walzer, *supra* note 3, p. 62.

<sup>76</sup> *Id.*, at 61-62.

<sup>77</sup> The writings of Joe Carens, for example, eloquently represent this line of critique. See, for example, “Citizens and Aliens,” *supra* note 78. See also Jules L. Coleman and Sarah K. Harding, “Citizenship, the Demands of Justice, and the Moral Significance of Political Borders,” in *Justice in Immigration*, ed. Warren F. Schwartz (Cambridge: Cambridge University Press, 1995), pp. 19-62.

A feminist variant of the relational approach, on the other hand, hopes to infuse specific values, including gender equality and respect for the labor of caregiving, into existing membership-attribution rules.<sup>78</sup> According to this line of argument, membership rules ought to reflect the central place of families in “constituting” citizens, and must do so in ways that ensure that women’s rights are upheld and respected.<sup>79</sup> Here, the emphasis is not necessarily on a shared history or distinct culture on the national level. Rather, attention is given to *specific* relationships with *particular* others, such as parents, spouses, lovers, or extended families, who mediate one’s inclusion in a larger political community. Citizenship laws must protect and foster the important contribution of such intimate and family-based relationships. A *jus soli* membership rule reflects these contributions in a circumstantial way, but a *jus sanguinis* membership rule does so explicitly. A relational approach that takes family ties and intergenerational continuity seriously therefore provides strong support for *inherited* citizenship entitlements.

Accordingly, if a child is born in a marriage between spouses from different countries, where each parent holds a different nationality, then it is argued that the child deserves to belong to both membership communities on grounds of safeguarding family relationships and respecting the principle of gender equality.<sup>80</sup> The notion that fathers and mothers should be equally able to transmit membership entitlement to their offspring may seem self-evident today. But the troubling record of gender-based discrimination in citizenship laws worldwide should teach us differently.

Historically, under Roman law, a child acquired citizenship on the basis of his father’s status, or according to family links transmitted exclusively through the *pater familias*. In keeping with this tradition, a mother had no right or legal power to pass her

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<sup>78</sup> For further elaboration of a feminist theory of relational rights, see, for example, Martha Minow and Mary Lyndon Shanley, “Revisioning the Family: Relational Rights and Responsibilities,” in *Reconstructing Political Theory: Feminist Perspectives*, ed. Mary Lyndon Shanley and Uma Narayan (Pennsylvania: Pennsylvania State University Press, 1997), pp. 84-108. More generally, see Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993).

<sup>79</sup> See, for example, Jennifer Nedelsky, “Citizenship and Relational Feminism” in *Canadian Political Philosophy*, ed. Ronald Beiner and Wayne Norman (Toronto: Oxford University Press, 2001), pp. 131-146.

<sup>80</sup> See Knop, “Relational Nationality,” *supra* note 75.

citizenship on to her children. Similarly, with the development of the common law doctrine of coverture, the father became the sole bequeather of citizenship to his children (born of a valid marriage).<sup>81</sup> A married mother had no similar authority or standing. In fact, she risked losing her own (birthright) citizenship upon marriage to a non-citizen husband.<sup>82</sup> Discrimination against women in citizenship-attribution rules was first targeted by international law in the early half of the twentieth century. This was not so much because of concern for gender equality as concern that such rules might result in statelessness for a child born out of wedlock or to an unknown father.

Gender discriminatory citizenship laws have been repealed in many countries since the end of World War II.<sup>83</sup> However, several countries (including the United States) still continue to uphold legal regulations that distinguish between the capacity of male and female parents to transmit citizenship status to their offspring born abroad. An illustration of how deeply the legacy of differentiated roles for men and women in transferring citizenship status to their offspring has permeated into modern citizenship laws, even in countries that consider themselves enlightened on the matter of gender equality rights, is found in three constitutional battles fought recently over these issues in Canada and the United States: *Benner*, *Miller*, and *Nguyen*.

