Citizenship as Inherited Property

Ayelet Shachar
Ran Hirschl
University of Toronto, Canada

The global distributive implications of automatically allocating political membership according to territoriality (jus soli) and parentage (jus sanguinis) principles have largely escaped critical scrutiny. This article begins to address this considerable gap. Securing membership status in a given state or region—with its specific level of wealth, degree of stability, and human rights record—is a crucial factor in the determination of life chances. However, birthright entitlements still dominate both our imagination and our laws in the allotment of political membership to a given state. In this article we explore the striking conceptual and legal similarities between intergenerational transfers of citizenship and property. The analogy between inherited citizenship and the intergenerational transfer of property allows us to use existing qualifications found in the realm of inheritance as a model for imposing restrictions on the unlimited and perpetual transmission of membership—with the aim of ameliorating its most glaring opportunity inequalities.

Keywords: citizenship; property; intergenerational transfer; equality of opportunity; global justice

“I am astonished that ancient and modern writers on public matters have not ascribed greater influence over human affairs to the laws governing inheritance. Such laws belong, of course, to the civil order, but they should be placed first among political institutions because of their incredible influence on a people’s social state; . . . in a sense, they lay hold of each generation before it is born. Through them, man is armed with an almost divine power over the future of his fellow men. Once the legislator has regulated inheritance among citizens, he can rest for centuries. Once his work has been set in motion, he can remove his hands from his creation. The machine acts under its power and seems almost to steer itself toward a goal designated in advance. If construed in a certain way, it collects, concentrates, and aggregates property, and before long, power as well.”

Alexis de Tocqueville, Democracy in America (1835)
The vast majority of today’s global population—97 out of every 100 people—have acquired their political membership by virtue of birthplace or “pedigree.” There is little doubt that securing membership status in a given state or region—with its specific level of wealth, degree of stability, and human rights record—is, even in the current age of increased globalization and privatization, a crucial factor in the determination of life chances. However, birthright entitlements still dominate both our imagination and our laws in the allotment of political membership to a given state. In fact, material wealth and political membership (which are for many the two most important distributable goods) are the only meaningful resources whose intergenerational transfer is still largely governed by principles of heredity. And whereas the normative foundations of these principles have been thoroughly discussed in terms of the intergenerational transfer of property, they have seldom been considered in terms of the intergenerational transfer of political membership.

This lacuna is especially disturbing in light of recent and vibrant debates in political and legal theory concerning the claims of minority groups, the narratives of collective-identity formation, and the ethics of political boundaries. These debates engage with what can be referred to as the “identity-bonding” dimension of citizenship. What remains conspicuously absent from these discussions, however, is a serious analysis of what we might call the “opportunity-enhancing” implications of the entrenched norm and legal practice associated with automatically allocating political membership according to parentage (jus sanguinis) and territoriality (jus soli) principles. This article begins to address this considerable gap. It offers a new perspective from which to conceptualize birthright citizenship laws, one that focuses on how these laws construct and govern the transfer of membership entitlement as a form of inherited property. We then employ this framework in order to provide a new prism through which to understand the “worth” of citizenship in an unequal world. This analysis also opens the door to fresh ideas for mitigating the profound distributive consequences that attach to relying on circumstances of birth in allotting political membership.

In today’s world, one’s place of birth and one’s parentage are—by law—relevant to, and often conclusive of, one’s access to membership in a particular political community. In this way, birthright citizenship largely shapes the allocation of membership entitlement itself (“demos-demarcation”). But it does more than that: it also distributes opportunity on a global scale. In a world where membership in different political communities translates into very different starting points in life, upholding the legal connection between birth and political membership clearly benefits the interests of some (heirs of membership titles in well-off polities), while providing little hope for others
(those who do not share a similar "birthright"). This raises the moral disdain against acquisition and transfer rules that systemically exclude prospective members on the basis of ascriptive criteria. It also highlights the urgent need to place the discussion of bounded membership within a broader framework of debate, exploring the distributional effects of birthright citizenship, which often translate into dramatically different life prospects for the individuals involved. And whereas we find vibrant debates about the legitimacy of citizenship’s demos-demarcation function (or “gate-keeping”), the perpetuation of unequal starting points through the intergenerational transmission of membership has largely escaped scrutiny. It remains conveniently concealed under the current system of entailed citizenship transmission.

Unlike advocates of global citizenship who seek to redistribute membership itself, we wish to mitigate the inequality of starting points that attaches to the present system of birthright citizenship laws. It is here that the conceptual analogy to property proves most helpful. After distinguishing between a narrow and broad conception of property, we turn to a description of the main insights that can be applied from the realm of intergenerational transfer of property to the study of intergenerational transfer of citizenship. Ultimately, we argue that once the analogy between property and citizenship is drawn, the rich literature on property and inheritance becomes relevant for our discussion of the intergenerational transmission of citizenship. This leads us to defend the protections that citizenship guarantees to those included within the circle of membership, while at the same time targeting the unequal effects of this transmission system on those who remain excluded by its rigid, birth-based entitlement structure. In short, we argue that the intergenerational transmission of membership titles should not serve to “naturalize,” as it has done to date, the accompanying wealth-preserving functions of the current membership-allocation system. To frame citizenship in terms of inherited property and acknowledge birthright entitlement as a human construct not impervious to change is to expose the extant system of distribution to critical assessment.

We begin our discussion of citizenship transfers as wealth transfers by highlighting the disparities in the living conditions and opportunities offered to citizens born into different political communities in an unequal world. In the second section, we survey a few key concepts in property theory that serve as a basis for our conceptual analogy between property and citizenship regimes. In the third section, we show that a broad conception of property corresponds with two core functions of bounded membership in the world today: “gate-keeping” and “opportunity-enhancing.” In the fourth part we venture into an exploration of the early common-law
mechanisms of “entailed” estates, showing the surprising commonalities in both form and function between these antiquated forms of property transmission and present-day birthright principles that regulate access to bounded membership. Both these mechanisms serve to preserve and legitimize immensely advantageous starting points in life to the beneficiaries of birthright transmission. The analogy between inherited citizenship and the intergenerational transfer of property allows us to use existing qualifications found in the realm of inheritance as a model for imposing restrictions on the unlimited and perpetual transmission of membership—with the aim of ameliorating its most glaring opportunity inequalities. In the final section, we sketch the contours of a number of possible responses to the deep-seated problems we identify here, focusing on the birthright privilege levy—a creative proposal for addressing the severe inequalities of starting points that currently attach to inherited membership.

What is the “Worth” of Citizenship?

Much has been written about global inequality. Everybody knows that the living conditions of a child born in Swaziland are ceteris paribus, far worse than those of a child born in Switzerland. Publications such as the United National Development Programme’s (UNDP) Human Development Report or the World Bank’s World Development Report reveal just how tremendous global disparities in life opportunities, chances and choices actually are. Consider, for example, measurements reflecting absolute deprivation: that is, the number of people falling below a threshold of decent human functioning, such that the possibility of autonomous human agency is severely restricted if not outright removed. According to recent World Bank statistics, approximately 1.1 billion people live in extreme poverty with an income of $1 per day per person, measured at purchasing power parity. Another 1.6 billion live in moderate poverty, defined as living on between $1 and $2 per day. In other words, over 2.7 billion people—approximately 45 percent of the world’s population—survive on less than $2 a day. Virtually all of the world’s extreme and moderate poor live in Asia, Africa, and Latin America. The overwhelming share of the extremely poor live in Southeast Asia and sub-Saharan Africa—at least 25 percent of the households in almost all sub-Saharan Africa or East Asian countries subsist on less than $1 per day per person in real purchasing power. As of the early 2000s, the average annual per capita income in the United States exceeded $30,000, with an average annual growth of 1.7 percent over the
last two centuries. In contrast, the per capita annual income in Africa is just over $1,300 (far below that in sub-Saharan Africa), with an average annual growth of 0.7 percent over the last 200 years. Global inequalities in terms of income are even more striking when gender is factored in. Whereas in most industrialized polities, significant strides have been made toward the elimination of at least formal gender inequality, women in most developing countries continue to lag far behind their fellow countrymen in terms of income and meaningful life choices.

