

## Article

---

"The Use and Abuse of *Jus Nexi*"

Noah Benjamin Novogrodsky

*Les ateliers de l'éthique / The Ethics Forum*, vol. 7, n° 2, 2012, p. 50-62.

Pour citer cet article, utiliser l'information suivante :

URI: <http://id.erudit.org/iderudit/1012996ar>

DOI: 10.7202/1012996ar

Note : les règles d'écriture des références bibliographiques peuvent varier selon les différents domaines du savoir.

---

Ce document est protégé par la loi sur le droit d'auteur. L'utilisation des services d'Érudit (y compris la reproduction) est assujettie à sa politique d'utilisation que vous pouvez consulter à l'URI <http://www.erudit.org/apropos/utilisation.html>

---

Érudit est un consortium interuniversitaire sans but lucratif composé de l'Université de Montréal, l'Université Laval et l'Université du Québec à Montréal. Il a pour mission la promotion et la valorisation de la recherche. Érudit offre des services d'édition numérique de documents scientifiques depuis 1998.

Pour communiquer avec les responsables d'Érudit : [erudit@umontreal.ca](mailto:erudit@umontreal.ca)

# THE USE AND ABUSE OF *JUS NEXI*

NOAH BENJAMIN NOVOGRODSKY

UNIVERSITY OF WYOMING

## ABSTRACT

This paper uses Shachar's conception of *jus nexi* to explore three interrelated ideas. I first contend that Shachar's analysis of the monetary value of birthright citizenship may be applied to temporary workers, lawful permanent residents and naturalized citizens as an exposé of inherited privilege in diverse communities and as a means of identifying which forms of membership and belonging are worth owning. Second, I use the idea of *jus nexi* to question which additional work relationships and identity networks that might qualify as genuine connections to a given state. Finally, I question whether an operationalized version of *jus nexi*, that is an alternative category of citizenship, would supplant or complement existing *jus soli* and *jus sanguinis* rules. Here, I seek to apply Shachar's theoretical contributions to current political debates and warn that a genuine connection test is increasingly being misused to support a nativist agenda.

## RÉSUMÉ

Cet article fait appel à la conception du *jus nexi* de Shachar pour explorer trois idées interreliées. Premièrement, nous soutenons que l'analyse de la valeur monétaire de la citoyenneté par droit de naissance de Shachar peut être appliquée aux travailleurs temporaires, aux résidents permanents qui ont un statut légal et aux citoyens naturalisés en tant qu'exposé des privilèges hérités dans des communautés différentes et comme un moyen d'identifier les formes d'appartenance et d'être ensemble qu'il vaut la peine de posséder. Deuxièmement, nous faisons appel à l'idée de *jus nexi* pour questionner les relations de travail additionnelles et les réseaux identitaires qui pourraient être reconnues en tant que liens authentiques à un État donné. Enfin, nous nous demandons si une version opérationnelle du *jus nexi*, entendons une catégorie alternative de citoyenneté, compléterait ou remplacerait les règles existantes du *jus soli* et du *jus sanguinis*. Ici, nous essayons d'appliquer les contributions théoriques de Shachar aux débats politiques actuels et nous formulons une mise en garde à l'effet qu'un test de lien authentique est de plus en plus (mal) employée pour supporter un agenda nativiste.

Shachar's *The Birthright Lottery* pivots on her seminal observation that birthright citizenship is best described as a form of entail property. The analogy, at once apt and disquieting, produces a number of consequences. Foremost among them is the realization that the value of citizenship, like other forms of inheritance, may be measured and quantified. Equally important, Shachar observes that laws governing the acquisition of citizenship create and perpetuate radical inequalities of opportunity. *The Birthright Lottery* employs each of these insights to imagine alternative citizenship models premised on *jus nexi*, a potentially revolutionary way of conceiving of the ties that bind a given political community.