(i) *Benner*

In the 1997 *Benner* case, the Canadian Supreme Court was asked to determine whether Section 5 of the Canadian Citizenship Act, which restricted access to Canadian citizenship based on the gender of the parent, violated the equality principle enshrined in

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<sup>81</sup> For a detailed discussion, see Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (Berkeley: University of California Press, 1998).

<sup>82</sup> For illuminating critiques of this gender-biased rule, see Virginia Sapiro, "Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States," Vol. 13 *Politics & Society* (1984): pp. 1-26; Nancy F. Cott, "Marriage and Women's Citizenship in the United States, 1830-1934, Vol. 103 *American Historical Review* (1998), pp. 1440-1474. Such discrimination continued until late in the twentieth century, when married women in most countries finally acquired the right to transmit their nationality to their children independently. For further discussion, see The Committee on Feminism and International Law, *Final Report on Women's Equality and Nationality in International Law* (International Law Association, 2000).

<sup>83</sup> See Lisa C. Stratton, "The Right to Have Rights: Gender Discrimination in Nationality Law," 77 *Minnesota Law Review* 195 (1992).

the Canadian Charter of Rights and Freedoms.<sup>84</sup> According to the Act, a child born abroad to a Canadian father was automatically entitled to Canadian citizenship upon registration of his or her birth. However, a child born under similar circumstances to a Canadian mother was denied similar entitlement to membership. Instead, that child's eligibility depended on the absence of a criminal record and his or her willingness to swear an oath of allegiance (neither of these requirements was imposed on a child born abroad to a Canadian father).<sup>85</sup> The Canadian Supreme Court ruled that this statutory provision violated the equality principle because it restricted access to citizenship "on the basis of something so intimately connected to and so completely beyond the control of the [child] as the gender of his or her Canadian parent."<sup>86</sup> This legislation, in the words of the Court, "continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen."<sup>87</sup> Such gender discrimination was ruled unjustifiable in a free and democratic society, and the relevant provision of the Citizenship Act was struck down.

(ii) *Miller*

By contrast, in the 1998 *Miller* case, the United States Supreme Court upheld Section 309 of the Immigration and Nationality Act (INA), which created a two-tiered system that distinguished between American men and women in their ability to transmit U.S. citizenship to their offspring born abroad.<sup>88</sup> Unlike the Canadian Act, the American Act imposed strict requirements for conferring citizenship upon a child born abroad to an unmarried American father, while attributing automatic birthright membership to a child born abroad to an unmarried American mother.<sup>89</sup> According to the Act, the citizenship of

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<sup>84</sup> See *Benner v. Canada (Secretary of State)* [1997] 1 S.C.R. 358 [hereafter *Benner*].

<sup>85</sup> See Citizenship Act, R.S.C., ch. C-29, § 5(2)(b) (1985) (Can.).

<sup>86</sup> *Benner*, 401.

<sup>87</sup> *Benner*, 403.

<sup>88</sup> INA, § 309, 8 U.S.C. § 1409 (1952).

<sup>89</sup> See *Miller v. Albright*, 523 U.S. 420 (1998) [hereafter *Miller*].



a child born to an American father could not be established unless and until either the father or the child had taken affirmative steps to confirm their relationship. Unlike the immediate recognition of the connection between a mother and her child at birth, which, in turn, established the child's connection to the political community, the Act held that the relationship between father and child must be legally established (for example, through a court order declaring paternity),<sup>90</sup> if the status of American citizenship was to be conferred upon the child.<sup>91</sup> *Miller*, in short, suggests that mothers are naturally bonded to their children, whereas fathers are not. The state is therefore not obliged to recognize children born abroad to unwed American fathers as its citizens. The Supreme Court affirmed this position, leaving unchanged the Act's gender discriminatory two-tiered citizenship-attribution system.<sup>92</sup>

(iii) *Nguyen*

In 2001, only three years after delivering its controversial *Miller* decision, the United States Supreme Court again reviewed Section 309 in the *Nguyen* case, this time around focusing on the Section's constitutionality.<sup>93</sup> *Nguyen* was born out of wedlock in