But global inequalities in opportunity go far beyond income and expenditure. The mean years of educational attainment for the world have almost doubled from 3.4 in 1960 to 6.3 in 2000. However, disparities in educational attainment and achievement between students in developing and Organisation for Economic Co-operation and Development (OECD) countries remain strikingly large. In many developing countries, literacy rates are still unacceptably low. According to the 2006 World Development Report, developing countries constitute the lower tail of the learning distribution. Students in these countries fare on average far worse than students in even the poorest performing OECD countries. A recent study found that for children in Argentina and Chile, average performance is two standard deviations below that of children in Greece—one of the poorest performing countries in the OECD. Another recent study found that the reading ability of an average Indonesian student is equivalent to that of a French student at the seventh percentile.

Whereas in 2002 the health expenditure per capita in Switzerland and Norway was roughly $3,500 (PPP US$), the health expenditure per capita in Sri Lanka in the same year was $131, and a meager $15 in the Congo. Or take the crucial indicator of access to clean water. In 2002, 100 percent of Australia’s population had permanent access to safe water sources. But only 70 percent of Australia’s neighboring Solomon Islands’ population, and approximately 39 percent of neighboring Papua New Guinea’s population had sustainable access to safe water sources. Another revealing disparity is found in health care provisions. Even health outcomes of the rich citizens in poor countries remain well below OECD average—for all countries with average per capita Gross Domestic Product (GDP) below $2 a day, the infant mortality rate of the richest quintile of the population is more than ten times higher than the OECD average. Basic sanitation standards seem to be a long way off throughout the developing world. The availability of appropriate medical services and drugs is sporadic. And we have not yet taken into account the developing HIV/AIDS pandemic, with its clear regional concentration and impact on infant mortality.
A baby born in 2001 in Mali—one of the world’s poorest countries—had 13 percent chance of dying before reaching the tender age of one year, with his or her chances improving a mere 4 percent, to 9 percent if the baby was born to a family in the top quintile of Mali’s asset distribution. It is further estimated that approximately one in four children (24 percent) born in Mali will not reach age five. By contrast, a baby born in the United States the same year had less than a 1 percent chance of dying in its first year or first five years. The probability at birth of not surviving to age 40 (percent of cohort 2000–2005) in Mali was 37.3 percent. In other words, at least one in every three people born in Mali between 2000 and 2005 will die before reaching the age of 40. As of 2003, only 48 percent of Mali’s population had sustainable access to an improved water source (100 percent had such access in the United States). That year, over 70 percent of Mali’s population lived on less than $1 a day, and over 90 percent of Mali’s population on less than $2 a day. While the average American born between 1975 and 1979 has completed more than 14 years of schooling (roughly the same for men and women, and in urban and rural areas), the average attainment of the same cohort in Mali is less than two years, with women’s attainment less than half that of men, and virtually zero in rural areas. Not surprisingly, the illiteracy rate in Mali (percent of ages 15 and above as of 2003) was 81 percent. Taking into account the actual quality of education in the two countries is likely to yield far greater differences.

In short, the general well-being, quality of services, safety, and scope of freedoms and opportunities enjoyed by those born in affluent polities are all far greater, ceteris paribus, than the opportunities of those born in poor countries. Ours is a world in which disparities of opportunity between citizens of different countries are so great that about half of the population of the world, according to the World Bank, lives “without freedom of action and choice that the better-off take for granted.” While extant citizenship laws do not create these disparities, they perpetuate and reify dramatically differentiated life prospects by reliance on morally arbitrary circumstances of birth, while at the same time camouflage these crucial distributive consequences by appealing to the presumed “naturalness” of birth-based membership.

These dramatically differentiated life prospects should disturb not only egalitarians, but also free marketers who believe in rewarding effort and distributing opportunity according to merit, rather than on the basis of station of birth. This problem of unequal allocation, which has gained plenty of attention in the realm of property, is, as the data provided here documents, far more extreme in the realm of hereditary citizenship. Remarkably, in spite of the conceptual affinity between the intergenerational transfer of
property and birthright citizenship, and irrespective of the thousands of pages devoted to debating the justifications for inheritance in property theory, there have been few, if any, scholarly attempts to scrutinize the justifications for automatic inheritance of citizenship by birth. Political theory’s silence with respect to the intergenerational transfer of citizenship by the fortuitous location or station of birth becomes all the more astonishing considering that the incredible gaps in life opportunities created and perpetuated by birthright citizenship regimes are far deeper and infinitely more multifaceted than the material inequalities perpetuated through intergenerational transfer of fungible wealth. By drawing the analogy from inherited citizenship to intergenerational transfer of wealth and property, a new space is opened up for the development of just such a debate.

Property: Some Key Distinctions

Property as State-Enforced Relations of Entitlement and Duties

Property is notorious for escaping any simple or unidimensional definition. It is common enough to recognize that “although property has to do with tangible and certain intangible ‘things’ property is not the thing itself.”9 Rather, it is a human-made and multi-faceted institution, which creates and maintains certain relations among individuals in reference to things.10 These relations have a special validity in law; a property owner has rights that are valid against the world (rights in rem), as distinct from rights in personam, which are only valid against a specific set of individuals, such as those with whom one has contracted. The in rem quality provides strong protection to entitlements that get defined as “property.” This protection, in turn, relies upon collective recognition and enforcement. This collective dimension is important: property rights gain meaning only when they are connected to a system of law and governance that can enforce them.11 In the modern era, that enforcing body has typically been the state.12 As Thomas Gray aptly observes, “property must be seen as a web of state-enforced relations of entitlement and duty between persons, some assumed voluntary and some not.”13 Given its currency in the contemporary moral and legal landscape, the specific content and protection given to a property entitlement has always been (and still is) subject to political contestation. Property relations are thus never immune to reconstructive inquiry whether in law or in philosophy.
Property relations establish a range of enforceable claims. Following Wesley Hohfeld’s seminal work, these enforceable claims are often described as a “bundle of rights.” Some of the most notable sticks in the bundle include the right to use, to transfer, to delimit access, and so on. As Guido Calabresi and Douglas Melamed observe in their classic “view from the cathedral,” each society or legal system must define who has an enforceable claim in a given entitlement and must further determine which rights, protections, decision-making processes, and opportunity-enhancing institutions become available to the right-holder.

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

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

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

Returning to our analogy to property, when we explore the realm of citizenship we soon recognize that what each citizen holds is not a private entitlement to a tangible thing, but a relationship to other members and to a particular (usually a national) government that creates enforceable rights and duties. From the perspective of each member of the polity, re-conceptualizing his or her entitlement to citizenship as a complex type of “property” fits well within the definition of new property, a phrase famously coined by Charles Reich, referring to public law entitlements as serving the traditional private law (and property-related) purposes of ensuring security and independence to citizens under market-based economies. Unlike traditional forms of wealth, which were held as private property, valuables associated with citizenship derive specifically from holding a status-entitlement that is dispensed by the state, an entitlement that bestows a host of goods and benefits to its beholders.
Although the value of citizenship is communally generated, the entitlement conferred upon each member is individually held. This combination of individual and collective aspects is part of what makes citizenship such a complex type of property, with “priceless benefits,” as the U.S. Supreme Court memorably put it, adding that “it would be difficult to exaggerate its value and importance.” In this legal structure, the state operates as purveyor and trustee of membership titles, with their critical enabling implications on the life opportunities of its individual members. Each insider differs from outsiders by virtue of his or her share in the protection conferred only on those counted as citizens, and their right not to be deprived of the valuable good of membership itself. For each member, citizenship further entails a share of “ownership” and governance of that polity’s communal and pooled resources. As such, citizens stand in a special relation to each other and to the collective that they govern. When citizenship is conceived in this way, the distinction between narrow and broad conceptions of property becomes highly relevant.

