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Citizenship as a Birthright

Abstract

Most persons inherit their citizenship status by territorial birthright (*jus soli*) or descent (*jus sanguinis*). These practices are controversial. Policymakers argue that territorial birthright citizenship or *jus soli* encourages birth tourism and irregular migration, while citizenship by descent does not ensure that expatriates and their children have sufficient connections to the polity. Some political theorists contend that all inherited forms of citizenship, whether by territorial birthright or descent, are overinclusive and distributively unjust (Shachar 2009; Stevens 2010; Tanasoca 2018, 12-13). In this paper, I defend the broad application of birthright citizenship by territory and descent to safeguard family unity for children and to ensure their protection by a state at the time of their birth. Territorial birthright citizenship has the benefit of allowing the children of unauthorized migrants to grow up to participate fully in the life of their country of birth and continued residence as citizens. Citizenship by descent acts as a backstop to ensure family unity in the event that non-citizen parents are deported before their children can remain in the country on their own.

Introduction

The practice of birthright citizenship, whether by territorial birth (*jus soli*) or descent (*jus sangunis*) is the subject of ongoing political controversy related to concerns about immigration and the prospect that parents can circumvent immigration laws through the citizenship claims of their children. Policymakers argue that *jus soli* birthright citizenship encourages opportunistic birth tourism. Normative political and legal theorists including Ayelet Shachar (2009), Jacqueline Stevens (2010) and Ana Tanasoca (2018) have challenged both *jus soli* and *jus sanguinis* citizenship policies for overincluding the children of non-citizens who may not have what they deem to be a "genuine link" or close enough lifelong connection to the country whose citizenship they claim from birth.

In this paper, I defend a broad application of *jus soli* and *jus sanguinis* birthright citizenship against restrictive policy initiatives and philosophical concerns about "overinclusive" citizenship policies. In the first section, I highlight the practical problem posed by policy initiatives restricting the application of *jus soli* or *jus sanguinis* in response to political fears about birth tourism, so-called "anchor babies," and "overincluding" children of non-residents and non-citizens as state beneficiaries. In the second section, I develop my argument that birthright citizenship by territorial birth and descent is necessary to ensure the protection and inclusion of children in mixed-citizenship status families, whether they remain in their country of residence or they have to leave with their parents. My initial concern is with the protection of children in mixed-citizenship status transnational families from *de jure* and *de facto* statelessness. My secondary concern lies with ensuring that these children enjoy full civil, social, and political rights as adults in their countries of citizenship.

In a world of nation-states, the complementary and expansive practice of birthright citizenship by both territorial birth and descent is the best means of safeguarding the baseline claims to *a* citizenship status and its protections. Territorial birthright citizenship elevates the

claims of children to protection over the considerations of political majorities that may want to deprive citizens who will be life-long residents of their societies of said rights on the basis of their parents' national origin, status, race, ethnicity, or any other consideration that ought not to be transferred to their children. Birthright citizenship by descent ideally operates to protect the rights of children who are dependent upon deportable parents to return to their countries of origin if necessary, and to reintegrate there as full members of the community.

Finally, I respond to proposed amendments to *jus soli* and *jus sanguinis* that base citizenship attribution on alternate principles. Children cannot attain the protection of citizenship if it relies on their consent or a link they develop over time expressed by Ayelet Shachar in terms of "the actual conduct of the person in the context of her social attachments and community ties, or earned citizenship" (Shachar 2009, 178). Young children need instruments of citizenship attribution that protect them as citizens before they are able to make choices or develop ties of their own. The best way to ensure that this occurs is to link their status both to their parents through an expansive interpretation of *jus sanguinis*, and to their place of birth and early residence through an expansive interpretation of *jus soli*, even if this comes at the risk of "overincluding" these children as citizens in multiple countries.

The Limited Inclusive Potential of Territorial Birthright Citizenship

Most Western Hemisphere countries provide for automatic acquisition of citizenship at birth (*jus soli*), with few exceptions regarding the immigration and nationality status of their parents except if they are employed in the service of a foreign country with diplomatic immunities (Vonk 2015, 10). Territorial birthright citizenship also exists alongside citizenship by descent in most Western hemisphere countries.[1] By contrast, citizenship by descent or *jus sanguinis* is the primary basis by which citizenship is attributed to new members in most countries in the Eastern Hemisphere (Macklin 2017, 291).[2] As an ordinarily inclusive instrument of citizenship attribution, *jus soli* citizenship can encourage immigrant integration and bridge diverse ethnic groups into a common imagined political identity (Dauvergne 2016, 20; Macklin 2017, 292). To reach its full inclusive potential, territorial birthright citizenship depends on universal birth registration. In practice, birth registrars do not always record non-institutional births, births in border regions, rural areas, and among irregular migrants (Vonk 2015, 11; Price 2017; Rosenbloom 2017; Kingston 2019, 67-72). Irregular birth registration leaves native-born residents of otherwise inclusive *jus soli* countries with disputed citizenship claims (Price 2017, 35; Rosenbloom 2017, 133-138). Sometimes these registration deficiencies arise from a lack of state resources, and other times they intentionally target irregular migrants whose children are supposed to have a right to citizenship at birth (Overmyer-Velázquez 2018, 28). Still, the provision of territorial birthright citizenship to children irrespective of the national origins or immigration status of their parents in most countries of the Western Hemisphere has the advantage of making *de jure* statelessness comparatively rare in the Americas (Belton 2017, 18).