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<sup>90</sup> INA, § 309(a) (codified as amended at 8 U.S.C. § 1409(a) (1986)). The Section imposes four requirements that must be met in order to confer citizenship "as of the date of birth" of a child of an unwed American father and a non-American mother outside the United States:

- (1) a blood relationship between the person and the father is established by clear and convincing evidence,
- (2) the father had the nationality of the United States at the time of the person's birth,
- (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
- (4) while a person is under the age of 18 years –
  - (A) the person is legitimated under the law of the person's residence or domicile,
  - (B) the father acknowledges paternity of the person in writing under oath, or
  - (C) the paternity of the person is established by adjudication of a competent court.

<sup>91</sup> *Miller*, 434.

<sup>92</sup> International law, on the other hand, clearly provides that men and women deserve equal rights to acquire, change, or retain their nationality, and to confer citizenship on their children. See, for example, Article 9, Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>93</sup> See *Tuan Anh Nguyen v. I.N.S.*, 121 S. Ct. 2053 (2001) (decision given on June 11, 2001), available at <<http://supct.law.cornell.edu/supct/html/99-2071.ZS.html>> [hereafter, *Nguyen*].

Vietnam to a Vietnamese mother and an American father. Unlike the child in *Miller*, who had lived outside the United States prior to seeking American citizenship, Nguyen had been in the care of his American father ever since the relationship between his parents had ended. At the age of six, when his father returned to the United States, Nguyen became a lawful permanent resident of the United States and was raised in Texas by his father. For all practical purposes, he was a full member of the United States. However, at the age of 22, Nguyen pleaded guilty to criminal offenses committed in the United States, and as a non-citizen, was ordered to be deported by the Immigration and Naturalization Service. Nguyen's father challenged the order, claiming that his son's blood relationship to him, and lifelong association with the American polity should render Nguyen eligible for full membership, and thus protect him from deportation.<sup>94</sup>

However, the United States Supreme Court rejected the father's argument. It ruled that in spite of the fact that a meaningful and lasting parent-child relationship had been established between the American father and his foreign-born son, the failure to follow one of the three affirmative legal steps defined by law for the transmitting of citizenship (legitimization, declaration of paternity under oath, or court order of paternity), meant that Nguyen had *no* entitlement to full membership status in the American polity. In other words, the state need not treat him as *its* own child.<sup>95</sup>

The Court also held in *Nguyen* that the decision to impose different requirements on unmarried fathers and unmarried mothers was justified by two important governmental interests: first, ensuring that a biological parent-child relationship existed; and second, ensuring that the child and the parent had demonstrated a relationship consisting of "real, everyday ties" that provided a meaningful connection between child and citizen-parent and, in turn, the state. Ignoring the fact that precisely such a connection had been established between the child-parent-state in this particular case, the Court preferred to twist the language of relationship by collapsing it into biological essentialism. According to the Court, the opportunity for developing a meaningful parent-

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<sup>94</sup> Nguyen's father obtained an order of parentage from a state court, based on DNA testing, proving their blood relationship as father and son. See *Nguyen*, at 2057.

<sup>95</sup> *Nguyen*, 2060.

child relationship inheres in the event of birth in the case of a citizen mother and her child, but does not result “as a matter of biological inevitability, in the case of an unwed father.”<sup>96</sup> The Court further declared that in the context of citizenship attribution rules, American men are legally relieved of personal responsibility for the results of their sexual actions. As the Court put it, “[o]ne concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.”<sup>97</sup> When turning to current conditions, the Court continued, it found “even more substantial grounds to justify the statutory distinction [between men and women]. The ease of travel and the willingness of Americans to visit foreign countries have resulted in numbers of trips abroad that must be a real concern when contemplating the prospect [of mandating] ... citizenship by male parentage.”<sup>98</sup>

