

## Article

---

### "Just Membership: Between Ideals and Harsh Realities"

Ayelet Shachar

*Les ateliers de l'éthique / The Ethics Forum*, vol. 7, n° 2, 2012, p. 71-88.

Pour citer cet article, utiliser l'information suivante :

URI: <http://id.erudit.org/iderudit/1012998ar>

DOI: 10.7202/1012998ar

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)

# JUST MEMBERSHIP: BETWEEN IDEALS AND HARSH REALITIES

AYELET SHACHAR  
UNIVERSITY OF TORONTO

## ABSTRACT

In this paper, Ayelet Shachar begins by restating the main idea of her important book *The Birthright Lottery: Citizenship and Global Inequality* (Harvard, Harvard University Press, 2009) and then goes on to address in a constructive spirit the main themes raised by the five preceding comments written by scholars in fields of law, philosophy and political science.

## RÉSUMÉ

Dans cet article, Ayelet Shachar commence par rappeler l'idée centrale de son livre important *The Birthright Lottery: Citizenship and Global Inequality* (Harvard, Harvard University Press, 2009) avant de répondre de manière constructive aux cinq commentaires qui précèdent, rédigés par des experts dans les domaines du droit, de la philosophie et de la science politique.

My thanks to Martin Provencher for organizing this symposium on *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009), and to the editors of *The Ethics Forum* for agreeing to host it. I am especially grateful to the contributors — five experts hailing from the fields of law, philosophy, and political science, and from different parts of the world — for their thoughtful engagement with my work. I have learned from their insightful and generous responses, even when I disagreed. I have, of course, also found much that I agree with. My commentators raise a confluence of important issues, more than I can fully address in this short reply. But to set the stage, let me begin by briefly articulating the central ideas of the book before turning to address, in a constructive spirit, the main themes raised by the commentators.

Although birthright is no longer a basis for privilege in any field of public life, it not only survives but thrives when it comes to the assignment of political membership — the realm we typically associate with democracy, participation, and accountability, making citizenship the domain where we would least expect to find inherited entitlement living on. This puzzling persistence and dominance of birthright in our laws and our imagination when it comes to articulating principles for allotting what Michael Walzer calls “the most important good” (Walzer 1983, 29) — equal membership in the political community — is at the center of my inquiry in *The Birthright Lottery*.

In this book, I propose a new way of thinking about the intergenerational transfer of citizenship as a special kind of property inheritance, highlighting “the unjustified privileges encased in the principle of birthright citizenship, whether understood in terms of *jus soli* or *jus sanguinis*” (Iverson, 13). Unlike the abstract quality of works in political philosophy, the book begins by accepting the non-ideal reality and complexity of existing legal categories, analyzing them critically and then reconstructing them to offer new conceptual frameworks and innovative institutional designs to address some of the most charged and pressed political realities of our times: membership and migration. This emphasis on legal structures and categories fertilizes the book’s discussion of the striking analogy between the (now deeply discredited) medieval property mechanism of transmitting wealth and power down the generational line through *entailed* estates and today’s almost taken for granted transfer of citizenship by birthright to “heirs in perpetuity” as a special — and extremely important — kind of inherited privilege. In his elegant and succinct style, Peter Spiro summarizes the significance of this reconceptualization: “[Shachar] introduces a radical and compelling new framework for confronting the dilemmas of birthright citizenship, one that promises to transform debates in the area” (Spiro, 63). This reconceptualization pivots on the “seminal observation that birthright citizenship is best described as a form of entail property” (Novogrodsky, 50).

To recognize the surprising similarities in form and function between birthright citizenship and inherited property of this particular kind is to identify a striking exception to the modern trend away from ascribed status. This only makes the link that persists between political membership and station of birth more puz-

zling and in urgent need of a coherent explanation. This is the task I have undertaken in *The Birthright Lottery*.

The stronghold of station of birth in the assignment of political membership is entrenched by two legal principles: *jus soli* (“by birth on the territory”) and *jus sanguinis* (“by bloodline”). As a result, access to affluent countries in our unequal world is still reserved primarily to those born in a particular territory or to a particular ancestry. Those born outside the circle of members have only a slim chance of ever overcoming their initial draw in the membership entitlement sweepstakes.

And what a significant sweepstakes this is: in our world, the global disparities are so great that “some are born to sweet delight”, as William Blake memorably put it, while others (through no fault or responsibility of their own) are “born to endless night.” The reality of our world is that the endless night is more prevalent than the sweet delight. No less than 97 percent of the global population who are assigned citizenship by the lottery of birth either choose, or are forced, to keep it this way. A recent report solemnly captures this last point: “Even in today’s mobile and globalized world, most people die in the same country in The incumbent system of perpetual membership inheritance is hard to defend in any circumstances. But when we look at the enormous disparities in well-being, human rights, and quality of life in different countries around the world, it becomes ever more difficult to justify.