[1] The Bahamas, Colombia, the Dominican Republic, Haiti, and Surinam are exceptions to this rule (Vonk 2015, 11).

[2] Variations of territorial birthright citizenship exist in the nationality laws of many countries outside the Western Hemisphere, including unconditional acquisition of nationality at birth by the third generation (the practice of "double *jus soli*" in France), acquisition based on birth and extended residence, and unconditional acquisition by foundlings as infants or young children of unknown parentage (Weil 2001, 29).

Policy Objections to Territorial Birthright Citizenship

Political debates about birthright citizenship often take place in the context of broader disputes about immigration and social welfare policy (Schuck and Smith 1985, 103-115; Stevens 2010, 37; Dickson 2018). In Britain (effective 1983), Australia (effective 1986), Ireland (effective 2005), and New Zealand (effective 2006), changes to citizenship attribution rules were designed as immigration control measures targeting non-citizen parents (Zappalà and Castles 1999; Layton-Henry and Zilpert 2003, 69-73; Luibhéid 2013, 151-167; Dauvergne 2016, 20-21).

In Canada, both Liberal and Conservative governments have considered changes to the Citizenship Act limiting citizenship by *jus soli* and *jus sanguinis* (Bethel 1994, 17; Young 1997).[3] These proposed policy changes are motivated by fears that non-residents could obtain social welfare or immigration benefits from Canada simply by giving birth to a Canadian child, or inheriting Canadian citizenship (Bethel 1994, 15, 17, 19; Yeates 2014, 9; Dickson 2018; Cosh 2019). Citing these concerns, Stephen Harper's Conservative government considered a proposal in 2014 to limit citizenship by territorial birth to the children of at least one citizen or permanent resident parent, a move opposed by the provinces tasked with registering births on cost concerns (Yeates 2014, 1; Dauvergne 2016, 21; Macklin 2017, 293). The Conservative Party of Canada again adopted a policy plank during its August 2018 convention renewing its support for limiting territorial birthright citizenship (Dickson 2018).

Overall, in Canada, the media and policy debate focuses on wealthy non-resident parents who can afford the costs of travel, accommodation, and medical bills to give birth to a child in Canada, leaving shortly thereafter (CBC Radio 2018; Bilfesky 2018; Cosh 2019). A 2018 report that over 1 percent of all births in Canada outside of Quebec were to mothers who reside outside Canada added to this concern, even though this figure included Canadian citizens living abroad who returned to give birth in Canada (Bilfesky 2018, Griffith 2018, 2).

In the United States, policy debates about birthright citizenship and the future status of unauthorized immigrants are closely connected. Territorial birthright citizenship is a key mechanism for the legal inclusion of the children of irregular immigrants as citizens, including 6.8 million U.S. citizen children born to irregular immigrants from 1980 to 2016 (Bloemraad and Sheares 2017, 830). The academic debate about the legality and ethics of territorial birthright citizenship in the U.S. was reinvigorated by Peter Schuck and Rogers Smith's *Citizenship Without Consent: Illegal Aliens in the American Polity* (1985). Though much of the text is devoted to U.S.-specific debates about the meaning of the "subject to the jurisdiction" clause of the Fourteenth Amendment to the U.S. Constitution, Schuck and Smith also express concern about the potential for all *jus soli* citizenship regimes to incentivize irregular residence (Schuck and Smith 1985, 94). Ideally, Schuck and Smith argue that political communities should be able

[3] Symbolic efforts to foster and preserve national unity have played an important role in citizenship law debates in Canada, as shown in the 1994 report commissioned by Liberal MP Sergio Marchi, Minister of Citizenship and Immigration, to "identify ways in which the symbolic nature of citizenship can be enhanced" (Bethel 1994, 1). The then-opposition Bloc Québécois attributed this project to "an identity crisis that Canada is undergoing" as sovereigntists anticipated a referendum on Quebec's independence (Bethel 1994, 51). The Bloc's dissenting report was critical of the Liberal majority's views on dual citizenship, claiming that "having a dual nationality need not mean either less loyalty towards one's country of origin or a less firm allegiance to Canada" (*Ibid*).

to grant or withhold citizenship to U.S.-born children with non-citizen parents, just as it does for new members by naturalization (Schuck and Smith 1985, 94, 101-103). Opponents of consent-based citizenship fear that citizens and their representatives will use the consent principle for citizenship to exclude U.S.-born children of parents whose loyalties are suspect because of their parents' group identity, national origin, or ideological beliefs (Chavez 2017, 13).

Given the failure of legislative efforts to repeal birthright citizenship in the U.S., Smith has since adopted the position that "the nation can be said to have effectively consented to a reading of the Fourteenth Amendment that confers jus soli birthright citizenship on children of aliens never legally admitted to the United States" (Smith 2009, 1331). Similarly, Peter Schuck now argues that Congress' lack of collective "inclination to eliminate the traditional rule" reflects "the advantages of the traditional rule" of territorial birthright citizenship, "which is clear, easily administered, inclusive, and avoids illegal status for the future generations of long-term residents" (Schuck 2017, 168-169). Legislative efforts to reinterpret the Citizenship Clause of the Fourteenth Amendment to exclude the children of irregular immigrants continue, supported by President Trump's threat to issue an executive order to this end in October 2018 (Hirschfield Davis 2018; Birthright Citizenship Act of 2019). However, most legal analysts believe that a constitutional amendment would be required to alter U.S. territorial birthright citizenship (Dellinger 1995, 81; Joppke 2010, 38; Dauvergne 2016, 20-21, 103-105).