The “Narrow” and “Broad” Conceptions of Property

The narrow conception treats property as a market commodity that can be sold, traded, or “alienated” through market transaction. According to this notion of property, each owner has a near absolute dominion over his or her assets, and is free to do with these assets as he or she sees fit. This vision of property rests on a particular conception of social life, according to which all interpersonal interactions are characterized as “trades,” and thus everything may in principle be subject to market transaction. This in turn relies on a “possessive individualism” worldview, whereby social atomism and unrestricted commodification rule, and where self-interest is the core motivation for human action. On this view, maximum freedom ought to be granted to the right-bearer, whose preferences can only be limited at the margins by compelling state interests, compensated “ takings,” or certain ex ante (rather than ex post) legal constraints.

In contrast, the broad conception of property—a tradition whose roots date back to Aristotle—views property as part of a web of social relations, wherein people depend on others “not only to thrive but even just to survive.” This view of human flourishing treats property not as an end to itself but as a means towards advancing the commonweal and building relations of trust. Closely related to the distinction between a narrow and broad conception is a disagreement over how best to characterize property’s “core.” For those who
emphasize self-interest (the narrow conception), property is understood primarily to entail the right to exclude others from the use and benefit of what one owns. This privileges the possessive individual who presumably stands solely in market relations to other “traders” in a laissez faire society. It allows each person to erect high and enforceable legal boundaries of exclusion around her property, boundaries which operate as in rem rights—rights “against the world.” On this account, as Hanoch Dagan and Michael Heller sarcastically observe, each individual is seen as “cloaked in the Blackstonian armor of ‘sole and despotic dominion.’” Given its fend-for-oneself ideological bent, the narrow account of property fails to explain situations where individuals stand in relations of co-ownership or inter-dependence. This is a remarkable shortcoming given the current social and economic reality in which co-ownership, partnerships, shareholding and the like, constitute a growing proportion of property relations.

The literature on property (which is mostly dominated by the proponents of the narrow conception), holds in stock plenty of arguments in favor of protecting exclusive and sole ownership. It is argued that this arrangement fosters the owner’s independence, dignity, and freedom by creating a “zone” of privacy within which he or she is protected against the power of the state or a majority of fellow citizens. Even the harshest critics of the solely individualized and narrow version of property, such as Jennifer Nedelsky, concede that it has valuable qualities: “[w]e mean by property that which is recognized as ours and cannot be easily taken away from us.” In practice, however, the narrow vision has limited traction in explaining the rise of new property regimes that blend individualized and communal ownership in the co-governance of valuable resources. For instance, there is a dramatic surge in the numbers of “common property” institutions that emphasize cooperation and trust building among diverse right holders by using the law of property to enhance mutually beneficial relationships rather than erecting zones of absolute privacy.

A concrete illustration of this trend is found in the rise of common-interest communities in the United States, where it is now estimated that approximately one-fifth of owners of residential housing have chosen to purchase property in housing communities with quasi-democratic governance structures, which typically involve exclusive rights to a dwelling unit and co-ownership of common areas. The rise of organizations such as public corporations and shareholding provide further support for this idea. Such co-ownership calls for the development of institutions and procedures for decision making that take into account conflicts of interest among individuals who must together control or share collective resources. Furthermore,
the “impoverished view of property,” as the narrow conception is called by its critics, fails to seriously take into account power relations or distributional inequities that this conception of social relations is likely to generate.

The broad conception of property better addresses these complexities. Unlike the narrow vision, it is guided by an understanding of property that involves a two-fold legal mandate: the right to exclude and the right not to be excluded. This “broad” interpretation of property is deeply grounded in the history of ideas. The combination of the right to exclude and the right not to be excluded is familiar to various standards of classic and contemporary democratic, liberal, and republican thought. Although offering different normative visions of the polity, these traditions converge on the following: individuals possess inalienable rights to life, liberty, and property. Reminiscent of these formulations, the U.S. Supreme Court famously described citizenship “as a right no less precious than life or liberty.” Citizenship, on this account, is seen as a precious status-entitlement that is regulated and conferred by the state, and, as such, must receive the highest legal protection.

No less significant, the right not to be excluded means that as members of the political community, individuals are seen as equal partners in the common enterprise of governing the commonweal. They stand in a special interpersonal relation to each other; they are co-owners or partners in a shared political community. This special relation entails for each member a right not to be excluded from whatever rights, powers, and privileges attach to such membership. Each is entitled to enjoy those goods that society has declared for common use and to partake in the governance of the polity. The broad conception further engages in the creation of a host of mechanisms for management, governance, and resolution of conflicts that may arise where more than one person has a stake in a given resource, reserving a wide host of decisions to democratic vote.

More important still for the purposes of our discussion, the right not to be excluded imposes a duty on joint owners to consult with one another, providing each a secured and inalienable “voice,” in Albert Hirschman’s influential terminology. In the analogy to citizenship, we can see how the right not to be excluded imposes an active duty on government to consult with its citizens, as decision makers and stakeholders, in determining how to generate and allocate revenue for necessary government functions as well as various redistributive and regulatory functions. Understanding property in these broader terms also permits thinking about the core democratic right of equal participation in collective decision-making processes—the franchise—as perhaps the strongest manifestation of a citizen’s right not to be excluded. The franchise provides each right-holder with a concrete and enforceable
claim to participate in the governance of the commonwealth, share its burdens, and ideally, attain at least a threshold-level of well-being.

To recapitulate, in contrast with the narrow interpretation of property that emphasizes “despotic” tendencies and possessive individualism, the broader conception sees property as a contributor to our human flourishing as individuals with dignity and opportunity, as well as a tool for governing shared resources and advancing the commonweal. This broad, “trusteeship” interpretation sees property as held not only for ourselves, but also in trust for a larger community of members.⁵⁰ It is this broader conception that we will take on board in our assertion that important considerations of justice become prevalent once we think of citizenship as a complex form of inherited property.

**Property and Citizenship: Several Analogous Functions**

Bounded citizenship shares several important characteristics with “property,” broadly conceived. To begin with, citizenship provides a textbook example of the combination of a right to exclude and the right not to be excluded. Where citizenship is concerned, we will call the right to exclude “gate keeping” and the right not to be excluded “opportunity-enhancing.” We analyze each in turn.

**The Gate-Keeping Function of Citizenship**

Citizenship crafts, to borrow from Waldron’s definition of property, a system of rules governing access to and control of a scarce resource; in this case, the precious good of membership in our human communities.⁵¹ It demarcates who is included in the body politic and who is excluded from it. States in the real world tend to be stringent, if not outright unyielding, in terms of drawing and enforcing the boundaries that distinguish those who “belong” from those who do not.⁵² Every state currently limits access to its citizenship, typically by granting automatic entitlement only to a select group of beneficiaries according to ascriptive principles of birthplace and bloodline (jus soli and jus sanguinis respectively).⁵³ Focusing on gate-keeping, it is notable that “citizenship is not only an instrument of closure, a prerequisite for the enjoyment of certain rights, or for participation in certain types of interaction. It is also an object of closure, a status to which access is restricted.”⁵⁴ In other words, polities follow through on their right to exclude. This is in part based on the rationale that in a liberal-democratic
country, once a person is included in the membership, that person is entitled (or will eventually be entitled) to the complementary *right not to be excluded* from any additional attendant rights and privileges. This simultaneous quality of (external) exclusion and (internal) inclusion matches the twin properties we earlier identified as central to the broad conception.

Despite much academic fanfare about the “demise of borders,” in practice, entry into a foreign land is still restrictive for most of the world’s population, especially for those arriving from low-income or politically unstable countries. Only members have an unconditional right to enter and stay in the state; strangers do not. Their cross-border mobility is anxiously guarded by border agencies whose main task is to monitor and regulate admission. Such regulation is carefully enforced at the external perimeter, though it increasingly bleeds into the interior as well.\(^5\) It typically involves a legal checkpoint, a passport, and the discretion of the official gatekeeper of the state as to whether or not to grant admission to a non-member and under what conditions.

Just as with property, citizenship creates a set of obligations on the admitting state—the right to exclude is never unlimited in practice—but it also specifies the types of sanctions that can be imposed against a person who seeks to “trespass” or enter its territory without permission. The ultimate sanction for such breach, whether in property or citizenship law, involves physical removal from the estate/territory. Both systems create legal boundaries that are backed up by force. These boundaries generally protect the interests of designated legitimate owners while imposing severe legal sanctions against those who are perceived (by these very same laws) as illegal entrants who breach them.

