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## A CITIZENSHIP MARKET

Kit Johnson\*

*Imagine a global marketplace in which private citizens could freely swap their citizenship. Participants might agree on a pure one-for-one trade or a swap with a cash payment on one side of the deal. What might the implications of such a citizenship market be? This Article explores the possibilities in terms of individual rights and economic efficiency.*

*The United States already comes close to selling citizenship—by prioritizing investors who bring capital with them and by pursuing reforms to quantify would-be migrants' potential economic contributions. Other governments go further, issuing a passport in return for a cash payment. Yet these government-directed systems can make no meaningful claims of maximizing human rights or economic efficiency.*

*By contrast, a free market for citizenship would recognize that individuals ought to be able to define their own place in the world rather than have their place in the world prescribed for them by the state or allocated to them by accident of birth. In this way, a citizenship market could be seen as advancing individual rights. Moreover, from a law-and-economic standpoint, a free-market regime for individual trading would have straightforward economic efficiency gains: People would strike mutually advantageous deals such that citizenship would be put in the hands of those who could make the most productive use of it.*

*There are well-placed objections to a citizenship market, and this Article imagines and considers many. In wrestling with the idea of a citizenship market, this Article aims to contribute to thinking about immigration law, law-and-economics scholarship, and the multidisciplinary open-borders literature.*

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## I. INTRODUCTION

Retired judge Jim Macken recently offered to swap his Australian citizenship with that of a single refugee currently held in one of Australia's two remote detention camps.<sup>1</sup> Macken said he “would consider it a privilege to live out [his] final years in either Nauru or Manus Island in [a refugee's] stead.”<sup>2</sup> And while he has acknowledged that his proposal “could be considered too novel for government,” he also declared it “perfectly possible.”<sup>3</sup>

This Article imagines a market for citizenship in which individuals, like Macken, could freely trade their citizenships. Perhaps surprisingly, this idea

1. Ben Doherty, *Retired judge, 88, offers 'body swap' with a refugee on Manus or Nauru*, THE GUARDIAN (Aug. 31, 2016), <https://www.theguardian.com/australia-news/2016/sep/01/retired-judge-88-offers-body-swap-with-a-refugee-on-manus-or-nauru>. At the time of Macken's offer, the remote islands of Manus and Nauru bore Australian-run offshore detention facilities for refugees and asylum-seekers denied entry to Australia. *Id.* Macken explained, “I understand this is an unusual request but I offer it in complete sincerity. My reason for making this proposal is simple. I can no longer remain silent as innocent men, women and children are being held in appalling circumstances on Manus Island and Nauru.” *Id.*

2. *Id.*

3. *Id.*

seems not to have been previously proposed or examined.<sup>4</sup> Yet the argument in favor of a citizenship market is a straightforward matter of neoclassical economics: A market would allow mutually beneficial trades, putting citizenship status to its best use.

While the idea of a citizenship market is new, it finds an antecedent in the vast, established literature on open borders, which explores the idea of allowing unrestrained movement of individuals among sovereign states. There is a strong case to be made for open borders, and support for the idea is eclectic. Proponents come both from the political left and right, and arguments in favor of open borders have been framed in terms of economic efficiency as well as individual rights.<sup>5</sup> From an economic standpoint, open borders—as the free movement of persons—is thought to be welfare-maximizing in the same way as free trade, being the free movement of goods and capital. In both cases, the argument is that the flourishing of economic liberty should make all nations better off and raise global economic welfare.<sup>6</sup> From an individual-rights perspective,<sup>7</sup>

4. Two writers have suggested a private market in citizenship, though both regarded only the sale and not the trade of citizenship. See Jawad B. Muaddi, *The Alienable Elements of Citizenship: Can Market Reasoning Help Solve America's Immigration Puzzle?*, 56 EMORY L.J. 229, 230 (2006) (“envision[ing] a program in which citizens could sell their right to temporary residency; the seller would leave the country but would maintain his citizenship; the buyer would receive a temporary visa”); Dwight R. Lee, *Let immigrants, street people make a deal*, THE ATLANTA JOURNAL-CONSTITUTION, Apr. 14, 2006 (a short op-ed by an economist positing, “Give Americans the right to sell their citizenships to non-Americans,” and suggesting sellers would have to leave and use proceeds from the sale to obtain permission to remain somewhere else). Nearly all other market-like immigration proposals have focused on public as opposed to private solutions. See, e.g., Barry R. Chiswick, *The Impact of Immigration on the Level and Distribution of Economic Well-Being*, in THE GATEWAY: U.S. IMMIGRATION ISSUES AND POLICIES 289, 290 (Barry R. Chiswick ed., 1982) (proposing increased visa fees or differential tax rates as a means for rationing admissions); Julian L. Simon, *Auction the Right to be an Immigrant*, N.Y. TIMES, Jan. 28, 1986, at A25 (proposing a government auction for visas); Gary S. Becker, *Why Not Let Immigrants Pay For Speedy Entry*, BUSINESS WEEK, March 2, 1987, at 20 (same); Gary S. Becker, *An Open Door For Immigrants—The Auction*, WALL STREET JOURNAL, Oct. 14, 1992, at A14 (same); Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1155 (1997) [hereinafter Chang 1997] (describing an optimal tariff); Gary S. Becker, *Sell the Right to Immigrate*, BECKER-POSNER BLOG (Feb. 21, 2005), <http://www.becker-posner-blog.com/2005/02/sell-the-right-to-immigrate-becker.html> [hereinafter Becker 2005] (“[c]ountries should sell the right to immigrate”). The writing of Peter Schuck on an international market for the sharing of refugees is also notable, though it too offers a public solution. See Peter Schuck, Opinion, *Share the Refugees*, N.Y. TIMES (Aug. 13, 1994), <http://www.nytimes.com/1994/08/13/opinion/share-the-refugees.html>; Peter H. Schuck, *Refugee Burden Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243, 248–49 (1997) [hereinafter Schuck 1997].

5. Alex Tabarrok, *The Case for Getting Rid of Borders—Completely*, THE ATLANTIC (Oct. 10, 2015), <https://www.theatlantic.com/business/archive/2015/10/get-rid-borders-completely/409501/> (“The argument for open borders is both economic and moral. All people should be free to move about the earth, uncaged by the arbitrary lines known as borders.”).

6. Many economists and economics-focused law professors have concluded that liberalization of immigration restrictions could produce significant economic gains. See, e.g., Bob Hamilton and John Whalley, *Efficiency and Distributional Implications of Global Restrictions on Labour Mobility*, J. DEV. ECON., Jan.-Feb. 1984, at 61 (calculating efficiency gains from liberalized global labor migration); Chang 1997, *supra* note 4, at 1150 (“it should be apparent that the potential gains from international trade in labor (and the costs we bear as a result of immigration barriers) are large”); HOWARD F. CHANG, LAW AND ECONOMICS OF IMMIGRATION xi-xii (2015) [hereinafter CHANG 2015] (outlining the economic benefits of labor migration); Jonathon W. Moses and Bjørn Letnes, *The Economic Costs to International Labor Restrictions: Revisiting the Empirical Discussion*, in CHANG 2015, *supra*, at 3 (updating Hamilton and Whalley’s research and finding “the estimated efficiency gains from liberalizing immigration controls have only increased over time”); Michael A. Clemens, *Economics*

the argument is that an open-borders regime would promote personal freedom and a just social order.<sup>8</sup>

There is, however, one glaring problem with an open-borders policy: oversubscription. A Gallup poll found that some 147 million adults worldwide would like to move to the United States.<sup>9</sup> If all those individuals were allowed into the United States at once, the U.S. population would increase by 50%.<sup>10</sup> Other countries face similar pent-up demand.<sup>11</sup> The radical short-term population shifts that would be brought about with open borders plainly seem to be untenable. And while the open-borders literature has discussed this problem at great length, no widely accepted solution has emerged.<sup>12</sup>

This Article explores whether a private citizenship market might gain the main advantages of an open-borders policy while eliminating its greatest weakness. Transactions on the citizenship market might involve transfers of money, or they might not. But trades would always entail a one-for-one swap of citizenship, and this structure would foreclose any question of oversubscription. Thus, this Article means both to contribute to and to challenge the open-borders literature by suggesting a way around its biggest problem.

The ramifications of considering a citizenship market, however, go far beyond the open-borders debate. In proposing and exploring the idea of a citi-

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*and Emigration: Trillion-Dollar Bills on the Sidewalk?*, in CHANG 2015, *supra*, at 21 (examining economic losses from restraints on emigration); George J. Borjas, *The Economic Benefits from Immigration*, in CHANG 2015, *supra*, at 45; John Kennan, *Open Borders*, REV. ECON. DYNAMICS, April 2013, L1, L11 (“If free movement of goods is important, then surely free movement of people is even more important.”); *see also* Tito Bruecker & Richard Portes, *It Makes Economic Sense to Open Borders*, FINANCIAL TIMES, June 10, 2005, at 19; *Let the huddled masses in*, THE ECONOMIST (Mar. 29, 2001), <http://www.economist.com/node/554349> (“just as the free movement of capital, of goods and of profits benefits economies, so does the free movement of labour”).

7. *See* Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L. J. 1211, 1218–24 (2014) [hereinafter Johnson, *Theories*] (describing “individual rights” as one of the four theories that explains why the United States chooses to grant or deny membership to certain prospective migrants).

8. Legal scholars and political theorists alike have touted the liberty benefits of open borders. *See, e.g.*, Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 251 (1987) [hereinafter Carens 1987]; Mark Tushnet, *Immigration Policy in Liberal Political Theory*, in JUSTICE IN IMMIGRATION 147, 155 (Warren F. Schwartz ed., 1995); Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 205–14 (2003) [hereinafter Johnson 2003]; KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICAN NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 168 (2007) [hereinafter JOHNSON 2007].

9. John Clifton, *Coming to America*, GALLUP, June 28, 2017, <http://news.gallup.com/opinion/gallup/212687/coming-america.aspx> (last visited Apr. 2, 2018) (4% of the world’s adult population). To put that figure in perspective, there are some 327 million people living in the United States at present. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (last visited Apr. 2, 2018). Of those millions interested in coming to the United States, over nine million applied for a shot at one of 50,000 diversity visas available in FY 2014 and FY 2015. *See* DIVERSITY VISA PROGRAM, DV 2013–2015, U.S. DEP’T STATE, <https://travel.state.gov/content/dam/visas/Diversity-Visa/DVStatistics/DVApplicantEntrantsbyCountry%202013-2015.pdf> (last visited Apr. 2, 2018).

10. *See U.S. and World Population Clock*, *supra* note 9.

11. *See, e.g.*, Jess McHugh, *What’s Driving Refugee Migration to Germany?*, INT’L BUSINESS TIMES (Sept. 5, 2015), <http://www.ibtimes.com/whats-driving-refugee-migration-germany-2084566> (discussing refugees’ desire to migrate to Germany).