Thus, the Court concluded, the legislature was well within its authority to *refuse* to embrace a child conceived abroad of an American father and a non-citizen mother as a U.S. citizen.<sup>99</sup> A child born abroad of an unwed American mother, on the other hand, automatically acquires such membership (without any requirement of proof of the establishment of a parent-child relationship) because, again to cite the Court’s own words, “[t]here is nothing irrational or improper in recognizing that at the moment of birth – a critical event in the statutory scheme and tradition of citizenship law – the mother’s knowledge of the child and the fact of parenthood have been established.”<sup>100</sup>

Instead of looking at the establishment of a *viable* relationship between Nguyen and his father, the Court preferred to stick to a gender-based stereotype of female caregiving and bonding as the paradigmatic case of “real, everyday ties” between a parent and a child that merits state recognition. The Court in *Nguyen* upheld, as the minority put it, “a historic regime that left women with responsibility, and freed men from

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<sup>96</sup> Nguyen, 2061.

<sup>97</sup> Nguyen, 2061-62.

<sup>98</sup> Nguyen, 2062.

<sup>99</sup> Nguyen, 2062.

<sup>100</sup> Nguyen, 2063.

responsibility, for nonmarital children. ...[R]ather than confronting the stereotypical notion that mothers must care for these children and fathers may ignore them, [the majority] quietly condones the very stereotype the law condemns.”<sup>101</sup> Nguyen and his father lost their case, and we received a fresh reminder of the dangers and biases that may be inherent in a relational-based theory of membership attribution.

While it is theoretically possible to develop a relational conception of citizenship that respects the crucially important role that families and other social networks play in children’s lives *without* repeating the mistakes of the past, the risks are nevertheless daunting. For one, the relational approach is likely to embroil citizens, their dependents, and the state, in a problematic situation where intimate relationships are regularly scrutinized by state officials because these relationships gain an important public dimension – potentially entitling foreign-born members of the family to citizenship. Such concerns are not hypothetical, as the *Benner*, *Miller*, and *Nguyen* cases demonstrate.<sup>102</sup> Moreover, related concerns are regularly encountered in immigration law practice, where some of the most sensitive and topical legal cases pivot around the definitions of *marriage*, *child*, *immediate relative*, or *family* for the purposes of acquiring permanent residency and naturalization status.<sup>103</sup>

Even if a generous definition of who counts as “spouse,” “child,” or “family member” is adopted, this still fails to resolve the basic difficulty: how to determine *which* human relationships deserve to be recognized as the basis for the most foundational attachment to the state: citizenship. This complexity arises because any definition of

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<sup>101</sup> Nguyen, 2066 (O’Connor J., dissenting) (internal quotation marks omitted).

<sup>102</sup> Immigration agencies (such as the INS in the United States) were criticized for their “invasions of privacy [in marriage-based immigration] which even the boldest of government agencies have heretofore been hesitant to enter.” See *Chan v. Bell*, 464 F.Supp 125, 130, n.13 (D.D.C.1978); *Stokes v. INS*, No. 74 Civ. 1022 (S.D.N.Y. Dec. 1, 1976)(consent judgment), reprinted in 54 *Interpreter Releases* 77 (1977) (ordering particular procedural guidelines for New York INS marital fraud investigation processes); *Doe v. Miller*, 573 F. Supp. 461 (N.D. Ill. 1983) (granting an injunction against implementation of state policies that forced undocumented alien parents to withdraw food stamp applications or disclose information about their alien status).

<sup>103</sup> Unlike the automatic nature of citizenship attribution at birth, a non-citizen seeking admission on the basis of marriage has to prove his or her eligibility for such inclusion. The burden is on the applicant to show that the relationship is genuine, i.e., it is not merely a pretext for gaining access to the rights and benefits of full membership.

political membership that depends on such relations must inevitably contain a normative judgement about what counts as “family.” The risk here is that unmarried cohabitants, gay and lesbian couples, and members of families that do not comply with a “standard” household stereotype might not only become vulnerable to societal pressure (as they often do today), but also face the detrimental possibility of non-inclusion in the polity. Like current *jus soli* and *jus sanguinis* rules, a relational conception of membership is likely to end up falling into the trap of both under-inclusiveness (e.g., excluding same-sex partners) and over-inclusiveness (e.g., including divorced men and women that no longer live in the former spouses’ home country).