In the United States, territorial birthright citizenship is entrenched in its Constitution as the lynchpin of the nation's commitment to legal equality emerging out of its Civil War and Reconstruction. Even before the U.S. Civil War, the struggle by emancipated African-Americans for recognition as free and equal citizens augmented existing legal arguments for *jus soli* citizenship in the United States (Jones 2018). Section 1 of the Fourteenth Amendment to the U.S. Constitution as ratified in 1868 guarantees territorial birthright citizenship for "all persons born and naturalized in the United States and subject to the jurisdiction thereof" (U.S. Constitution, Amendment XIV). A generation later, in 1898, the U.S. Supreme Court interpreted the clause "subject to the jurisdiction thereof" through the lens of precedents in English common law, excluding only children "born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state" (*Wong Kim Ark v. United States* 1898, 682). Pursuant to this ruling, the U.S. State Department maintains that:

> . . . acquisition of U.S. citizenship generally is not affected by the fact that the parents may be in the United States temporarily or illegally; and that; and (b) A child born in an immigration detention center physically located in the United States is considered to have been born in the United States and be subject to its jurisdiction. This is so even if the child's parents have not been legally admitted to the United States and, for immigration purposes, may be viewed as not being in the United States (U.S. State Department 2018).

Short-term visitors or irregular immigrants apprehended after crossing the border and held in an immigration detention center can give birth to a U.S. citizen-child. But the vast majority of births to immigrants without citizenship or U.S. legal permanent resident status are to long-term U.S. residents (Passel, Cohn, and Gramlich 2018). In 2016, the Migration Policy Institute found that 86 percent of U.S. born children with irregular immigrant parents had resided in the U.S. for

more than 5 years (Capps, Fix and Zong 2016, 9). Policy objections to U.S. citizenship for the children of unauthorized immigrants that portray the parents as "birth tourists" and the children as "anchor babies" do not account for their longstanding social membership in the United States.

Underinclusiveness: Punishing Children for the Behavior/Actions of their Parents

Territorial birthright citizenship provides little protection for children while they are dependent on deportable parents. Immigration laws that prevent minors from sponsoring their parents for immigration benefits undermine the protections of territorial birthright citizenship for children in mixed-status families (Sullivan 2016, 264). Young children have a strong developmental interest in forming intimate attachments to their parents to help them to develop modes of self-regulation necessary to function as autonomous and productive adult citizens (Brighouse and Swift 2014, 72-73). Federal immigration authorities routinely compromise a young child's interests in continuity of care by detaining a citizen-child's parents, and local and state authorities do the same when they take a parent's custody away as a result of their immigration violations (Hacker 2017, 184-186). Providing younger children with a citizenship by descent that they can exercise simultaneously with at least one of their parents can help to protect their well-being, if immigration authorities and family courts allow them to leave with their deportable parents to their country of origin (Abrams 2018, 123). However, this solution comes at a cost to older children who will have to leave their broader network of school and community-based care providers behind to maintain parental care in ancestral countries of origin where they have few ties and often experience social and legal barriers to reintegration (Heidbrink 2019, 136-138; Caldwell 2019, 140). Many deported parents do not have the financial means or institutional knowledge to register their U.S. born children in Mexico so they can claim documents proving their *jus sanguinis* citizenship by descent there (Mateos 2019, 13). Even when they can obtain the required documentation, they face further difficulties registering for public services and enrolling in the educational system as presumed foreigners, with limited Spanish language abilities (Mateos 2019, 13-14). Not all dual nationals benefit from a privileged position as compared to mono-nationals who never left their country of birth.

Even so, assigning citizenship by territorial birthright can eventually free native-born children as adults from the penalties that apply to their parents because of their citizenship or immigration status, conduct, or allegiance. Children of irregular immigrants can ordinarily obtain citizenship in the country of their birth irrespective of the immigration offenses of their parents. However, territorial birthright citizenship in Canada does not apply to diplomatic and consular officers and employees in their service (Citizenship Act 2018, §3(2)). A prominent example of this exclusion from territorial birthright citizenship in Canada is the case of Deepan Budlakoti, a stateless man denied Canadian citizenship because his parents were domestic servants of the Indian High Commission to Canada before he was born (Stasiulus 2017, 17; Sullivan 2018).[4]

[4] The United States limits exceptions to its constitutionally protected territorial birthright citizenship rule to the children of foreign diplomats with full privileges and immunities. U.S.-born children in this position are eligible for U.S. lawful permanent resident status. In February 2019, this exception made news following the U.S. State Department's refusal to grant New Jersey-born alleged ISIS participant Hoda Mothana a U.S. passport, based on a disputed claim that her father was in the U.S. as a Yemeni diplomat at the time of her birth (Benton and Banulescu-Bogdan 2019).