Whereas the archaic institution of the hereditary transfer of entailed estates has been discredited in the realm of property, in the conferral of citizenship we still find a structure that strongly resembles it. Inherited entitlement to citizenship not only remains with us today; it is by far the most important avenue through which individuals are ‘sorted’ into different political communities (Brubaker 1992; IOM 2010; UN DESA 2008). Contrary to the general trend toward the breaking down of ascriptive barriers and replacing them with mechanisms of choice and fair distribution, under the incumbent regime of birthright, membership is automatically designated only to those who ‘naturally’ belong. And who naturally belongs according to current citizenship laws? Only those who are born on the territory of the state or into its membership community. (Note the circularity of this validation of the naturalness of the transfer of citizenship.) It is not open to anyone who would voluntarily consent to membership or is in dire need of its associated benefits. This stands in tension with core liberal and democratic principles that seek to minimize the impact of social and structural hierarchy and to relieve us of the weight of the circumstances of our birth.

Indeed, part of my project is to dispel (or *de-naturalize*) the notion that the birthright transmission of membership is simply ‘natural’ and ‘apolitical’. A main impetus for writing the book was to bring this system of unequal endowment acquired through the public inheritance of citizenship — a system that is both invisible and taken for granted — under critical appraisal. Víctor Muñoz-Fraticelli nicely captures this last point, stating that the book succeeds in “de-

naturalizing citizenship and making it more amenable to much-needed reform” (Muñiz-Fraticelli, 19).

The reliance, by law, on birthplace and bloodline in the allocation of citizenship is not a result of some genetic or innate endowment that we cannot control, such as the color of our eyes. Rather, it is a human-made regime of legal entitlement that our citizenship laws perpetuate and then disguise under the cloak of a natural given. Once we see this transmission regime for what it is, the possibility for reassessment and revision opens up.

The existing system of membership allocation did not fall from the sky. It is the result of human agency. We can alter it, just as we can preserve it. The latter route simply asks us to continue our complicity in preserving an unjust situation. The former clearly requires hard work: breaking old habits of thought and adopting creative reformulations instead.

*The Birthright Lottery* begins to do just that. My commentators have raised thoughtful questions about the breaking of these old thought-habits and about the kinds of creative reformulations that could be adopted in their place. Given space constraints, I will synthesize my remarks in a way that allows me to incorporate the core insights developed by the five commentators, grouping them into two broad themes: 1) the conceptual analogy to inherited property; and 2) the ‘worth’ of citizenship. I explore each topic in turn and, where relevant, address the possibilities for developing viable alternatives. The pressing realities on the ground — as well as the rise of a ‘Time of Outrage’ which has inspired millions to remember and continue to fight for freedom from want, freedom from fear, and to rekindle a spirit of social mobilization and non-violent resistance against injustice both domestically and globally — add a further sense of exigency to the book’s project of finding fresh answers to old questions of justice and mobility; membership and migration; inherited privilege and unequal opportunity.

### THE CONCEPTUAL ANALOGY TO INHERITED PROPERTY

As Duncan Ivison’s essay elucidates with precision, according to the broad view of property and membership that developed in the book, “what each citizen holds is not a private entitlement to a tangible thing, but a *relationship* to other members and to a particular (usually the national) government that creates enforceable rights and duties” (Shachar 2009, 29). This social relational aspect of political membership is crucial for understanding the kind of responses I advance in the book, a point to which I return later.

In developing the conceptual analogy between birthright citizenship and inherited property, I begin from two presumptions. First, my analysis starts with the world as we find it, with its many imperfections and already established institutions (including states, passports, regulated mobility and guarded borders) instead of hypothesizing about how to start *de novo* at the level of ideal theory. Yet, even if we recognize and endorse the value of citizenship (as I do in the book), this is not a good enough reason to accept, without challenge, the existing trans-

fer regime of birthright citizenship.

My second presumption is this: ideas matter, especially unsettling ideas that venture into uncharted territory. The power of ideas — their value in expanding and rewriting the universe of the possible — is what attracts me here. Unlike advocates of world citizenship who seek to abolish bounded membership altogether, I believe that greater promise lies in diminishing the extreme inequities in life prospects that are presently attached to ascribed membership status under the existing birthright regime.

This new approach strikes a new balance between political membership and global justice — without substantively detracting from the enabling qualities of membership in a self-governing polity. While there are a number of ideal-type responses that might get us closer to accomplishing this vision, I focus in the book on the idea of placing justice-based restrictions on citizenship's automatic transfer regime — not by restricting access to membership to birthright heirs, but through targeting the more fungible aspects of their tremendous opportunity-enhancing windfall. The birthright privilege levy, which is elaborated in the book, offers one such concrete mechanism. It calls attention to the situation of those whose life-chances are dramatically shaped by their initial draw of citizenship in the birthright lottery, an allocation that in the twenty-first century is still, astonishingly, determined by nothing but blood and soil. This is the “huge moral problem” (Smith 2011) that the book seeks to tackle.

Once we acknowledge this problem for what it is, the prospect of placing upon recipients of “unearned privilege” (as John Stuart Mill would put it) the responsibility to provide at least a minimal threshold of wellbeing, or subsistence, to those excluded from membership by nothing but accident of birth becomes harder to escape. Whether to interpret this as a strong egalitarian commitment or a weaker international baseline welfarism is of course open to debate, and will eventually have to be worked out through various democratic deliberations and reiterations (Benhabib 2011). But the crux of my argument is this: once the analogy to inherited privilege is placed at center stage, it becomes harder to justify the massive intergenerational transmission aspect of citizenship that has long been cloaked under the cover of birthright's ‘naturalness’. It provides a foundation for advocating and advancing obligations of justice within and across borders, yet without jumping to the quasi-tyrannical conclusion that we must abolish *tout court* the space in which semi-bounded, self-governing political communities can flourish.