12. *See infra* Part II.

zanship market, this Article aims to make a number of contributions both to immigration law scholarship and to law-and-economics scholarship. Considering a market for citizenship offers a means to expand and challenge our thinking about immigration law in the same way that law-and-economics analyses have expanded and challenged our understanding of torts, contracts, and other fields of law. And in a complimentary fashion, this Article aims to enrich the law-and-economics literature by bringing economic logic to bear on one legal construct—citizenship—that it has yet to tackle. Perhaps most importantly, mulling over a market for citizenship forces us to re-evaluate our conceptions at the deepest level, of the idea of citizenship itself, a construct as fundamental as any to the modern ordering of law and society.

Let us consider some hypothetical market participants: Aiesha is single, twenty-five years old, and a U.S. citizen who loves everything British. She reads *The Guardian* every day and listens to the BBC World Service on her phone. Priya is single, twenty-five years old, and a U.K. citizen who loves everything American. She listens to *On Air with Ryan Seacrest* over the internet, and, to satisfy her chocolate cravings, she consistently passes up Cadbury Buttons for Hershey's Kisses. Aiesha and Priya would like to trade citizenships to cure each one's feelings of citizenship dysphoria.<sup>13</sup> Right now, they cannot. But should they be allowed to do so? Such a trade would make both Aiesha and Priya better off, and it would recognize each woman as having the fundamental capacity to decide for herself who she is in relation to the world.

Now consider Charles, who was born in the United States and is a U.S. citizen. Charles, who was always happy to be an American, was a diligent saver throughout his career, but he lost every penny in a too-good-to-be-true investment opportunity that turned out to be a Ponzi scheme. Now in his seventies, Charles has no money on which to live out the remainder of his days. Charles could apply for public assistance, or he could sell his U.S. citizenship and retire on the proceeds. He would like to live in Ecuador, Panama, Mexico, or Costa Rica.<sup>14</sup> And he is willing to swap citizenships for the right price.

Should Charles be allowed to trade his citizenship with the highest bidder from a country he would like to call home? Perhaps he should.

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13. Citizenship dysphoria is very real. See, e.g., *Getting a Hong Kong Passport, Becoming a Chinese National*, VARSITY (Jan. 10, 2013), <http://varsity.com.cuhk.edu.hk/index.php/2013/01/ethnic-minorities-chinese-passports/> (discussing the problems faced by Hong Kong-born children of permanent residents in getting a Hong Kong Special Administrative Region passports). Varsity interviewed the first documented ethnic minority person with no Chinese relatives to obtain an HKSAR passport: Vehka Harjani. *Id.* Of her nationality, Harjani said: "I was born in Hong Kong, I was raised in Hong Kong. Inside, I feel like my nationality is more of a Hong Kong person, that's why I wanted to apply for the Hong Kong passport." *Id.* In the United States, advocacy by "DREAMers," noncitizens brought to the United States as children and without lawful status, has centered on the "disjunctive" between "formal legal status" and "American identity." Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 103 (2013).

14. I pick those countries as examples because they were named as among the top five countries in which to retire. See Kathryn Dill, *The Top Countries To Retire To In 2015*, FORBES (Jan. 12, 2015), <https://www.forbes.com/pictures/fjle45kgkl/the-top-25-countries-to-retire-to-in-2015/#5303a4773c2c>.

At a visceral level, we may be leelier of Charles's proposed bargain than of Aiesha's. But why? The fact is that citizenship is already for sale in many parts of the world—including, if one counts fast-track citizenship for investors, the United States.<sup>15</sup> It turns out that if a would-be migrant has significant reserves of cash on hand, there are many countries willing to make that person a citizen and issue a passport in return for either an explicit cash payment or a substantial business investment. Thus, countries have already widely commodified immigration, despite officially professing an ethos of noncommodification.<sup>16</sup> The difference between actual practice and the official line seems explainable by the fact that public opinion tilts strongly against selling citizenship.<sup>17</sup> A survey of U.S. citizens in 1999 revealed that 67% were against the idea of selling citizenship.<sup>18</sup>

Despite an emotional reaction against it, there is an ineluctable economic logic that favors a thriving trade in citizenship.<sup>19</sup> For no trade would take place unless each party believed it would be made better off. And countries should, on the whole, end up with a happier and more loyal citizenry.

In the end, perhaps what is most compelling about the idea of a citizenship market is that it extends the logic of both the conservative law-and-economics side of legal scholarship and the liberal human-rights-centered side—and yet the idea is simultaneously prickly to both camps. This symmetry suggests that wrestling with the idea could be instructive.

Part I of this Article reviews the open-borders literature, with a particular eye to how it lends support to the idea of a citizenship market. Part II provides context for questions surrounding individual sale and transfer of citizenship by exploring global examples of citizenship transfers. Part III discusses the benefits of a private citizenship market in terms of individual rights and economics. Part IV confronts anticipated criticisms of a private citizenship market, including concerns of equality, efficiency, and inalienability.

## II. THE CASE FOR OPEN BORDERS

Sovereign states are defined by their physical borders. Correspondingly, they steadfastly guard their prerogative to determine who will be a citizen—

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15. See *infra* Section III.B.

16. Eleanor Marie Lawrence Brown, *Visa as Property, Visa as Collateral*, 64 VAND. L. REV. 1047, 1101 (2011).

17. Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 294 (2002) (noting “the distastefulness of placing the American dream on the auction block”); cf. Stephen J. Dubner and Steven D. Levitt, *Flesh Trade*, N.Y. TIMES (July 9, 2006), [http://www.nytimes.com/2006/07/09/magazine/09wwln\\_freak.html](http://www.nytimes.com/2006/07/09/magazine/09wwln_freak.html) (discussing the “repugnance” towards a market in human organs).

18. Shaheen Borna & James M. Stearns, *The Ethics and Efficacy of Selling National Citizenship*, 37 J. OF BUS. ETHICS 193, 196 (2002); see also Brown, *supra* note 16, at 1102 (“a majority of U.S. citizens oppose proposals to auction visas”).

19. See *infra* Section IV.C.

meaning, in essence, who will have membership rights within those borders.<sup>20</sup> Countries also defend the corollary privilege to exclude others from crossing their physical boundaries in order to seek membership.<sup>21</sup> They do this in consonance with the view of Eighteenth-Century philosopher, Immanuel Kant, who posited that it is the “prerogative of the republican sovereign” to grant membership in the nation, and any such grant involves a pure act of “beneficence” that can just as easily be denied.<sup>22</sup>

While this “prerogative” has long been widely accepted, the open-borders literature has interrogated it at length. Philosophers, political scientists, and legal scholars alike have debated whether nations have any right to exclude migrants from physical entry or membership.

Political theorist Joseph Carens has led the vanguard on this issue.<sup>23</sup> Carens challenges the accepted wisdom that the state has a moral or legal right to exclude noncitizens out of a concern for its own national interest.<sup>24</sup> Instead, he argues, “borders should generally be open and . . . people should normally be free to leave their country of origin and settle in another, subject only to the sorts of constraints that bind current citizens in their new country.”<sup>25</sup> Carens likens citizenship to “feudal privilege” and suggests that citizenship is just as difficult as feudal privilege to justify in moral terms.<sup>26</sup>

Citing John Rawls and Robert Nozick, Carens concludes that free migration is a human right.<sup>27</sup> In particular, Carens focuses on the idea that liberal theory cannot support exclusion.<sup>28</sup> He demands an answer to the question of why some people should be entitled to an inside track on the good life at the cost of excluding others.<sup>29</sup>

While Carens has “qualified” his open-borders approach in later works,<sup>30</sup> he remains convinced that there are few, if any, deep-level plausible justifica-

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20. See MICHAEL WALZER, SPHERES OF JUSTICE 31–63 (1983) (discussing how membership is constituted, focusing on communitarian principles).

21. *Id.*

22. See IMMANUEL KANT, TO PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795), <https://www.mtholyoke.edu/acad/intrel/kant/kant1.htm>; see also SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS 65 (2004) (discussing Kant’s views).

23. Carens 1987, *supra* note 8, at 251. While Carens may have led the vanguard as the most notable voice on the issue of open borders, he was by no means the first. See, e.g., Roger Nett, *The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth*, 81 ETHICS 212 (1971) (discussing the advantages and disadvantages of “free and open migration”); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 85 (1984) (“[I]n a truly liberal polity, it would be difficult to justify a restrictive immigration law or perhaps any immigration law at all.”).

24. Carens 1987, *supra* note 8, at 251.

25. *Id.*

26. *Id.* at 252.

27. Joseph H. Carens, *A Reply to Meilaender: Reconsidering Open Borders*, INT’L MIGRATION REV. 1082, 1095 (1999) [hereinafter Carens 1999].

28. *Id.* at 1082; see also Tushnet, *supra* note 8, at 155 (“As a matter of principle, liberals ought to be committed to relatively unrestricted immigration policies.”).

29. Carens 1999, *supra* note 27, at 1084.

30. *Id.* at 1083.

tions for restricting migration.<sup>31</sup> For if we take the equal moral worth of all individuals worldwide seriously, he argues, then closed borders cannot be justified.<sup>32</sup>

Carens notes that the free movement authorized within the European Union<sup>33</sup> is proof that movement across borders does not diminish sovereignty.<sup>34</sup> After all, one cannot raise serious doubts about the sovereignty of Germany even if Germany cannot control immigration from other EU states.<sup>35</sup> The fact that the EU freed movement within its boundaries for economic rather than individual-rights reasons only strengthens Carens's analysis, as he sees it, writing: "[C]ontrol over borders is most often essential to protect a community when that community is so economically privileged relative to others, that many people would consider moving there. Restrictions on migration usually serve as a protection for economic and political privilege."<sup>36</sup> And protection of that privilege, in Carens's view, is unjustified. His call for open borders is an effort to "question the complacent certitude that there is nothing fundamentally wrong with the way we have constructed our collective lives and with our decisions to exclude others from the social resources we enjoy."<sup>37</sup>

Perhaps surprisingly, given his advocacy, Carens ultimately does not see open borders as a "concrete recommendation" for action.<sup>38</sup> Rather, he believes the argument in favor of open borders serves a "heuristic function, revealing to us something about the specific character of the moral flaws of the world in which we live, the institutions we inhabit, and the social situation of those who dwell in rich industrial states."<sup>39</sup>

In contrast, when legal scholar Kevin R. Johnson argues in favor of eliminating the "legal construct" of borders, he "calls for consideration of no less than a revolutionary change in immigration law."<sup>40</sup> Johnson cites Carens and

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31. *Id.* at 1084; *see also* PHILLIP COLE, *PHILOSOPHIES OF EXCLUSION: LIBERAL POLITICAL THEORY AND IMMIGRATION* xii (2000) ("[A]sking how anybody, regardless of their circumstances, can legitimately be excluded from our political community.").