Both systems of exclusion share another important characteristic: they typically preserve unequal structures of holdings that tend to concentrate control over wealth. In the context of property, we find volumes of competing arguments that attempt to justify this unequal system of accumulation and transmission. No similar elaborations or theoretical justifications are found with respect to citizenship. There are also no convincing explanations for why a draconian system of legal exclusion can legitimately be perpetuated by reliance on the “natural” event of birth in the conferral of membership rights. Thinking through this analogy yields yet another surprising revelation: whereas the principle of automatic and irrevocable birthright has been roundly criticized as a basis for the intergenerational transfer of property, the birthright transmission of citizenship has largely escaped similar scrutiny. That is the case despite the fact that such transmission is relied upon by governments (rather than a select class of estate
owners)—thus inviting more rigorous, rather than lenient, standards of review and accountability. More important still, citizenship as a form of inherited property affects a far greater number of individuals in the world, making it quantitatively and qualitatively far more crucial today for discussions of global justice and equality than any antiquated—and in most countries now prohibited—form of perpetual transfer of landed estates.

The Opportunity-Enhancing Function of Citizenship

So far, we have emphasized citizenship’s gate-keeping function, or the “right to exclude.” Fortunately, citizenship does more than delimit access and preserve unequal accumulation of wealth and power in the hands of birthright heirs. It also entails the “right not to be excluded.” Just as fiercely as it externally excludes non-members, citizenship can also internally level opportunity and provide the basic enabling conditions for each member to fulfill her potential. The argument for such inclusion is simple yet powerful: citizens enjoy these entitlements—which are “of right”—on the basis of a fundamental equality of status, which is their membership in the community. This we label as citizenship’s opportunity-enhancing (or “enabling”) function.

Like other types of property, citizenship allows its possessor to exercise freedom and autonomy through what is legally hers and to protect her rights “against the world.” But the right not to be excluded goes beyond this negative liberty. It involves a positive dimension as well. This positive component entails, just like property, a “bundle of sticks,” which in this context translates, at the most minimal account, into the security of holding an irrevocable membership status. This security of status cannot, save exceptional circumstances, be denied by one’s government or fellow citizens. This stands in sharp contrast to the vulnerable situation of non-members, who remain potentially subject to deportation by the admitting polity, lacking precisely the property-like protections that attach to citizenship.

But the enabling function of citizenship guarantees more than just protection from deportation. For each member, it bestows the right to participate in the governance of the polity. It further provides, at least in its ideal type, the threshold condition of freedom-from-want as a classic expression of the “right not to be excluded.” It is here that Reich’s argument about treating governmental benefits as “property” to which citizens hold a rightful claim, is connected to the idea of providing essentials for basic security and independence to members of the body politic. Rather than merely operating to restrict access (through its gate-keeping function), citizenship on this broader account is seen as an enabling condition that offers
members benefits and entitlements on an equal basis, and in the process assisting in securing their well-being.\textsuperscript{60}

In many respects, the opportunity-enhancing function is far more powerful in the context of citizenship than it is for most other types of property, material or abstract. Such entitlement guarantees that each member will enjoy “a share in the protection conferred on the group as a whole over some asset and its wealth-potential.”\textsuperscript{61} Such a protection implies (even on the narrow reading) that each individual will gain a fair share of equal liberties, access to public goods, and non-discriminatory participation in economic and labor markets.\textsuperscript{62} The broader account may, however, endorse more robust conceptions of enabling: those that rise above the abolition of absolute deprivation to the fulfillment of relative prosperity as part of the prescription of shared citizenship; it could further suggest that part of the state’s role as creator and enforcer of membership entails the obligation to mitigate inequalities among social actors; or that membership in a common polity entails an expectation of generosity by those citizens with greater authority and wealth towards those without it as part of their joint responsibility to the larger community; or it might lend support to an interpretation of full membership as entailing that the political community owes to each member the provision of those basic living conditions and infrastructure services (clean water, police protection, health, education, shelter, and the like) that are seen as preconditions for a decent life.\textsuperscript{63}

None of these interpretations of opportunity, which offer different manifestations of the content that can be given to the right-not-to-be-excluded, are premised on an idea of flat equalization of results. Instead, citizenship’s opportunity-enhancing function is better understood as emphasizing the goal of advancing the equality of starting points. As such, it is fully compatible with the moral intuition that people can justifiably claim the rewards of their enterprise as a result of relevant efforts. However, unlike the narrow conception of property—which emphasizes self-interest of individual “traders” at the expense of losing sight of the existence of a community—the broad account of property treats success by such individuals as itself predicated, to some degree, on larger societal conditions.\textsuperscript{64} This may include conditions such as effective government, the rule of law, protection against foreign invasion, domestic peace and security, stable markets, as well as additional supporting conditions such as public investment in infrastructure, higher education, and various social services.\textsuperscript{65} While the precise definition of what is included in the “basket” of citizenship’s benefits may vary (even among OECD countries), a societal commitment to providing these preconditions differs sharply from the narrow, fend-for-oneself conception of civil society.
The latter focuses on negative liberty as a way to restrict the “encroaching” state, while the former treats citizenship’s opportunity-enhancing function as corresponding with positive liberty as well as creating an environment that is conducive to best fulfilling the capacities of those who belong to the body politic.

Undoubtedly, meeting these requirements imposes a heavy burden that is not fully borne out even by the world’s most affluent and generous polities—let alone by resource-strapped or corrupt governments. But it serves as a normative yardstick against which to measure how countries fare in their “enabling” commitment. There’s another message, though, to be drawn here, which is crucial for our argument: automatic entitlement to political membership as encoded in today’s birthright citizenship laws has itself become a valuable property right, which generates for its holders secure access to certain common goods and the enjoyment of the basic infrastructures that permit human flourishing, in addition to establishing for those who count as members a right to participate in the governance of their shared polity.

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

“Entailed” Property and Birthright Citizenship: Analogous Transmissions?

If we were to look for a pattern that closely resembles the structure of birthright transmission of entitlement, we would find it—somewhat surprisingly—in the inheritance regimes of property that date back to medieval England. There, we find the (now long discredited) institution of the fee tail or entail—an effective illustration of just how much of an outlier
the reliance on birthright transmission of entitlement is in the current era. In the language of the early common law, fee tail involved a landed estate that automatically descended from person A to person B “and the heirs of his body” and continued so passing through the descending line only in order to keep the landed estates squarely in the hands of a small echelon of powerful and wealthy families. Practically, then, “entail” was a legal means of restricting future succession of property to the descendants of a designated estate-owner. It offered a tool to preserve land in the possession of dynastic families by entrenching birthright succession, while at the same time tying the hands of future generations from altering the estate they inherited from their predecessors.

The history of entail dates back to thirteenth century Britain. The English Parliament formally adopted the entail regime in the De Donis Conditionalibus statute (1285 AD) in response to petitions from “landowners who wanted to bestow on a child and the heirs of his or her body an inheritable estate in land that could not be alienated by fee simple.” The De Donis statute thus secured a special interest in land, which created a distinctive pattern of succession, whereby each successive holder was limited to use of the land for life, without the power to alter the chain of transmission or to dispose of the property. It was also deeply gendered, commonly limiting the entail to male descendants alone (in the form of primogeniture). The entail was to keep the estate strictly within the possession of the heirs of landed aristocracy in a social order where the hold on land was intimately tied up with political authority. The birthright transmission it upheld was designed to be infinite in duration, transferring the land from one generation to another in perpetuity.

The successive generations, the progeny of aristocracy, were not always pleased with the restriction that entail attached to the inherited estate. English lawyers eventually developed a method known as “common recovery,” which permitted one to “dock” (or “break”) the entail and “seize” the estate, thus effectively removing the original restraint that ran to A for life, then to B and the heirs of his body, then to C and the heirs of his body, and so on. Such legal maneuvering, which permitted cutting off the chain of transmission from one generation to another, was eventually approved by the English courts in the landmark decision of Taltarum’s Case (1472 AD).