Muñiz-Fraticelli's erudite and engaging essay extends the analogy to inherited property beyond the common law sources explored in the book, bringing in fresh insights from civil law and private law. This is a creative and fruitful terrain to uncover; I hope that he and equally talented interdisciplinary scholars continue to plough and toil in this direction of exploration. Where I found Muñiz-Fraticelli's analysis particularly illuminating is in the distinction he emphasizes between the arbitrariness of birthright citizenship and its unequal consequences,



asking which part of this dilemma my critique seeks to tackle. The simple answer is both, but if pressed to choose between them, I would certainly emphasize the former: The injustice of allotting citizenship — something that is so crucial for our identity, for our sense of security, freedom and place in the world, for our political voice and our life opportunities — according to nothing but circumstances of birth that are fully beyond our control. The fact that we live in a dramatically unequal world, where the “location premium” (to draw from Branko Milanovic’s terminology) remains exponentially important, makes this injustice all the more pronounced for the parties concerned. The critique of birthright citizenship advanced in the book would hold even in a world of full equality across borders and regions, but it becomes that much more dramatic in a world of severe inequality like our own.

Muñiz-Fraticelli’s path departs from mine, however, at the point at which he tries to extend and expand the citizenship-as-inherited-property analogy that I have drawn up as an heuristic device — much as political theorists use the social contract as a heuristic tool to illuminate important insights about the relationship between individuals and governments — from the conceptual and metaphorical plane into a historicized claim. Nothing in my analysis justifies or demands this move. Indeed, I reject it, just as theorists who use the ‘social contract’ as a heuristic device would treat an interpretation that explores where, when, and whether such a social contract was signed, agreed and applied, as slightly missing the point of the intellectual exercise. The goal of the thought experiment, in both cases, is to make visible what often goes unnoticed: legal order and political authority is not a natural order, but a human creation that requires legitimization and justification, especially by those whom it most directly affects (Dahl 1970; Goodin 2007; Shapiro 1999; Whelan 1983).

This overextension of the argument also helps address Muñiz-Fraticelli’s skepticism about whether it is “true that birthright citizenship is the main culprit in the system of global inequality?” The answer is plainly in the negative. As I take pains to show in the book, my analysis rests on the assumption that birthright citizenship itself is not a cause of global inequality. It is better described, just like inheritance, as a conduit or mechanism to pass down a differentiated welfare and opportunity in time, granting accession to hereditary privileges to the few while denying it to the many.

Another way to put the point is this: birthright citizenship does *not* create global disparities, but it reifies and perpetuates very different life prospects through the automatic intergenerational transfer of membership entitlement by virtue of blood and soil criteria. Scholars of an earlier era expressed the same disdain by highlighting the unwarranted and unjustified weight given to station of birth, rejecting the idea that ‘chance, not choice’ can, and ought, to determine what country and government we will be asked to bear allegiance to, merely by virtue of station of birth. This is a weak moral link. Speranta Dumitru captures this last point perceptively in her essay: “The idea that people should not be treated according to the circumstances of their birth is generally regarded as a minimal re-

quirement of justice” (Dumitru, 35). It is here that the reconceptualization of birthright citizenship’s transfer regime as analogous to a complex and now largely discredited form of hereditary transfer of entailed estates, cascading down the generational line to “their body” — a restricted group of birthright heirs — has the strongest bite.

Generously endorsing this reconceptualization, Duncan Ivison treats it as “an enlightening way of approaching the issue of global justice and our obligations to those excluded from our borders” (Ivison, 14). With Ivison, I share the notion that the social-relational aspect of the broad conception of citizenship is always open to reinterpretation and must stand in dialogue with concrete democratic demands raised by various social actors, most significantly, those from the outside looking in, even when their claims challenge the very boundaries of the membership community. I take his speculation that “[c]itizenship is (at least in principle) much more fluid and changeable...than property tends to be” (Ivison, 15) as open to empirical assessment. Even if it proves correct, it would provide a friendly amendment to my argument: both citizenship and property are complex legal and distributional systems that can, and often do, change over time. Moreover, such changes require collective action. An owner’s rights in her property are neither self-executing nor the result of a state of nature; rather, they rely upon collective recognition and a web of “relations of entitlement and duty between persons” (Grey 1980, 79). This of course still leaves open to deliberation and recalibration the precise nature of these relations. Property relations, just like citizenship relations, are never immune to reconstructive inquiry, whether in law or in philosophy. This last point fits well with the thrust of my argument, and with Ivison’s call for elucidating the conceptual resemblances as well as potential variations between the entail of property and the entail of political membership.