These dilemmas have not escaped advocates of the relational approach. Their response has generally been to try to expand the definition of family, and to fight vigorously against any gender-biased constructions of political membership. While this effort is laudable, it may prove more relevant for removing residual inequalities that still persist in membership-attribution rules (as in *Miller* or *Nguyen*) rather than offering a comprehensive alternative to *jus soli* and *jus sanguinis*. Specifically, it is hard to conceptualize what a general schema of relational citizenship would require in practice. For example, if citizenship is to be defined relationally, i.e., based on a web of attachments to meaningful others, should one be deprived of citizenship because of the lack (or breakdown) of relationships? Would residency be required or would it be sufficient to have family members in the host country? Should all persons belonging to a “transnational” family carry multiple affiliations, and if yes, for how long (one generation two generations, or in perpetuity)? And if constitutive relationships are at the heart of this approach, could citizenship be attributed in a counter-diachronic direction, i.e., would children be entitled to pass on political membership to their parents (for example, where the parents entered the country illegally)? Unlike birthright membership, which at least rests on a factual and usually clearly recorded event (birth), reliance on “relations” for granting access to the good of citizenship almost inevitably invites political, cultural, and legal debate about the values upon which acceptable forms of marriage and family are based. A relational approach to citizenship is likely to deepen these problems further, especially if one’s definition of a “spouse” or “child” becomes the prime sorting mechanism for including individuals in the political community, in lieu of reliance on *jus*

*soli* or *jus sanguinis*. According to the latter scenario, *all* citizens would have to establish their status in the political community based on their effective ties to the state or its citizens.

Add to these definitional problems the troubling realization that a relational approach may unwittingly place children and spouses in a dependency trap because their status as members of the polity rests on their ongoing connection to another individual, who happens to be a citizen. As such, they lack the security and agency that is gained when a person establishes an *unmediated* relationship with the rest of the political community. In the history of citizenship, the struggle (ongoing in many parts of the globe) to ensure that all adult women and men, rich and poor, literate and illiterate, property owners and free slaves, whites and blacks, gain equal membership in the state and an equal standing before the law, has been no small feat. This achievement was seen as a great victory over the previously mediated relationships that individuals were entangled in, where entities such as the guild, the family, or the church defined the set of rights and duties that were attached to the person. It would be unwise to turn back the clock and risk the independence that women and other historically vulnerable groups have won through the acquisition of full citizenship by re-introducing interdependency (here, through family and marriage, instead of church and guild) as a condition for entitlement to equal political standing in the polity.<sup>104</sup>

Furthermore, gender equality itself may not be served by emphasizing a relational approach to citizenship. Again, the realm of immigration provides a useful context for considering such problems. There is troubling evidence to show that regulations originally intended to address concerns about possibly fraudulent marriages may end up burdening the weaker party in the relationship. For example, a two-year “conditional status” provision was recently introduced in the United States,<sup>105</sup> requiring the foreign spouse to stay married for that length of time before being able to qualify for lawful

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<sup>104</sup> Of the now-established body of feminist literature on this problem, see, for example, Iris Marion Young, “Mothers, Citizenship, and Independence: A Critique of Pure Family Values,” 105 *Ethics* (1995), pp. 535-556.

