

11 Against birthright privilege: redefining citizenship as property

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While the topic of immigration attracts considerable attention, it is by means of birthright, and not naturalization, that approximately 97 percent of the global population acquires political membership.¹ In distributing membership and entitlement, or what Michael Walzer calls “the most important good”² within our communities, modern polities have long adhered to a formal, legal connection between *entitlement to membership* and *circumstances of birth*. This adherence automatically bequeaths to some a world replete with opportunity and condemns others to a life with little hope. There is no doubt that membership status in any given state or region – with its particular level of wealth, degree of stability, and human rights record – is, even in the current age of increasing globalization and privatization, a crucial factor in the determination of life chances. Political and legal theory has, however, had remarkably little to say about the system of distributive injustice attributable to current birthright citizenship laws.

This lacuna is especially surprising in light of recent and vibrant citizenship debates concerning topics closely related to the injustice in question – for example, the claims of minority groups, the narratives of collective-identity formation, and the ethics of political boundaries. These debates engage with what can be referred to as the “identity-bonding”

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¹ See United Nations Population Division (2002: 2).

² See Walzer (1983: 29).

dimension of citizenship.³ What remains conspicuously absent from these discussions, however, is any analysis of what we might call the “opportunity-enhancing” implications of the entrenched norm and legal practice associated with automatically allocating political membership according to kinship and heredity principles.⁴ It is my intention to remedy this oversight. In what follows, I offer a new perspective from which to conceptualize birthright citizenship laws, one that focuses on how these laws construct and govern the transfer of membership entitlement as a form of inherited property. I then explore the moral implications of viewing citizenship allocation in this way. Ultimately, I show that the conception of citizenship as a form of inherited property permits us to envision this good in terms of its redistributive potential.

Specifically, I argue that reliance on the event of birth in attributing political membership has too long concealed questions about the distribution of power and wealth from the realm of *demos* definition. Extant citizenship laws perpetuate a system of inherited inequality through reliance on a “natural” regime; by selectively focusing on the event of birth as the sole criterion for allotting automatic membership, they contribute to the conceit that this assignment is no more than an apolitical act of membership demarcation. It is in this way that potential distributive implications are obscured from view.⁵ In fact, birthright-attribution laws do far more than *demarkate* who may be included in the polity. Like other property regimes, they also define access to specific protections, privileges, decision making processes, and opportunity-enhancing institutions, which are held by rights holders to the exclusion of all others.⁶ In this respect, birthright principles exhibit the definitive features of

³ The complete list of contributions to these contemporary debates is too long to cite. A partial list of influential works includes: Kymlicka and Norman (1994: 352–81); Held (1995); Tamir (1995); Weiler (1999a: 324–57); Miller (2000); O’Neill (2000); Shachar (2001); Benhabib (2002a); Buchanan and Moore (2003); Marx (2003); Smith (2003b); Brysk and Shafir (2004).

⁴ The identity focus of citizenship debates has unwittingly left little room for sustained consideration of the distributive implications of birthright citizenship. Within the domestic arena, authors such as Nancy Fraser and Brian Barry have similarly flagged the concern that an overemphasis on recognition in the debate over group rights may come at the potential expense of attention to distribution. See Fraser (1995: 68–93); Barry (2001). Whereas these authors critically assess various multicultural accommodation policies adopted within such societies, my analysis here investigates the international arena, scrutinizing the concept of birthright citizenship *per se*.

⁵ For further elaboration on the distinction between the “demarcation” and “distributive” functions of membership rules, see my discussion in Shachar (2001: 49–55).

⁶ Restricting access to citizenship in this manner not only serves important *internal* functions (such as those of democratic self-governance or respect for special relationships), but also has a vital *external* dimension: it serves to restrict access to commonly held resources by structurally excluding non-rights-holders from the associated benefits of membership due to birthright arbitrariness. I have in previous works identified and critically

property: they constitute a system of rules that govern access to, and control over, resources that are scarce relative to the human demands made upon them.⁷ Unlike traditional forms of inherited entitlement, though, which are typically held as private property, valuables associated with citizenship derive specifically from holding a *status* that is dispensed by the state – a status that bestows exclusive goods and benefits upon a select group of rights holders.⁸

My analysis draws attention to the connection between birth and political membership, which, for the vast majority of the world's population, still governs *who* is entitled to *what* rights, opportunities, and wealth. Through the development of the conceptual affinity between hereditary citizenship and inherited property, I reveal the paradoxes and instabilities inherent in a system that relies on birth as the core criterion for determining access to the good of political membership and its associated benefits. For once we categorize certain relationships under the rubric of property, the classic questions of distributive justice – that is, of who owns what, and on what basis – cannot but follow. To frame citizenship in terms of inherited property and acknowledge birthright entitlement as a human construct not impervious to change is to expose the extant system of distribution to critical assessment.

My discussion proceeds in four main stages. First, I briefly elucidate the basic legal principles of birthright citizenship that govern the automatic attribution of membership entitlement in virtually all countries the world over: territoriality (*jus soli*) and descent (*jus sanguinis*). Second, I address the two major problems that derive from reliance on birthright citizenship laws in a world fraught with severe inequality across national border lines: unequal voice and unequal opportunity. These I refer to, respectively, as the *demos*–democracy puzzle and the global–distributive framework. Third, I offer a brief exposition of two prevalent and opposing responses to the question of citizenship attribution. On the one side, there is the recent work in political philosophy that endorses “world citizenship.” On the other, we find the practice of most immigrant-receiving countries, which, in the past few decades, has been to restrict access to the territory by imposing greater control measures in an attempt to “resurrect

assessed the prevalent defenses of birthright citizenship, which generally fall into three major categories: democratic self-governance, administrative convenience, and respect for constitutive relationships. I began this exploration in Shachar (2003: 345–97).

⁷ Following Hohfeld, property is frequently described as a “bundle of sticks”: that is, a collection of substantive rights, such as the right to use, to define access, to limit it (i.e., exclude), and so on. See Hohfeld (1917: 710–70). For concise discussion on the form and substance of property, see Dagan (2003: 1517–71). For a comprehensive analysis, see Waldron (1988).

⁸ See Reich (1964: 733–87).

the border.” This is an approach that began prior to September 11 and has only gained momentum since. I argue that neither the “world citizenship” nor the “resurrect the border” option is attractive: the former sacrifices too much of the identity and self-determination that belong to bounded political membership, while the latter courts the potentially disastrous consequences of global inequality by simply amplifying and re-enforcing birthright arbitrariness. Fourth, and lastly, I further develop the contours of the conceptual analogy between birthright citizenship and inherited property, and begin to draw out the redistributive implications of this reconceptualization.