Canada's Federal Court of Appeal has since reviewed the scope of allegiance and diplomatic exceptions to territorial birthright citizenship, in a case pertaining to the citizenship status of Timothy and Alexander Vavilov, Canadian-born children of parents who were covert Russian agents without formal diplomatic status in Canada (*Vavilov v. Canada* 2017). The Vavilov children grew up in Canada with no knowledge of their parents' covert identities. Their parents' true identities were discovered by U.S. officials when their family was living in Massachusetts, and the family was detained and deported to Russia (Friscolanti 2018). As adults, the Canadian-born Vavilovs sought to return to Canada as citizens. The Canadian government initially denied this request, contending that they were born subject to a provision in the citizenship act denying citizenship by birth to the children of representatives of a foreign government. Upon appeal, Canada's Federal Court of Appeal found that the revocation of the appellant's citizenship could not be sustained because their parents "were never enjoying civil or criminal immunity" while in Canada. The Federal Court of Appeal supported its decision by invoking a normative claim "that the sins of parents ought not to be visited upon children without clear authorization by law" (*Vasilov v. Canada* 2017, §82). In this and similar cases, territorial birthright citizenship stands for the principle that children should be held innocent for their parent's conduct and allowed to live as equal citizens of the land of their birth.

Normative Objections to Birthright Citizenship as "Overinclusive"

In normative political theory, objections to territorial and descent-based birthright citizenship are motivated by concerns about the supposed "overinclusiveness" of current citizenship laws (Schuck and Smith 1985, 121; Shachar 2009, 116). Schuck and Smith's 1985 objection to *jus soli* birthright citizenship did not extend to claims to citizenship by descent by persons who "lives his entire life outside the United States," leaving this matter up to the consent of the "current American community" to decide (Schuck and Smith 1985, 128). Ayelet Shachar's *Birthright Lottery* (2009) offers a broader normative indictment of all forms of birthright citizenship, whether by territorial birth, or by descent, encompassing the majority of citizenship attribution policies worldwide. The first half of *Birthright Lottery* focuses on the alleged distributive injustices of acquiring citizenship status at birth, while the second part of the book proposes that states adopt *jus nexi* or a centre of life connections basis for distributing citizenship linked to residence and other ties to the political community. Shachar views a non-resident descendant of a citizen as a "nominal heir" of the benefits of citizenship, particularly when this "windfall beneficiary" is "born abroad to parents who merely inherited the title of citizenship by virtue of entail-like birthright, never themselves establishing a genuine connection to the home community the grandparents left behind" (Shachar 2009, 181). Overall, Shachar's objection to both *jus soli* and *jus sanguinis* is that both practices have the potential "to lead to the situation where persons with only minimal ties to the polity are granted all the rights and benefits of membership (overinclusiveness)" (Shachar 2009, 137).

Birthright citizenship by descent (*jus sanguinis)* can lead to further political objections that children and subsequent descendants of citizens living abroad can obtain the benefits of citizenship without establishing connections to the polity arising from residence there. This objection was an important factor motivating changes in Canada's citizenship laws that took

effect on 17 April 2009 as part of Bill C-37, limiting citizenship by descent to the first generation of Canadian citizens born abroad (Keon 2008, 1519-1520; Becklumb 2014, 13-14).[5] Limitations on citizenship by descent have the potential of leaving children stateless, if they can no longer obtain citizenship either by descent or by birth according to the citizenship laws of the country where they are born. The Canadian restriction on citizenship by descent only partly addresses this problem. A grandchild of a Canadian-born citizen without a claim to citizenship elsewhere must apply for Canadian citizenship by age 23, and prove that she has resided in Canada for three out of the four years preceding her application (Immigration, Refugees and Citizenship Canada 2019). These restrictions may render descendants of Canadian citizens stateless at birth, with limited social rights and subject to deportation in Canada, and without diplomatic protection abroad (Brennan and Cohen 2018, 1309). Canada's limitations on citizenship by descent also do not consider the value of alternative ways that transnational families can maintain strong ties to Canada abroad apart from formal employment with the government of Canada or a province or territory.

Why Newborns Need the Protections of Birthright Citizenship

Shachar's *jus nexi* proposal is centered on connections established through long-term residence in a country, but she is also willing to consider attachments established through "related activities that indicate a person's connectedness and willingness to share both the risks and benefits of membership in a society in which he or she never lived" (Shachar 2009, 173). This proposal goes further than the 17 April 2009 changes to Canadian citizenship law towards recognizing the possibility that external citizens living abroad may retain ties to Canada sufficient for indicating their connection to the political community, meriting claims to citizenship. The problem is that newborn children who are in immediate need of the protections of citizenship do not have the capacity or lived experience to establish a genuine connection to any country based on past participation, contributions, or behavior. It may be morally justifiable for states to take actions, behaviour, and experiences developed over a lifetime into consideration when considering whether to admit *adults* as new legal permanent residents or naturalized citizens (Sullivan 2019, 49). Yet it is morally illegitimate to extend the same expectations to newborn infants who are in need of the protections of citizenship, denying them this security based on the actions of their parents, or because citizens, legislators or bureaucrats believe they lack a "genuine link" to the country of their birth.

The legitimacy of judging newborns by factors like subjection to the laws, long-term residence and participation to civil society is dubious since they have no record that authorities can use to justify granting or denying them citizenship (Carens 2016, 208). Arguably, a state can withhold granting citizenship to the native-born children of non-citizen parents without lawful permanent resident status and still provide these children with the protection of their laws (Tanasoca 2018, 26). This is the policy that has been in place in Australia since 1986, when that country imposed a ten year residency requirement for children of non-permanent residents to obtain citizenship. While a child may enjoy some local legal protections during this time, ten years provides immigration authorities with ample time to deport non-permanent resident parents

[5] On the problematic assumptions in the debate on Bill C-37 regarding the valorization of previous generations' of expatriate Canadians (Doyle 2007), all the while denying the claims of belonging to Canada by current and future generations of Canadians living abroad (Siskay 2010, 4521), see Harder and Zhyznomirska 2012.