This essay elaborates on three interrelated ideas contained in Shachar's work. First, if citizenship has monetary value, so too do lesser forms of legal status, including lawful permanent residency. Part One of this comment applies Shachar's analysis to additional categories of migration with a view to unpacking the alienable characteristics of cross-border migration. Second, the introduction of *jus nexi* invites a broad reading of the relationships and identity networks that might qualify as genuine connections. Part Two explores a number of criteria that might flesh out our conception of the nexus between work/life identity and full citizenship rights. Third, a capacious definition of *jus nexi* begs the question—unanswered in *The Birthright Lottery*—of whether an alternative understanding of citizenship would supplant or complement existing *jus soli* and *jus sanguinis* rules. Part Three wades into the debate over the value of change and how Shachar's theoretical contributions could be applied in practice. In each of these parts, I rely primarily on illustrations from the United States immigration experience and the Immigration and Nationality Act.

I

Immigration scholars have long understood that the movement of people and prospects across borders is rife with inequality<sup>1</sup>. With the exception of some bona fide refugees, acquired attachment to a political community is heavily monetized<sup>2</sup>. Indeed, every stage of migration from application to receipt of a visa or passport is accompanied by the payment of fees. This is true for individuals in the naturalization process as well as for temporary workers.

In diverse contexts, only the wealthiest class of foreigners, particularly from developing countries, has the opportunity to emigrate. Individual migrants with access to knowledgeable counsel, who speak the dominant language of the country of refuge and who have affluent relatives to guide them through the process succeed far more often than others. Unlike birthright citizenship, however, naturalization and other forms of migration involve the affirmative and intentional attainment of valued citizenship. For immigrants, numerical quotas maintain scarcity, the immigration fees and emigration costs are real and the combination serves to deter frivolous applications<sup>3</sup>. At each stage in the process, money facilitates naturalization<sup>4</sup>. The explicit courting of investor immigrants bares the propertied qualities of immigration<sup>5</sup>. For immigrants and global relocation advisors alike, the market in immigration to desirable states may be imperfect and

less than wholly transparent but it is well understood that substantial sums of capital are an essential component of acquired nationality.

Likewise, the many shades of long-term legal visitors — lawful permanent residents, landed immigrants, guest workers or resident aliens — are steeped in the propertied qualities and economics of migration. As a general proposition, economic migrants pay handsomely for the privilege of moving from one state to another. In the formal economy, those services are both fungible (that is, they may theoretically be employed by any prospective migrant) and alienable (there is a market, albeit a heavily regulated one, in visas permitting individuals and families to relocate across borders). When FIFA awarded the 2022 World Cup to Qatar, the decision was applauded by migrant workers in India, Pakistan and Bangladesh as a boon to employment in the Gulf<sup>6</sup>. In informal and illegal economies too, a market in desperation fuels human trafficking<sup>7</sup>.

What distinguishes birthright citizenship from other forms of status is the hidden quality of the benefit but the concerns of inequality persist across categories. This is the source of Shachar's insight — she unmasks the feudal nature of citizenship law, complete with its brutal arbitrariness and inherited privilege. The problem with entail property, particularly untaxed bequests, is that it benefits recipients regardless of merit. For Shachar, ascriptive citizenship produces perpetual, unearned opportunities. And precisely because it is inalienable, birthright nationality functions as an immutable, reified and fixed coda of class and belonging. Rather than resetting periodically in a marketplace that values individual choices, effort or worth, birthright citizenship facilitates stasis. There are winners and losers in the world of nationality and in some communities, bright line property rules give people tangible, endless advantages. A child born in El Paso accrues to a bundle of goods and possibilities by virtue of the location of her birth that her sibling, born to the same parents 300 metres away in Ciudad Juarez, may never enjoy. The automatic inheritance that attaches to children under *jus sanguinis* is just as problematic. A German woman in Windhoek endows her son with infinitely greater life opportunities than does her Namibian neighbour. The disparity is only reinforced by Professor Bruce Ackerman and Professor Anne Alstott's proposal that government officials establish a stakeholder account of \$80,000 for each American citizen<sup>8</sup>.