I. Principles of citizenship attribution: territoriality and descent

Two main principles govern citizenship attribution in the world today: birth in a certain territory (*jus soli*) and birth to certain parents (*jus sanguinis*).⁹ The *jus soli* 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 in that polity. *Jus sanguinis*, on the other hand, does not elevate the particulars of birthplace to a guiding principle. Instead, it confers political membership according to *descent*: that is, it automatically entitles the children of current members of a polity to full citizenship status in that community. No country relies exclusively on either one of these principles alone. Instead, they generally uphold various combinations of *jus soli* and *jus sanguinis* in order to determine who to recognize and protect as their own.¹⁰

While the principles of *jus soli* and *jus sanguinis* differ in their emphasis on territory and parentage, respectively, what they share is the basic notion that circumstances surrounding birth should determine political membership. The distinction between them refers to the preferred connecting factor that is given priority in demarcating a respective state’s

⁹ Citizenship can also be acquired through naturalization – as the end result of citizenship. In practice, however, only a tiny minority (estimated at less than 3 percent of the total world population) has managed to acquire citizenship in this way. See United Nations Population Division (2002: 2). Even in traditional immigrant-receiving countries, such as the United States, the foreign-born population rarely exceeds 10 percent of the total population. After migration to the United States, some foreign-born residents become naturalized citizens. This process usually requires legal entry to the country and at least five years of residence, in addition to a volitional decision by the foreign-born resident to apply for citizenship, a process which culminates with a pledge of allegiance to the new country at a public naturalization ceremony.

¹⁰ For an illuminating analysis, see Weil (2001: 17–35).

membership boundaries. As Chris Eisgruber observes, it is tempting to think that a rule that makes birthright citizenship “contingent upon the place of a child’s birth is somehow more egalitarian than a rule that would make birthright citizenship contingent upon the legal status of the child’s parents.”¹¹ But this distinction can easily lead us astray. *Both* criteria for attributing membership at birth are arbitrary: one is based on the accident of geographical borders, the other on the brute luck of descent.¹²

Unlike consent, merit, achievement, residency, compensation, or need, the acquisition of automatic (birthright) membership in the state is arguably the least defensible basis for distributing access to citizenship, because it allocates rights and opportunities merely according to aspects of our situation that result from arbitrary, unchosen, and unalterable circumstances.¹³ The idea that persistent inequalities of wealth and opportunity can be justified on the basis of ascriptive characteristics, such as gender, race, or place of birth, runs counter to the core principles of liberal and democratic theory.¹⁴ Instead of nullifying or minimizing the contingencies of birth, extant *jus soli* and *jus sanguinis* citizenship laws effectively amplify their significance.

II. The consequences of birthright: unequal voice and opportunity

In a world fraught with severe inequality across national borders and between states, the *jus soli* and *jus sanguinis* principles perpetuate strikingly

¹¹ See Eisgruber (1997: 54–96, here 59).

¹² In theory, one might argue that the *jus sanguinis* birthright rule is more easily justifiable than a *jus soli* rule because it rests on a “relational” understanding of membership (i.e., one that privileges family ties) as opposed to a purely individual-centered vision of membership. This defense of the birthright principle fails, however, to provide us with the tools with which to examine whether such reliance on family in the acquisition of membership increases human dignity, or runs the risk of perpetuating oppressive patterns of reliance on intimate relations in bestowing political membership. For example, there is damning historical evidence that shows how reliance on marriage for the purposes of defining a married woman’s membership status has led to increased regulation, policing, and ultimately exclusion of women who have dared marry husbands from “outside” their national communities. See Cott (1998: 385–426).

¹³ For those who think that the answer to birthright arbitration lies simply in adopting more open naturalization policies to reward those who take risks and show initiative by leaving their home countries and emigrating to a new society, it is important to remember that “migrant stock” in the world’s population currently stands at less than 3 per cent. As indicated above, this means that 97 per cent of the world’s citizens are still living in their country of birth. Moreover, the number of governments adopting more restrictive immigration measures has risen dramatically, from 6 per cent in 1976 to 40 per cent in 2001.

¹⁴ For a now-classic exposition of this view in the debate over immigration, see Carens (1987: 251–73).

different prospects of well-being, security, and freedom for persons based solely on legitimizing grounds as weak as birthplace or bloodline. Surprisingly, these dramatic consequences of reliance on birthright citizenship laws in attributing political membership have seldom been subject to thorough normative critique, even by scholars who are open to re-evaluating the traditional relationship of political authority to territorial space. In embarking on this important inquiry, I believe it is imperative to isolate two interrelated, yet analytically distinct, types of consequences of birthright attribution of political membership: those relating to *political voice* and those relating to *inequality of opportunity*. The former I label “the *demos*–democracy puzzle”; the latter the “global–distributive framework.” I discuss each in turn.

The demos–democracy puzzle

Democratic theory has long taken for granted the boundaries of political membership, treating them as given.¹⁵ So has liberal theory, which until recently treated problems of justice as contained within “a closed system isolated from other societies.”¹⁶ Yet even the most minimalist conception of democracy, as any undergraduate student should be able to recite, requires that rulers be selected by the people in competitive elections. Also needed is a procedure to aggregate the preferences of the voters, such as through majority rule.¹⁷ Frequently heard concerns about the “tyranny of the majority” also assume a predefined whole, of which only a majority has spoken.¹⁸ But who comprises “the people” who are to collectively deliberate? Neither democratic nor liberal theory can resolve this puzzle because, as mentioned above, both presuppose the existence of a bounded *demos* – that is, a stable political community with members through whom and for whom democratic discourse takes place. As Ian Shapiro and Casiano Hacker-Cordon pointedly observe: “[a]n enduring embarrassment of democratic theory is that it seems impotent when faced with questions about its own scope . . . A chicken-and-egg problem thus lurks at democracy’s core. Questions relating to boundaries and membership seem in an important sense prior to democratic decision making, yet paradoxically they cry out for democratic resolution.”¹⁹

¹⁵ See Kolers (2002: 29–50).

¹⁶ See Rawls (1971: 8). ¹⁷ See Przeworski (1999: 23–55).

¹⁸ Luminaries from Robert Dahl to Joseph Schumpeter to Ronald Dworkin have addressed this problem, offering answers that include advocacy of cross-sectional interest-group polyarchy, a procedural defense of fair “rules of the game,” and a more robust, substantive vision of democracy, which requires elevating certain constitutionally protected rights and civil liberties above the vicissitudes of democratic politics.

¹⁹ Shapiro and Hacker-Cordon (1999: 1).

In practice, most countries address this *demos*–democracy boundary problem by relegating it to the legal realm, where citizenship laws that rely on birth as the gateway to membership by and large define the contours of the constituency. Yet this technical resolution of the “boundary problem” does not offer a substantive response to the concerns identified by Shapiro and Hacker-Cordon. It does not answer *why* accidents of birth should acquire such significant legal meaning in the process of defining entitlement to political membership. Nor does it provide convincing democratic or liberal justifications to legitimize the hereditary passage of title to at least two relevant audiences: the beneficiaries of such transmission (those who automatically count as full members), and those who are being kept out as a result of the construction of these birthright-based walls of inclusion/exclusion. What this relegation to the legal sphere does achieve, however, is political expediency: these inevitably charged questions of boundary making are conveniently removed away from public debate.

For other scholars, the *demos*–democracy puzzle is troubling in regard to the potential “corruption” of the *demos* by an *ethnos*. In Jürgen Habermas’ words: the “republican achievement is endangered when . . . the integrative force of the nation of citizens is traced back to the prepolitical fact of a quasi-natural people, that is, to something independent of and prior to political opinion- and will-formation of the citizens themselves.”²⁰ While this concern about a “quasi-natural” transmission of membership is typically raised in regard to *jus sanguinis* countries (where the nation often predates the state), it must be further pressed in a world where virtually all citizenship laws encode birthright attribution principles, even where the genealogy of the political community is not independent from the creation of the state.