But there is more to Ivison’s critique. He astutely takes issue with another aspect of the analogy: if we take seriously the book’s embrace of a more inclusive and relational model of citizenship, he asks, then why draw the analogy to property and inheritance which inevitably involve a complex matrix of boundary making? This is an excellent query to raise, which touches on the book’s insistence that citizenship is a multi-layered and multi-textured institution and ideal, and cannot be reduced to a unidimensional or singular factor, without losing the qualities that make it valuable and worth preserving. No less significant for the purposes of our analysis is the recognition that political membership involves both gate-keeping and opportunity-enhancing dimensions, both of which are addressed in great detail in the book and cannot be repeated here. But it is worth describing here the purpose of the citizenship-as-inherited-property framework depicted in the book. It works on at least two planes: first, it allows us to see something so familiar and ‘natural’ as the entail of citizenship in a less familiar, and unsettling, light. Second, it enables us to inject into the identity-heavy citizenship debate the immensely rich body of literature that critiques the unfettered transfer of entitlement in property to a dynastic estate’s progeny. The legal category of entailed bequests from generation to generation without restraint



has been a major source of social and political reform ever since the revolutionary proclamation that we are all born free and equal (Yack 2011). I wish to instill the same sense of discomfort in what has remained a mostly taken-for-granted route for distributing political membership — the birthright nature of the entail of political membership, which secures a tremendously valuable public inheritance for the few while denying same for the many, on account of arbitrary circumstances of “chance not choice.”

Virtually all the giants of social and political thought — from Adam Smith to John Stuart Mill, from Ronald Dworkin to Robert Nozick — agree, from different ideological perspectives, that restrictions can (and should) be placed on the perpetual transfer of unearned entitlement. This cross-fertilization of property theory and citizenship law informs the kind of responses that I explore in the book within the intellectual parameters of seeking tangible and justifiable legal responses to curb these entail-like perpetual transfers in the citizenship domain. This shift in perspective empowers us to resist and locate cracks in the presently unfettered connection between station of birth, political membership, and radically unequal citizenship bequests; a concern that becomes ever more acute if “nothing can be done to go beyond the bounds set at birth” (Dumitru, 38). Instead of a false choice between the antipodes of a world of open borders versus the restrictionist position that endorses resurrecting previously relaxed borders (for example, amongst Schengen States in Europe), *The Birthright Lottery* challenges us to envision new ways to reduce the correlation between station of birth, political membership and unequal fortunes.

The basic dilemma is this: inheritance violates the ideal of equality of starting points; “wealth is opportunity, and inheritance distributes it very unevenly.” The solution, for most thinkers, is to impose restrictions against the unrestrained inheritance of swollen fortunes. As one account nicely puts it, “justice demands a constant erosion of accumulated fortunes to limit this influence” (Henderson 1926, 12-13; Haslett 1986). It is intuitively clear that, in an unequal world, the perpetual inheritance of political membership contributes to a larger pattern in which opportunity is distributed very unevenly. As we have already seen, birthright citizenship in a well-off polity carries with it not only important identity and belonging values but also significant enabling implications for the recipient. In spite of this, sparse attention has been paid in the literature to the significance of the transfer regime of membership and its pernicious effects on the distribution of voice and opportunity on a global scale. This is the black hole of our contemporary thinking about citizenship.

In contrast, all modern theories of property and justice place significant checks and constraints on the social institutions that transmit inequality. Even Thomas Jefferson, an iconic defender of property, echoes this notion, imbuing it with radical implications when stating that the “portion [of the earth] occupied by any individual ceases to be his when he himself ceases to be, and reverts to society.” Many others, from different ideological quarters, share this intuition. The debates among them focus on what, precisely, reverts to society — the whole es-

tates, part thereof, or the reminder after fulfilling certain justified expectations, is to name but a few possible resolutions. The crucial point here is that any of these options is preferable over the current citizenship status quo of unburdened intergenerational transmission of prized membership titles.

Unlike Ivison's nuanced discussion and acceptance of the distinction between the broad and narrow conceptions of citizenship, and in contrast with Muñiz-Fraticelli's expansive interpretation, Speranta Dumitru takes a literal, if not outright reductionist, interpretation of the citizenship as inherited property analogy. She ignores the inheritance aspect almost completely, which is to misunderstand the core objective of a project like mine that focuses on the transfer of membership. Dumitru also pays little heed to the distinction I draw between the broad and narrow conception, uncritically accepting instead as-a-given the highly atomistic and possessive individualistic framework that is the trademark of the narrow (or "rivalrous") conception of social interaction that operates in a purely laissez-faire, Shangri-La-like world. This leads her to see only exclusion, whereas in law, practice and social theory, as Ivison reminds us, "we know from as far back (at least) as John Locke, property is *both* inclusive *and* exclusive" (Ivison, 15; emphasis added). This insight is shared by the recent vintage of property theories that take aim at the exclusion conception, labeling it as "as an exaggerated and rather damaging notion because it tends to improperly bolster the cultural power of libertarian claims" (Dagan 2012, 12). Property is always subject to limitations and obligations, even toward third parties that have no title or possessory right. If this is true in this traditionally 'private' realm of social life, which has received the strongest legal protection, then the same rationale should apply to the public realm of governmental exercise of power that bears dramatically on the human rights of those seeking to get in, as well as those already within the boundaries of the citizenry body (Shachar 2011). In short, the same intuition that justifies a degree of regulating and taming of repeated transfers of propertied fortunes applies, with equal if not greater force, to the domain of citizenship 'entails'.