Shachar's dissection of *jus soli* and *jus sanguinis* privilege invites a close reading of membership status and the value associated with the security of belonging. For Shachar, citizenship represents a locus of identity and a community of people who share a commitment to territory, beliefs and one another. Her conception rejects both global or open citizenship — the notion that individuals with transnational interests and allegiances have corroded territorial bounded states — as well as a fortress mentality that employs a fixed understanding of citizenship to keep unwanted outsiders from joining the nation. In short, Shachar's analysis evinces deep respect for the idea of the state as an entity that gains its legitimacy from the population and which, in turn, provides its people with rights and benefits. This conception recalls Hannah Arendt's formulation of citizen-

ship as the right to have rights<sup>9</sup>. By this Arendt meant that without membership in the polity, the individual stands exposed to the violence of the state, unmediated and unprotected by rights. The result of such exposure, she argued, was to reduce the person to a state of bare life, or life without humanity. *The Birthright Lottery* takes this view a step further by naming and measuring the previously unexamined worth of ascribed citizenship. Using the theory and language of property law, Shachar identifies a particular value of inherited citizenship with its attendant features of the right to full membership (including, in many democracies, the right to vote, to hold elected office, to serve on a jury and to be free from deportation) in a territorially delimited society. In the process, Shachar reveals birthright citizenship as a bundle of rights that can be separated, reassembled and, in some contexts, priced with some degree of accuracy.

By relating the assets associated with territorial and lineage based heredity, *The Birthright Lottery* encourages close scrutiny of other forms of membership and belonging through the same lens. Shachar's analysis of birthright entitlements may thus be applied to temporary workers, lawful permanent residents and naturalized citizens in two distinct ways: as an exposé of inherited privilege in this community; and as a means of identifying which forms of membership and belonging are worth owning.

If birthright status is a form of inherited property, in many circumstances so too is the opportunity to emigrate for family unification and work purposes. Put differently, immigration to a number of desirable states is skewed in favor of family-sponsorship and reunification<sup>10</sup>. Among guest worker applicants and refugee-seekers alike, the presence of family members or friends in a particular state or industry is a draw for relatives<sup>11</sup>. The language, home town or ethnic affiliation of a temporary worker or visa applicant — all accidental characteristics — are as important as any other variable in determining who obtains the opportunity to work and travel abroad<sup>12</sup>. A significant body of sociological data suggests that the universe of *Gastarbeiter*, migrant workers to Germany, are drawn from family and community networks and represent nothing like a random selection of Turkish labourers seeking to work in Germany<sup>13</sup>. In this respect, second wave workers inherit the reputational and integrative capacity of their predecessors.

A close look at migrant workers and the ways in which they obtain their work opportunities also casts light on the value of birthright citizenship itself. Shachar presents a compelling case for the worth of birth in a wealthy state governed by *jus soli* rules vis-à-vis the economic liability that is citizenship in a state like Mali, with appalling illiteracy rates and miniscule health expenditures<sup>14</sup>. But we also know that some individuals in poor countries will assume grave risks and hardship for the opportunity to work and live in other states<sup>15</sup>. Plainly, citizenship is not the only form of human organization. In places like the Gulf States, migrant workers and temporary visitors are the norm, even as they have children who are largely disconnected from their parents' country of origin. The globalized fragmentation of labour markets, coupled with the diminishing cost of re-

mittances, causes workers from low-wage, high population states to seek out higher wage prospects<sup>16</sup>. Temporary workers and non-citizen lawful permanent residents may ultimately be liminal statuses but they are chosen by millions of people who cannot or who elect not to become full members of their new society. The fact that such populous communities of people willingly trade full citizenship in a poor country for attenuated status in a rich one suggests that the comparison between Swiss and Malian citizenship is one-dimensional. As long as non-trivial numbers of immigrants legally immigrate or cross borders to find temporary work, and as long as they have legal rights and/or economic opportunities in destination states, citizenship is just one among many identifying labels<sup>17</sup>. Denizenship, like birthright citizenship, has propertied attributes and the process of separating the cluster of rights associated with visitorship exposes the worth of more than citizenship. Indeed, law and economics scholars might express lawful permanent residency or temporary worker status as the value of legal economic opportunity in a secure environment discounted by the length of time the status will persist, measured either by a well-defined period for which the person is admitted or by the probability of deportation and removal.

And what of the other benefits of citizenship, particularly for individuals from source countries that allow dual or multiple nationalities? Where it is possible, do they affirmatively seek full membership in destination countries and do they, consciously or unconsciously, aim to profit from the transfer rules of heredity citizenship for the next generation? Here too, the empirical data is mixed. Among the cohort of immigrants who came to the United States lawfully in 1977, 63.3% of immigrants from the former Soviet Union had naturalized but only 14.5% of Canadians had done so — predictable numbers in geopolitical terms<sup>18</sup>. Curiously, only 17.6% of Mexicans in that cohort became naturalized citizens.