At present, every polity limits access to the property of citizenship by carefully drawing a circle around those to whom it ascribes membership at birth. Even countries that are widely viewed as archetypes of the *jus soli* model (such as the United States and Canada) rely on considerations of blood and soil – not choice and consent – in defining who “naturally” belongs to the collective.²¹ In practice, then, both civic and ethnic

²⁰ Habermas (1998a: 115).

²¹ My point is not to suggest that there are no important differences between the *jus soli* and the *jus sanguinis* membership regimes. Clearly, such differences exist, as demonstrated by the familiar example of “second-generation immigrants.” Under a pure *jus soli* regime, any child born within the state’s territory automatically acquires citizenship as a matter of right; thus the notion of “second-generation immigrant” constitutes an empty category. Under a pure *jus sanguinis* regime, on the other hand, residency and territory are not considered relevant factors for acquisition of citizenship. Thus a child born and bred in a

countries rely on birthright principles to delimit the boundaries of the political community and determine entitlement to participation in political decisions.²²

The *demos*-democracy puzzle gains further salience in a globalizing world of increased interdependence and interconnection between states and societies. Under such conditions, reliance on birthright principles as the basis for distributing the franchise does little to amend the democratic voice deficits created by a lack of overlap between those who are significantly affected by a political decision and those who are entitled to participate in that polity's decision making processes. This problem has two dimensions. First, it may lead to inadequate inclusion of non-members who habitually reside within the polity's territorial jurisdiction, but nevertheless lie outside the ascriptive reach of its *demos*.²³ As such, they are excluded from effectual deliberation regarding decisions that deeply affect their lives. The situation involving Germany's "guest workers" is an example of this problem that has received much attention in the literature.²⁴ Second, we must consider certain "extraterritorial" voice deficiencies. Here the main concern is that reliance on the criteria of birthplace and parentage is underinclusive. It may systematically exclude relevant stakeholders who physically reside outside the territorial jurisdiction of the decision making community, but who are nonetheless significantly affected by its decisions. The example of cross-border environmental pollution will serve to illustrate this. Imagine a scenario in which the electorate in one country (*A*) imposes negative externalities on the territory of their neighboring country (*B*), without the constituency in country *A* consulting with, or being held to account by, the citizenry

jus sanguinis country may nevertheless be precluded from acquiring citizenship in it solely because she has "inherited" her parents' nonmembership status. This distinction does not weaken, however, the general claim that we tend to overlook the *demos*-democracy legitimacy puzzle in civic nations by associating it too narrowly with ethno-nationalism. I discuss in detail the relationship between birthright citizenship and "civic" and "ethnic" conceptions of the nation in Shachar (2003).

²² Although some countries have granted local voting rights to non-citizens in an attempt to overcome a deficit of democracy stemming from a growing population of permanent residents who lack citizenship status, access to the *national* franchise is still allocated on the basis of birthright or requires the act of naturalization by the foreign-born.

²³ This is a major theme of David Held's "cosmopolitan democracy" argument. See, for example, Held (1999). While I agree with Held's analysis of the "boundary problem," we differ on how best to resolve it. See section IV of this chapter.

²⁴ Discussion of this dimension of the voice deficit experienced by long-term permanent residents is emphasized by scholars who specialize in European immigration studies. See, for example, Bauböck (1994b); Rubio-Marin (2000); Giesen (2001). For a comprehensive discussion of dilemmas of citizenship in contemporary Europe, see Benhabib (2002a: 147-77).

of country *B*.²⁵ Given the reality of unequal bargaining power between polities, along with the recognition that more powerful countries routinely make political decisions that adversely affect the lives and livelihoods of noncitizens who have little or no say in these decisions, it is difficult not to conclude that under such conditions, basic principles of voice, accountability, and democratic justice would be violated.²⁶

The tension between formal legitimacy (following the “rules of the game”) and substantive illegitimacy (that those adversely affected by decisions are barred from participation) is far from new in the history of citizenship. In the past, however, the excluded parties were physically *within* the jurisdiction of the political community. Their exclusion relied on “immutable” group-based characteristics such as race or gender. Today, relevant stakeholders outside the territorial state are excluded from democratic participation. The removal of gender and race criteria from the right to vote is widely regarded as one of the greatest victories of law and morality in the twentieth century. Will the twenty-first century witness a further expansion of the boundaries of political voice beyond the ascriptive *demos*? At present, it is clear that there is a tension between liberal-democratic values and the definitions of territorial boundaries and membership that determine who is to have a voice – a tension that needs to be addressed.

The global–distributive framework

Birthright citizenship is responsible for more than just defining the boundaries of political voice. Hereditary membership is also associated with unequal access to opportunity. For those granted a head-start simply because they are born into a flourishing political community, it may be difficult to appreciate the extent to which others are disadvantaged due to the lottery of birthright. But the global statistics are strikingly clear and consistent. Children born in the poorest nations are five times more likely to die before the age of five. Those who survive their tender years will in

²⁵ Clearly, greater precision is required in defining which decision making processes should be open to some input by citizens in neighboring country *B* (or similarly affected countries *C*, *D*, and so on), and how to determine whether the latter have a *legitimate* stake in participation. For promising work in this emerging field of inquiry, see Ong (1999); Kolers (2002); Bauböck (2005a: 763–7); Williams: chapter 10 in this volume.

²⁶ See Gutmann (1999, online version: 4). Note that this “extraterritorial” problem of voice deficit can be ameliorated somewhat by regional or international coordination, or by bilateral talks at the executive level between representatives of countries *A* and *B*. In his more recent work, Shapiro has advocated the idea of “defining the *demos* decision by decision rather than people by people” – that is, following a principle of affected interests. See Shapiro (2003a: 222).

all likelihood lack access to basic subsistence services such as clean water and shelter and are ten times more likely to be malnourished than children in wealthier countries. Also significantly increased are the odds that they will either witness or themselves suffer infringements of basic human rights. What is more, these conspicuous disparities cannot be attributed to random misfortune or “fate”; they represent a pattern of *systematic* inequality in the distribution of basic social conditions throughout the globe.²⁷

When analyzed in this broader context, we can begin to think about the enjoyment of full membership status in affluent societies and its birthright-based transmission as a complex form of inherited property. In an unequal world, such entitlement to citizenship in a wealthy and stable democracy is a scarce and valuable resource. It has come to serve as a reliable proxy for predicting whether or not a person will have her basic needs met, whether or not her dignity and livelihood will be protected, and whether she will face violence, fear, hunger, disease, and oppression on a daily basis; whether, in short, she will live in a society that provides even the minimum conditions for the pursuit of well-being, let alone a more robust vision of human flourishing.²⁸ The standard response of liberal and democratic theory to the inequality of opportunity caused by ascriptive factors is to work hard to ensure that “no child is left behind.” While this slogan has never fully materialized in any country, it reflects an aspiration to overcome the social hierarchies and economic barriers that are caused by morally arbitrary circumstances or structural patterns of disadvantage. It is therefore surprising and disturbing that the opportunity-enhancing quality of ascriptive membership has largely escaped critical scrutiny. This paucity of analysis is explained at least in part by the fact that the study of citizenship laws has traditionally been the province of domestic and often parochial scholarship, which tends to concern itself with the particular features of its own country’s norms and procedures for defining membership and admission.²⁹ International law, for its part, has focused primarily on attempts to resolve the problem of statelessness. This account calls our attention to the fact that it is better for the individual to enjoy a special

²⁷ For a concise overview of these statistics concerning the global fragmentation of opportunity with reference to democracy and participation, economic justice, health and education, as well as peace and security, see “Human Development Balance Sheet” in United Nations (2002). See also UNICEF (2005).