32. Carens 1999, *supra* note 27, at 1089.

33. For a brief summary of the main "organs" of the European Union, "an economic and political partnership between 27 European nations," *see* Stella Burch Elias, *Regional Minorities, Immigrants, and Migrants: The Reframing Of Minority Language Rights in Europe*, 28 *BERKELEY J. INT'L L.* 261, 263 n.12 (2010).

34. Carens 1999, *supra* note 27, at 1090.

35. *Id.* One need not cross the Atlantic to find an example of open migration. The United States did not enact comprehensive federal immigration legislation until 1870s or 1880s, leaving migration to this country largely unrestricted. *See* RYAN PEVNICK, *IMMIGRATION AND THE CONSTRAINTS OF JUSTICE: BETWEEN OPEN BORDERS AND ABSOLUTE SOVEREIGNTY* 78 (2011); Gerald L. Neuman, *The Lost Century of Immigration Law (1776-1875)*, 93 *COLUM. L. REV.* 1833 (1993) (noting, however, that states did restrict immigration during this period). Yet, as with the 1834 EU example, there is no question that the United States was an effective sovereign nation during this time of relatively free migration.

36. Carens 1999, *supra* note 27, at 1090.

37. Joseph H. Carens, *Open Borders and Liberal Limits: A Response to Isbister*, *INT'L MIGRATION REV.* 636, 640 (2000) [hereinafter Carens 2000].

38. *Id.* at 643.

39. *Id.*

40. Johnson 2003, *supra* note 8, at 196, 205-14; *see also* JOHNSON 2007, *supra* note 8, at 1 (titling Chapter 1 "A Call for Truly Comprehensive Immigration Reform").

others who emphasize individual rights in liberal theory.<sup>41</sup> But he also makes new arguments, citing “serious moral concerns regarding the human impacts of border enforcement.”<sup>42</sup>

Specifically, Johnson points out that immigration laws in the United States have historically been designed to discriminate on the basis of race,<sup>43</sup> and border enforcement efforts have been racially charged and violent.<sup>44</sup> Moreover, thousands of migrants die annually trying to cross borders,<sup>45</sup> while those who do make it often suffer exploitative labor practices.<sup>46</sup>

In addition to citing the negative effects of current border restrictions, Johnson cites the potential economic benefits of open borders.<sup>47</sup> Here, Johnson’s work dovetails with that of the many economists who agree that opening borders will lead to economic benefits.<sup>48</sup>

Johnson also brings other policy arguments to bear. He notes that open borders are consonant with an understanding that perfect enforcement of the border will never be possible.<sup>49</sup> He highlights that Americans do not, by and large, view unauthorized migration or the employment of undocumented migrants as criminal.<sup>50</sup> And he points out that unauthorized migrants in the U.S. are contributing to the economy even as they are exploited.<sup>51</sup> Moreover, if borders are opened, government officials will be able to focus their limited resources not on the many seeking economic opportunity in the United States, but on those few who pose the greatest danger to the community.<sup>52</sup> Finally, Johnson persuasively argues that foreign policy gains will be possible if migrants are “welcomed rather than labeled a public menace, barred from entry, and treated as pariahs.”<sup>53</sup>

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41. JOHNSON 2007, *supra* note 8, at 92–95.

42. Johnson 2003, *supra* note 8, at 200. Teresa Hayter, in her book *OPEN BORDERS: THE CASE AGAINST IMMIGRATION CONTROLS 1–7* (2d ed. 2004), makes similar arguments about borders globally.

43. Johnson 2003, *supra* note 8, at 215–18.

44. JOHNSON 2007, *supra* note 8 at 107–11; Johnson 2003, *supra* note 8, at 218–24.

45. JOHNSON 2007, *supra* note 8, at 111–16; Johnson 2003, *supra* note 8, at 221–24; *see also* INTERNATIONAL ORGANIZATION FOR MIGRATION, *FATAL JOURNEYS, TRACKING LIVES LOST DURING MIGRATION 54* (Tara Brian & Frank Laczko eds., 2014) (estimating 6,000 deaths along the U.S.-Mexico border between 1998 and 2013); *IOM Monitors Latest Migrant Arrivals, Deaths in Mediterranean*, INT’L ORG. FOR MIGRATION (Oct. 6, 2015), <https://www.iom.int/news/iom-monitors-latest-migrant-arrivals-deaths-mediterranean> (calculating nearly 3,000 deaths this year in the Mediterranean).

46. JOHNSON 2007, *supra* note 8, at 119–25; Johnson 2003, *supra* note 8, at 226–30; *see also Rape in the Fields* (Frontline and Univision television broadcast, June 25, 2013) (documentary investigating the rape of undocumented female workers in the United States).

47. JOHNSON 2007, *supra* note 8, at 131–43 (Chapter 4: The Economic Benefits of Liberal Migration of Labor Across Borders); Johnson 2003, *supra* note 8, at 200.

48. Many economists have concluded that liberalization of immigration restrictions could produce significant economic gains. *See, e.g.*, CHANG 2015, *supra* note 6, at xi-xii; Borjas, *supra* note 6, at 45; Clemens, *supra* note 6, at 21; Moses and Letnes, *supra* note 6, at 3.

49. JOHNSON 2007, *supra* note 8, at 200–11.

50. *Id.* at 264.

51. *Id.*

52. *Id.* at 203–04.

53. *Id.* at 264.

Despite these wide-ranging philosophical, economic, and policy-based arguments in support of open borders, what Carens, Johnson, and others<sup>54</sup> have been unable to do is offer a satisfactory response to the concern that unrestricted migration will overwhelm those nations to which many would like to migrate, fundamentally changing the receiving countries in the process.

This oversubscription problem has caused some to step back from supporting a pure form of open borders. Carens, for example, accepts that “some limitations on immigration might be justifiable in some circumstances,” but he says that there must be a justification for such exclusions.<sup>55</sup> Ultimately, Carens punts the issue entirely, since the question of numbers becomes moot when he eventually characterizes his proposal as nothing more than a thought experiment.<sup>56</sup>

Johnson, for his part, believes the “floodgates” fear is overblown: “Most people have no inclination to leave their native soil, no matter how onerous conditions become.”<sup>57</sup> And for those who worry that a large influx of migrants would work a cultural shift, Johnson notes that large numbers of migrants are already coming (without authorization), and any opposition to migration on the basis of culture would be inapposite to our country’s antidiscrimination laws.<sup>58</sup>

As for the economists, they have responded to the numbers challenge by positing that mass migration will end at the point when it’s no longer economi-

54. Carens and Johnson are not the only advocates of open borders. *See, e.g.*, MICHAEL DUMMETT, ON IMMIGRATION AND REFUGEES 78 (2001) (“[T]he principle of open borders will be . . . the ideal to be attained . . .”); ROBERT GUEST, BORDERLESS ECONOMICS: CHINESE SEA TURTLES, INDIAN FRIGDES AND THE NEW FRUITS OF GLOBAL CAPITALISM 220 (2011) (“Someday, I would like to see a world where people can move as freely from one country to another as they currently do from one American state to another.”); POPE JOHN XXIII, PACEM IN TERRIS 25 (1963), [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html) (“[E]very human being has the right to freedom of movement and of residence within the confines of his own State. When there are just reasons in favor of it, he must be permitted to emigrate to other countries and take up residence there.”); Robert L. Bartley, *Thinking Things Over: Liberty’s Flame Beckons a Bit Brighter*, WALL ST. J., July 3, 2000, at A13 (discussing the paper’s proposal for a constitutional amendment: “There shall be open borders.”); Letter from Milton Friedman to Henryk Kowalczyk (Oct. 16, 2006), <https://www.freedomofmigration.com/wp-content/uploads/2012/02/Friedman-20061016.pdf> (“There is no doubt that free and open immigration is the right policy in a libertarian state . . .”); J.V. Rudd, *J.V. Rudd: Immigration: Let Them All In*, DAILY CAMERA (Nov. 5, 2015), [http://www.dailycamera.com/guest-opinions/ci\\_29077128/j-v-rudd-immigration-let-them-all](http://www.dailycamera.com/guest-opinions/ci_29077128/j-v-rudd-immigration-let-them-all) (“The real solution to our ‘immigration problem’ is to open up the borders. Let everyone in.”).

55. Carens 1999, *supra* note 27, at 1083.

56. Carens 2000, *supra* note 37, at 643.

57. Johnson 2003, *supra* note 8, at 201, citing ALAN DOWTY, CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT 223 (1987). Poet Warsan Shire has made this point profoundly in her poem *Home*. Warsan Shire, *Home*, in LONG JOURNEYS. AFRICAN MIGRANTS ON THE ROAD xi-xii (Alessandro Triulzi and Robert Lawrence McKenzie eds.) (“you only leave home / when home won’t let you stay.”). Economists make the point as well. *See* Kennan, *supra* note 6, at 12 (“One might initially expect that in a world with open borders, everyone would move to the most productive location. But this ignores the strong attachment to home locations that is evident in the data.”).

58. Johnson 2003, *supra* note 8, at 203.

cally beneficial for migrants to leave their home countries.<sup>59</sup> In other words, they assume that the system will peacefully reach an equilibrium point. But this response—what we can call the “marginal-benefit-limit argument”—rests on an assumption that migrants would have both perfect information about the destination country and would assess that information perfectly before making their decision to migrate, such that no migrant would seek an entry that would put them at an economic disadvantage. Such an assumption seems dubious and is unsupported by empirical evidence. The marginal-benefit-limit argument also ignores the fact that the receiving nation might change radically before migration comes to a halt on its own. In addition, this argument leaves wide open the possibility that those persons who are not immigrants—persons living in the receiving country before the borders are opened—might well be made worse off by the sudden population increase.<sup>60</sup>

In the end, the proponents of open borders have not offered a satisfying answer to the problem of oversubscription. Yet, the benefits identified in the open-borders literature are tantalizing. So the question becomes this: How could we avail ourselves of the benefits of open borders without succumbing to its greatest weakness? A private citizenship market just might be a plausible answer.

### III. CURRENT OPTIONS FOR CHANGING CITIZENSHIP

A citizenship market is not as radical of an idea as it might first seem. Countries around the globe currently allow individuals to naturalize, which is to say that countries offer individuals a means by which they can voluntarily change their citizenship. And some countries allow individuals to pay for the privilege of naturalization.<sup>61</sup> But governments currently act as monopolists—they alone hold the power to make new citizens.<sup>62</sup> The only nongovernmental transactions in citizenship involve black-market purchases.

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59. After all, migration itself takes place only when the migrant’s “expected lifetime earnings in the destination country exceed his expected earnings in the source country.” Anu Bradford, *Sharing the Risks and Rewards of Economic Migration*, 80 CHI. L. REV. 29, 32 (2013).

60. Professor Bradford argues that “the presumed gains to domestic employers, who would benefit from the increase in the supply of workers, and to domestic consumers, who would gain access to the goods and services produced with those workers” would offset such losses. *Id.* at 34.