with native-born children, which was the reason why Australia imposed a lengthy residency requirement for birthright citizenship in the first place (Zappalà and Castles 1999, 284). If we are concerned with providing children with the protections that come with citizenship status at birth, the most efficient way to do this is to grant them citizenship where they are born, without exceptions. The practical dangers of leaving vulnerable individuals outside the protection of any state ought to supersede symbolic concerns that some children might be "overincluded" as citizens of more than one polity where they do not reside, leaving them ineligible for many of the benefits of citizenship there.[6]

Children Should Not be Penalized for their Parents' Actions or Status

It is also worth considering whether political communities should be free to decide whether to deny citizenship, and its substantial protections, to infants based on their parents' actions or behaviors, including a parents' immigration status, their place of residence, or where they work at the time of their child's birth. Despite exceptions that bind some children to the status of their parents based on their employment or conduct, for most native-born children, territorial birthright citizenship contains the promise of integration on equal terms with other citizens for second-generation immigrants that does not indefinitely tie them to the immigration status of their parents. In the United States, equal protection of the law for the children of irregular immigrants means a free public education, on the grounds that "legislation directing the onus of a parent's misconduct against his children" that "does not comport with fundamental conceptions of justice" (*Plyler v. Doe* 1982, 220). Similar justifications have been made for granting children protections from deportation through the Deferred Action for Childhood Arrivals program, arguing that immigrants who entered a country without authorization as children should not be held culpable for their parents' immigration violations (Sullivan 2019, 212, 223). On the whole, children who arrive in a country shortly after they are born are similarly situated to native-born children who remain in their country of birth, meriting the protections and benefits of citizenship irrespective of citizens' judgment of their parents' conduct as irregular entrants or visa overstayers. Children of irregular immigrants deserve separate consideration for immigration benefits and citizenship apart from the status and conduct of their parents.

Moreover, the gravity of the parent's alleged offense should not be taken into consideration in deciding whether a child is allowed to acquire citizenship by descent. Children of suspected terrorists should not be denied citizenship by descent in their parents' country of origin as a collateral consequence of punitive actions, including denationalization, levied upon their parents.[7] Legislation that punishes children for the conduct of their parents "classifies on the basis of an immutable trait" that is "entirely out of the child's control" (Stier 1992, 736-737).

[6] In a critical appraisal of birthright citizenship, Ana Tanasoca (2018) argues that the advantages that come from the potential "accumulation of these birthright citizenships . . . are not purely symbolic" because "citizenship unlocks, fast-tracks, or at least facilitates access to precious benefits ranging from suffrage to health and wealth and education" (Tanasoca 2018, 33). In practice, states often disaggregate the decision to grant someone citizenship from subsequent decisions about whether they become eligible for education, social welfare benefits, and voting rights. External citizens retain an attenuated citizenship that amounts to little beyond diplomatic protection and the right of re-entry, which is a right that expatriate children cannot readily act on as individuals (Bauböck 2009).

[7] This is a pressing issue for children stranded in Syria after the collapse of ISIS, in light of Denmark's explicit denial of citizenship by descent to children of Danish nationals who joined ISIS (Amiel 2019).

Citizenship by Descent Helps to Safeguard Family Unity

Citizenship by descent provides limited but important benefits to the children of deported parents who left their other country of citizenship under duress and have to integrate in another country with few resources or ties of their own. It safeguards against statelessness and protects family unity and the continuity of care for children in mixed-citizenship status families (Titshaw 2018, 98). Citizenship by descent does not protect children from barriers to integration in their parents' country of origin that often lead to educational setbacks, developmental disruptions, and discrimination (Zayas and Bradlee 2014, 171). Even so, political and legal theorists including Ayelet Shachar (2009), Jacqueline Stevens (2010), Costica Dumbrava (2018), and Ana Tanasoca (2018) question the moral legitimacy of citizenship by descent as though it were a form of inherited privilege, akin to a family heirloom rather than a public good regulated by a self-governing people (Tanasoca 2018, 29-32). One can provisionally acknowledge the legitimacy of these concerns and ask adults to assume greater duties in exchange for "inheriting" the rights and status of citizenship, while still insisting that children be entitled to the same citizenship status as their parents while they are dependent upon them for care and support, at the very least. Since what is most important is that children have the same citizenship as their caregivers to ensure continuity of care, we can envision adapting *jus sanguinis* to ensure that children inherit the citizenship status of their primary caregivers so families can live and move together (Bauböck 2018b, 85-86; Honohan 2018, 133).

Birthright Citizenship Does Not Necessarily Privilege Its Recipients

Normative arguments about the alleged distributive injustice of birthright citizenship that are predicated on a child's *potential* ability to benefit from a legal claim to citizenship in a developed country as an adult fail to take into account the degree to which a child's ability to act on this potential is linked to her parents' status and circumstances. In the United States, most of the children born to parents without U.S. citizenship or lawful permanent resident status are long-term irregular residents of limited economic means who live under a constant threat of detection and deportation. A child born in the U.S. to irregular immigrant parents is a citizen there by territorial birthright, but her capacity to take advantage of educational opportunities that will prepare her for employment and socioeconomic advancement there may be limited if her parents face deportation. If her irregular immigrant parents are able to elude immigration enforcement and remain in the country, their limited earning capacity, wealth-based residential segregation and resulting educational inequalities may still undermine her chances to take full advantage of her citizenship status (Capps, Fix and Zong 2016). Even in same-citizenship status families, wide disparities of opportunity linked to parental socioeconomic status dramatically limit the advantages that a child can benefit from simply by being born in a highly developed country with territorial citizenship like the United States. Though they are potential dual citizens, native-born children of irregular immigrants are not heirs to an inegalitarian form of privilege that places them ahead of other mono-citizens, as critics of dual citizenship like Ana Tanasoca claim as a general matter (2018, 33-34). The desperate circumstances that lead parents to take the risk of migrating without authorization are indicative of their family's lack of privilege and status in both of their children's countries of citizenship, and are hardly deserving of a "birthright

privilege levy" of the form that Ayelet Shachar envisions as a way of minimizing global inequality (2009, 96-101).[8]