Identity and belonging are complicated creatures. There are myriad reasons why individuals don't embrace naturalization, from continued discrimination and racism in the recipient state to the raw costs to the less-than-compelling benefits of the new nationality. Citizenship thus sits at one end of the membership spectrum and Shachar's insights and powerful property analogy tell us something about the previously unexamined value of birthright inheritance. It would be wrong, however, to assign too much predictive weight to Shachar's analysis with respect to the many other forms of association that exist in a given society. The disadvantage of birth and the prize of certain nationality appear to be but two variables in the decisional matrix of real and potential migrants.

## II

*The Birthright Lottery* does more than unpack the privileges and anomalies of conventional citizenship law. Section II of Shachar's work is addressed to the consequences of this world, namely the inherent problems of over and under-inclusiveness associated with territorial and descent-based political membership. Underinclusiveness plagues individuals born in a foreign country to non-nationals who later move to a state that becomes the centre of their life. Even if the move happens at two weeks of age, that person may not enjoy the privileges of

citizenship in her adopted country, the only place she has ever lived and her sole political and interpersonal community. Overinclusiveness, on the other hand, occurs when *jus sanguinis* confers perpetual citizenship on individuals with attenuated connection to the state of membership enjoyed by their parents or grandparents. Shachar cites the *Sheinbein* case for the proposition that bloodline citizenship is an invitation to abuse where an individual can evade the responsibilities of his state of genuine connection (here, the extradition request of Sheinbein's country of origin) by reinventing himself as a member of his father's citizenship community. Similarly, the 1955 *Nottebohm* case before the International Court of Justice featured a German national who had resided in Guatemala for most of his adult life where his business activity was headquartered. He later acquired a Lichtensteinian passport and sought to assert the protections of that citizenship against Guatemala — a clear instance of international legal opportunism. Additionally, the accident of birth is a boon to children born in wealthy states governed by *jus soli* citizenship principles if their presence is fleeting<sup>19</sup>.

Shachar's *jus nexi* prescription seeks to correct each of these excesses. *Jus nexi*, she posits, "redefined as a 'real and effective link' to one's polity, will shift attention to an individual's community participation, self-identification, and the location of his or her centre of life as the factors defining citizenship"<sup>20</sup>. *The Birthright Lottery* locates the genuine connection that is *jus nexi* in the 'real and effective citizenship' standard of the *Nottebohm* case, as well as the European Court of Justice's *Collins* decision and Israeli Chief Justice Aharon Barak dissent in *Sheinbein*. Shachar's view is further informed by the writing of Alex Aleinikoff, Joseph Carens, Seyla Benhabib and Linda Bosniak in support of functional and pragmatic criteria for the true ties that bind. The standard that emerges, however, is only loosely defined by the terms actual, real and genuine. As such, Shachar's discussion is an opportunity to think broadly about *jus nexi* relationships.

In the absence of *jus soli* and *jus sanguinis* rights, we might look to formative schooling, location of employment, and family and social networks as markers of true membership. Indeed, the process of citizenship naturalization tends to count family sponsorship, periods of extended residency, tax remittances, payment into social security, capital investment and language proficiency as signifiers of connectivity<sup>21</sup>. But what of less obvious bonds? Should working for a foreign state qualify — consider English translators in Iraq or Afghanistan or workers at USAID or Canadian International Development Agency operations overseas? What about military contractors who fight alongside troops from developed world states? Do proponents of democracy and human rights establish a nexus to a state that holds such ideas to be sacred? Could a fan of a national sports team, a religious adherent or an avid reader of news from a particular state point to subjective affiliations as the basis for the nexus? Does identification with a defining characteristic of the receiving state qualify?

Ideas matter in some corners of immigration law, particular in the determination of asylum and refugee claims. The firmly held convictions of a refugee-seeker can be the difference between demonstrating a well-founded fear of persecution or not<sup>22</sup>. For example, an Iranian blogger who champions free expression and representative government while incurring the wrath of the regime may well satisfy the criteria for asylum status under increasingly harmonized refugee standards. Is the same true for a capacious understanding of *jus nexi* ties? Should subjective affiliations count?