Interestingly, the legal institution of entail later migrated to North America with English colonists who created estates in fee tail, primarily in the southern colonies such as Virginia, Georgia, and North Carolina. One of history’s little ironies was that it became harder for descendants of landed estates in the American colonies to “dock” or cut off the entail than it was for their wealthy aristocratic brethren in England, because certain
colonies, such as Virginia, specifically enacted statutes that prohibited the option of “common recovery.” Thus, once an entail was created, the transfer of property to the heirs of one’s body—and to them only—“was of indefinite duration—the original perpetuity, in fact.”

It should come as no surprise that this aristocratic method for preserving land in the sole dominion of certain families, which effectively perpetuated their disproportionate wealth and political power, sparked the ire of American revolutionary reformers. Thomas Jefferson, for example, led the effort to abolish entail in Virginia, his home state, by putting forward a motion in 1776 to the Virginia Assembly to extinguish entailed estates by law. As many legal historians have observed, Jefferson counted this legislation among his foremost achievements. What is less well known is that James Madison, the champion of property rights in the new republic, also supported the abolition of fee tail in Virginia and elsewhere in the United States. Madison, like Jefferson, held the position that “[a]bolishment of fee tail [would] shorten the longevity of inherited wealth and thereby lesson the ‘proportion of idle proprietors’ in Virginia society.”

For American republican lawyers, hereditary transfer of privilege such as the “entailment of land appeared to be the most glaring vestiges of a corrupt past.” It was associated with feudal-like encrustations on the common law that preserved and perpetuated social hierarchy in England. For Jefferson, explains John Hart, abolishing entail “was a key part of a ‘system’ of reforms ‘by which every fibre would be eradicated of ancient . . . or future aristocracy and a foundation laid for a government truly republican.’” It was a central component of this project because entailed transfer of estates, by creating a bloodline of land owners, diminished opportunity for those who did not enjoy such inheritance. It therefore defeated a broader social and economic agenda of “republican laws of descent and distribution,” designed to gradually contribute to “equalizing the property of the citizens.” What is more, the concern was not only with accumulation of great wealth, but with the permanence of such riches in the hands of certain families. Such permanence was the result of the birthright nature of entail, which guaranteed entitlement to successive descendants simply by virtue of their status as “the heirs of [the original landholder] and his body.” No other criteria were imposed, nor could a later generation alter this automatic grant. This lead to a concern, already expressed by William Blackstone in his magisterial 1765 *Commentaries on the Laws of England*, that the Nth generation of heirs to an entail might become morally corrupt, lazy, and “disobedient when they knew they could not be set aside.”

In the American version of this critique, three main reasons can be identified in support of the abolition of the automatic birthright entitlement in
estates: concerns about “moral corruption” (or what we would label today as the decline of civic virtue); reservations about the inefficient allocation of resources that is preserved when the land is held by “idlers”; and repudiations of antiquated legal instruments that perpetuated social privilege and inequality. The eighteenth century republican discussion of “moral corruption,” or decline of virtue, revolved around the concern that those who have a guaranteed birthright to inhere entailed estates will become “idlers” with tainted habits and manners. Instead of being productive republican citizens, these idlers visited “suffering” on American society in their individual extravagance and excessive consumerism, which Madison described as the wasteful “capacity to purchase of costly and ornamental articles consumed by the wealthy only.” As Madison saw it, a core cause for such tainting of manners was the “too unequal distribution of property, favored by laws derived from the British code, which generated examples in the opulent class inauspicious to the habits of other classes.”

Instead of cultivating a civic republican ethics of virtue, the perpetuation of property in certain families through mechanisms such as entailment of land created a nascent American aristocracy. What is more, heirs of such families knew that they could not be cut off from the chain of birthright transmission; as a result, the republican concern was that they would become “disobedient” and socially unproductive members of the polity. The abolishment of entail and the creation of more equal partition of property were thus seen as a crucial ingredient in diminishing the prospect of individuals inhering great wealth in perpetuity irrespective of their talent, work ethics, and virtue.

Another dimension of the critique of entail focused not so much on the moral character of the birthright recipient, but on the lack of efficiency of this allocation scheme, which created little incentive for those who are guaranteed such wealth as matter of birthright to “maximize” the value of their estate. The preamble to the 1776 Virginia statute, which abolished entailed estates, did not shy away from explicitly expressing such concerns: “the perpetuation of property in certain families, by means of gifts made to them in fee tale, is contrary to good policy, . . . [it] discourages the holder thereof from taking care and improving the same [the estate], and sometime does injury to the morals of the youth.” An even more pointed argument about inequality is articulated in the 1784 legislative act of North Carolina, which similarly abolished the fixed and perpetual transfer of wealth and opportunity by birthright, stating in its preamble that, “entails of estates tend only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic.”
This opposition to the perpetual birthright transmission of entitlement was extended, at least historically, into the realm of citizenship. As James Kettner argues, *naturalization*—the process of volitional admission to the polity *rather than* birthright citizenship—provided the model of republican citizenship at this period. On this model, a non-member who voluntarily and affirmatively decided to become a citizen of the republic was, after becoming part of its social and economic life and taking an oath of allegiance, adopted into the polity as a full member. This process of *post*-birth admission, which emphasized agency and volition, indeed seemed to better reflect the ideal of political membership as conceived by the republican and liberal traditions, which emphasized choice and consent of the governed as the root of legitimate authority.

This sentiment informs an oft-cited passage in John Locke's *Second Treatise of Government*: “a child is born a subject of no country or government.” When that child comes to the age of discretion, continues Locke, “then he is a free-man, at liberty what government he will put himself under; what body politic he will unite himself to.” This rejection of imposed, or ascriptive membership, finds striking parallels in early American republican thought, which, as Jefferson’s formulates in the context of access to volitional citizenship, holds that “all men [have a right to] depart from the country in which chance, not choice has placed them.” Such insistence on severing the accidents of station of birth in assigning political membership (an ideal, which we must not forget, was initially conceived to apply merely to a small fraction of the population, namely free, white men) still remains a far cry from the reality that is in place under the current world system. What is particularly surprising is that the alternative path that has been chosen—reliance on automatic and hereditary transfer of membership entitlement—resembles some of the most deeply criticized, and ultimately abolished, feudal mechanisms of inheritance: the entail.

Whereas the archaic institution of hereditary transfer of landed estates has been discredited in the realm of property, in the most unlikely of places, we still find a structure that resembles it: that is, in the conferral of political membership. Birthright entitlement to citizenship not only remains with us today; it is by far the most important venue through which individuals are “sorted” into different political communities. Birthright principles strictly regulate the “entail” of citizenship for the vast majority of the global population. They secure the transmission of membership entitlement to a limited group of beneficiaries: “natural-born” citizens who automatically gain access to the property on the basis of bloodline or birthplace. These
beneficiaries, in turn, gain the right (and are bound by the duty) to pass it on to the next generation of “natural-born” citizens, and these children will then pass it on to their children, and so forth: this structure effectively recreates the “fee tail” in the transmission of membership titles.89

To recognize the surprising similarities in form and function between birthright citizenship and inherited property of this particular kind is to identify a striking exception to the modern trend away from ascribed statuses.90 This birthright-transmission mechanism, which is still exercised today, cannot be dismissed as a mere historical accident, given that the question of legitimizing political authority and property is central to the liberal, democratic and civic-republican intellectual traditions. This only makes the link that persists between political membership and station of birth—a connection that has been both ignored and taken for granted—ever more puzzling and in urgent demand of a coherent explanation.

One possible explanation, which grows out of our analysis here, is that birthright citizenship remains in operation—despite its tension with the core tenets of the leading political theories of our times—at least in part because it permits the perpetuation of unequal “estates” in the descanting lines of different political communities. As we have seen, the “natural” reliance on birthright entitlement camouflages the dramatically unequal voice and opportunity implications of this allocation system.