²⁸ This list is intentionally minimalist in scope. For a more comprehensive list of basic capabilities, see Nussbaum (2002). See also the illuminating discussion developed in Blake (2002: 257–96).

²⁹ Even more recent comparative work is still primarily concerned with country-by-country analysis rather than problem-driven analysis. See, for example, Hansen and Weil (2001); Kondos (2001).

attachment to any given polity than to remain with no state protection at all.³⁰ This is clearly a potent argument. However, this formulation focuses only on *formal equality of status*. It says nothing about rectifying inequalities in the *actual life opportunities* of individuals. Moreover, the standard focus on formal equality of status (requiring that all individuals belong to one state or another) itself relies on a schematic picture of an orderly world comprising clearly delineated political communities. This conception of the world is described by Rainer Bauböck as having, “a quality of simplicity and clarity that almost resembles a Mondrian painting. States are marked by different colors and separated from each other by black lines . . . [This] modern political map marks all places inhabited by people as belonging to mutually exclusive state territories.”³¹ In such a world, with its clear and exhaustive division of the global political landscape into mutually exclusive jurisdictions, it appears “axiomatic that every person ought to have citizenship, that everyone ought to belong to one state.”³² By focusing on the formal equality of citizenship, it becomes possible to emphasize the artificial symmetry between states (represented as different color-coded areas on the world map) while ignoring inequalities in the actual life prospects of citizens who belong to radically different (yet formally equal) state units. In this respect, notes Benedict Kingsbury, “[t]he system of state sovereignty has hitherto had the effect of fragmenting and diverting demands that international law better address inequality.”³³

For most legal scholars (as well as most political philosophers), then, the question of *which* state would guarantee membership to a particular individual has been seen as largely irrelevant.³⁴ This may help to explain why theories of law and morality have too long been blind to the

³⁰ With the adoption of the 1951 Refugee Convention, international law governs the basic norms concerning the status of refugees. However, the assumption is that refugees already possess birthright citizenship – that is, they are *not* stateless. Rather, for various reasons (including political, religious, or other prescribed forms of persecution), they are temporarily unable to reside in or return to their home countries or are barred from so doing.

³¹ Bauböck (2005b: 1). As Bauböck points out, this Westphalian image of the world cannot account for the political significance of transnational connections and affiliations that many individuals now bear toward their (old and new) home countries, nor can it satisfactorily address the reality of dual nationality.

³² Brubaker (1992: 31).

³³ For a detailed exploration of this theme, see Kingsbury (1998: 600).

³⁴ Even progressive scholars who justify a moral or basic human right to membership typically do so at a general, abstract level, while relegating “the specific content of the right to citizenship in a specific polity . . . [to the] specific citizenship legislation of this or that country.” See Benhabib (2004a: 141). This “division of labor” may well be motivated by the idea of sovereign autonomy or democratic self-determination. However, it unwittingly strengthens the notion that all that matters is that one gain a right to membership “in this or that country,” instead of insisting that it is important that one gain membership in a country that can provide one’s basic needs and generate conditions

dramatically unequal voice and opportunity consequences of birthright citizenship, but it does little to justify it. In spite of the allure of neutrality, the reluctance to confront the global-distributive implications of birthright citizenship can hardly be warranted. In theory, the focus on formal as opposed to substantive equality might be tolerable if we lived in a world in which it would not matter where a child was born, because she would enjoy roughly equal opportunities regardless. But this is clearly not the global reality. Ours is a world in which disparities between countries are 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.”³⁵

If we agree that the current global allocation of opportunity is far from just, acknowledge the fact that well-being significantly tracks birthright membership, and at the same time recognize that access to citizenship is presently distributed in a way that perpetuates inherited privilege, what conclusions are we to draw for the traditional legal standards of *jus soli* and *jus sanguinis*?³⁶

III. Open versus closed borders: two prevalent responses and their limitations

The academic literature has seen a proliferation of arguments predicting the demise of the nation-state and the rise of postnational, denationalized, or cosmopolitan conceptions of political membership. This line of argument represents a movement toward an ideal model of “world citizenship.” At the same time, many countries have taken significant and practical policy steps to *restrict* the flow of noncitizens across their territorial boundaries. These latter developments fit squarely within what I will label as the “resurrect-the-border” model of response. This dramatic gap between cosmopolitan theory and actual practice illustrates that at present there are no simple and widely accepted answers with which to respond to the challenge of “re-imagining political community.”³⁷ Various proposals, such as managed migration solutions, regional burden-sharing agreements, multilevel governance regimes, and the like, may

that permit the fulfillment of one’s capacities. It is in this slippage between an abstract right to membership and its concrete materialization that we witness how the focus on formal equality of status makes invisible the inequality of actual life chances attached to membership in specific political communities.

³⁵ See World Bank (2000).

³⁶ For further discussion, see Shachar (2003); Blake (2003: 398–409); Shachar (forthcoming).

³⁷ I am borrowing here directly from the title of an influential volume on this topic, *Re-Imagining Political Community* (Archibugi, Held, and Köhler 1999).

fall between the two poles of “world citizenship” and “resurrect the border.” For the sake of analytical clarity, it is helpful to focus on the “world citizenship” and the “resurrect the border” models because they represent the two opposite ends of the spectrum that lies between a vision of a world without borders and a “fortress” paradigm of sovereign self-determination.

World citizenship

One alternative to the uncritical acceptance of the intimate alliance between birth and political membership is to advocate the abolition of closed borders, or to embrace the concept of global or world citizenship.³⁸ In theory, this option appears to resolve the problem of birthright arbitrariness: instead of perpetuating privilege and disadvantage through inherited membership entitlement in different countries, we would all hold an equal status as members of a political authority of a specifically global kind. Thomas Pogge best expresses this vision, which he calls “legal cosmopolitanism,” as committed “to a concrete political ideal of a global order under which all persons have equivalent legal rights and duties, that is, are fellow citizens of a universal republic.”³⁹

In its strongest manifestation, the ideal of world citizenship stands not as a complement to bounded political membership but as its *alternative*.⁴⁰

³⁸ Claims in favor of “cosmopolitan” or “global citizenship” have received much attention in recent years. One prominent example is found in Nussbaum (2002). For other perspectives, see the essays in *Re-Imagining Political Community* (Archibugi, Held, and Köhler 1999); Dower and Williams (2002); Vertovec and Cohen (2003). For an eloquent and comprehensive defense of the idea of “denationalizing” citizenship, see Bosniak (2000).

³⁹ See Pogge (1992: 48–75, here 49).