61. See Jeff Veteto, *The Alienability of Allegiance: An International Survey of Economic Citizenship Laws*, 48 INT’L LAW. 79, 92–102 (2014) (surveying global programs); see also Kit Johnson, *Buying the American Dream: Using Immigration Law to Bolster the Housing Market*, 81 TENN. L. REV. 829, 852–57 (2014) [hereinafter Johnson, *Dream*] (discussing global practices of exchanging citizenship for real estate and other financial investments); Graham Messick & Evie Salomon, *Passports for Sale*, 60 MINUTES (CBS television broadcast, Jan. 1, 2017), <https://www.cbsnews.com/news/60-minutes-citizenship-passport-international-industry/>.

62. The 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws, of which the United States is not a signatory, proceeds from exactly this position: “It is for each State to determine under its own law who are its nationals . . . . Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State.” Convention on Certain Questions Relating to the Conflict of Nationality Laws, Art. 1 & 2, Apr. 12, 1930, 179 LNTS 89, <http://www.unhcr.org/refworld/docid/3ae6b3b00.html>.

A. *Basic Citizenship Changes*

Citizenship around the globe is largely determined on a random basis by virtue of where one is born or who one's parents are.<sup>63</sup> But citizenship is not immutable. In many countries, individuals have the opportunity to change their citizenship through naturalization, a process that allows individuals, after following a series of prescribed steps, to take on a new citizenship different from the one they were born into.<sup>64</sup>

Naturalization is a process dictated by sovereign nations. An individual cannot naturalize without the help and consent of the nation. And, critically, any change in citizenship through naturalization is just that—a change and not an exchange. It is a process that affects a single individual.<sup>65</sup>

It is also typically a lengthy process. Take the United States. The path to citizenship begins with lawful permanent resident (“LPR”) status.<sup>66</sup> Yet, obtaining this status can take decades. Consider this example: Lupe became a naturalized U.S. citizen in 1997. Lupe would like to bring her daughter, Maria, to the United States. Maria lives in Mexico and is a citizen of Mexico. When Lupe became a U.S. citizen, Maria was unmarried but over twenty-one years old.<sup>67</sup> If Lupe filed immigration paperwork on behalf of Maria in September of 1997, and if Maria has remained unmarried all this time, Maria is just now eligible to come to the United States.<sup>68</sup> She will arrive on an immigrant visa, making her a lawful permanent resident—a so-called “green card” holder. Maria will have waited more than twenty years to come to the United States. When she arrives, Maria will not immediately be eligible for citizenship. She must file more paperwork, take a test, and, most importantly, wait an additional five years.<sup>69</sup>

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63. Citizenship based on where one is born is known as “jus soli,” and it is constitutionally grounded. U.S. CONST. amend. XIV (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”). Citizenship based on one's parentage is called “jus sanguinis,” and it is statutorily based. 8 U.S.C. § 1401(a) (“The following shall be nationals and citizens of the United States at birth”); 8 U.S.C. §§ 1402–1407, 1409; *see generally* Borna & Stearns, *supra* note 18, at 193.

64. *See* United States Office of Personnel Management Investigations Service, IS-1, *Citizenship Laws of the World* 4 (Mar. 2001), <http://www.multiplecitizenship.com/documents/IS-01.pdf>.

65. In the United States, this is not quite true. A parent who naturalizes will convey automatic citizenship on their under-18 children. 18 U.S.C. § 1431(a) (2012).

66. 8 U.S.C. § 1427(a)(1) (2012) (LPR status is a requirement for naturalization).

67. This would make Maria eligible for LPR status pursuant to 8 U.S.C. § 1153(a)(1) as an “F1” or first preference family member of her mother, a naturalized U.S. citizen. 8 U.S.C. § 1153(a)(1) (2012).

68. The U.S. Department of State maintains a “visa bulletin” that summaries the availability of immigrant visas. The February 2017 bulletin indicates that the United States is just now processing F1 applications filed in September of 1997. *See* U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, VISA BULLETIN FOR MARCH 2018, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-march-2018.html>.

69. *See* 8 U.S.C. § 1427 (2012) (setting out criteria for naturalization).

*B. Government Sales of Citizenship and Fast-Tracking Investors*

If twenty-five years seems too long to wait for citizenship, there are countries that offer a fast-track option—at a price.<sup>70</sup> In fact, citizenship is for sale around the globe, although it is commonly phrased in terms of “investment” in the receiving country.<sup>71</sup> That investment may take the form of financing private-sector assets or a direct payment to the government.<sup>72</sup> Terms of investment vary widely from method to timing, as well as in the quantity of cash required.

The small Caribbean country of Dominica, for example, offers citizenship after an investment of \$100,000 USD plus fees.<sup>73</sup> This can be a good deal since Dominica is a member of the Commonwealth of Nations, a group of fifty-three states that includes the United Kingdom, Canada, Australia, and other countries formerly connected through the British Empire.<sup>74</sup> Citizens of the Commonwealth of Nations share special privileges, such as travel, throughout the Commonwealth.<sup>75</sup> Potential citizens of Dominica wait between four and fourteen months for a passport,<sup>76</sup> which they can obtain without ever stepping foot on the island nation.<sup>77</sup>

The Mediterranean island nation of Malta also offers citizenship in exchange for cash, requiring an investment of at least €650,000 (\$689,000 USD) in the country.<sup>78</sup> Maltese citizenship has great value not so much because of the beautiful beaches along the archipelago that makes up the country, but because the nation is a member of the European Union<sup>79</sup> and part of the Schengen Visa zone.<sup>80</sup> As a result, Maltese citizenship opens the door to unrestricted travel throughout much of Europe.<sup>81</sup>

70. See *supra* note 61. The sale of citizenship is not a modern invention. The Bible recounts the following interaction between Saint Paul and a Roman commander: “The commander went to Paul and asked, ‘Tell me, are you a Roman citizen?’ ‘Yes, I am,’ he answered. Then the commander said, ‘I had to pay a big price for my citizenship.’ ‘But I was born a citizen,’ Paul replied.” *Acts* 22:27–28. A big thank you to Professor Natalie Banta for providing this example.

71. See Messick & Salomon, *supra* note 61 (visiting Dominica’s “Citizenship By Investment Unit”).

72. See Madeline Sumption and Kate Hooper, *Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration*, MIGRATION POL’Y INST. 1 (Oct. 2014).

73. For a little more money, you can purchase citizenship in St. Kitts and Nevis in exchange for a non-refundable \$250,000 donation to the St. Kitts and Nevis Sugar Industry Diversification Foundation, or a \$400,000 investment in real estate. Kim Gittleston, *Where is the cheapest place to buy citizenship?*, BBC NEWS, June 4, 2014, <http://www.bbc.com/news/business-27674135>.

74. *Id.*

75. Privileges are not uniform across the Commonwealth and vary from country to country. *Id.*

76. *Id.*

77. Messick & Salomon, *supra* note 61 (describing the purchase of Dominica passports as “mail order citizenship”).

78. Johnson, *Dream*, *supra* note 61, at 856–57.

79. See *supra* note 33, at 262 n.6.

80. The Schengen Zone was created in 1985. Citizens of the 28 signatory states of the Schengen Zone are free to travel within any other member state. See, e.g., Erin F. Delaney, *Justifying Power: Federalism, Immigration, and ‘Foreign Affairs,’* 8 DUKE J. CONST. L. & PUB. POL’Y 153, 156 n.9, 160 nn.28–30, and accompanying text (2013).

81. Johnson, *Dream*, *supra* note 61, at 855; Messick & Salomon, *supra* note 61.

Other countries offering citizenship in return for an investment include Antigua and Barbuda, Comoros, Cyprus, Grenada, Macedonia, St. Kitts and Nevis, and St. Lucia.<sup>82</sup>

The monies flowing into these nations as a result of passport sales have been significant; the prime minister of Antigua and Barbuda credits passport sales with turning his country's economy around.<sup>83</sup> In St. Kitts and Nevis, passport sales accounted for 40% of the country's revenue in 2014.<sup>84</sup> But participating countries have also experienced problems with corruption, reflected in missing passport revenues.<sup>85</sup>

Some countries do not offer straight cash-for-passport options, but they do offer a fast-track path to citizenship for investors. For example, since 1990, the United States has granted EB-5 immigrant visas to individuals who have invested, or are actively in the process of investing, capital of \$1 million<sup>86</sup> in a "new commercial enterprise" within the United States—or \$500,000 for certain "targeted employment areas"<sup>87</sup>—that will create full-time employment for at least ten U.S. citizens or lawful permanent residents.<sup>88</sup> The EB-5 visa is "current," meaning, in contrast to our example of Maria,<sup>89</sup> there is no wait time to obtain a visa.<sup>90</sup> The visa itself offers conditional residency status, which can convert to permanent residency after two years in the United States.<sup>91</sup> Three years after receiving permanent residency, an EB-5 investor can apply for naturalization to ultimately become a U.S. citizen.<sup>92</sup>

Programs similar to the EB-5 visa exist in other countries as well.<sup>93</sup> Although the required investment amounts vary, the United Kingdom, Canada,

82. Rick Noack, *7 Countries Where You Can Become a Citizen or Resident – If You Have the Cash*, WASH. POST (Dec. 3, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/12/03/7-countries-where-you-can-become-a-citizen-or-resident-if-you-have-the-cash/>; Veteto, *supra* note 61, at 92; Messick & Salomon, *supra* note 61.

83. Messick & Salomon, *supra* note 61.

84. *Id.*

85. *Id.*

86. Capital can include cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the entrepreneur. IRA J. KURZBAN, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK* 1105–06 (13th ed. 2012).

87. "Targeted employment areas" include rural areas with populations under 20,000 or areas of high unemployment at least 150% of the national average. 8 U.S.C. § 1153(b)(5)(B)(ii–iii) (2012).

88. 8 U.S.C. § 1153(b)(5)(A)(ii) (2012). Some lawmakers have proposed raising the capital investment required for this visa. Sophia Yan, *It May Get Harder for Rich Chinese to Buy Green Cards*, CNN MONEY (Oct. 12, 2015, 1:34 AM), <http://money.cnn.com/2015/10/11/news/eb-5-immigrant-investor-changes/> (discussing proposal to raise investment rates to \$1.2 million and \$800,000); see also EB-5 Immigrant Investor Program Modernization, 82 Fed. Reg. 4738 (Jan. 13, 2017) (proposing increases to \$1.8 million and \$1.35 million), <https://www.gpo.gov/fdsys/pkg/FR-2017-01-13/pdf/2017-00447.pdf>.

89. See *supra* notes 66–69 and accompanying text.

90. U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Visa Bulletin for February 2017* (2017), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2017/visa-bulletin-for-february-2017.html>.

91. 8 U.S.C. § 1186(b) (2012).

92. See *id.* § 1427(a)–(f) (setting out criteria for naturalization).

93. Veteto, *supra* note 61, at 93–34 (Brazil requires investment and 4 years as a permanent resident, while Bulgaria requires investment and 5 years as a permanent resident).