Whereas the delineation of enforceable membership boundaries (citizenship’s gate-keeping function) has been challenged in recent years as an offense to the universality of our shared humanity, both proponents and opponents of bounded membership have surprisingly paid scant attention to the crucial “wealth-preserving” aspect of hereditary citizenship—the dramatically differential opportunity structures to which individuals are entitled, based on the allocation of political membership according to predetermined circumstances of birth. This is a blind spot, if not the “black hole,” of citizenship theory. Unlike the critical accounts of entailed property regimes, from Blackstone to Jefferson to Madison, scholars of citizenship have to date failed to turn their gaze to the largely analogous form of strict intergenerational transfer that still persists in the realm of birthright transmission of membership entitlement. Our account, which has established a conceptual and descriptive analogy between property and citizenship, brings to the fore familiar criticism that have been leveled against antiquated and unequal transfer regimes of property in order to highlight the global distributive implications of prevalent structures of citizenship transmission. Such an inquiry is ever more urgent given that a transmission mechanism of this kind has, in a world like our own, particularly pernicious influences that interfere with the equality of starting points.
Ameliorating the Injustices of Birthright Citizenship Transmission

Our critical account of birthright citizenship as a complex type of inherited property is not targeted, as must be clear by now, against the political ideal and institution of citizenship. Full membership in a self-governing and bounded polity involves invaluable properties for the right holder, especially for the less advantaged: it guarantees for even the most vulnerable within a given society the fundamental security of an inalienable right to membership, the cultural and psychological benefits that attach to such a protected membership status, and the power to make claims in collective decision making as an equal stakeholder. In a world riddled with deep social and economic inequality, the value of these protections cannot be overestimated.

However, such recognition should not silence us from condemning the assumption that reliance on birth in the transmission of the political membership in an unequal world (as codified in extant citizenship laws), somehow resolves the serious dilemmas of concentration of wealth and power that attach to such “entailed” transfers. The crucial point here is that the analogy between inherited property and birthright citizenship permits us to see the latter in the light of the former: as a carefully regulated system for limiting access to scarce resources to those that “naturally” belong within its bounds as the heirs—not of “one’s body”—but of the body politic itself.

To treat birthright citizenship as a special kind of property is to open the door to the application of core insights from inheritance theory to the arena of citizenship. In this way, we can begin to address the inequality of starting points that attaches to the intergenerational transfer of membership entitlements according to birthright citizenship. While any full-blown development of equalizing strategies is beyond the scope of this paper, we will mention a few concrete options that stem from our analogy between birthright citizenship and inherited property. In the context of the intergenerational transfer of collective goods, four ideal-type solutions come to mind: abolition, commodification, extended admission, and restricted inheritance. We argue that the latter option—applied to the realm of citizenship through the birthright privilege levy, a novel idea the contours of which we develop below—provides the most viable and balanced remedy to the problem at stake.

The outright abolition of bounded citizenship—an idea that may be extracted from calls for “world citizenship”—is not only an unrealistic option, but one that would wash away the entire collective identity aspect
embedded in political membership as we know it today. Such a move further risks disintegrating the social bonds and mutual responsibilities that are presently encapsulated in the “right not to be excluded.” Equally troubling, by removing citizenship’s gate-keeping function, many of its opportunity-enhancing capacities may go with it, without necessarily guaranteeing a better mechanism of leveling opportunity globally.91

A second alternative is to adopt a market-based approach, which, in line with the narrow conception of property, suggests that among qualified applicants membership in affluent countries would be sold to the highest bidder. The crux of this vision is that the political ideal of bounded membership should eventually morph into a mere economic relationship that relies primarily on the narrow version’s logic of “trades.” In other words, people would be able to buy their way into the body politic, just as they may acquire ownership of any other tradable good. Such a collapse of political membership into a pure market relationship would signify the victory of the narrow vision of property over the broad one. It is clearly not the path we recommend. It would likely cause an irreparable harm to the vision of citizenship as involving relations of trust and shared responsibility. It is difficult to imagine how these values could be preserved under circumstances in which insiders and outsiders are distinguished merely by the ability to pay a certain price. Furthermore, to trade in citizenship is to institutionalize inequality: it is to grant admission to the political community on the basis of nothing but financial might.

A more attractive possibility would be that of extended admission. Drawn on existing immigration regime models, emigrants would be permitted to acquire citizenship based on cross-border movement, resettlement, and eventual naturalization. This allows individuals to overcome their station of birth by way of deciding—in Locke’s words—“what body politic he [or she] will unite himself [or herself] to.” This amounts to a redistribution of membership titles per se, which may be achieved, for example, by significantly reducing barriers to international migration. In a world of regulated borders like our own, however, well-off countries increasingly restrict admission to their territories, and even more so, into their membership boundaries, making it particularly difficult for residents of low-income and unstable polities to reach the shores of the “promised land” of immigration. As a tool of global redistribution of opportunity, this option thus provides an answer only to a very small fraction of the problem. The latest available statistics show that approximately 1.75 million immigrants are admitted annually by all OECD countries combined; whereas more than four and a half billion people live in the world’s poor and less stable regions. This leads to a ratio of 1:1,500 (or 0.0006 percent) between those granted admission and those who may wish it.
Even if current admission levels were drastically increased, the basic problem does not whither away: international migration provides extremely generous returns to a very limited group of recipients. This route of granting membership titles for those who wish to naturalize, after having complied with the required admission procedures, will likely remain selective; many will remain without a chance to gain entry.

Given these limitations on the redistribution of citizenship titles per se, we find greater promise in imposing justifiable restrictions on the inheritance of membership entitlements, in ways that target the “perpetuities” aspect of birthright citizenship. Such an approach takes seriously the preservation of membership as a collective good while at the same time attending to its pernicious distributional consequences on those locked outside the “enclosed” circle of members. Specifically, it permits the option of “taxing” recipients of entail-like membership titles through what we label the birthright privilege levy. We briefly elaborate on this idea, which is compatible with adopting more generous admission policies, in the following pages.

The Birthright Privilege Levy

Virtually all giants of social and economic thought have paid close attention to the question of the intergenerational transfer of wealth, and its implications on equality of opportunity. Competing philosophical accounts of property and inheritance are offered by almost all the major schools of thought: classic liberal thinkers, utopian socialists, contemporary liberal egalitarians, and libertarians. All concur that a relevant distinction exists between the initial acquisition of property and its transfer by inheritance, and that certain restrictions on such transfer may be justified. Inheritance poses a number of challenges for theorists and jurists: it does not sit well with the major bases for acquisition of property (effort, merit, need, and so on); it may lead to an inefficient allocation of resources; it limits the freedom of those who are excluded due to predetermined circumstances surrounding their birth; and, most importantly for our discussion, it violates the principle of equal opportunity. In the realm of citizenship, it leads to an unbalanced concentration of power and wealth in the hands of heirs of certain body politics, while preventing others from entering these membership systems or enjoying their benefits on fair terms.

As many political theorists have noted, “the influence of the institution of inheritance highlight[s] the effects of all other inequalities, by determining the vantage-ground upon which different groups and individuals shall stand, [and] the range of opportunities which shall be open to them.” Inherited title
to membership both disrupts the equality of starting points and perpetuates a structure of “unearned advantage” (as Mill famously put it). A similar intuition leads Ronald Dworkin to propose a compensatory matrix for the consequences of arbitrary brute luck as opposed to the consequences of people’s own choices. Following this idea, it is now commonplace to distinguish between unequal outcomes that result from people’s choices and efforts, and those that result from a windfall. The former are seen as permissible (with some restrictions under specific circumstances), while the latter are typically considered morally weaker bases for enrichment. This leads to the stipulation that recipients of undeserved fortune should transfer some of their gains to those who suffer from equally undeserved misfortune.

Another compelling idea in this context is the notion of a “declining intergenerational entitlement” structure (as we might call it) that resembles an innovative proposal developed by Eugenio Rignano in the early twentieth century as part of the effort to curtail the inequality that attaches to intergenerational transfers of wealth. Rignano was searching for a way to restrict inheritance without destroying the incentives that motivate individuals to work and save; his proposed solution to this dilemma was “to differentiate the right of bequest according to the ‘origin’ or ‘age’ of the property to be bequeathed.” This required a distinction to be made between the property that a person created or saved during his or her lifetime (“zero transfers”), the property which that person inherited from a prior generation and which came out of the prior generation’s own hard work and savings (“one transfer”), and property that was inherited from persons who themselves inherited it from others (“two transfers”). The “Rignano principle,” as it came to be known, stipulates that the higher the number of transfers, the weaker the entitlement of the heir; this in turn permits a steeper rate of taxation on intergenerational transfer. In other words, the greater the generational distance from the original titleholder to the heir, the weaker the recipient’s claim for unlimited and uninterrupted transfer of the bequest.