⁴⁰ In its extreme variant, this view resolves the moral universalism concern by diluting if not erasing the distinction between the citizen and the person by conceptually collapsing the former (a particularist identity) into the latter (a universal one). In developing his cosmopolitan vision, Thomas Pogge, for example, “does not presuppose the existence of a community of persons committed first of all to share with one another.” See Pogge (1992: 56). Other scholars have endorsed the importance of international and domestic human rights codes in providing rights and protections to persons *qua* persons, as opposed to limiting state responsibilities towards citizens, but without necessarily endorsing a vision of world citizenship. For example, David Jacobson notes that “the state itself is a critical mechanism in advancing human rights. Similarly, international human rights codes draw wider swaths of the population – specifically foreign populations – into the legal web of the state . . . Thus the process described here, involving the relationship between the state and international institutions and law, is a dialectical one: the state is becoming a mechanism essential for the institutionalization of international human rights. The state and the international orders are, consequently, mutually reinforcing.” See Jacobson (1997: 11). In a similar vein, Yasemin Soysal observes that “the very transnational normative system that legitimizes universal personhood as the basis of membership also designates the nation-state as the primary unit for dispensing rights and privileges.” See Soysal (1994: 143).

As such, this vision may prove unattractive for several reasons.⁴¹ For one, the remedy is too drastic; it might well amount to throwing out the baby with the bath water. To remove borders altogether is to lose an important feature of modern citizenship – namely, the direct, reciprocal, and special relationship between the individual and the bounded community to which she belongs, along with all the benefits and risks that such social cooperation entails. While polities come in different shapes and sizes, redrawing the world map *de novo* – this time without the black Mondrian lines – seems too radical a remedy, unless we have some guarantees for its prospective success. Unfortunately, no such assurances are currently on offer.

Moreover, political membership in a bounded community involves notions of participation, solidarity, and even sacrifice in times of need. It is difficult to imagine how these values could be preserved when our state community would include the entire world population. Transferring the weight of political membership from the bounded community to the global scale therefore runs the risk of denigrating and disintegrating the bonds of interdependence that are part and parcel of the collective enterprise of political membership as we currently know it. This includes the risk of dissolving the constitutive ties that, through joint responsibility, currently bind people to the benefits and burdens of membership in a relatively stable and self-ruling political community.⁴²

Another set of concerns refers to the potential cultural and social capital losses that are likely to occur if memories are all that remain of rich and diverse forms of modern statehood, with states' distinct histories,

⁴¹ My criticism of the “world citizenship” position is not based on a rejection of the idea that it is possible and indeed desirable to cultivate multilevel governance regimes, networks, and institutions, particularly if they establish cooperative and competitive jurisdictional relations along the lines of “joint governance.” In *Multicultural Jurisdictions*, I focus on envisioning multilevel governance regimes within the state in order to resolve, or at least ameliorate, the tension between respecting cultural differences and protecting women’s rights in the event of a clash. In principle, nothing prohibits the application of joint governance at the supranational level, though attention must be paid to defining which challenges are to be met by such joint governance regimes, who will be involved in their establishment and enforcement, which voices and interests will be represented and protected through joint governance, and how well such a proposal fares in comparison to other alternative remedies. See Shachar (2001).

⁴² Similar concerns are raised by James Bohman in Bohman (2001: 3–21). In Bohman’s view, once political authority itself shifts toward supranational agents, it becomes imperative to establish new institutional venues for political influence and accountability-holding by the citizens of the different countries that are influenced by such supranational bodies. For Bohman, such participation would not replace membership in a bounded community but merely complement it. As mentioned above, I have no objection to this argument, which represents a specific variant of response to the larger democratic deficit problem discussed in section II.

narratives of identity, political struggles, social experiments, linguistic diversity, and so on. There are also instrumental considerations in recognizing the value and significance of membership in a domestic (as opposed to a global or transnational) political community for the proper functioning of democracy, in addition to the argument that a relatively stable and bounded community is often required to sustain a meaningful expression of the welfare state.⁴³ Political economists, for their part, have stressed the importance of scale for economizing on the costs of administering a political system, in terms of aggregating individual preferences in a democracy or executing a chosen public policy. These costs are likely to increase with the size of the territory and citizenry over which authority is exercised.⁴⁴

Finally, arguments in favor of a “cosmopolitan” or “world citizenship” model remain notoriously abstract; typically, they lack even a minimal account of institutional concreteness in envisioning how this new world-state membership status would manifest itself in practice.⁴⁵ No answers are given to basic queries, such as what type of benefits and obligations global citizenship would bestow upon its members, which governance structures it would entail, what administrative procedures it would follow, what equality guarantees its citizens would enjoy, and so on. It also remains to be clarified whether (and if so, how) meaningful opposition could be articulated in the context of a mega-state bureaucracy of unprecedented proportions. Similar concerns arise when contemplating the level of autonomy that minority communities, or even smaller nations, would obtain in a global-citizenship structure, given that their few numbers would make it difficult to win binding concessions through majoritarian politics. Furthermore, assuming that no meaningful jurisdictional boundaries remained in place, where would we escape to if we deeply disagreed with the public policies adopted by fellow members in the world polity? Ironically, we might find ourselves more exposed to the “tyranny of the majority” or “soulless despotism” (as Kant put it) in this brave new borderless world, than in our imperfect, bounded polities.

⁴³ On the democratic politics argument, see, for example, Kymlicka (1999). On the social welfare argument, see Tamir (1995); Miller (2000). See also Moore (2001: 1–20).

⁴⁴ These political economy arguments, however, do not preclude a move toward greater sharing of responsibility among overlapping membership communities (as is the case, in effect, in existing federal systems). Nor do they suggest that *jus soli* and *jus sanguinis* currently establish the “optimal” composition for existing polities in terms of size or population. Rather, they serve as a critique of the simplistic assumption that the solution to birthright citizenship lies in abolishing membership boundaries altogether.

⁴⁵ For a similar theme, see Walzer (1996), which provides a pointed critique of Nussbaum’s essay in the same collection.

In short, it requires a great leap of faith to assume that a new concept of “world citizenship” will inevitably prove to be more democratic or egalitarian than the current alternatives. The concern here is that if citizenship were to become a “flat” membership status, then we might see a thinning out of the content associated with the concept itself, rather than a global application of the relatively robust and successful formula of internal redistribution and mutual responsibility in a self-governing polity that has been achieved (however imperfectly) at the domestic level.

Resurrect the border

Failing to find persuasive reasons for adopting the cosmopolitan or denationalized vision of citizenship, others have offered a diametrically opposed alternative: ignore the deficits of voice and opportunity in the current world system by fortifying and reinvigorating existing membership boundaries that distinguish “us” from “them.” This “resurrect-the-border” argument utilizes the naturalizing mask of *jus soli* and *jus sanguinis* principles to reify the distinction between the legitimate propertyholder (the citizen) and the illegitimate trespasser (the alien). It is fueled by a deep sense of crisis or “loss of control” over borders, which requires, in the eyes of its proponents, the adoption of immediate and tough measures to regulate the movement of people.⁴⁶ If borders are reformed, it is argued that each polity can focus on its internal challenges, instead of meddling in or trying to ameliorate the harms caused by other states’ problems. Prima facie, this technique of isolation makes it possible to ignore, or treat as irrelevant, the needs and concerns of those who are legally and physically excluded (through the combined effect of hereditary citizenship and guarded territorial borders) from entering *our* jurisdiction of membership, care, and responsibility.