In an era of interconnected communication and global employment and schooling, these questions are relevant to any discussion regarding the depth of affiliation. Consider the following scenario: The daughter of a British father and Japanese mother is born and raised in Tokyo. She attends university in the United States at an elite college. There she meets a fellow student who is a citizen of India. Post-graduation, they each work legally in New York before finding two jobs in the Cape Town office of a U.S. company. While living in South Africa, they have a son who is raised in English on a steady diet of American culture. Under the existing birthright citizenship regime, none of the three nuclear family members is a U.S. citizen although the centre of their shared life is more American than anything else. If the three of them were kidnapped by pirates off the coast of Somalia or Kenya, which state should come to their aid<sup>23</sup>?

By itself, the construct of *jus nexi* does not answer these concerns. It is, however, a helpful vehicle for conceiving of the relational linkages and a flexible standard for a world of semi-permeable borders and highly mobile populations. Shachar's view of citizenship premised on a genuine connection that reflects individual choices and the communal priorities of democratic legitimacy and pluralist representation is appealing. Consistent with our collective distaste for entail property, this idea more closely approximates values of personal worth and earned reward. To continue the property analogy, Shachar conceives of ideal citizenship more as an easement — a boundary or a social compact within which many forms of connectedness would serve to meet the legal test.

The benefit of this theory is its balance — she weighs the dangers of overinclusion and underinclusion equally. But this is an elegant sleight of hand; the two problems are hardly equivalent, at least in North America. On the one hand, the undercounted include millions of undocumented migrants who have no legal status in the country they call home. On the other hand, Shachar identifies the relatively uncommon cases of the nominal heir who claims the benefits of a state to which she has attenuated or diminished connections. The problem of overinclusion, however, is more readily corrected. In recent years, many Western states have begun to address the unseemly consequences of perpetual hereditary citizenship by adopting what Shachar calls 'declining intergenerational entitlement' rules. For U.S. citizenship purposes, Shachar notes, an American parent who gives birth to a child outside of the United States can only transfer citizenship to the next generation if the parent can prove he or she resided in the U.S. at



some point prior to the birth<sup>24</sup>. In Canada too, *jus sanguinis* bonds are severed over time by gradual physical detachment<sup>25</sup>.

It follows that the added value of *jus nexi* is as a conceptual route of social mobility for the children of illegally present or transient parents and other long-term residents without documented status. As Shachar candidly admits, “*jus nexi* offers resident stakeholders a predictable and secure route to becoming full members, irrespective of their lack of birth-based connection to the polity”<sup>26</sup>. In the United States, a nation with 11 million illegal immigrants (many of them children or young adults born in another state but with primary ties to the U.S.), a robust version of *jus nexi* has the potential to produce equality of opportunity for a generation that is currently paying for the perceived sins of their parents. Policy advocates may also see *jus nexi* as the logical conclusion of the stalled D.R.E.A.M Act which would provide illegal immigrant children with a pathway to legal citizenship if they attend high school in the United States and wish to join the military or attend university at their own expense<sup>27</sup>.

### III

Having introduced the concept, *The Birthright Lottery* posits that *jus nexi* could be used as a complete alternative to *jus soli* and *jus sanguinis* or as a supplementary principle for citizenship acquisition. Either option would unsettle citizenship axioms and provoke an exploration of the genuine markers of connectivity. In practice, however, *jus nexi* as a supplemental principle is more likely to gain near-term traction and only for certain populations. To the extent that naturalization decisions already involve waiting periods, proof of residency and an inquiry into criminal conduct, the broader criteria of the *jus nexi* framework could be instructive for removal and deportation purposes<sup>28</sup>. Even if *jus nexi* is not a prescription to solidify the status of millions of people, evidence of genuine connections could create a (rebuttable) presumption capable of operating throughout the field of immigration law.

The danger of substituting the bright line rule of *jus soli* with a nuanced alternative is that it provides ammunition for those who would create different (read, lesser) citizenship rights for disfavored groups and individuals. In the current U.S. debate, influential politicians and legal scholars have decried the Constitutional rule that grants citizenship to all persons born on U.S. soil as an incentive for undocumented aliens to give birth in the United States<sup>29</sup>. In popular parlance, the children of ‘birth tourists’ or undocumented aliens are then characterized as ‘anchor babies’ whose nationality may someday permit their relatives to resist removal or bootstrap their own residency or citizenship applications to the child’s status<sup>30</sup>.