Costica Dumbrava (2018) proceeds a step further to argue that citizenship as membership in a political community should not depend on contingent facts of birth, such as their parents' immigration and citizenship status (Dumbrava 2018, 79; Bauböck 2018b, 87). Yet arbitrary allocations of membership – in families no less than in states – are impossible to avoid at birth and for some time thereafter, as we are necessarily born into a web of relationships and consequent commitments prior to attaining moral agency (Bauböck 2018b, 87). What is essential is not the means of distribution but that we have agents to protect our vital interests in a period of minority or vulnerability (Blake 2003, 402). Birthright citizenship – whether it is assigned by territorial birth or descent – among other unchosen ties – provides individuals with a context for choice in which children can securely develop their capacity to become free moral agents in their own right (Macintyre 1984, 221; Duff 2018, 196). The contingent nature of assigning citizenship based on one's place and jurisdiction of birth also helps us to "avoid the trap of moral judgment about who (or more appropriately, the children of whose parents) deserves to be a citizen" (Shachar 2009, 146). Children should not be penalized for the polity's assessment of the actions, behaviour, or status of their parents. They should have the opportunity to participate fully in the life of their country of birth and continued residence as citizens in their own right.

Reminding Citizens about their Duties as Part of an Intergenerational Political Community

Analogies between private property inheritance and citizenship by descent do not adequately account for potential public reasons and civic justifications for the intergenerational transmission of citizenship from one generation to the next. Rainer Bauböck (2018) suggests that citizenship by descent "signals that membership is linked to responsibilities for the common good and for future generations" (Bauböck 2018a, 72; Bauböck 2018b, 89). Citizenship by descent can remind us of what we owe to previous generations for the strengths, and flaws of our current political institutions. However, the idea of conceptualizing citizenship in an intergenerational political community that we identify with as *our* inheritance from *our* ancestors comes with the danger that we might fail to consider contributions to a country's collective well-being by non-citizens and former citizens who were denationalized, deported, or not permitted to pass citizenship to their descendants (Sullivan 2019, 50-53). Coupled a with a civics curriculum that addresses these issues, thinking of citizenship as a connection to an intergenerational polity may be a useful tool to recall citizens to the lessons of the past, including the need to atone for the misdeeds of our political community before our birth (Davies 2017).

There is a place for a "citizenship for mortals" that prioritizes the political needs and attachments of the moment, "honoring this time between past and future, out of love for the world and not to escape it," if this helps citizens to think of the current consequences of their actions beyond their borders (Stevens 2010, 2-4, 26). However, issues like deficit financing and

[8] Shachar's "birthright privilege levy" would apply to "everyone within the well-off political community who enjoy its enabling functions," but it would also account for "minimal income thresholds," presumably lowering but not eliminating the levy placed on U.S.-born children of irregular immigrant parents (Shachar 2009, 99). It is questionable why individuals should be held accountable for remediating global distributive injustices based on a status they acquired at birth, which may not improve their lot in life.

the long-term environmental consequences of unsustainable economic growth also require voters and policymakers to make the difficult conceptual leap to think beyond their immediate needs and experiences, the current election cycle, or consequences that might occur during the remainder of their lives. The prospect of transmitting citizenship to descendants by birth or adoption can also serve as an admonition to otherwise short-sighted, present-minded citizens and policymakers to consider the long-term consequences of their policy decisions on future generations that they can identify with as current and prospective children, younger relatives, and subsequent generations of descendants. This perspective may be more difficult to adopt if we tell citizens that their descendants may not be able to inherit their citizenship status and reap the benefits of any forward-thinking political decision-making if their children have no choice but to emigrate to find work, settling and giving birth abroad. The future well-being of a polity is dependent both on its willingness to provide opportunities for its current citizens to stay and contribute there, and to rapidly integrate new citizens through naturalization and birthright citizenship for their children.

Citizenship by Descent: Addressing Concerns about Overinclusiveness

Most nations allow the children of native-born citizens born abroad to retain citizenship throughout their lives. One way to justify citizenship by descent using stakeholder theory is through the principle of biographical subjection. Once someone becomes a citizen by descent, they expect this country to continue to provide them with the right to return, and are subjected to the political authority of a state that seeks to circumscribe this right (Bauböck 2009, 482). To denationalize an external citizen later in life amounts to banishment and involuntary exile, a severe penalty for any state to impose on its citizens simply for residing abroad (*Ibid*, 483). The abstract principle of biographical subjection becomes more concrete when we consider why external citizens may need to return for the benefit of resident citizens. As children, they are dependent on their native-born parents. As adults, their native-born parents may return to their country of origin, and need their children born abroad to come home to provide care for them in their country of residence. In both cases, a native-born mono-citizens' interests in family unity and continuity of care may depend on their foreign-born children's lifelong right to return.