Advocates of this “resurrect-the-border” approach emphasize that there is no international human right to freedom of mobility.⁴⁷ Indeed, determining who shall enter and remain on its territory still remains an important prerogative of the state, although this is no longer seen as an impenetrable bastion of sovereignty.⁴⁸ Governments may choose to assist

⁴⁶ For an influential collection of essays that seeks to identify whether such a “loss of control” claim is supported by evidence drawn from a comparative study of the efficacy of immigration control measures in leading industrialized countries, see Cornelius, Martin, and Hollifield (1994).

⁴⁷ Although a citizen holds a right to exit her own home country, she holds no corresponding right to enter and remain in another country, since no state presently allows unlimited or unregulated crossing of its borders.

⁴⁸ To date, there is no governing international principle that can force a country to adopt one or another method of citizenship transmission. Instead, each political community or

the residents of other countries by means of foreign aid, trade, charity, and investment, if they so wish. But no norm of international law requires them to do so.⁴⁹ Defenders of refortified borders are not blind to the fact that we live in a world of increased interdependence, in which no polity is fully immune to the effects of events occurring outside its borders – be they civil war, currency meltdown, or environmental disaster. It is precisely the acknowledgment of such interdependence that leads proponents to seek refuge behind increasingly high walls.⁵⁰ To erect such walls, many countries have in recent years adopted a combination of policy measures: significantly restricting their immigration laws, allocating greater resources to land border control, tightening entry restrictions, and vowing to “get tough” on illegal immigration.⁵¹

While clearly not designed to remedy the *demos*–democracy puzzle nor the global–distributive deficit of birthright citizenship, these defensive measures can be seen as pre-emptive responses to emigration pressures in the world’s poorer regions, where roughly 95 percent of the global population resides.⁵² As Bimal Ghosh observes, “no other source of tension and anxiety has been more powerful [in the West] than the fear, both real and perceived, of huge waves of future emigration from poor and weak states in the years and decades to come.”⁵³ Refortified borders are perceived, in this context, as essential building blocks in the larger toolbox of strategies to insulate affluent, stable, rule-of-law countries from the threats of uncontrolled immigration, ethnic and national strife, poverty, disease, war, and despair that seem to plague much of the world. As one scholar bluntly puts it, “[t]he first world more and more sees the second either as a threat or a Pandora’s box of insoluble problems, for whom nothing positive can be done but from which one should above all be

country is free to choose its own method of assigning citizenship, as a manifestation of its autonomy and sovereignty. In practice, new democracies face increasing pressures to ensure that the basic rights of all their permanent residents are respected; see Orlenticher (1998).

⁴⁹ Signatories to the Geneva Convention of 1951 on the Status of Refugees (in force since 1954) are bound to provide *temporary* relief to certain asylum seekers (those that fit the definition of “refugee” as codified in that Convention). This obligation is borne by the first “safe country” entered by the asylum seeker.

⁵⁰ This recognition leads advocates of cosmopolitan citizenship to the opposite conclusion – namely, that we should seek new bonds of transnational solidarity.

⁵¹ See *International Migration Report 2002* on the adoption of new measures to restrict immigration by receiving states. The 1996 immigration reform in the United States represents a specific example of this broader trend. It is also widely recognized that the opening of internal borders in Europe has been consistent with the closing of external borders to non-EU or third-country nationals. The legal changes that followed the events of September 11 in the United States and July 7 in the United Kingdom have only fortified this restrictive trend.

⁵² See Ghosh (2000: 10). ⁵³ *Ibid.*

isolated, so as not to sink into its quicksands or be contaminated by its illness.”⁵⁴ These fears may nourish an extreme, Hobbesian–survivalist variant of the “resurrect-the-border” argument, according to which each polity must see *all* noncitizens as potential threats.

The obvious problem with this strong and unattractive “resurrect-the-border” approach lies in the very real concern that it may be fueled by (and in turn inflame) xenophobic, often racist, anti-immigrant, or anti-minority, sentiments. However, weaker and more defensible formulations lean towards protecting extant borders, as opposed to championing open borders, on the grounds of an appeal to ethical particularism or the priority of special ties and duties owed to fellow citizens and co-residents of our country – however such membership boundaries are defined.⁵⁵ While presenting an array of arguments to make their case, the common strategy shared by defenders of regulated (but not impenetrable) borders is to minimize the extent to which current practices of inclusion and exclusion rely on the legal construction of citizenship according to accidents of birth, in the process implicitly reconstituting the boundaries of the political community as a “natural” given. This allows for a shift in focus from dilemmas of birthright arbitrariness to questions concerning how best to protect the prosperity, security, and freedom of those who *already belong* as full members of the collective. Under such conditions, little room is left for contemplating the arbitrariness/fairness of extant membership rules or the (in)justice of birthright principles. Similarly, debates concerning the potentially detrimental distributional effects of *jus soli* and *jus sanguinis* principles are generally inhibited.

Even taken on its own merits, the policy argument for resurrecting the borders suffers acute inconsistencies. First of all, governments have been ambivalent about the adoption of a “fortress” mentality, because of the profound contradictions this raises for liberal democracies that defend human rights values, support greater freedom in the exchange of goods and capital across national border lines, and also advocate increased “openness” to trade and democracy in societies traditionally governed by more centralized regimes. The growing gap between “open borders” for trade and information versus “closed borders” for the movement of

⁵⁴ See Pierre Hassner, referring to arguments by Jean-Christophe Rufin, Max Singer, and Aaron Wildavsky, in Hassner (1999: 278).

⁵⁵ For further elaboration of the distinction between special and general duties in this context, see Parekh (2003: 3–17). See also Miller (1998: 202–24). Others have emphasized that the only reason that justifies restrictions upon free movement is to guard against the potential fragility of liberal-democratic institutions, which may be overwhelmed by large numbers of foreigners previously accustomed to authoritarian governance. See, for example, Ackerman (1980: 93–5).

people thus creates serious ideological and enforcement tensions for liberal democracies.

Second, most traditional immigrant-receiving countries do not wish to adopt a zero-tolerance immigration policy. Rather, they seek to better manage the definition of *who* may be included in their polities, and according to *which* criteria. Such attempts have led to “reshaping” the boundaries of inclusion through immigration; for example, by adopting stricter requirements for some (e.g., asylum seekers) and more relaxed admission procedures for others (e.g., adopted children). Furthermore, in spite of the general trend toward restricting the entry and residence of nonnationals, we are witnessing increased reliance on professional-employment visas (including the H1-B and L visas in the United States, for example), along with fierce competition among receiving polities to attract highly skilled immigrants to their respective markets as a boost to technological and economic growth.⁵⁶

Third and last, we live in a deeply fragmented world, in which many countries fail to provide their citizens with access to democracy, the protection of human rights, freedom from poverty, and even the satisfaction of basic needs. To do nothing under such circumstances to ameliorate the pressures of global inequality may prove unwise, if not outright disastrous, in the long run.⁵⁷ This recognition has not escaped several defenders of the “resurrect-the-border” argument. However, faced with a collective action dilemma, in which the benefits of “do-it-alone” restrictionism prevail, at least in the short term, over the barriers to international cooperation that are so difficult to overcome in developing a stable regime of managed migration, it is not surprising that many countries in the North Atlantic region have become increasingly bent on adopting measures of self-aid. What is indisputable, however, is that any attempt to keep the borders shut forever without addressing the tensions and pressures that encourage global migration patterns is hardly a compelling moral response to acute and persistent disparities of voice and opportunity.