Dumitru's response to these vital challenges is, in essence, to espouse the demise *in toto* of "the power to control movement and entry into land" (Dumitru, 41). On this account, we will live in a world in which territorial access is permitted to all, although such access will not be connected to a chance to gain membership. Dumitru goes further in claiming that "there must be no conceptual relationship between controlling citizenship and refusing access to land" (Dumitru, 42). Under this alternative universe, access to the territory is totally separated from the right to establish citizenship. But on what account of greater mobility does this grim picture rely, and must we accept it? Dumitru holds a laissez-faire market-based vision of a world in which claims for inclusion are detached from the acts of membership or mobility, potentially leading to a situation whereby those not born as members are left permanently without an avenue to establish a right to stay, if they so wish, in the political community into which they have already moved and where they have already established roots, facing instead a constant state of deportability and the risk of a "bare life" (Agamben 1998). This is a very

peculiar solution to the problem of unequal opportunity: downgrading the hard-earned collective achievements of civil and political measures of political membership and replacing them with “unconstrained survival-of-the fittest market relations, with the dispossessed falling helplessly to the wayside” (Spiro 2008, 134).

This approach may well have the effect of “entrenching a division between citizenship and what we might call *subjecthood*.” As Ivison puts it, “[t]he distinction between citizenship and non-citizenship, in other words, becomes meaningful for all the wrong reasons. This is arguably what happened with Turkish migrants in Germany, where they were originally admitted as guest-workers and allowed to stay for long periods of time, but remained cut off from the full range of civil and social rights possessed by German citizens” (Ivison, 12). Instead of resolving the problem of unequal opportunity, which Dumitru so elegantly analyzes, denial of citizenship perpetuates its worst status implications.

What Dumitru calls a freer world could thus be re-characterized as a dark dystopia. We will have access to territorial spaces, according to this vision, and we will be free to sell out labor power to the highest bidder, but we will have nothing beyond that: no protection, no rights, no participation, no voice, no community, no citizenship. Instead of leveling up rights and opportunities in the name of a libertarian vision of freedom and equality, Dumitru’s solution boils down to opening up borders but closing down citizenship and taking away whatever protections it grants us as equal members of a shared political community. This is no utopia at all, especially not for the weak, the incapable, or the destitute. It is the morphing of the social-relational bonds of mutual responsibility and stakeholding (Baubock 2005) into mere ‘trades’ and pure market-based relations, here, operating within and across borders interchangeably.

There is no guarantee, however, that access to land per se, without the protections or rights of citizenship and personhood, and without the creation of transnational institutions or overarching rights regimes, will generate a more equitable distribution of voice and opportunity either globally or locally for those who need it or desire it most. The latest statistics show that approximately only 1.75 million immigrants are admitted annually by leading OECD countries. The population residing in the world’s poorer or less stable regions amounts to roughly 4.5 billion. This leads to a ratio of 1:1500 between those granted admission and those who may wish it. Even if the world’s wealthy countries declared their borders as open as possible, the problem would not dry up.

Another misconception in Dumitru’s analysis is found in what she calls the sedentarist mistake, a view that presumably holds that a “world without mobility and change is a desirable one” (Dumitru, 11). Here, I fear that Dumitru stands on shaky ground. She confuses a descriptive analysis with a normative claim. We live in a world in which the vast majority of the population is locked into the initial assignment of political membership at birth (UN DESA and IOM international migration reports offer the latest global figures) and where the options for

overcoming this birthright lottery are extremely slim. This is not anyone's "sedentarism mistake"; these are the observable, real-world facts that we must acknowledge, especially if we wish to begin to challenge and dismantle them. If I had thought this state of affairs desirable and morally defensible, I would not have written a book that challenges the very foundations of this system. Indeed, my endeavor rests on the assumption that social and legal categories, including borders and membership boundaries, are never as fixed and immutable as those in power (or those who gain from the status quo) would like us to believe.

Noah Novogrodski's illuminating essay reminds us that 'liminal statuses', like the ones implicitly endorsed by Dumitru, are back in vogue in some parts of the world and are prevalent in places like the Gulf States (Novogrodski, 6). There, migrant workers gain access to the territory and its market, but are never considered as potential candidates for inclusion as members. This is a replay of the *Gastarbeiter* moral hazards all over again, yet the precarious status of these temporary migrants (Anderson 2010) is even more pronounced and alarming given that they reside in countries that have weaker democratic and constitutional protections. This makes the situation of those permitted to cross the border — but prohibited from joining the community of members — fraught with vulnerabilities and insecurities: they lack adequate employment rights; they often work in substandard health and safety conditions; they have access to few if any viable legal channels to demand or have enforced fair labor conditions; and they are deprived of the power to express their voice politically.

The attempt to disaggregate working bodies from full humanity accentuates the cracks and tensions embedded in the laissez-faire approach to resolving the deep-seated membership and justice dilemmas that we face today. Lest we forget that the vision of depriving those holding liminal statuses from the basic opportunity to secure membership in the community of equals is hardly a new or promising invention. From the exclusion of slaves, women, and metics in Ancient Greece to Jim Crow laws in the United States, the technique of territorial presence without full rights and status, with its excruciating human costs, is unfortunately all too familiar. This last point is perhaps best expressed in a now-classic passage from *Spheres of Justice*: "[migrant] workers, then, are excluded from the company of men and women that includes other people exactly like themselves. They are locked into an inferior position that is also an anomalous position; they are outcasts in a society that has not caste norms, metics in a society where metics have no comprehensible, protected, or dignified place. That is why the government of guest workers looks very much like tyranny: it is the exercise of power outside its sphere, over men and women who resemble citizens in every respect that counts in the host country, but are nevertheless barred from citizenship" (Walzer 1983).