Australia, and New Zealand all have investor visas that share the same basic character as the EB-5.<sup>94</sup>

These examples—from Dominica to New Zealand—are all instances of countries that are, in essence, offering citizenship for sale. There are differences in whether that sale is immediate or delayed, how long the process of obtaining citizenship can take, and the level of financial investment required. But in every case, the economic reality undeniably is that citizenship is being sold.

Even beyond the pure sale of citizenship, countries are, more and more, looking to “engineer the economically perfect immigration policy.”<sup>95</sup> That is, they are looking to extend membership only to individuals who will concretely benefit the nation in an economic sense. In the United States, for example, the reform efforts of 2013 sought to establish “merit-based immigration” where would-be migrants could obtain permanent residency by accumulating points based on skills, employment history, and educational credentials.<sup>96</sup> Donald Trump, during his 2016 presidential election campaign, similarly called for migration based on “merit, skill, and proficiency.”<sup>97</sup> As president, Trump signed an executive order calling for evaluation of migrants’ “ability to make contributions to the national interest.”<sup>98</sup> While not explicitly offering citizenship for sale, as the EB-5 does, these efforts nonetheless extend the possibility of citizenship as a prize in exchange for individual achievement that will “make the country richer[.]”<sup>99</sup>

### C. *Black-Market Purchases*

In the above examples, new citizenship is obtainable, but only with the help and assent of a sovereign nation. If an individual seeks to obtain a new citizenship on his or her own, without the involvement of any government, the only way to so do is through the black market.

The most direct example of a black-market purchase of “citizenship” would be the illegal acquisition of citizenship documents. Citizenship here is in quotes because new citizenship is not truly obtainable without the consent of the governing nation. But an individual could create the verisimilitude of citizenship by obtaining a birth certificate that would establish one as having been born in a country that confers citizenship on the basis of geography, like the

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94. Johnson, *Dream*, *supra* note 61, at 855–64.

95. Adam Davidson, *The Trump Immigration Idea That Almost Makes Sense*, THE NEW YORKER (Sept. 3, 2016), <https://www.newyorker.com/business/currency/the-trump-immigration-idea-that-almost-makes-sense>.

96. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2301–02 (2013) [hereinafter S. 744].

97. Davidson, *supra* note 95.

98. Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017). It must be noted that this pronouncement is part of the president’s executive order suspending migration from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen for 90 days, an action that in and of itself will have significant negative economic impact on the United States. See, e.g., Dustin McKissen, *Here’s the Catastrophic Impact Trump’s Immigration Ban Could Have on the US*, CNBC (Jan. 30, 2017, 9:31 AM) <https://www.cnbc.com/2017/01/30/trump-immigration-ban-could-have-catastrophic-impact-on-us-commentary.html>.

99. *Id.*

United States.<sup>100</sup> Indeed, birth certificates establishing U.S. citizenship are currently bought and sold on the black market, both in the United States and overseas.<sup>101</sup>

Another form of black-market sale of citizenship is marriage fraud. Marriage fraud occurs when a couple marries not for love but to obtain immigration benefits.<sup>102</sup> In the United States, the temptation of marriage fraud results from the fact that spouses of U.S. citizens are exempt from quotas that might otherwise require a prospective immigrant to wait many years before entry into the country.<sup>103</sup> In addition, spouses of U.S. citizens qualify for “immigrant” as opposed to “non-immigrant” status when they enter.<sup>104</sup> That means spouses are more than temporary visitors. They have the right to remain in the United States and automatically have a path to eventually becoming a U.S. citizen.<sup>105</sup> Moreover, spouses of U.S. citizens need to wait only three years before seeking naturalization themselves.<sup>106</sup> That’s a substantially shorter wait time than for other immigrants, who must wait five years.<sup>107</sup> While many debate the prevalence of marriage fraud in the U.S.,<sup>108</sup> there is no doubt that at least some marriage fraud exists.<sup>109</sup> And where marriage fraud exists, it is, in its economic essence, a black-market sale of citizenship.

#### IV. BENEFITS OF A CITIZENSHIP MARKET

Accepting that citizenship is already for sale, how might a private citizenship market work? The citizenship market envisioned in this Article is a simple one. Individuals, globally, would be free to trade citizenship. Such trades might occur without any cash incentive, as Aiesha and Priya from the Introduction

100. See *supra* note 63.

101. See, e.g., *Smyrna man sentenced in citizenship papers fraud case*, THE TENNESSEAN, Oct. 13, 2013, at B2; Alfonso Chardy, *Puerto Rican Birth Certificates are Sold to Undocumented Immigrants*, THE MIAMI HERALD (Apr. 19, 2015), <http://www.miamiherald.com/news/nation-world/national/article18918543.html>. The black market in birth certificates is not limited to the United States. See Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT’L L. 93, 107 n.34 (2000) (describing trade in Mexican passports to Central Americans).

102. Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 30 (2012).

103. 8 U.S.C. § 1151(b)(2)(A)(i) (2012); see also Abrams, *supra* note 102, at 40–41 (discussing the historical developments in immigration that incentivized marriage fraud). Recall that the wait time for lawful entry in the United States can last decades. See *supra* notes 67–69 and accompanying text (discussing the example of Lupe and Maria).

104. 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

105. *Id.*

106. *Id.*

107. Compare 8 U.S.C. § 1427(a) (2012) (general five-year requirement), with 8 U.S.C. § 1430(a) (2012) (three-year requirement for spouses of U.S. citizens).

108. See STEPHEN H. LEGOMSKY AND CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 291–95 (6th ed. 2015) (surveying the marriage fraud debate).

109. Matt Hamilton, Cindy Chang and Corina Knoll, *Wedding Bell Blues for Suspects in Marriage Scam*, L.A. TIMES (Sept. 9, 2015, 6:20 PM), Matt Hamilton, Cindy Chang and Corina Knoll, *Wedding Bell Blues for Suspects in Marriage Scam*, L.A. TIMES (Sept. 9, 2015, 6:20 PM), <http://www.latimes.com/local/lanow/la-me-ln-phony-marriage-chinese-immigration-fraud-arrests-20150909-story.html>; see also Nicole Byer: *I Married for Money*, Conan, Sept. 13, 2016, <http://teamcoco.com/video/nicole-buyer-married-for-money> (Actress and comedienne, Nicole Byer, admits to being paid to engage in marriage fraud).

would like to do, or trades might be sweetened by a financial incentive, as Charles from the Introduction would be happy to offer.

A citizenship market would allow, in many ways, free movement across borders. So long as a transaction were agreed upon, movement would be allowed. That is consistent with a liberal theory of immigration.

In addition, a citizenship market would have strong economic benefits within the framework of neoclassical economic theory that tells us that no exchange will take place in a free market unless both parties will benefit.<sup>110</sup> Thus, every transaction in a citizenship market would be one that would make each participant better off.<sup>111</sup>

Before delving into these benefits further, let's start with a model that explains the nature of the trade—what I call the Seating-Chart Model of Citizenship.

#### A. *The Seating-Chart Model of Citizenship*

The model of citizenship I am using here can be likened to seating assignments at a wedding reception. Let me first paint a picture: Imagine a wedding reception for about 100 guests. The bride and groom do the best they can to arrange tables of individuals with like interests—but they do an imperfect job.

There is a table of fabulous up-and-coming, single, twenty-somethings who will spend the evening discussing their FitBit stats, last weekend's Decemberists concert, and Tinder fails. Across the room is a table of happily married sixty-somethings who will focus their discussion on retirement portfolios, golf courses to try, and the ins and outs of Medicare Part D.

Devin is a swimsuit designer in his twenties. He'd love to be at the twenty-something table, but somehow he ended up at the sixty-something table—where he finds himself in the awkward position of having to explain and defend the monokini. Edward is a banker in his sixties who would love to be at the sixty-something table, but he somehow ended up at the twenty-something table—where he is now sorry to have provoked a conversation about whether the moon landing was faked. Clearly, both Devin and Edward would have a much better time at the wedding if they could just get together and trade seats. To put it in economic terms, Devin and Edward can make a mutually beneficial, welfare-maximizing trade. Thus, we ought to allow them to do so.

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110. See, e.g., Interview by PBS with Milton Friedman (Oct. 1, 2000), [https://www.pbs.org/wgbh/commandingheights/shared/minute/int\\_miltonfriedman.html#1](https://www.pbs.org/wgbh/commandingheights/shared/minute/int_miltonfriedman.html#1) (last visited Apr. 2, 2018) (“The most important single central fact about a free market is that no exchange takes place unless both parties benefit.”).

111. See Schuck 1997, *supra* note 4, at 284 (“As in any voluntary exchange, the parties will only do so if the exchange makes each of them better off . . .”); Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111, 113 (2000) (“Parties who choose to trade their goods and rights will virtually always be made better off by such trades.”); ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT 190 (2004) (“[B]oth parties are made better off, in their own estimation, by virtue of the exchange”).

Now picture Flo. She's a professor of psychology who studies how culture affects individuals—particularly how the young generation is different and why. She's in her sixties and was seated at the sixty-something table. But she'd really love to be seated at the twenty-something table to test out some ideas for a new book. Ginny is seated at the twenty-something table, and she is perfectly happy to be there. But Ginny is also broke. She would be happy to move to the sixty-something table if she was paid to do so. Flo and Ginny would both be better off if they could trade tables, albeit this time with a cash component that makes the trade mutually beneficial.

Of course, Devin and Flo could just visit the twenty-something table. They might wander over, crouch down by one of the guests, and chat for a few moments. Their ability to do so is something analogous to a tourist visa. But without a seat, they could not rest their feet or enjoy dinner. What they want is a seat at the table—citizenship in our analogy.

Using the seating-chart model, we can understand the tradable good in a citizenship market to be the right of an individual to have a seat at the table. It is the opportunity to become a full member of society—to stay through the tiramisu and not have to leave.

### B. Individual Rights

A citizenship market has the potential to advance the same concerns for individual rights championed by those favoring open borders.<sup>112</sup> That is, included among an individual's unassailable set of rights is the right to move freely.<sup>113</sup> Since this freedom of movement is a basic individual liberty, countries should not infringe on it by denying migrants mobility across political borders.<sup>114</sup> Professor Kevin Johnson writes: "Liberal theory, with its commitment to the protection of individual rights, finds it difficult to reconcile the rights of noncitizens with closed borders marked by numerous restrictions on entry."<sup>115</sup>

The individual rights affected by closed borders go beyond the right of entry. As Johnson indicates, individual rights are also affected by current border practices that result in violence and death that is largely motivated by race.<sup>116</sup> And closed borders affect the rights of individuals who manage to enter a country despite aggressive border enforcement in the form of exploitative labor practices.<sup>117</sup>

Despite these morally concerning side effects of closed borders, sovereign nations around the globe continue to enforce them—forcefully.

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112. See *supra* Part II.

113. Tabarrok, *supra* note 5 ("Freedom of movement is a basic human right."); Johnson, *Theories*, *supra* note 7, at 1220 (discussing the philosophical grounding of a "right to migrate").