The source of both the legal right and the opening to attack it is the 14<sup>th</sup> Amendment to the U.S. Constitution which 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”<sup>31</sup>. This language granted citizenship rights to African Americans born in the United States whose status

in the polity had been negated by the infamous 1857 Dred Scott decision of the U.S. Supreme Court<sup>32</sup>. In 1898, the Supreme Court's decision in *United States v. Wong Kim Ark* affirmed that the 14<sup>th</sup> Amendment applied to children born in the United States of non-citizen parents<sup>33</sup>.

Critics of this regime have seized on the “subject to the jurisdiction thereof” language to suggest that illegal immigrants owe their loyalty to another state and that their children, like the issue of diplomat parents, are not really subject to the jurisdiction of the United States. Accordingly, the Birthright Citizenship Act of 2009, introduced by Representative Nathan Deal, would amend the Immigration and Nationality Act “to consider a person born in the United States ‘subject to the jurisdiction’ of the United States for citizenship purposes if the person is born in the United States of parents, one of whom is: (1) a US citizen or national; (2) a lawful permanent resident alien whose residence is in the United States; or (3) an alien performing active service in the US armed forces”<sup>34</sup>. Rep. Deal's proposal has since been updated by a similar but revised federal bill that has garnered some political support among conservatives<sup>35</sup>. In Arizona and Montana too, state law bills purporting to redefine state citizenship in those jurisdictions have been introduced<sup>36</sup>.

Although the claim that citizenship could be restricted by passage of a statute rather than a Constitutional Amendment is contested, that view has recently been buttressed by legal commentary asserting that *Wong Kim Ark* was never intended to apply to the children of illegal immigrants. Professor Peter Schuck has argued that “it is hard to believe that Congress would have surrendered the power to regulate citizenship for such a group, much less grant it automatically to people whom it might someday bar from the country”<sup>37</sup>. Schuck suggests that the U.S. condition the citizenship of the children of undocumented immigrants on a “genuine connection” test and adopt the British practice which allows such children to petition for retroactive birthright citizenship after 10 years if there are no long absences from the country.

The selective application of *jus nexi* principles for some, but not all, potential citizens is fraught with problems<sup>38</sup>. Beyond the obvious equal protection concerns and logistical challenges, Schuck's proposal threatens to create a permanent American underclass. Much pivots on the question of whether unauthorized parents would actually register their children. If they do not — and there is substantial evidence that illegal immigrants are reluctant to engage government offices — stripping citizenship from the children of unauthorized immigrants is likely to remove their ability to access in-state tuition, to obtain driver's licenses, to vote in future elections, to serve in the armed forces and to work legally. Such a community would then constitute a class of individuals with no real connection to any country other than the U.S., and yet no ability to become full or productive participants in American society. Almost immediately, the number of illegally present immigrants would balloon as the children of illegal immigrants are added to the number of undocumented aliens. The Migration Policy Institute has proffered a study that uses standard demographic techniques to suggest that

eliminating *jus soli* citizenship for that community would cause the number of illegal immigrants in the United States to rise from 11 million to 16 million over the next four decades<sup>39</sup>.

The perverse irony of this position is that proponents of repealing birthright citizenship employ elements of *jus nexi* for the purpose of excluding whole communities from the promise of full membership. Shachar, I suspect, would find this development anathema to her central theses; if the idea of *jus nexi* is to be applied in policy terms, *The Birthright Lottery* aims to facilitate inclusion, not create further stigmatization in the next generation.

It is nonetheless a testament to the strength and timeliness of her theory that policymakers across the political spectrum have seized on *jus nexi* principles to advance their views. In this respect, Shachar's description of birthright citizenship as a form of inherited property is beyond reproach. More specifically, it is an insight that is likely to reshape our understandings of immigration law and the connections that bind citizen and state. Like all good ideas, the resulting debate over when and how to apply her theory honours the author and her lasting contribution.