We can do better than that. Instead of burying our heads in the sand or repeating past mistakes, greater promise lies in reassessing what is worth preserving and what is no longer sustainable in our inheritance of regimes of entailed-like membership.

## WHAT IS THE “WORTH” OF CITIZENSHIP?

We can detect two diametrically opposed responses to this query in the commentaries: the ‘maximalist’ and the ‘minimalist’ views (Joppke 2011, 39). Novogrodsky’s crisp analysis represents the former. Spiro’s spirited argument speaks for the latter. The maximalist argument fits squarely in line with a long tradition of seeing immigration as a transitory stage. Novogrodsky articulates this view emphatically, stating that citizenship “sits at the end of the membership spectrum; Shachar’s insights and powerful property analogy tell us something about the previously unexamined value of birthright inheritance” (Novogrodsky, 53).

If citizenship holds this kind of utmost value as far as membership goods go, argues Novogrodsky, then it can usefully serve as a benchmark against which to assess more accurately the “lesser forms of legal status, including lawful permanent residence ... [and the] many shades of long-term visitors — landed immigrants, guest workers and resident aliens — [all of which] are steeped in the propertied qualities and economics of migration” (Novogrodsky, 50-51). This is a creative and valuable spin-off that takes the book’s core argument as a seedling, which is then planted on the fertile terrain that is already soaked by the “Alphabet soup” of legal definitions referring to those who lack full membership but hold a nascent relationship with the admitting country, its society and its economy. When this relationship blooms into full membership, the unilateral trajectory of immigrant to citizen has been concluded.

But there is a dark side, too. What happens when newcomers who have already settled in the new country are denied “membership status and the value associated with the security of belonging” (Novogrodsky, 51)? This situation raises the fraught moral and ethical dilemmas of “exclusion from within,” to which I have devoted the book’s final part. As Novogrodsky’s graciously puts it, “*The Birthright Lottery* takes this [Arendtian] view a step further by naming and measuring the previously unexamined worth of ascribed citizenship” (Novogrodsky, 52). This is a framework that serves Novogrodsky as a springboard to develop a nuanced matrix to identify and potentially redress the different shades or gradations of unjust deprivation of membership. One measure of response that I have proposed in the book is the introduction of an innovative legal principle, *jus nexi*, that open up a new path to acquire citizenship for those not “naturally-born” into the political community, thus allowing us to overcome some of the deep-seated flaws of relying on birthright *simpliciter*. In practice, *jus nexi* could operate alongside traditional *jus soli* and *jus sanguinis* principles. It may become ever more influential in a world of greater interdependence and mobility. I envision this principle as remedial: a new root of title that would grant an opportunity for full inclusion to those who already belong (as a matter of social relations and externally observable connections to the new country), but who are nonetheless legally treated as less than equal. It is not designed or justified to operate in a reverse manner; namely, as restricting rather than expanding the pool of receipts of citizenship, with all of its enabling and human-flourishing potential.



Take the case of Sandra McIntyre, a retired grandmother who has lived her whole life in Canada: “I grew up here, got my education here, got married and raised kids here, and worked here all my life. So I’ve always assumed I was a Canadian. My loyalties go to Canada, and I’ve never lived anywhere else” (Seaman 2008). It came as a shock to learn, in her late fifties when she applied for a passport in preparation for travel abroad, that she was naked of the basic rights of citizenship: for instance, the right to enter and exit one’s home country. Little did Sandra know that circumstances fully beyond her control — her birth just south of the border (she was only a few hours old when her parents, lawful immigrants to Canada, drove back home, with their newborn in tote, across the border from New York to Ontario at Niagara Falls) — would legally turn her into a ‘foreigner’ in Canada, the very country in which she had lived for over fifty years, voted in every election, volunteered in her community, and was a full member by any criteria but the harsh letter of the law. Alas, Sandra was not born in Canada, *ergo* she was not a citizen. *Dura lex, sed lex* (the law is hard, but it is the law).

Sandra is not alone. In the United States, hundreds of thousands of children born outside the United States who were brought into the country in their infancy, and then raised and educated in English as Americans through and through, hold the same uncertain membership status. The sword of deportation hangs over them at all times. Contrary to the familiar image of America as a beacon of hope and opportunity for the “huddled masses, yearning to breathe free,” the United States has more recently been dubbed the deportation nation (Kanstroom 2007). Whereas Sandra McIntyre was at least offered a chance to ‘immigrate’ to her very own home country of Canada, children who grew up American, and have been shaped by this country’s American-dream ethos, are categorically denied a path to legal membership in its citizenry body.

The scholarly literature refers to these children as members of the “1.5 generation”: “[t]hey are not the first generation because they did not choose to migrate, but neither do they belong to the second generation because they were born and spent [a brief] part of their childhood outside the United States” (Gonzales 2007, 2). Under current immigration law, there is no path to regularize their status. Many members of the 1.5 generation “have been in this country almost their entire lives and attended most of their K-12 education here.” Yet, because they are in the country without legal status, “their day-to-day lives are severely restricted and their futures are uncertain. They cannot legally drive, vote, or work. Moreover, at any time, these young men and women can be, and sometimes are, deported to countries they barely know” (Gonzales 2007, 2).