Canada is unusual in restricting citizenship by descent to the first generation born abroad. Beyond the first generation, many countries allow the grandchildren of native-born citizens with a claim to citizenship provided they reside in the country for a specified period (Weil 2001, 20; Macklin and Crépeau 2010, 5). Ireland has a particularly expansive conception of citizenship by descent. Ireland's Department of Justice and Equality encourages the children and grandchildren of Irish-born citizens to claim Irish citizenship by registering in its Foreign Births register, and to do so "before the birth of the next generation (ie your children)" to "safeguard the Irish citizenship of future generations" (Department of Justice and Equality 2019). Registration of births with the Irish government provides a mechanism for each generation of the Irish diaspora to pass down their entitlement to Irish citizenship from generation to generation, which also allows them to live and work in other EU countries as well (Handoll 2006, 309). Further normative challenges to *jus sanguinis* citizenship are often triggered by the absence of a residency requirement and a distant or non-existent intergenerational stopping point for

citizenship transmission by descent, coupled with exclusionary immigration laws for current residents (Shachar 2009, 121; Joppke 2010, 65-66; Bauböck 2018a, 69).[9]

In response, political communities offer three main rationale for granting intergenerational diasporic citizenship without a residence requirement, which I categorize in descending order of moral priority: 1) protection of vulnerable nationals abroad; 2) atonement, and 3) shared identity combined with political or financial gain. First, most states claim a legal right and responsibility to protect their nationals residing abroad, even when they were not born there and have no immediate intention to return, if they cannot acquire citizenship in the country where they reside (Fitzgerald 2008, 176; Waldinger 2015, 121-123).

Second, political communities decide to offer citizenship to the descendants of denationalized former citizens as a form of atonement for the crimes of a previous regime. For this reason, Germany offers citizenship to the descendants of citizens expelled by the Nazi regime (Harpaz 2013, 176; Cohen 2018, 42).[10] Spain offers citizenship to the descendants of Spaniards expelled from their country during and after Spain's civil war as a form of reparation for persecution by the Franco regime (Martín-Pérez and Moreno-Fuentes 2012, 632, 639-640; Escudero 2014, 142). Far from being a discretionary gesture, Germany and Spain may be fulfilling a moral duty incumbent on all states that have coercively constituted the identities of individuals and their descendants (Smith 2015, 254), by addressing the specific harm of denationalization with the benefit of renationalizing an affected individual. There are potential harms to this practice, if it is not merely symbolic, that do not seem insurmountable, or sufficient on balance to justify ending this practice. The political community may have to make collective decisions about the scope of possible claimants among the groups harmed by antecedent regimes, accounting for the degree of harm and the passage of time, among other factors. The individual's prior country of nationality may be among a diminishing number of states that objects strongly to dual nationality as a violation of its sovereignty. This objection can be overcome either through the consent of the other state, or an individual's choice to elect the offered nationality and expatriate himself from his country of origin. If the country is part of a multinational federation like the European Union that permits its citizens to live and work in other member states, it should seek input from other affected member states before granting citizenship as reparation. The state may also elect to provide preferential immigration benefits to persons in affected groups as a percentage of its overall immigration reception targets, rather than granting them all citizenship outright, allowing the state to vet and limit the number of atonement-based immigrants entering at any given time.

A third reason why traditional sending states grant citizenship by descent without a prior residence requirement is to maintain mutually valued ties of identity between the "homeland" and the "diaspora." An increased tolerance of dual citizenship by countries with large diasporas

[9] For Shachar, the real problem lies in countries with "underinclusive" immigration laws that exclude long-term residents coupled with "overinclusive" citizenship laws that constitute "a perpetual transfer of title with respect to children born outside the territory to parents of the 'appropriate' stock" (Shachar 2009, 121). A state could respond to the first part of this objection with more inclusive immigration policies for current long-term irregular residents, while still extending citizenship to its diaspora.

[10] The relevant provision in the German basic law is Article 116(2), which provides that "Former German citizens who between January 30, 1933 and May 8, 1945 were deprived of their citizenship on political, racial, or religious grounds, and their descendants, shall on application have their citizenship restored."

has made it more practical for emigrants and their descendants to retain their nationality of origin and to pass this status down to their foreign-born children (Fitzgerald 2008, 177). Sending states have self-interested reasons in retaining the membership of emigrants and their descendants so as to benefit from their diasporas by encouraging remittances, investment and human capital transfers (Waldinger 2015, 117; Bloemraad and Sheares 2017, 837). A benefit of diasporic citizenship comes when a sending state assists its nationals to integrate into their country of residence, harmonizing its interests in protecting its nationals with the interests of the receiving state in integrating new immigrants. Some sending states, including Mexico, encourage their nationals to naturalize in their country of residence to function as an instrument of political influence abroad (Délano Alonso 2018, 49; Fitzgerald 2008, 178). There are also drawbacks to diasporic citizenship. Some expatriates argue that they should not have to emigrate to benefit from the resources granted by their country to citizens living abroad (*Ibid*., 104). Self-interested nationals of convenience can take advantage of the travel benefits and insurance of a second passport with no intention of developing ties to their ancestral country of origin (Harpaz 2013). Finally, receiving states may resent consular protection on behalf of a country's expatriates that evolves into an "ethnic lobby" designed to influence its domestic affairs.