## NOTES

- <sup>1</sup> See generally, Howard F. Chang, “The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory”, 41 *CORNELL INT’L L.J.* 1 (Winter 2008).
- <sup>2</sup> Increasingly harmonized global refugee standards mean that what is true for naturalization and long-term visitors is generally true for asylum seekers too: affluent, well-educated asylum applicants are more likely to succeed than poorer, less educated refugees. See Margot Mendelson, “The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women”, 19 *BERKELEY WOMEN’S L.J.* 138 (2004).
- <sup>3</sup> See, e.g., Immigration and Nationality Act § 201(a)(1)-(3).
- <sup>4</sup> There are only two paths to citizenship: birth and naturalization. *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898).
- <sup>5</sup> INA 203(b)(5) (“Employment Creation: (A) In general. - Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership).”)
- <sup>6</sup> See <http://www.telegraph.co.uk/sport/football/international/8253092/Qatar-will-use-World-Cup-as-a-catalyst-to-improve-conditions-for-migrant-workforce.html> (Accessed August 4, 2012) (According to the International Organization for Migration, temporary contractual workers constitute 86 percent of Qatar’s population of 1.6 million people.).
- <sup>7</sup> Stephen Yale-Loehr, Christina Sherman, Christoph Hoashi-Erhardt & Brian Palmer, “T, U and V Visas: More Alphabet Soup for Immigration Practitioners”, 6 *Bender’s Immigr. Bull.* 113, 113-14 (Feb. 1, 2001) (noting that approximately 50,000 persons, predominately women and children, are trafficked into the United States every year for purposes including prostitution and ‘slavery-like labor’).
- <sup>8</sup> Bruce Ackerman & Anne Alstott, *The Stakeholder Society*, Yale University Press, 1999.
- <sup>9</sup> Hannah Arendt, *Origins of Totalitarianism*, Schocken Books 2004, p. 376.
- <sup>10</sup> INA § 201(b)(2)(exempting immediate family members from quotas); INA § 203(a)(listing the preference for family-sponsored immigrants); see also, Karen A. Woodrow-Lafield, Poch Bunnack, “Family Reunification and Citizenship for Recent Chinese Immigrants”, New York City, Presented at the annual meeting of the *Population Association of America*, Los Angeles, March 29-April 1, 2006 (examining the ease with which Chinese immigrants naturalize and the great number of family members they sponsor for immigration); Ramah, McKay, Family Reunification (May 2003), online: Migration Policy Institute <http://www.migrationinformation.org/feature/display.cfm?ID=122> (Accessed August 4, 2012) (examining the U.S. family-sponsored immigration program and identifying its accountability for two thirds of immigration to the U.S. annually).
- <sup>11</sup> See e.g., Aniz Alani, “‘To Construe and Apply’: Does the Immigration and Refugee Protection Act Assign Priority to International Human Rights Law?” 64 *Univ. of Toronto. Fac. L. Rev.* 107 (2006)(identifying the family unification objective of IRPA as consistent with international human rights instruments to which Canada is signatory).
- <sup>12</sup> See generally, Eleanor Brown, “Outsourcing Immigration Compliance”, 77 *Fordham L. Rev.* 2475 (2009)(tracking the visa-compliance of Jamaicans working in Canada).
- <sup>13</sup> Thomas F. Pettigrew, “Reactions toward the New Minorities of Western Europe”, *Annual Review of Sociology*, Vol. 24 (1998), 77, 80-81 (see <http://www.jstor.org/stable/223475>) (explaining Germany’s Gastarbeiter guest worker program and its natural development into a migratory chain as families joined the workers.)
- <sup>14</sup> Ayelet Shachar, *The Birthright Lottery*, Harvard Univ. Press, 2009, p. 26.
- <sup>15</sup> See, e.g., Human Rights Watch, “Building Towers, Cheating Workers, Exploitation of Migrant Construction Workers in the United Arab Emirates”, Nov. 11, 2006, available at: <http://www.hrw.org/en/reports/2006/11/11/building-towers-cheating-workers-0> (Accessed August 4, 2012).