Individuals facing this uncertainty of status are keenly aware of citizenship’s value. As a multidimensional concept and institution, citizenship’s varied interpretations and dimensions are neither fixed nor closed. Most commentators agree, however, that “citizenship entail[s] membership, membership in the community in which one lives one’s life.” (Held 1991, 19-20). This is precisely the



kind of membership that Sandra, and similarly situated individuals, wish for. For them, gaining equal status as citizens is a lifeline and a matter of just membership. It is about establishing a legal connection to close the gap between their social experience of membership and their lack of entitlement to inclusion in the only political community they know and perceive as home.

Members of the 1.5 generation, tired of repeated legislative failures to address their precarious situation, have recently turned to political mobilization and democratic action, which in itself demonstrates just how deeply the admitting society has shaped their horizon of expectations and the lexicon they now utilize to resist the pending threat of deportation. This grassroots campaign for legalizing undocumented students in the United State takes its cues unmistakably from America's rich civil rights traditions and imageries: they engage in sit-ins, march to Washington, escape the shadows by telling their own compelling life stories publically (while risking harsh consequence by self-identification as one of those lacking legal status), under the slogan of "unlawful and unafraid". These students draw upon the emancipatory language of citizenship and the promise of a fresh and fair start — the quintessential American Dream, showing just how much this country in which they have grown has shaped them in its image — to challenge their own exclusion from its promised land of immigration. They are living proof of the human costs associated with "exclusion from within" and the misguided vision of separating access to territory from access to the citizenry body, for those who wish or need it desperately.

Like so many other once-excluded groups and constituencies who were barred from formal citizenship (on the basis of race, gender, sexual orientation, and so on), the appeal here is to the justice of reforming existing legal categories and their harsh implementation, so that the promise of equal membership is extended to new subjects and new domains. For these DREAMers, as they are known, the adoption of *jus nexi*-like mechanisms for gaining access to full membership in the community in which they live their lives would not only remove the hanging sword of deportation and expulsion from the only country they know as home. It would also grant them a tangible and concrete measure of freedom and security that comes with the acquisition of something so precious and hard to earn for those not initiated by birth into the ranks of entailed citizenship: just membership.

Let me close by turning to the 'minimalist' view of citizenship, which Spiro's analysis masterfully exemplifies. Spiro's postnational edifice leads him to conclude that citizenship "might well go begging" (Spiro, 63). He may well be correct in this assessment in reference to the circumstances of a very tiny elite of the world's jet setters who already possess full membership in a well-off country, although even they do not appear keen on giving up their privileged membership entitlements any time soon. When we open the lens in order to bring the rest of the world into view, we find that there are many more applicants knocking on the doors of well-off polities than new admission slots to fill. This is evidenced along all major streams of migration: family reunification, skills based,

and humanitarian causes. Even among the category of the ultra-rich, which fits most closely to Spiro's cosmopolitan elite, we find a growing number of "migrant millionaires" (as David Levy fittingly calls them) who are willing to open their checkbooks and wallets, offering stacks of cash as the tender with which to secure the good of membership in a desired destination country. This raises a conundrum. If citizenship is not worth much, how can we explain the growing demand for, and supply of, investor-admission routes that are offered by a growing number of countries? These proliferating programs require hefty investments. The current investment rate stands at US\$1 million in the United States, Euro€1 million in Germany, and in the UK, individuals possessing personal assets amounting to not less than GBP£2 million are encouraged to apply. This is clearly not your average-Joe target population. However, those with the financial might have not been discouraged by these towering figures; on the contrary, they are voting with their feet. It is those who wish to enter based on more traditional grounds, including family-based migration or the various humanitarian streams, who more often than not go begging.

Another way to gauge the persistent interest in, rather than decline of, the lure of citizenship is to look at the numbers of worldwide subscribers to America's 'diversity' visa category, which has exceeded 10 million applicants annually. Less than 50,000 of these 10 million applicants will gain a chance to start a new life in their chosen promised land of immigration. Their willingness to invest their time and energy and to fill in their bid for such a slim chance of success seems to refute the view from the ivory tower that gaining legal access to permanent residence and embarking on the road to citizenship is unimportant or redundant. The harder issue to discern, which Spiro is absolutely correct to emphasize, is whether permanent residence or citizenship is the 'homerun'. We can only speculate here based on what the statistics are telling us. Among immigrants to Canada and the United States, for example, those who were born in poorer, less democratic and less stable regions of the world display disproportionately higher naturalization rates than those from other OECD countries, and they do so more quickly. This is particularly evident with highly skilled migrants — another category of migrants that is close in profile to the globetrotter that Spiro is referring to. Other things held equal, a high-tech engineer from India or China will take on American citizenship, whereas a Canadian who has moved to the US to fulfill her career ambition is far less likely to do so. Ditto a Frenchman that followed his love to establish a shop in Italy, and so on. It is quite simply too easy, then, to bid farewell the understanding of citizenship as incredibly, immensely valuable.

This state of affairs offers us a fresh reminder that even if those who inherit citizenship have come to take it for granted, those who do not are keenly aware of its value. In today's world of severe inequality, some are taking increasingly dangerous routes and means of passage to reach the greener pastures of Europe and North America. Others who have made it into these territories are occupying the lesser forms (or 'liminal statuses') of membership, forsaking the kind of

basic protections that most natural born citizens would take for granted. Some would like to further exploit these tradeoffs and celebrate them as representing the road ahead. An equally convincing interpretation is, however, to see these acts as testament to the desperation of the current situation and the corrosive effects of the incumbent regime of membership allocation. This motivates the urgent need to improve matters, here and now.