IV. The citizenship-as-inherited-property analogy: its redistributive potential

The brief discussion of world citizenship above suffices to establish the inadequacies of the idea that extant borders between states should be traversed with the greatest of ease, to the extent that they become next

⁵⁶ For detailed discussion, see Shachar (2006).

⁵⁷ For a concise “human development balance sheet,” accounting for both global progress and global fragmentation, see “Overview: Deepening Democracy in a Fragmented World,” in *Human Development Report 2002*: 10–11.

to meaningless. Similarly, I hope that I have shown the limitations of the claim that do-it-alone “restrictionism” can provide viable answers to structural inequities in a deeply fragmented yet interdependent world. Both views are problematic because they assume that we must either dissolve bounded communities to achieve greater global justice or re-fortify them as means of shielding the citizenries of affluent polities from mounting claims outside their jurisdictions. Neither of these strategies can promise to eradicate global voice and opportunity inequalities while upholding the valuable freedom, security, and identity ties associated with membership in a relatively stable and bounded polity.

What remains to be seen is whether there is an approach to citizenship that lies somewhere between these extremes and can provide a solution to the problems associated with birthright attribution while at the same time retaining the positive attributes of bounded membership. Put differently, the question that remains is what should be done in the face of the *demos*–democracy and global–redistributive challenges. Instead of recommending that we trivialize notions of political membership by distributing it equally to all persons without following any criteria at all (as effectively advocated by proponents of world citizenship), we need to think more creatively about new ways to *reduce* the correlation between birthright citizenship and inequality of actual life opportunities.

Recall that my critique is not targeted against the political ideal of citizenship *per se*. As a protected and irrevocable status, full membership in a self-governing and bounded polity still bears invaluable properties for the right-holder, especially for the less advantaged. For instance, full membership guarantees for even the most vulnerable within a given society the fundamental security of holding nonderogative rights, the cultural and psychological benefit of inalienable membership, and the power to make claims in collective decision making as an equal stakeholder. In a world riddled with deep social and economic inequality, the value of these benefits cannot be overestimated. These valuable properties of citizenship notwithstanding, we must still criticize the prevalent assumption that reliance on birth in the transmission of the political membership, as expressed in extant citizenship laws, somehow resolves the moral dilemmas of boundary making. As we have seen, the “natural” reliance on birthright entitlement camouflages the dramatically unequal voice and opportunity implications of this allocation system.

The reconceptualizing of citizenship as inherited property provides an important missing link in this regard: it introduces a new argument for rewriting the *property* dimension of citizenship, which establishes a threshold duty of leveling opportunity towards those without membership – as a corollary to the very right of members to enjoy the privileges of their inherited entitlement.

This reconceptualization does not require that we reject the premise that special, or more extensive, obligations are owed toward those defined as fellow members in the political community.⁵⁸ It simply means that bearing such special obligations does not tell against having general duties to provide a minimum level of opportunity to those who are barred from our bounty through accidents of birth.⁵⁹ As we have seen, extant transmission-entitlement mechanisms, which legally coerce nonmembers to exclusion from the goods associated with membership in well-off countries on grounds of ascription, perpetuate unequal starting points. What is more, they do so in ways that make it possible for the current rightholders to transmit their advantage in *perpetuity*. It is this latter structure of permitting “entailed” ownership – of the dead controlling the distribution of opportunity to the living – to which all modern theories of property object.

It is here that the analogy between hereditary citizenship and inherited property proves most useful.⁶⁰ Modern theories of property generally allow for unequal accumulation of wealth and other resources. Yet they devote considerable thought to providing *justificatory* grounds for defending such inequity in the distribution of holdings. More important still for the purposes of our discussion is the recognition that all modern theories of property impose important *restrictions* on social institutions that generate inequality. This is precisely what is missing in the prevalent framework of birthright citizenship.

The most familiar example of this kind of restriction is found in John Locke’s “enough, and as good” proviso to his moral desert/labor theory of property, which itself assumes a natural world in which there is no scarcity – a far cry from the present reality of overwhelming demand for the scarce resource of membership in stable, affluent, rule-of-law countries. Automatic acquisition of citizenship by birth is clearly *not* an entitlement that is rightly earned, in any sense of the word, by the recipient. It simply represents a windfall enjoyed by those who find themselves born into the “right” political community.⁶¹ Equally troubling, extant citizenship laws incorporate no restriction that is analogous in spirit to

⁵⁸ A similar point is eloquently made by Tan in Tan (2004).

⁵⁹ As welfare economists would put it, the exact definition of this minimum level of opportunity can be evaluated as a standard of abolishing “relative” or “absolute” deprivation. My working hypothesis is that the “external” obligation on beneficiaries of birthright citizenship is to prevent absolute deprivation of those who do not count as members. See Casiano Hacker-Cordon (2003) on the prevention of “malfare.”

⁶⁰ My intention in this section is merely to offer a skeleton outline, an intellectual appetizer if you will, of the motivation for identifying and elucidating this analogy. See Shachar (forthcoming).

⁶¹ Thus even if we concede that the hard work and risktaking by the first generation justifies their entitlement to the property of citizenship, the question remains whether the good of political membership (and its associated benefits) ought to be automatically transferred, in perpetuity, to their heirs. The problem is further aggravated if, decades after the

the “enough, and as good” proviso, thus freeing the propertied few from even considering the potentially detrimental impact of their entitlement regime on the many who find themselves excluded from similar bounty by accidents of birth. Even Robert Nozick, who admits fewer restrictions on the acquisition and transfer of property than most other entitlement theorists, specifies as a central tenet of his “unpatterned” theory of justice the requirement that unequal distribution should result from just transfers of justly acquired holdings.⁶² Applied to the context of citizenship, it is yet again hard to see how being privileged by birthright in the obtainment of membership fulfills the cardinal requirement of fair transfer of justly acquired holdings. In *The Examined Life*, Nozick specifically addresses the topic of inheritance, holding that while an original propertyowner has a right to bequeath his fortune to his or her children or grandchildren, the bequest has to be limited to one passing. In other words, the beneficiaries of inherited property cannot themselves pass it on by inheritance.⁶³ This is a far cry from the current reality of hereditary citizenship that is passed down from one generation to another in perpetuity. Nozick’s account, on the other hand, would call into question the legitimacy of such acquisition of political membership once we reach the second, third, or *N*th generation of heirs.⁶⁴

Many other liberal political theorists, from Bentham to Mill, have similarly argued that the right of inheritance may be upheld, but only if significant restrictions are imposed upon it. Bentham, for example, proposed a regulation of inheritance according to the following principles: “1st, Provision for the subsistence of the rising generation; 2nd, Prevention of disappointment; 3rd, the equalization of fortunes.”⁶⁵ It is this latter restriction that currently remains unfulfilled in a world where birthright principles both determine the boundaries of membership and reify them as a “natural” allocation of entitlement that is not subject to consideration

original right-holder acquired the right to property on the basis of the workmanship ideal, a nonmember arrives at the territory, investing her time, labor, and creativity in it. A notion of desert appears to require that she gain access to membership/property rights, which she has earned through such cultivation. If we compare her situation with that of the descendants of the original right-holder, the newcomer seems to have a stronger Lockean claim for membership entitlement. However, it is the heirs who automatically acquire citizenship (irrespective of their cultivation efforts or lack thereof), whereas the newcomer’s hard work is not sufficient for inclusion in the polity, especially if she entered the country without an immigrant visa. For a rich account that investigates the implications of traditional property rights for justice in multicultural societies, see Valadez (2001: 254–97).