- <sup>16</sup> See Gils Beets, Frans Willekens, “The Global Economic Crisis and International Migration: An Uncertain Outlook”, Netherlands Interdisciplinary Demographic Institute (November 2009). Also published in Vienna Yearbook of Population Research 2009, pp. 19-38 (discussing the effects of economic crisis on labour migration including reduction of remittances and noting that low wages do not alone prevent migration during economic recession).
- <sup>17</sup> See Andrew Coyne, “Our Feudal Immigration Policy,” *Literary Review of Canada*, July/August 2009 (accepting the inherited property analogy but arguing for greater numbers of immigrants rather than global redistribution of citizenship privilege).
- <sup>18</sup> INS 1994 Statistical Yearbook, Table K, cited in Stephen H. Legomsky & Cristina M. Rodríguez, *Immigration and Refugee Law and Policy*, 5th ed., Thomson Reuters/Foundation Press, 2009.
- <sup>19</sup> Barbara Demick, “Korean Moms Want ‘Born in the U.S.A.’ Babies,” *Los Angeles Times*, May 26, 2002.
- <sup>20</sup> Sasha Baglay, Book Review, “The Birthright Lottery: Citizenship and Global Inequality”, 155 [2009] 47 Osgoode Hall Law Journal.
- <sup>21</sup> INA § 316(a) and INA § 312(a)(1).
- <sup>22</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 233-34 (BIA 1985); *Al-Ghorbani v. Holder*, 585 F.3d 980, 996 (6<sup>th</sup> Cir. 2009)(“a particular social group may be made up of persons who actively oppose the suppression of their core, fundamental values or beliefs.”)
- <sup>23</sup> As Omar Khadr, Maher Arar and David Hicks each discovered, the state of nationality is highly relevant in the global war on terror, although it may not always serve as a guarantee of support and advocacy in times of need.
- <sup>24</sup> INA § 301(c) (declaring required elements of citizenship by descent when the child was born abroad to two United States citizens parents; INA § 301(g)(declaring required elements of citizenship by descent when the child was born abroad to one citizen parent and one noncitizen parent).
- <sup>25</sup> Citizenship Act, R.S.C. 1985, c. C-29 (17 April 2009).
- <sup>26</sup> Ayelet Shachar, *The Birthright Lottery*, Harvard Univ. Press, 2009, p. 180.
- <sup>27</sup> H.R. 6497, 111th Cong. (Dec. 7, 2010) — Text of the proposed bill online: <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.6497> (On December 8, 2010, the U.S. House of Representatives passed the DREAM Act by a margin of 216-198. On December 18, the Senate held voted 55-41 for cloture on the DREAM Act, meaning the bill did not come to a vote in the Senate. The bill is likely to be addressed again by the 112<sup>th</sup> or subsequent Congresses.)
- <sup>28</sup> See *Zadvydas v. Davis*, 533 U.S. 678 (U.S. 2001)(addressing the deportability of long-term resident of the United States to the country of origin, Cambodia, to which the deportee had attenuated ties).
- <sup>29</sup> See George Will, “An Argument to be Made About Immigrant Babies and Citizenship”, *Washington Post*, March 28, 2010.
- <sup>30</sup> Julia Preston, “Citizenship from Birth Is Challenged on the Right,” *New York Times*, August 6, 2010 (quoting Sen. Lindsay Graham “We can’t just have people swimming across the river having children here — that’s chaos.”)
- <sup>31</sup> U.S. Const., amend. XIV, § 1.
- <sup>32</sup> *Scott v. Sandford*, 60 U.S. 393, 406 (1857).
- <sup>33</sup> *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).
- <sup>34</sup> H.R. 1868, 111th Cong. § b (April 2, 2009)
- <sup>35</sup> H.R. 140, 112th Cong. (Jan. 5, 2011) – Text of the proposed bill online: <http://www.govtrack.us/congress/billtext.xpd?bill=h112-140> (Accessed August 4, 2012)
- <sup>36</sup> See, e.g. Arizona’s H.B. 2561 and 2562, available at: <http://www.azleg.gov/legtext/50leg/1r/bills/hb2562p.pdf> (Accessed August 4, 2012)
- <sup>37</sup> Peter H. Schuck, “Birthright of a Nation,” *New York Times*, Aug. 13, 2010.
- <sup>38</sup> This issue raises definitional concerns. Are asylum seekers who give birth in the U.S. illegal immigrants? What about in-status short-term visitors?

- <sup>39</sup> Jennifer Van Hook & Michael Fix, “The Demographic Impact of Repealing Birthright Citizenship”, Migration Policy Institute, September 2010, available at: [www.migrationpolicy.org](http://www.migrationpolicy.org).