These insights lead us to develop a potentially far-reaching idea, which we can only begin to develop here: namely, to address the global distributive consequences of birthright citizenship by “taxing” the intergenerational transmission of political membership. As we have seen, the intergenerational transmission of political membership shares substantive similarities to intergenerational transfer of wealth and property; since the latter are subject to estate and inheritance tax, so may be the former. Tapping a portion of the “unearned” advantage of citizenship inheritance would serve as the basic source for funding the redistribution of opportunity; the goal here would be to strengthen the enabling function of membership elsewhere. This permits
redefining the *property* dimension of citizenship such that as a corollary to the privileges of birthright citizenship, those without membership are granted opportunities. The idea is that revenues generated by the “levy” on inherited citizenship in an affluent polity would be devoted to specific projects designed to improve the life circumstances of children who are most adversely affected by the legal connection drawn between circumstances of birth and citizenship. This, in a nutshell, is the idea behind the birthright privilege levy.

Given that citizenship is a multilayered concept, the birthright levy could be undertaken in many different ways; all of these would be designed to target the wealth-preserving aspects of intergenerational transfers rather than the identity bonding qualities of membership. For instance, it might involve monetary transfers (calculated as some proportion of the “worth” of the entitlement of inherited citizenship, as described below). Just like any estate or inheritance taxation, the birthright privilege levy would be owed just once in a lifetime, not year after year, treating entitlement to citizenship as a “stock,” not a flow.99

The tax could equally well—or perhaps preferably—be paid in the form of public service. For example, as a birthright heir you would be expected to make some use of your privilege to do good in the world; if you did not, your political community would have to compensate for your failure to act by making a financial contribution to, or an investment in infrastructure for, a less advantaged polity. The goal of the birthright levy would not be to eradicate inequalities altogether, but rather to make visible what is now taken for granted, namely, the “natural” entitlement to the goods of membership acquired at birth.100 Unlike other global wealth transfer schemes, our proposal shifts such redistribution from the realm of charity to that of obligation, for it is only when we view citizenship as an *arbitrary* advantage obtained through the accident of birth, that it makes sense to view the global “tax” on the immense opportunities that attach to inherited membership in terms of obligation. It is in this context that we present our proposal to establish a tax on the privilege of gaining birth-based entitlement to membership in a well-off polity.

What would a birthright-privilege levy scheme look like? We briefly sketch here a number of different methods for financing the birthright privilege levy; we raise these possibilities to generate discussion rather than to provide an exhaustive list of options for implementation. As Brian Barry once observed, “economists and accountants [and we might add, lawyers and development experts] would no doubt have a field day arguing about the details.”101 Defining different possibilities for institutional design is a serious and sensitive business; but the process begins with a compelling and
creative idea. In what follows, we provide some possible forms that our proposal might take in order to encourage serious conversation about the possibility of “taxing” birthright privilege. One possibility would be to calculate the contribution of each government based its annual birth rate (typically calculated as the number of live births for every 1,000 people), multiplied by a fixed dollar base, representing a one-time payment per child that would offset the advantage gained from inheriting citizenship in a well-off polity in the context of an unequal world.

We can further imagine a division of the world into ranked groupings, such as the familiar United Nations (UN) categorization that distinguishes between “more developed regions” (comprised of all regions in Europe plus North America, Australia, New Zealand, and Japan; in other words, the more prosperous and democratic countries of the world) and the “less” and “least developed regions” that would define which countries would be asked to collect the levy for the birthright fund, and which would benefit from it. Such a mechanism would clearly represent an improvement on the status quo, where the heirs of “entailed” citizenship are subject to zero taxation for their privilege (just like many generations before them of aristocratic dynasties under the landed estates regime). However, this division into the “haves” and “have-nots” would be too crude to account for the potentially vast differences in GDP and per capita income among the “more developed” countries, and the ever greater variation in the needs of children in the less and least developed countries.

A more sophisticated, and, in our view, more promising option is to move from a fixed categorization mechanism to a more flexible system, in which the birthright privilege levy is funded by annual contributions calculated in reference to size of citizenry, actual birth rate, and a given country’s ranking on an internationally recognized matrix, such as the UN Human Development Index. The idea here is that the proceeds would be distributed on a parallel basis but in reverse order. Assume, for example, a matrix with 200 countries. The country occupying the first spot represents the most-well-off polity in terms of human development, while the country ranked 200 is the most disadvantaged. On this matrix, the country ranked number one will be obliged to make transfers to the residents of country 200, calculated, for example, at a set rate of say $1,000 per capita (multiplied by that country’s newborn population per year). The country ranked number two will make transfers to country 199 at a declining rate of $990 per capita, country three will contribute its proceeds to country 198 at the rate of $980 per capita and so forth.

The advantage of this institutional design is that it accounts for the relative advantage gained by birthright citizenship in different polities, and aims
to ensure that the heaviest obligations are imposed on the governments whose citizens are the greatest beneficiaries of the present property/membership regime. Like most inheritance liability in the domestic arena—which is shouldered by a tiny percentile of the total population, namely, the ultra-rich—the birthright levy would best be designed as a steeply progressive tax, which imposes higher rates only on the marginal dollar. In other words, within each polity, this liability for the collective would effectively be borne by a small echelon of the most well-established citizens/title holders.

Obviously, there are many details that must be ironed out before the birthright levy could begin to funnel development funds (or service-in-equivalent) towards the global redistribution of opportunity from the heirs of entail in well-off polities to those disadvantaged by the lottery of birthright. Assuming that our proposed birthright-privilege levy scheme gained international momentum, it could offer a viable advance from the present situation, in which no moral or legal obligation is acknowledged with respect to the dramatic disparities in advantage that are transmitted by birth under the current system. This regime of entail-like transmissions of citizenship has too long concealed key questions about the distribution of wealth and power under the guise of “natural” reliance upon the circumstances of birth.

But this cannot last forever. Beneficiaries of any property/membership regime must attend to the social interactions that generate and substantiate their “entitlement.” Under circumstances of severe disparities of holdings and opportunities, property-holders have in the past proven willing to acknowledge, at least in part, the societal dimension of their bounty, leading them to accept certain restrictions and limitations on intergenerational transfers, especially where the alternative is to see the collapse of the whole system that disproportionately advantages them. A similar rationale may help convince the reluctant citizens of wealthy polities to accept the birthright levy, even though they would likely rather continue to enjoy their “tax-free” membership inheritance.

Finally, the birthright levy, as a limited taxation on inherited privilege, has another advantage over other alternatives. It does not require significant sacrifices or alterations to the level of benefits that citizens in the well-off polities have come to expect—the global disparities of opportunity are so steep that even relatively modest transfers (of skills, knowledge, or investment) can make a significant difference. If the birthright recipients wish to continue to enjoy the immensely disproportionate wealth and power that they inherited under the current property/membership system, they must, in an increasingly interdependent global environment, also attend to the world around them: this involves contributing to the improvement of the life
chances of those whom they presently exclude by reliance on entail-like transmissions of membership titles.

Thinking of citizenship as inherited property thus offers a core insight: it asks us to take account of the enormous impact of the extant legal practice of allocating political membership on the basis of birthright, thus forcing us to seek justification for such entitlement in the first place. It also highlights the urgent need to address the resulting inequities, particularly the way in which birthright locks in structures of privilege. By teasing out the similarities between citizenship and other inherited property regimes, we hope to encourage debate about existing distributional schemes, as well as the proposed remedies for the injustices inherent in the current membership-allocation structure. The birthright levy offers one such option, which coherently emerges out of the comparison that we have drawn. But this is merely one piece of a larger puzzle: clearly, the parallels between birthright citizenship and inherited property are simply too striking to ignore.