⁶² See Nozick (1974: 150–3). ⁶³ See Nozick (1989: 31).

⁶⁴ I do not necessarily endorse this conclusion, but I raise it here as an illustration of the type and scope of restrictions on the *perpetuation* of unequal opportunity through inherited entitlement which have been endorsed by scholars that otherwise permit great disparities in the accumulation of property and wealth.

⁶⁵ Bentham (1882 [1789]: 177).

of “equalization of fortunes.” Mill, for his part, held that that right of inheritance did not form part of the idea of property itself, but he did assert that children have a legitimate expectation to the provision of “such education, and such appliances and means, as will enable them to start with a fair chance of achieving their own exertion of a successful life. To this every child has a claim.” But Mill adds an important closing sentence to this discussion: “and I cannot admit, that as a child, he has a claim to more.”⁶⁶ This last point is important: beneficiaries of *jus soli* and *jus sanguinis* may well have a legitimate claim to expect fulfillment by their political community of “a fair chance of achieving their own exertion of a successful life.” But this does not automatically equate them with a more expansive right to the *whole* estate. Rather, once “thus much has been done,” in Mill’s words, the children’s interests and expectations are in no way violated if “the remainder of the parent’s fortune is devoted to public uses.”⁶⁷ Again, we fail to find any similar restriction in the current world of birthright citizenship, where the heirs of well-off political communities are automatically and uncritically assumed to deserve entitlement to the “whole estate.”

In short, what is puzzling about the current state of the theory and practice of hereditary citizenship is that we have not developed even the basic vocabulary and analytical categories to begin to draw similar restrictions against an “unlimited” and “perpetual” transfer of entitlement, or to draw a line between what is rightly owed to children and the “remainder” that can legitimately be devoted for public uses, or considered the introduction of “birthright privilege levies” that are progressive in time, to mention just a few concrete and promising lines of inquiry.⁶⁸ The point I wish to emphasize here is that by drawing the analogy of inherited citizenship to intergenerational transfer of wealth and property, a new space is opened up for developing precisely such a debate.

While this is not the place to elaborate on the institutional options generated by this analogy, suffice it to say here that this new approach offers a core insight: it asks us to take account of the enormous impact of the extant legal practice of allocating political membership on the basis of birthright, forcing us to seek justification for such entitlement in the first place and highlighting the urgent need to address its resultant inequities, particularly the way in which it locks in structures of privilege worldwide. Differently put, once we reconceptualize membership status in an affluent society as a complex type of inherited property, the distributive implications of hereditary citizenship can no longer hide behind the “naturalizing” veil of birthright. Conceived of as a valuable resource, the

⁶⁶ Mill (1965: 221). ⁶⁷ *Ibid.*: 221–2.

⁶⁸ I elaborate these options in detail in Shachar (forthcoming).

benefits associated with inherited citizenship, just like any other form of property entitlement, become subject to considerations of distributive justice.

Treating birthright citizenship as a special kind of inherited property thus allows us to “import” these core insights. It further provides us with a rich new resource for generating fresh answers to old questions about how best to mediate the demands of justice and citizenship, especially those dealing with ownership, selection, and allocation. More important still, this reconceptualization compels us to see the need to amend the present system of hereditary entitlement of political membership so as to include minimal justice-based restrictions on its contribution to the unequal distribution of voice and opportunity on a global scale.

In a world of gross disparities, it is an enormous privilege to be a citizen of a stable, rule-of-law, and affluent polity. Once we accept the reality of this accidental and great privilege and at the same time acknowledge that neither the “world citizenship” nor “resurrect-the-border” approaches are desirable, we must look to other possible ways to reduce what we have identified as the unjustifiable inequalities that attend citizenship, while at the same time preserving its substantive benefits.⁶⁹ Such a desirable outcome may well be possible to achieve. That is, the challenges of the *demos*–democracy puzzle and global–distributive framework can be met by targeting the most blatant consequences of birthright, even without demanding a total overhaul of bounded membership regimes. This may be achieved, for instance, by the redrawing of boundaries of political voice to better correspond to cross-border democratic deficit concerns; the de-coupling of voice from political status in reference to specific policy issues that dramatically affect stakeholders’ lives; the shifting away from ascriptive principles of birthright membership toward a genuine connection principle of citizenship acquisition. Furthermore, individuals who enjoy membership privilege due to the system of inherited title can legitimately be asked to contribute to the well-being of those who are excluded from similar benefits by virtue of the very same citizenship laws that protect the property entitlement of the former. While bounded membership may continue to exist, the analysis offered here insists on a correlating duty to reduce global inequalities of voice and opportunity, so long as citizenship is transmitted by virtue of birth alone.

⁶⁹ In addition to the concerns already mentioned regarding a borderless world, there is no evidence to suggest that the dismantling of membership boundaries by itself guarantees an effective answer to the problem of unequal voice and opportunity.

V. Concluding remarks

My intention throughout this chapter has been to begin to establish a conceptual framework for debating the merits of the seemingly natural, apolitical, and ironclad system of birthright citizenship. I have attempted to do so in a way that addresses the dramatically unequal global distributive and political voice consequences of extant *jus soli* and *jus sanguinis* principles, without necessarily implicating a world devoid of membership boundaries. Clearly, the analogy between hereditary citizenship and inherited property has potentially far-reaching implications. For one, it may require the reconsideration of the very legitimacy of the intergenerational transfer of citizenship. Alternatively, and to my mind more interestingly, it provides an important (and thus far missing) link for imposing certain obligations upon the beneficiaries of birthright principles to contribute to the well-being of those who are excluded from similar bounty by the very citizenship laws that protect the property entitlement of the former. Admittedly, the prospect of establishing distributive deeds and bonds across national borderlines requires a considerable shift in perspective: the current regime of *jus soli* and *jus sanguinis* appears to free countries from any obligation to address the needs or concerns of those they define as outside their membership borders. The new conception of citizenship as inherited wealth and property challenges this understanding.

Unlike other alternatives currently on offer, the concept of citizenship as inherited property enables us to acknowledge that members of bounded political communities may legitimately continue to exercise a degree of authority and autonomy in identifying and preserving their membership boundaries. However, recognition of the property dimension of citizenship also implies that the preservation of such boundaries can no longer serve as quite so formidable a barrier in permanently excluding the vast majority of the world's population from access to a more level opportunity structure. Even the most sophisticated defenders of property rights and inherited entitlement recognize the need to justify and rectify persistent inequalities of transfer and accumulation. Applying these lessons to the realm of citizenship will permit severing the Gordian knot that links birthright, political membership, and unequal access to voice, wealth, and opportunity.