114. Carens 1987, *supra* note 8, at 255–62.

115. Johnson 2003, *supra* note 8, at 205.

116. *Id.* at 200.

117. *Id.*

A citizenship market, however, would capture much of the benefits of open borders. It would enable individuals to travel freely across political boundaries. More than that, it would give many migrants freedom to become citizens of another country. In many cases, the only entry fee would be the citizenship that they themselves give up. Even where citizenship would only be available at a price, a citizenship market would make that citizenship available to anyone capable of funding the purchase.

At the same time, a citizenship market would solve one of the central problems of open borders: oversubscription. An individual market would not result in a glut of new citizens. Rather, the entire market would be net-neutral, allowing new citizens to enter the country only at the rate by which citizens would be looking to leave it.

### C. *Economic Efficiencies*

In addition to the liberal-theory benefits of an open market, the Coase Theorem<sup>118</sup> suggests that the trade of citizenship would be economically efficient: in the absence of transaction costs, individuals will bargain to an efficient outcome.<sup>119</sup> Thus, assuming the transaction costs of this market are kept low enough, the trades effected and auction prices reached should be efficient for both sellers and buyers.<sup>120</sup>

Before unpacking these statements, it is important to remember that citizenship is currently allocated by nations. Nations decide who can become members of the country, and those decisions are largely random and are based on birth—either resulting from where one is born or who one’s parents are.<sup>121</sup> A smaller percentage of individuals become citizens at some point after birth by taking prescribed steps to change their nationality and naturalize in a new country.<sup>122</sup>

Considering whether a citizenship market should be allowed requires asking whether a market, of the sort I discuss here, could increase the efficiency of citizenship allocation over distribution by countries. If there is an inchoate, but unrealized, citizenship exchange, there is allocative inefficiency. Disallowing

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118. The Coase Theorem refers to the insights of R.H. Coase in his influential work: R. H. Coase, *The Problem of Social Cost*, 3 J. OF L. & ECON. 1, 1 (1960).

119. Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1366 (2000).

120. It should be noted that Coase, in making his argument, was not intending to suggest that transaction costs are unimportant and should be easily assumed away. *See, e.g.*, Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 267 (2007) (“[A]s Coase recognized, we live in a world rife with transaction costs. He mainly intended to emphasize the importance of taking into account transaction costs when comparing institutional solutions to perceived market failures.”).

121. *See supra* note 63.

122. *See* 8 U.S.C. § 1427 (2012) (setting out criteria for naturalization). In the United States, even naturalization can be random. Since 1990, the country has granted lawful permanent residence status (a prerequisite for naturalization) to 50,000 people annually on the basis of a lottery that is entered by millions. *See id.* § 1153(c). For a glimpse at the statistical likelihood of winning the citizenship lottery, check out: *Green Card Lottery DV-2012*, IMMIGRATIONROAD.COM, <http://immigrationroad.com/green-card/green-card-lottery-dv-2012-results-and-data.php> (last visited Apr. 2, 2018).

market participants from engaging in the exchange means that participants in the would-be citizenship economy cannot put citizenship to its highest use. Potential value is lost.

The lost value might be purely economic, perhaps representing the increased earnings a would-be migrant would experience in the country where they would like to gain membership. The very fact that citizenship has been monetized by countries and by the black market indicates that citizenship can, indeed, be an item of monetary value.

The lost value might also be something more ephemeral, like happiness. Recall Aiesha and Priya from the introduction. If they are prevented from transferring their citizenships, each will suffer a distinct loss in happiness.

Not only would a citizenship market have the potential to recapture these lost allocative efficiencies; a market would also have the potential to reap new economic gains. For now, consider just the pure transfer market. Each party to a swap would only be willing to trade citizenships if they believed it would be a potential benefit to them or, at least, would not make them worse off. Theoretically, trading and swapping would continue so long as one party to the swapping would be better off as a result of the swap and the other would be no worse off—a status known as Pareto superiority.<sup>123</sup> Thus, the market would have the potential to help individuals put each and every citizenship to its highest use. And maximizing the highest use can be conceived of as increased economic value.

In the monetary market for citizenship, citizens who may never have thought about selling their citizenship might be induced to do so because of the availability of a market. Recall Flo (the psychologist researching youth and culture) and Ginny (the broke editorial assistant). Ginny might never have thought about selling her seat at the twenty-something table until approached by Flo with an offer she finds irresistible. That's akin to the position of Charles in the Introduction. He is induced to enter the market specifically because of the financial payout it promises. When someone like Charles enters the market, greater efficiency is reached. Charles will not agree to a sale until he receives money that he believes fairly compensates him for his citizenship. And a potential buyer will offer Charles only so much money for that citizenship as they believe is advantageous for their own situation. Bidding within the market would continue to a point that would leave both Charles and the buyer in a position they believe to be better than the one from which they started.

The potential allocative efficiencies for individuals in the citizenship market are real. The market would allow individuals to reach agreements (whether to buy, sell, or trade) that would make all participants in the transaction better off.

The benefits to individuals are further increased by the private nature of the market. Keeping governments out of the market would reduce transaction

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123. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* at 14 (9th ed. 2014) (“A Pareto-superior transaction (or ‘Pareto improvement’) is one that makes at least one person better off and no one worse off.”).

costs by eliminating governmental screening and paperwork, which are themselves often both onerous and inefficient.<sup>124</sup> Lowered transaction costs would increase the efficiency of the market.<sup>125</sup>

Moreover, keeping governments out of the process of citizenship exchanges would eliminate the real and substantial inefficiencies posed by corruption. Journalists have noted that while “vast sums of money” flow from current government-controlled passport sales, they are not well accounted for and frequently go missing.<sup>126</sup> A private market would eliminate these inefficiencies.

## V. CRITICISMS OF A CITIZENSHIP MARKET

Despite the fact that a citizenship market could be both economically beneficial and more consonant with liberal theory, there are many reasons people would find it objectionable. This Part considers critiques along three lines: equality, efficiency, and inalienability.

### A. Equality

There are several equality arguments against a citizenship market. One could argue that a citizenship market would unfairly impact poor individuals in highly desirable countries. This might negatively affect the countries the poor are leaving. It might also negatively affect the countries to which they relocate.

#### 1. Equality at the Individual Level

The individual-equality argument against a citizenship market is this: The poor holding citizenship in highly desirable countries are more likely to sell their citizenship and do so for a small sum;<sup>127</sup> this is an equality concern because only the poor will be enticed to leave, and they would be enticed to leave at a price that is perhaps lower than the true value of their citizenship.

It is no doubt true that the poor are more likely to sell their citizenship and more likely to accept a lower dollar figure in exchange for their citizenship. That is a straightforward consequence of the diminishing marginal utility of money—the fact that a single additional dollar is more valuable to a poor person than a rich person.<sup>128</sup> Such an argument, however, sidesteps the prospect that the poor might be made better off with such a market transaction. Whatever sum of money is obtained through the market could be the basis for starting a

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124. See, e.g., Benson, *supra* note 17, at 205 (discussing how “bureaucratic process borders” significantly impact proposals for immigration reform).

125. Coase, *supra* note 118, at 5.

126. Messick & Salomon, *supra* note 61.

127. Muaddi, *supra* note 4, at 265 (noting that “poor citizens probably have the greatest incentive to sell”); Lee, *supra* note 4 (proposing the homeless be allowed to sell their citizenship); cf. Hasen, *supra* note 119, at 1329 (discussing a similar challenge to the sale of votes).

128. N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 425 (6th ed. 2012) (“In other words, as a person’s income rises, the extra well-being derived from an additional dollar of income falls.”).

new life in another country. And, by and large, less money is needed to start a new life in another country.<sup>129</sup>

Recall Charles, discussed in the Introduction. Charles is currently poor and highly motivated to sell his remaining asset: his citizenship. But Charles does not need to sell it at a level that would satisfy a rich person. Charles needs only to sell it at an amount that would finance a life he would be satisfied with somewhere in a country with a lower cost of living, such as Ecuador, Panama, Mexico, or Costa Rica. At the end of that transaction, Charles is better off than he would have been continuing to live in poverty in the United States.

The objection to a citizenship market on the basis of individual equality also needs to be put in context. That is, we must ask about the basis for comparison in claiming that a citizenship market harms equality. If a citizenship market is thought to be more unequal, then we must ask, *more unequal compared to what?* If the argument about equality is that a citizenship market exacerbates inequality compared with the status quo, that argument seems unavailing for the reasons discussed above. If, on the other hand, the equality-based objection to a citizenship market is that it results in a more unequal social order than would be achieved through open borders, that objection is well put—but it must be placed in context with the unresolved practical objection to an open-borders policy on the basis of oversubscription.

A more sophisticated way of framing the individual-equality argument would be to suggest that poorer individuals will be unfairly taken advantage of; that is, even if free-market citizenship *could* make the poor theoretically better off, that theory is unlikely to translate to reality because the poor will be disproportionately induced to make less-than-optimal or even non-beneficial trades, for reasons ranging from outright fraud to behavioral economics effects.<sup>130</sup> This is a generic critique in the consumer law context that applies potentially to all consumer transactions.<sup>131</sup> Certainly there would be every reason to be concerned about advantage-taking in the citizenship market, as there is in

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129. Anyone who has ever fallen prey to the wiles of HGTV's House Hunters International knows the allure of moving overseas to take advantage of the higher quality of life (at a lower price) available in a foreign country. See, e.g., *House Hunters International: Trading in the Sacramento River for Lake Atlan in Guatemala* (HGTV television broadcast). That allure may be particularly high for retirees. Muaddi, *supra* note 4, at 267; see also Kathleen Peddicord, *9 Affordable Places to Retire Overseas*, U.S. NEWS (July 7, 2014 3:03 PM), <https://money.usnews.com/money/retirement/slideshows/9-affordable-places-to-retire-overseas>; Anne Tergesen, *Six Financial Mistakes People Make When Retiring Abroad*, WALL ST. J. (Dec. 13, 2015), <https://www.wsj.com/articles/six-financial-mistakes-people-make-when-retiring-abroad-1450062190> (offering advice to the 380,000 retirees who live abroad).

130. See, e.g., Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206–08 (2003) (arguing that courts' application of unconscionability doctrine should be informed by insights from behavioral economics).

131. See, e.g., Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes As Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 833 (2006) (expressing the view that consumer-protection law is problematic for being "seldom enforced, with the poor bearing the brunt of the ease with which con artists and slick operators can get away with their scams. The result is not only inefficiency but redistribution from the relatively worse off to the relatively better off." (footnote omitted)).

other consumer market transactions. And the stakes in a citizenship transaction are high. But concerns about abusive deals are not specific to a citizenship market, as consumers getting taken advantage of is sadly common.<sup>132</sup> In this vein, it is certainly sensible to contend that if a citizenship market were to be made a reality, it would need to be equipped with a robust array of consumer-protection mechanisms.