Notes

2. The complete list is too long to cite. Some of the most influential contributors to this body of literature include: Brian Barry, Rainer Baubock, Seyla Benhabib, Linda Bosniak, Allen Buchanan, Joseph Carens, David Held, Robert Goodin, Will Kymlicka, David Miller, Margaret Moore, Bhikhu Parekh, and Rogers Smith, among others.
5. For a detailed analysis, see Thomas W. Pogge, World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms (Polity, 2002).
12. In theory, other levels of governance (those “above” or “below” the state level) can fulfill this enforcement function. However, in a world where states still enjoy significant power over respective territories, they offer a reliable system of law and governance for enforcing property rights.


20. Our usage of the term “scarcity” here refers to the unmet demand placed upon this precious good by those who currently do not enjoy access to it. This scarcity is at least in part constructed by the very citizenship laws that we criticize here.


25. On the scholarly debate over whether the state has “lost” or “retained” control over its borders in the age of globalization, see e.g., Saskia Sassen, Losing Control? (Columbia University Press, 1996); Virginie Guiradon and Gallya Lahav, “A Reappraisal of the State Sovereignty Debate: The Case of Migration Control,” Comparative Political Studies 33 (2000), 163–195.

26. Reich, “The New Property.” Reich referred to governmental largesse, such as welfare entitlements, jobs, and subsidies.


28. On the distinction between “private” and “communal” property (the latter is often referred to by different names, with somewhat different interpretations, such as “group,” “collective,” or even “limited-access commons”), see e.g., J. W. Harris, “Private and Non-Private Property: What is the Difference?” The Law Quarterly 111 (1995), 421; Michael A. Heller, “The Boundaries of Private Property,” Yale Law Journal 108 (1999), 1163–1223.
29. Harris, “Private and Non-Private Property.”

30. The distinction that we develop here between the narrow and broad conceptions draws upon C. B. Macpherson’s classic writings on property, in particular, his essay on “Human Rights as Property Rights,” Dissent 24 (1977), 72–77.


33. The term “possessive individualism” was coined by Crawford B. Macpherson in The Political Theory of Possessive Individualism: Hobbes to Locke (Oxford University Press, 1962).


35. This conception is famously traced back to Blackstone’s Commentaries, in which Blackstone stated that property empowers the right-holder to “total exclusion . . . of any other individual in the universe.” See William Blackstone, Commentaries on the Laws of England Vol. 2. (1797, reproduction 1766 edition), 2.


37. A classic articulation of this view is offered by Milton Friedman in Capitalism and Freedom (1962), 7–21.


39. For a comprehensive discussion of these themes, see Carol M. Rose, Property and Persuasion: Essays in the History, Theory, and Rhetoric of Ownership (Westview Press, 1994).

40. Dagan and Heller, “The Liberal Commons.”

41. Dwyer and Menell, Property Law and Policy, 807.

42. Macpherson, “Human Rights as Property Rights.”

43. The use of “property” up until roughly the seventeenth century correlated with the broad conception, as explained by Macpherson in “Property.”


46. Alexander, Commodity and Propriety.


48. On this interpretation of property relations, see Dagan and Heller, “Conflicts in Property.”


52. We make this statement as a descriptive observation of the reality we find in practice, not as normative judgment about whether or not this is a desirable state of affairs.


54. Brubaker, Citizenship and Nationhood.


57. The security that attaches to full membership is thought to nourish our sense of identity and belonging, with important “returns” in terms of our ability to fully exercise our autonomy and freedom.

58. Clearly, acquisition of citizenship status per se is no guarantee against the persistence of inequalities between members of the same polity. But it does anchor certain basic interests as non-revocable once a person is counted in the innermost circle of members.


61. J. W. Harris, Property and Justice.


63. The latter interpretation draws on Sen’s capabilities approach, see e.g., Amartya Sen, Inequality Reexamined (Russell Sage Foundation, 1992); John Roemer, Equality of Opportunity (Harvard University Press, 1998); Martha Nussbaum, Women and Human Development: The Capabilities Approach (Cambridge University Press, 2000). Nussbaum makes explicit the claim that these capabilities ought to be fulfilled by governments.

64. See e.g., Ross Zucker, Democratic Distributive Justice (Cambridge University Press, 2001), chaps. 9–11.


66. Importantly, we are not relying here on the historical precedent of treating ownership of real property as a precondition for full membership in the polity. As is well recorded, such reliance has worked to drastically restrict access to citizenship, excluding the vast majority of the population from full inclusion as equals. Our focus is different: we are exploring the conceptual and functional analogies between the regimes of protected property and bounded citizenship.


70. This strict pattern of transfer often put women at the precarious situation of reliance on marriage as the core means for ensuring financial security and social respectability (in a highly stratified society) for themselves and their children. In this respect, the entail was part of a larger system of laws that regulated monogamy, patriarchy, and inheritance. Of the vast body of feminist critique of this hierarchical social order, see e.g., Eileen Spring, Law, Land and Family: Aristocratic Inheritance in England, 1300 to 1800 (University of North Carolina Press, 1993).

71. Alexander, Commodity and Propriety, 38.


73. Y.B. 12 Edw. 4, Mich 25 (1472).

75. We draw this argument from the elegant analysis offered by Orth, “After the Revolution.”
77. For an illuminating and meticulous study of Madison’s position on entail, see Hart, “A Less Proportion of Idle Proprietors”.
78. Alexander, Commodity and Propriety, 39.
80. Ibid, 189.
81. Blackstone, Commentaries.
82. Madison, “Fashion.”
86. Obviously, at this time the definition of eligibility for inclusion in the body-politic was itself deeply laden with race and gender-based exclusions. Full membership was reserved exclusively for “free white persons.” See Rogers M. Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History (Yale University Press, 1997).
89. This perpetual structure of hereditary transfer also appears to violate the common-law rule against “perpetuities,” which has been in effect for centuries, dating back to at least the 1682 decision in the Duke of Norfolk’s Case.
90. This notion is perhaps best captured in Henry Maine’s and later Emile Durkheim’s “from status to contract” typology.
91. This is not the place to fully expand the critique of world citizenship. For an initial discussion, see Ayelet Shachar, “Birthright Citizenship as Inherited Property: A Critical Inquiry,” Identities, Affiliations, and Allegiances, ed. Seyla Benhabib, Ian Shapiro and Danilo Petranovich (Cambridge University Press, 2007), 257–281.
92. One way to do so is by creating a closer nexus between right and duty. For further elaboration, see Citizenship as Inherited Property: The New World of Bounded Communities (Harvard University Press, forthcoming), chap. 4.
97. Note that such responsibility to compensate for people’s brute luck accrues only to “that part of others’ good fortune that is undeserved.” See Anderson, “What is the Point of Equality,” at 290. Similarly, windfall beneficiaries will be asked to contribute that part of their good fortune that is “undeserved” to compensate those who remain outside, though it is obviously difficult to quantify these components.


99. Isbister, Capitalism and Justice, 102. This obligation may be discharged by a stream of periodic payment with the same expected overall lifetime value; we thank Barbara Fried for calling our attention to this point.

100. Our proposal differs from “natural resource” global taxation proposals such as Steiner’s or Pogge’s—that must begin with the assumption that the whole world once belonged to all as the basis for reallocation (Steiner’s argument) or apply globally the Rawlsian difference principle (Pogge’s argument). The birthright privilege levy, on the other hand, targets the artificiality and inevitability legally constructed process of determining who is a citizen by birth—in the processes aiming to “de-naturalize” this very construction.


Ayelet Shachar is Leah Kaplan Visiting Professor in Human Rights, Stanford Law School; Canada Research Chair in Citizenship and Multiculturalism, Faculty of Law, University of Toronto. Her scholarship focuses on citizenship theory, immigration law, multiculturalism, and feminism. She has also contributed to real-world policy debates on these topics. Shachar is the author of the award-winning book Multicultural Jurisdictions: Cultural Differences and Women’s Rights (Cambridge University Press, 2001).

Ran Hirschl is a professor of political science and law at the University of Toronto, and holds a senior Canada Research Chair in Constitutionalism, Democracy and Development. He is currently a fellow at the Center for Advanced Study in the Behavioral Sciences at Stanford University. Hirschl has published extensively on comparative law and politics in leading social science journals, law reviews, and edited collections, and is the author of Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, 2004).