<sup>105</sup> INA § 216, as part of the Immigration Marriage Fraud Amendments of 1986 (IMFA).

permanent residence.<sup>106</sup> These regulations criticized by feminist activists and scholars who explain that foreign spouses are often so desperate to escape the poverty and hardship of their home countries that they remain in abusive relationships out of fear that leaving the marriage will jeopardize their chances of adjusting their status in their spouse's home country.<sup>107</sup> Unfortunately, their fears are not unsubstantiated. Immigration regulations in the United States require that *both* spouses jointly petition the INS to adjust the foreign spouse's status before the end of the two-year period. If, on the other hand, such a petition is not filed or the marriage relationship dissolves at any time during the conditional residency, the foreign spouse becomes a deportable illegal alien. This regulatory framework may have been designed with a benign intent (to avoid including persons who have entered a marriage relationship solely for the purpose of gaining admission into the body politic) – but its de facto impact is devastating. This scheme leaves foreign spouses vulnerable to abuse by their partners who hold the key to membership in the desired polity. Such a system projects existing power inequalities between nations onto intimate family relationships, usually to the detriment of women from poorer and less developed regions of the world.<sup>108</sup>

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<sup>106</sup> If a petition for adjustment of status is not filed or the marriage relationship dissolves at any time during the conditional residency, the foreign spouse becomes a deportable illegal alien. The Immigration Act of 1990 was designed to alleviate some of the problems that this system created, specifically, the vulnerability of foreign spouses to domestic violence and abuse. See INA, § 216 (c)(4)(C); (codified as amended at 8 U.S.C. § 1186a (c)(4)(C) (1990)). However, the current statutory and regulatory framework still allows husbands to control the petitioning process for most women, and establishes evidentiary requirements that make it almost impossible for a foreign spouse to independently establish her permanent residence status even if she or her children suffered abuse or extreme hardship. For detailed discussion, see Michelle J. Anderson, Michelle J. Anderson, "A License to Abuse: The Impact of Conditional Status on Female Migrants," Vol. 102 *Yale Law Journal* (1993), pp. 1401-1430. See also Linda Kelly, "Domestic Violence Survivors: Surviving the Beatings of 1996," Vol. 11 *Georgetown Immigration Law Journal* (1997), pp. 303-327. On the history of spouse-based immigration to the United States and its detrimental impact on women, see Janet M. Calvo, "Spouse-Based Immigration Laws: The Legacies of Coverture," Vol. 28 *San Diego Law Review* 593 (1991).

<sup>107</sup> Conditional permanent residents receive documents that clearly mark that their status expires at the end of the two years. Within the last 90 days of the two-year period, *both* spouses must petition the INS to have the conditional status removed. This creates a power imbalance between the anchor spouse (the American citizen) and the foreign spouse. Moreover, staying in the marriage relationship (however abusive) becomes the foreign spouse's only route to lawful status in the United States upon expiry of the two-year conditional period, which further adds to her vulnerability.

<sup>108</sup> See Anderson, *supra* note 108.

## V. SUSTAINING GLOBAL INEQUALITY THROUGH THE PROPERTY OF BIRTHRIGHT CITIZENSHIP

To conclude this investigation of the connection between birthright and political membership, I now turn to a relatively unexplored possibility: thinking about citizenship status as a complex type of property right that plays an important role in maintaining an unequal distribution of wealth and opportunity according to national affiliation. By considering this, we move from a search for justifications of such membership attribution rules (as described in the approaches above), to a more critical analysis of the functionality of birthright-citizenship attribution in a world fraught with deep inequality. The discussion that follows is intended only to provide the bare bones of this argument, which I call “re-conceptualizing citizenship status as property.” It is not intended as a full exploration of the multi-layered implications of such a re-conceptualization, an investigation that I undertake at greater length elsewhere.

When we speak about property as a legal concept, we are talking about relations between people and things.<sup>109</sup> Modern theories of property 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 and university degrees, genetic information, even folklore practices).<sup>110</sup> Changes in human relations and social values, along with new

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<sup>109</sup> “[Property] is not a term of art and in itself no more than a convenient expression to denote a legal relationship between a person and a thing, from which it can be inferred that a person is the owner of a particular thing.” D.G. Kleyn et. al., *Silberg and Schoeman’s The Law of Property* (Butterworths, 3d ed. 1992), at 1.