## 2. *Equality Among Nations and National Identity*

Another equality argument can be posited at a supra-individual level: Even if a citizenship transaction leaves a poor individual better off, the cumulative effect of poor individuals selling off their citizenship may be negative for the country they are leaving and for its national identity. Critics could argue that, at least in the United States, establishing a market that will disproportionately involve the poor will contradict our “ideal moral and democratic principles.”<sup>133</sup> This argument captures the sentiment—no doubt widely held—that we do not want to be a country where the rich can “buy their way in” and where the poor are pushed out.<sup>134</sup>

A weakness in this argument lies in the assumption that anyone who is capable of obtaining citizenship with a financial incentive is rich.<sup>135</sup> That may not be the case. A single citizenship transaction might be financed by a group. Family members or an entire community might sponsor one of their own in the market.<sup>136</sup> Or a single citizenship transfer might be financed traditionally, by way of a loan.<sup>137</sup> Thus, individuals who come to the United States might themselves be poor, but they might nonetheless have the backing of a community or financial institution that believes they can put citizenship to its highest use. Perhaps individuals would obtain financing because they are uncommonly hard

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132. Granted, the stakes in a citizenship transaction are high, but many other transactional contexts provide for life-ruining consequences.

133. Borna & Stearns, *supra* note 18, at 198.

134. Concerns about migrants “buying their way into the United States” are hardly new. *See* 36 CONG. REC. S7768 (daily ed. July 12, 1989) (comments of Senator Dale Bumpers in opposition to the creation of the United States’ EB-5 investor visa: “There is nothing wrong with persons who wish to invest. An investment is good for the USA. But the rich ought not be able to buy their way into this country.”); *see also* Johnson, *Dream*, *supra* note 61, at 866 (noting, in discussing whether the United States should grant visas to foreign nationals willing to invest large sums in the U.S. housing market, that “admitting migrants who have already managed to reach the pinnacle of success, by virtue of their current economic position to buy a way into the United States, arguably does not comport with the traditional view of bootstrapping and so cannot be justified under the national values theory”).

135. *See, e.g.*, Muaddi, *supra* note 4, at 271 (“wealthy foreigners are more likely to buy” citizenship); Benson, *supra* note 17, at 295 (critiquing an auction model of citizenship on the basis that “an auction may be unfair to religious or nonprofit organizations or to other segments of society, who might not have the ability to compete in the purely economic realm of an auction”).

136. Borna & Stearns, *supra* note 18, at 201 (noting that “potential immigrants may borrow from friends or relatives” to effect entry into the United States).

137. Gary S. Becker, *Why Not Let Immigrants Pay For Speedy Entry*, BUSINESS WEEK, March 2, 1987, at 20 (suggesting the availability of financing entry into the United States); *see also* Borna & Stearns, *supra* note 18, at 201 (“Financial institutions could make judgments about potential immigrants’ ability to repay.”); Becker 2005, *supra* note 4 (discussing a private “loan program” to “finance entry”).

workers. Perhaps they have skills that could be put to higher use in the United States. Perhaps they have entrepreneurial ideas that can only succeed in the United States. It is clear there are numerous reasons that citizenship transactions might be financed, and so it is far from clear that only the rich would be able to take advantage of a citizenship market.

Nevertheless, it is certainly true that a thriving citizenship market would eventually have an impact on national identity. And the more thriving the market, the larger the impact. Whether that impact would be good or bad ultimately depends on market outcomes that are probably impossible to predict, as well as what normative values about what is desirable in terms of national identity.

### 3. *Global Inequality*

A final equality argument against a citizenship market concerns global inequality. In many ways, such an objection is the flipside of the argument on national identity: Instead of lamenting the loss of poor individuals from highly desirable countries, this argument is concerned with lesser-developed countries who lose their most motivated citizens. The argument is this: A citizenship market would inflame the problem of “brain drain,” meaning the flight of educated migrants from poorer nations to wealthier nations.<sup>138</sup> That is, a citizenship market would encourage educated and well-off migrants to buy citizenship in a more developed country where they could make greater use of their skills.<sup>139</sup> Their departure would hurt their home nation by the loss of a skilled member of society.<sup>140</sup> And, in return for this lost skilled worker, the nation would receive a poor member of the highly developed nation, one who was not able to make the most of her or his citizenship.

The weakness with this argument is that it does not acknowledge how the market itself could correct for this effect. These transactions would almost certainly fall into the swapping-with-compensation side of the citizenship market. As such, the skilled immigrants would be paying for the opportunity to leave. And the money paid would presumably stay within the countries they are abandoning because it would arrive with the individuals who sold their desirable citizenship.<sup>141</sup>

Of course, money is imperfect compensation. If every doctor in Country A buys his or her way into Country B, the fact that Country A will be compensated would not change the fact that it needs doctors. But free-market theory again suggests the answer—doctors from some other Country C would be willing to trade their way into Country A where they know they can put their citizenship to highest use.

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138. Borna & Stearns, *supra* note 18, at 202.

139. *Id.*

140. *Id.*

141. Muaddi, *supra* note 4, at 266 (noting sellers in his system would arrive in their new countries of residence with the proceeds from the sale).

### B. Efficiency

As explained in Section IV.C, economic efficiency forms a powerful argument in favor of a citizenship market. But is there any way in which economic efficiency might be compromised by a citizenship market? Could the cost to countries outweigh the individual gains? That is to say, would the mutually beneficial trade agreed upon by the individual players produce negative externalities,<sup>142</sup> where the individuals' gains are at the expense of third parties—the sending and receiving nations? One argument in this vein focuses on national interests. Another more compelling argument questions the assumption of one-to-one trading.

#### 1. *Ex Ante vs. Ex Post Regulation*

One efficiency challenge to a citizenship market springs from the fact that governments currently regulate both those leaving and joining their nations. Would the lack of country pre-approval of exits and entries lead to inefficiencies?

Consider exits: Governments may want to ensure that market participants are currently paid up on all taxes and might want to disallow sales or transfers of citizenship where taxes are outstanding. If an individual transfers citizenship in an effort to avoid taxation, the argument would be that such a citizenship exchange is fiscally disadvantageous, at least from the exited country's standpoint.

The problem with this argument is that individuals regularly renounce their citizenship for tax reasons.<sup>143</sup> The United States deals with this by imposing an “exit tax” on Americans who renounce their citizenship based on the “deemed sale” of worldwide assets.<sup>144</sup> A citizenship market would not prevent any country from doing this or something similar.

Now let's consider entries. In the United States, we have numerous barriers to admission centered on the potential migrant's health,<sup>145</sup> past criminal conduct,<sup>146</sup> financial stability,<sup>147</sup> ties to national security concerns,<sup>148</sup> and im-

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142. MANKIW, *supra* note 128, at 12 (defining externality as “the impact of one person's action on the well-being of a bystander”); *cf.* Hasen, *supra* note 119, at 1343 (discussing the externality problem of vote buying).

143. See, e.g., Elise Tang, *Solving Taxpatriation: “Realizing” It Takes More Than Amending The Alternative Tax*, 31 BROOK. J. INT'L L. 615, 615–16 n.14 (2006) (discussing the renunciation of U.S. citizenship for tax purposes, or, “taxpatriation”); Sophia Yan, *Record 1,335 Americans give up their passports*, CNN MONEY (May 8, 2015, 11:02 PM), <http://money.cnn.com/2015/05/08/pf/taxes/american-expats-passports-renounce/> (noting 1,335 Americans gave up their citizenship during the first three months of 2015, setting a pace that might end up with some 5,000 Americans renouncing their citizenship).

144. See INTERNAL REVENUE SERVICE, EXPATRIATION TAX, <http://www.irs.gov/Individuals/International-Taxpayers/Expatriation-Tax> (last visited Apr. 2, 2018); Sophia Yan, *The U.S. is making millions from Americans tossing their passports*, CNN MONEY (Feb. 19, 2016 10:56 AM), <http://money.cnn.com/2016/02/18/news/us-expat-tax-revenue/>.

145. 8 U.S.C. § 1182(a)(1) (2012).

146. *Id.* § 1182(a)(2).

147. *Id.* § 1182(a)(4).

migration history.<sup>149</sup> The efficiency argument against a citizenship market is that the costs of admitting individuals who do not meet these criteria far outweigh the benefits individuals reap within the market.

The problem with this argument is that it supposes countries would be incapable of efficiently addressing their concerns after market transactions. For example, a citizenship market would not give a suspected terrorist free rein to enter the United States after obtaining citizenship through a market transfer. Upon arrival in the United States, and subject to constitutional limitations, authorities would be free to detain, investigate, and prosecute an entering terrorist.

## 2. *The One-to-One Ratio Problem*

A stronger efficiency argument focuses on potential inequalities in the transfer market between whom a given country is losing in relation to whom that country is gaining.<sup>150</sup>

In pure numbers, one could consider a citizenship market to be universally efficient in that it would be net-neutral, allowing new citizens to purchase their way into the country only at the rate by which citizens are looking to leave it. Indeed, this is one of the arguments in favor of a citizenship market: It would not flood the labor market because it would bring new entrants in only to the extent others leave.

But that one-to-one ratio has potential complexities. What if the seller is eighty-years old and the buyer is eighteen-years old?<sup>151</sup> What if the seller is healthy and the buyer is sick? In either scenario, the transaction is far from net-neutral and the economic benefits of those transactions will be hard to quantify.

For example, if an eighty-year-old sells his citizenship to an eighteen-year-old, the country receiving the teenager will experience a net population increase, since the number of years each would expect to live in the country is vastly unequal. The eighty-year-old might have had five more years in the country, while the eighteen-year-old, if he lives to the same age, will have another sixty-seven years. If the teenager-receiving country is experiencing an unfavorable demographic trend of aging, like Japan,<sup>152</sup> perhaps the net gain of sixty-two years of life expectancy is economically favorable. Yet, if Japan is

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148. *Id.* § 1182(a)(3).

149. *Id.* § 1182(a)(6) & (9).

150. *Cf.* Muaddi, *supra* note 4, at 269 (“The more the buyer and seller have in common, particularly in terms of age, education, and skill, the less the substitution of one for the other would affect the U.S. economy.”).

151. This is precisely the situation posed by Australian judge Jim Macken who, at 88, has acknowledged “I only have one or two more years to live.” Jonathan Pearlman, *Retired Australian judge offers to swap places with refugee held in offshore detention*, THE TELEGRAPH (Sept. 1, 2016, 1:39 PM), <http://www.telegraph.co.uk/news/2016/09/01/retired-australian-judge-offers-to-swap-places-with-refugee-held/>.