In summary, a liberal approach to citizenship by descent beyond the first generation may be necessary to protect an individual's right to *a* nationality and diplomatic protection abroad, when she is living in one of a declining number of states that rarely grants citizenship to the native-born descendants of foreigners. Citizenship by descent beyond the first generation need not intrude upon the rights of native-born residents to have maximum influence over laws that affect them directly.[11] Finally, the genuine connection criterion for defining citizenship does not necessarily lead us in the direction of curtailing citizenship by descent, as Ayelet Shachar (2009, 166) suggests. Instead, the International Court of Justice decision from which Shachar draws her discussion of the "genuine connection criterion" states that nationality is a "legal bond having as its basis the social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties" (Nottebohm Case 1955, 23). Nothing in this statement suggests residence is required of an external citizen to fulfill this requirement. A connection of existence, interests and sentiments may be fulfilled by an individual who is motivated enough to learn the language, culture, and acquire the civics, administrative and legal knowledge to make a claim to his ancestral country of origin. The language of the Nottebohm decision regarding the impact of naturalization on allegiance and the need for a closer connection to one nation than another is anachronistic (Nottebohm Case 1955, 23-24). Today, many countries accept dual nationality, with fewer compulsory military service requirements or other instances where one claim to nationality may come into conflict with another. Moreover, advances in communication enable motivated expatriate citizens to maintain ties with their country of origin and to acquire the current knowledge needed to be an informed participant in its evolving political affairs (*Frank v. Canada* 2019, ¶33-35, 69).[12] In short, it is

[11] One way to limit the possible impact of dormant citizenship on resident citizens is by disaggregating citizenship, and limiting the voting rights of non-resident citizens as adults (Bauböck 2018, 69-70). This approach has been justified in Canada to privilege a current relationship between electors and their particular geographical communities. However, in *Frank v. Canada* (2019), a majority of justices on the Supreme Court of Canada questioned the value of this approach in an era of rapid communication and online community building (¶33-35, 69). The court also argued against linking citizenship rights and residence, restoring voting rights to expatriate citizens.

[12] Canadian Supreme Court Chief Justice Richard Wagner justified the majority's ruling in *Frank v. Wagner* (2019) as the product of a progressively more inclusive, outward-looking view of Canadian citizenship,

becoming increasingly possible for non-resident citizens and their descendants to demonstrate a "genuine connection" with their ancestral country of origin that merits a continued claim to citizenship there. Non-resident adult citizens by descent may have a further moral obligation to their compatriots to maintain their citizenship status through a variety of contributions to the well-being of their ancestral country of origin and its citizens.

Conclusion

In this article, I have argued to ensure that children receive maximal protection as citizens of *a* state, countries should err on the side of including all persons born within their territorial jurisdiction as citizens, regardless of their parent's immigration and nationality status, and without prejudice to the parent's behavior and/or immigration violations. The importance of ensuring that children are granted *a* citizenship status at birth is so important that it should be constitutionally protected to prevent a political majority from discriminating against children based on their parent's immigration or nationality status, deterring parents from entering to give birth, or punishing children for their parent's actions, including immigration law violations.

It is also important to protect children's claims to citizenship in a country where they can return with their parents by ensuring that they can acquire citizenship by descent. Even beyond the first generation, descendants of children born abroad (external citizens) may have strong claims to the rights and duties of citizenship based on enduring ties to their ancestral country of origin. These may include historical responsibilities for past injustice, social, economic, and political contributions, and demonstrated attachment and identity with the current political community. While resident citizens admittedly have strong interests in eventually drawing a limit to claims to citizenship based on ancestry, or translating these claims into immigration preferences, they should consider a wide range of connections between external citizens and their country of ancestral origin as claims to citizenship extending beyond residence. At the very least, every descendant of a citizen that would otherwise be stateless in his or her country of habitual residence should also be included as an external citizen by descent at birth.

These normative recommendations have broader policy implications for current and proposed changes to Canada's citizenship laws by territorial birth and descent. In recent years, Canada has receded from its commitment to inclusive citizenship laws and protection for newborns by excluding the children of external citizens born abroad from citizenship through legislation with minimal protections against statelessness, and an overly narrow understanding of the ties that link external citizens to Canada beyond residence and government employment. The non-symbolic financial benefit of this change for current residents is unclear, given residence-based limitations on most social welfare benefits from Canadian jurisdictions.

The potential cost of this change to external citizens' right to return in practice is high. External Canadian citizens may be able to return as individuals, but face limitations on their ability to do so as families if their dependent children born abroad are not entitled to citizenship at birth. Their foreign-born children may not be entitled to citizenship in their country of birth, as many countries primarily rely on descent-based citizenship laws, thereby facing statelessness. For these reasons, Canadian policymakers ought to consider restoring access to citizenship to the

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whereby "citizenship, not residence, defines our political community. . . " (¶35).

third generation of citizens born abroad, making retention of their citizenship as adults conditional upon their return to Canada, or substantial contributions to the country.

Second, to protect Canadian-born children's rights to a citizenship status, and to avoid discriminating against them based on the actions, national origins or immigration status of their parents, Canada should also retain territorial birthright citizenship. Moreover, for the same reasons, future Canadian governments ought to consider lifting all remaining restrictions on territorial birthright citizenship based on a parent's allegiance or diplomatic status, entrenching a simple rule in the Charter of Rights and Freedoms guaranteeing citizenship to all children born in Canada, or born abroad to Canadian citizens, without limitations.

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