<sup>110</sup> For further discussion, see Jennifer Hill, “Visions and Revisions of the Shareholder,” 48 *American Journal of Comparative Law* 39 (2000); Brian F. Ladenburg, “Unilateral Refusals to deal in Intellectual Property after *Image Technical Services, Inc. v. Eastman Kodak Co.*,” 73 *Washington Law Review* 1079, 1086-87 (1998); Timothy S. Harris, “Do Professional Degrees and Licenses Earned During Marriage Constitute Marital Property? An Irrelevant Issue,” 48 *Ohio State Law Journal* 1171 (1987); Catherine M. Valerio Barrad, “Genetic Information and Property Theory,” 87 *Northwestern University Law Review* 1037 (1993); Paul Kuruk, “Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States,” 48 *American University Law Review* 769 (1999).



developments and discoveries in the physical world, constantly modify our understanding of what counts as protected property.<sup>111</sup>

Once we categorize certain relationships as falling under the rubric of property, important questions of allocation are raised: who gets what, and why? When applying contemporary understandings of property to 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 one's entitlement to citizenship as a form of property fits well within the definition of "new property," a phrase famously coined by Charles Reich, referring to the power to control a particular portion of the well-being and wealth of valuables accumulated by governments.<sup>112</sup>

Another important feature of property is the ability of its holder to *exclude* others from access to the entitlement. Citizenship not only serves important internal functions (such as those of democratic self-governance or respect for constitutive relationships) but also has a vital external dimension: it serves to structurally *restrict access* to commonly-held resources by excluding non-rights holders from enjoyment of the goods of membership.<sup>113</sup> Unlike traditional forms of wealth, which are held as private property, valuables associated with citizenship derive specifically from holding a *status* that is dispensed by the state, one that bestows exclusive goods and benefits to a select group of status holders.<sup>114</sup> The value of an entitlement such as citizenship depends at least in part

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<sup>111</sup> Scientific research on the use of stem cells in the treatment of disease, for instance, has precipitated a new debate about what constitutes private property. For a description of the novel relationship between stem cells and conceptions of property, see Jodi K. Fredrickson, "Umbilical Cord Blood Stem Cells: My Body Makes Them, but do I get to Keep Them? Analysis of the FDA Proposed Regulations and the Impact on Individual Constitutional Property Rights," 14 *Journal of Contemporary Health and Policy* 477 (1998).

<sup>112</sup> See Charles A. Reich, "The New Property," 73 *Yale Law Journal* 732 (1964).

<sup>113</sup> Only those who are defined as insiders have a formal share in various state-created rights and benefits, as well as goods and services attached to the special relationship between the rights-holder (the citizen) and the government.

<sup>114</sup> Thus, as with other types of "new property" (such as a professional license to practice law or medicine, for example), a rights-holder cannot lawfully trade or sell his or her entitlement to citizenship. In other words, each citizen enjoys the benefits of full membership in a state-held asset, but not the power to

upon governmental power. For example, by limiting the number of persons who can qualify as full members, the government can make the status of citizenship extremely remunerative for those who hold it. In a similar way, if citizens are the only ones guaranteed access to resources administered by the state, they gain a tremendous competitive advantage. Even in the current age of privatization, governments still control significant amounts of land, mineral wealth, routes of travel and commerce, various communications facilities and avenues of broadcasting, public facilities, and other infrastructural assets. Use of these resources generates wealth, and national governments often privilege domestic owners and entrepreneurs over foreign investors hoping to gain access to these same goods.

Reich's analysis intended to establish that governments owe an obligation to distribute public goods in ways that are predicated on an assessment of collective interests and that guarantee each member certain minimal rights to "intangible" entitlements (such as welfare payments in the event of need).<sup>115</sup> My intention, however, is to begin to explore what might be gained by thinking about citizenship as property in a different context: in terms of the *global distributive effects* of the extant system of inherited citizenship, which is currently facilitated through *jus soli* and *jus sanguinis* membership-attribution rules.