Along with Spiro, I share the belief that citizenship is bound to change in the 21<sup>st</sup> century and beyond. But we do not necessarily agree on the direction of the change. Spiro treats it as a losing cause, a dead horse, a fossil from a bygone era. I hold greater faith in the ideal and institution of equal membership in the political community as providing a baseline of security and opportunity to the individual that no other human rights regime (regionally or internationally) have yet achieved. The scale and scope of citizenship has changed dramatically in the past and it may well change in the future. Human rights regimes may well come to flourish and fulfill their tremendous potential. This will generate a new and welcome balance between sovereignty and humanity, and local and global justice. Alas, we cannot read the tea leaves of this complicated tale; too many intervening factors may derail a happy ending. So let us begin with the here and now. The main challenge that we face today is not to speculate about the rise or fall of citizenship in some distant future. A more pressing challenge, both ethically and prudentially, is to ensure that whatever the spoils of membership — from the most mundane service-oriented definition that refers to building roads and laying pipes for clean water to flow to remote villages, to the enabling qualities that are associated with fair access to maternal health care and equal education for girls, to the security and opportunity that democratic governance and a vigilant human rights record can grant all of us by protecting freedom of speech and expression just as it includes freedom from want and from fear — they, and the many other crucial ‘properties’ of citizenship, are not reserved only for those born into the ranks of privilege. It is time to open up and shake up this fine institution. There is no better way to start than by revisiting its fixed and unnecessarily rigid transmission regime.

## BIBLIOGRAPHY

Agamben, Giorgio. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Daniel Heller-Roazen Trans. Stanford University Press.

Anderson, Bridget. 2010. "Migration, Immigration Controls and the Fashioning of Precarious Workers." *Work, Employment and Society* 24: 300-317.

Baubock, Rainer. 2005. "Expansive Citizenship—Voting beyond Territory and Membership," *Political Science and Politics* 38: 683-688.

Benhabib, Seyla. 2011. *Dignity in Adversity: Human Rights in Troubled Times*. Cambridge: Polity Press.

Brubaker, Rogers. 1992. *Citizenship and Nationhood in France and Germany*. Cambridge, MA: Harvard University Press.

Dagan, Hanoch. 2012. "Inside Property," *Wright Lecture*. Toronto: Faculty of Law, University of Toronto.

Dahl, Robert A. [1970] 1990. *After the Revolution? Authority in a Good Society*. New Haven: Yale University Press.

Gonzales, Roberto G. 2007. *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Migrants*, Washington DC: Immigration Policy Center.

Goodin, Robert E. 2007. "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy & Public Affairs* 35: 40-68.

Grey, Thomas, C. 1980. "The Disintegration of Property," in *NOMOS XXII: Property*, J. Roland Pennock and John W. Chapman eds. New York: NYU Press.

Haslett, J.S. 1986. "Is Inheritance Justified?" *Philosophy & Public Affairs* 15: 122-155.

Held, David. 1991. "Between State and Civil Society: Citizenship" in *Citizenship*, Geoff Andrews, ed. London: Lawrence and Wishart.

Henderson, Hubert Douglas. 1926. *Inheritance and Inequality: A Practical Proposal*. London: The Daily News.

International Organization for Migration (IOM). 2010. *World Migration Report 2010*. IOM: Geneva.

Joppke, Christian. 2011. "How Liberal Are Citizenship Tests? A Rejoinder," in *How Liberal Are Citizenship Tests?* Rainer Baubock and Christian Joppke eds. EUI Working Papers, RSCAS 2010/42. Florence: European University Institute Robert Schuman Centre for Advanced Studies.

Kanstroom, Daniel. 2007. *Deportation Nation: Outsiders in American History*. Cambridge, MA: Harvard University Press.

Shachar, Ayelet. 2009. *The Birthright Lottery: Citizenship and Global Inequality*. Cambridge, MA: Harvard University Press.

Shachar, Ayelet. 2011. "Earned Citizenship: Property Lessons for Immigration Reform," *Yale Journal of Law & Humanities* 23: 110-158.

Shapiro, Ian. 1999. *Democratic Justice*. New Haven: Yale University Press.

Spiro, Peter J. 2008. *Beyond Citizenship: American Identity After Globalization*. Oxford: Oxford University Press.

United Nations Department of Economics and Social Affairs (UN DESA). 2008. *Trends in International Migrants Stock, the 2008 Revision*.

Vink, Maarten P. and Gerard-René de Groot. 2010. "Birthright Citizenship: Trends and Regulations in Europe." *EUDO Citizenship Observatory Comparative Report*. Florence: European University Institute Robert Schuman Centre for Advanced Studies.

Walzer, Michael. 1983. *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books.

Whelan, Fredrick G. 1983. "Democratic Theory and the Boundary Problem," in *NOMOS XXV: Liberal Democracy*, J. Roland Pennock and John W. Chapman eds. New York: NYU Press.

Yack, Bernard. 2011. "Birthright, Birthwrongs: Contingency, Choice and Cosmopolitanism in Recent Political Thought." *Political Theory* 39: 406-416.