Clearly, citizenship status per se is no guarantee against the persistence of inequalities between members of the same polity. But it does anchor certain basic interests as irrevocable, once a person is inducted into the innermost circle of members.<sup>116</sup> The advantages of citizenship can be seen most clearly when we expand our

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transfer it through market activity. The only way in which an individual can automatically transmit this valuable entitlement to another person is through intergenerational inheritance, i.e., by virtue of birthright.

<sup>115</sup> See the landmark case of *Goldberg v. Kelly*, 397 U.S. 254 (1970), which is considered to have been influenced by Reich's concept of "new property" (affirming that the due process clause of the U.S. Constitution requires that a recipient of state financial aid be afforded an evidentiary hearing before the termination of benefits).

<sup>116</sup> Each insider differs from outsiders by virtue of enjoying a share in the protection conferred only on those counted as full citizens, and by holding a right not to be deprived of the valuable good of membership. Other scholars have termed this particular type of entitlement "communitarian property." For further discussion, see, for example, J. W. Harris, "Private and Non-Private Property: What is the Difference?" Vol. 111 *The Law Quarterly Review* (1995), pp. 421-444.

horizons from the domestic scenario to the global one. Citizenship status creates an apparently “invisible” shield of entitlement and protection that applies only to those who “naturally” belong to the state. This collective power to limit access to the goods of membership in a stable, rich, political community creates a seemingly “natural” border between those who deserve to enjoy the disproportionate spoils in these countries (by virtue of birth) and those who are classified as non-members. But once we understand citizenship to be a form of property, we can no longer hide the important distributive implications behind the “naturalizing” veil of birthright. At the very least, we need to pay closer attention to the principles and procedures governing admission to and allocation of the property of citizenship.

Once we begin to think of citizenship as property, we are in a better position to appreciate how birthright subtly but surely perpetuates privilege. It does this by creating a mechanism of closure that excludes the concerns (and pains) of non-members – not on substantive grounds related to specific disputes at issue, but by defining them as falling outside *our* jurisdiction of care and responsibility. Outsiders are those who (by definition) are not counted as stakeholders and rights-holders in *our* communal enterprise, and so they have no say in determining how we should define “internal” issues (such as membership boundaries). But it is precisely the nature of the property we call citizenship that builds this boundary between “us” and “them,” while at the same time making this distinction appear natural, a-political, and non-controversial.

“The will to (boundary) power” inherent in both *jus soli* and *jus sanguinis* citizenship laws can thus be seen in a new light.<sup>117</sup> By privileging the event of birth first and foremost, the principles of *jus soli* and *jus sanguinis* actually camouflage the property-related, exclusionary aspects of citizenship, because attributing automatic membership to a newly-born child seems so benign and easily justifiable. Yet once conceived as a valuable resource, citizenship itself becomes subject to the arguments of distributive justice – just like any other form of property entitlement. Differently put, if we view citizenship as a specific kind of property that secures access to certain valuable rights and benefits associated with political membership in particular communities, we

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<sup>117</sup> See Friedrich Nietzsche, *The Will to Power* (Walter Kaufmann and R.J. Hollingdale trans., Walter Kaufmann ed., 1967).

can infuse this concept with questions of justice, specifically those dealing with power, selection, and allocation.

By exploring the different ways in which *jus soli* and *jus sanguinis* are less different in reality than they are often thought to be in theory, I hope to have shown in this article how both these birthright-attribution principles collude in the pretense that human-made distinctions between nations, countries, and peoples are “natural” and “inherited” boundaries. These boundaries, in turn, preserve selective access to scarce resources and goods according to an entitlement-allocation scheme that is neither just nor fair in its distributive implications for those children who, through no fault or merit of their own, end up enjoying far more limited life prospects than their counterparts in wealthier and more stable countries. Even the most sophisticated defenders of property rights and inherited entitlements recognize the need to provide justifications for severe and persistent inequalities of accumulation. It is therefore vital that we sever the Gordian knot that has long obscured the connection between birthright, political membership, and differential access to the wealth of nations. In so doing, we tear off the mask of naturalness surrounding inherited entitlements and their complicity in the perpetuation of global injustice and inequality.