152. See Charles Riley, *Baby shortage imperils Japan's economy*, CNN MONEY (Jan. 2, 2015, 5:11 AM), <http://money.cnn.com/2015/01/02/news/economy/japan-baby-shortage/index.html>.

receiving the eighty-year-old, it would be demographically unfavorable given the problems the country is already facing with its aging population.<sup>153</sup>

Imagine another scenario: an Indian national is dying of renal failure due to the limited availability of kidney dialysis in his native country.<sup>154</sup> He is motivated to enter the market to obtain citizenship in the United States, which has more dialysis capacity.<sup>155</sup> If the exiting U.S. citizen in the trade was already a heavy user of Medicare benefits for dialysis, then the new citizen from India may pose no net cost. But if the U.S. emigrant was in all respects healthy, there is a net fiscal cost to the United States.<sup>156</sup>

There is an additional problem with the one-to-one aspect of the citizenship market caused by the vagaries of immigration laws allowing the sponsored immigration of family members. Imagine a family that crowdfunds the purchase of citizenship for one member of the family for the sole purpose of putting the buyer in the position of being able to sponsor non-market immigration of other members of the family. For example, in the United States, all citizens are in a position to sponsor the immigration of their spouses, children, parents, and siblings.<sup>157</sup> Thus, while the market might only allow one-for-one transfers in form, it could in practice become numerically unrestrained.

These efficiency challenges all fall into the sphere of practicalities. As such, these issues do not imply that a citizenship market is fundamentally flawed as a concept. Rather, assessment of these issues would have to be considered in light of the fact that “all solutions have costs.”<sup>158</sup> Would a free market for citizenship nevertheless achieve more efficient outcomes despite the fact that it is not perfectly efficient? A full answer would require quantitative and empirical analysis. At the end of the day, however, all objections based on the problems of the one-to-one assumption are not objections to the theory underlying the argument for a citizenship market, since, in theory, all such objections can be answered either by creating a more sophisticated citizenship market or by not taking the status quo for granted. For example, the problem of an eighty-

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153. Justin McCurry, *Japanese centenarians' honorary gifts hit by austerity as numbers soar*, THE GUARDIAN (Sept. 16, 2016), <https://www.theguardian.com/world/2016/sep/16/japans-centenarians-hit-by-austerity-as-numbers-soar> (noting the number of people aged 100 or over in Japan rose to more than 65,000 last year, the 46th annual increase in a row); Bruce Stokes, *The countries that will be most impacted by aging population*, PEW RESEARCH CENTER (Feb. 4, 2014), <http://www.pewresearch.org/fact-tank/2014/02/04/the-countries-that-will-be-most-impacted-by-aging-population/>.

154. See, e.g., Teena Thacker, *Government Hospitals Set to get Exclusive Dialysis Centres*, ASIAN AGE, (Feb. 29, 2016), <http://www.asianage.com/india/government-hospitals-set-get-exclusive-dialysis-centres-156> (“India has very little to offer in terms of infrastructural facilities for renal care. Centres for treatment are few, and are concentrated in the major towns. To take the example of haemodialysis, there are only about 500 dialysis centres in India with about 3000 dialysis machines.”).

155. Gary Becker, *The price of entry*, ECONOMIST (June 24, 2010), <http://www.economist.com/node/16424085> (“America may want lots of scientists, for instance, but could wind up instead with an excess of Indians near retirement age, tempted by the idea of using their accumulated savings to buy free Medicare for the rest of their lives.”).

156. Similar problems can arise in just about any scenario. For example, imagine a felon entering the country in the place of a law-abiding individual.

157. 8 U.S.C. § 1153(a) (2012).

158. Coase, *supra* note 119, at 18.

year-old swapping citizenship with an eighteen-year-old can be answered with conception of a more complex citizenship market requiring more sophisticated swaps. For a swap to be considered net-neutral and permissible, for instance, the persons exchanging citizenship might have to be shown to pose roughly equal propositions for their countries in terms of fiscal benefit or burden and in terms of their demographic character.<sup>159</sup> Alternatively, swaps with unequal remaining life expectancy could be made equal with an offsetting payment, one which could theoretically be made up in part by a payment from one country's treasury to another.<sup>160</sup> And the family-sponsorship issue only endures in as much as one continues to take the status quo for granted. If we had a worldwide citizenship market, a country would retain a policy of family-sponsored immigration only to the extent it perceived that doing so would continue to be desirable.<sup>161</sup>

### C. *Inalienability*

A third anticipated critique of a citizenship market questions the alienability of citizenship altogether. Arguments in this vein might come in different flavors, which I will group under the headings of commodification and values.

#### 1. *Commodification*

One argument about the inalienability of citizenship comes from the backlash against the commodification of citizenship.<sup>162</sup> That is, citizenship should not be for sale, so there should not be a market for it.<sup>163</sup> This argument springs from a sense that markets themselves have a “corrosive tendency”<sup>164</sup> that can corrupt or degrade the nature of what is being marketed.<sup>165</sup> If we do not want to

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159. Cf. Muaddi, *supra* note 4, at 269 (“The more the buyer and seller have in common, particularly in terms of age, education, and skill, the less the substitution of one for the other would affect the U.S. economy.”).

160. Cf. Chang 1997, *supra* note 4, at 1164–65 (“[A] Pigouvian fee would not only optimize use of the public good, but also ensure that immigrant users (as well as native users) compensate the public treasury for any inconvenience they cause others. Such an access fee, however, may not always be practical.”).

161. Indeed, there has been “growing consensus in Congress, even among lawmakers who support immigration reform that family-based visas should be reined in to make room for more employment-based visas that serve the nation’s economic needs.” Daniel González, *Congress considers tighter restrictions on family visas*, USA TODAY (Nov. 8, 2013, 7:47 AM), <https://www.usatoday.com/story/news/nation/2013/11/08/congress-considers-restrictions-family-visas/3473769/>.

162. See Schuck 1997, *supra* note 4, at 296–97 (discussing the commodification objection to his proposal regarding refugee burden-sharing, namely, concerns that “a market would allow and encourage states to traffic in human beings,” offending “common morality”); Saul Levmore, *Unconditional Relationships*, 76 B.U. L. REV. 807, 813, 819 (1996) (noting a “collective distaste” for auctioning off citizenship as an “unsuitable bargain”); see also Peter Spiro, *Cash-for-passports and the end of citizenship*, in SHOULD CITIZENSHIP BE FOR SALE? 9 (Ayelet Shachar & Rainer Bauböck eds., 2014) (collecting comments from a range of experts in response to Malta’s new policy of selling citizenship).

163. Cf. Hasen, *supra* note 119, at 1335–38 (discussing similar challenges to vote buying).

164. MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS 9 (2012).

165. *Id.* at 9–10, 64. Sandel is by no means the only theorist writing on anti-commodification. See, e.g., BENJAMIN R. BARBER, CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE *passim* (2008); MARGARET JANE RADIN, CONTESTED COMMODITIES *passim* (2001); DEBRA

degrade citizenship itself, such an argument goes, then we should not transform it into a saleable good.

The problem with this argument is that citizenship has already been transformed into a saleable good by countries around the globe.<sup>166</sup> It is already “an accepted element of strategic immigration policy.”<sup>167</sup> Scholars have recognized that this process is “irreversible.”<sup>168</sup> Thus, it seems unavailing to assail a citizenship market for what already appears to be a *fait accompli*.<sup>169</sup>

Recent commodification scholarship suggests another criticism of this line of argument, positing that “[i]f you may do it for free, then you may do it for money.”<sup>170</sup> That is, “if you may have, use, possess, and dispose of something (that does not belong to someone else) for free, then—except in special circumstances—it is permissible for you to buy and sell it.”<sup>171</sup> Since citizenship is something that every citizen has, and it is something that can be disposed of for free,<sup>172</sup> following this argument, it should also be able to be disposed of for money in a citizenship market, irrespective of the fact that citizenship is already for sale.

## 2. Values

The final critique that turns on the inalienability of citizenship centers on the meaning of citizenship. Here, it is not about who controls citizenship itself. It is about citizenship’s meaning.

The argument is that citizenship is about “national self-definition”<sup>173</sup> and membership in a political community.<sup>174</sup> Yet, the nation cannot engage in self-definition if it does not have a role in selection of its members. Allowing the

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SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS *passim* (2012); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985); Lynn Parramore, *6 things money shouldn't be able to buy*, SALON (Dec. 11, 2012, 9:49 AM), [https://www.salon.com/2012/12/11/6\\_things\\_money\\_shouldnt\\_be\\_able\\_to\\_buy/](https://www.salon.com/2012/12/11/6_things_money_shouldnt_be_able_to_buy/).

166. See *supra* Section III.B.

167. Spiro, *supra* note 162.

168. Rainer Bauböck, *Summary: Global, European and National Questions about the Price of Citizenship* in SHOULD CITIZENSHIP BE FOR SALE? 1 (Ayelet Shachar & Rainer Bauböck eds., 2014).

169. See Levmore, *supra* note 162, at 813 (the fact that the United States already prioritizes immigration by those “who can offer investment capitol . . . limit[s] our ability to . . . claim that the use of market mechanisms in this context would be unseemly or immoral”).

170. JASON BRENNAN AND PETER M. JAWORSKI, MARKETS WITHOUT LIMITS: MORAL VIRTUES AND COMMERCIAL INTERESTS 10 (2016). Notably, Part I of Brennan and Jaworski’s book is entitled “Should everything be for sale?” *Id.* at 1.

171. *Id.* at 10.

172. See 8 U.S.C. § 1481(a) (2012) (listing acts that, if voluntarily performed “with the intention of relinquishing United States nationality” can affect expatriation). Of course, the United States imposes an “exit tax” on those seeking expatriation. *Supra* note 145.

173. Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694, 694 (2011).

174. See WALZER, *supra* note 20, at 31–63 (exploring the meaning of membership in a nation, with an emphasis on communitarian principles).

acquisition of citizenship through trade could be said to erode the very idea of membership.<sup>175</sup>

This argument is consistent with scholarship that finds a psychological and symbolic value to citizenship.<sup>176</sup> As Professor Linda Bosniak has discussed, “in psychological or cultural terms, the term citizenship is invoked to refer to an experience of identity and solidarity that a person maintains in collective or public life.”<sup>177</sup> How can this identity be obtained through an impersonal market transaction?

Maybe it can, and maybe it cannot. Recall Aiesha, Priya, and Charles.<sup>178</sup> Both Aiesha and Priya have a genuine affiliation with and commitment to the countries they would like to call home—a commitment they have built over time. Allowing their trade would be entirely consistent with citizenship as membership. On the other hand, Charles completely lacks a similar commitment to any country. He is open to moving to one of several countries for a price. Is there concern with allowing one who does not “love the flag” nonetheless obtaining citizenship?<sup>179</sup> Then again, who is to say Charles will not throw himself wholeheartedly into becoming a true citizen of his newly adopted country?<sup>180</sup>

A parallel to adoption helps. Years ago, I undertook training to become a respite care provider for children in foster care. The classes were largely attended by and geared to prospective adoptive parents. I vividly recall discussion surrounding the adoption of older children. Adoptive parents were told that they should call their new child “my son” or “my daughter” from day one, even if they did not yet feel like they connected with this child. The instructors advised: use the language, the feelings will follow.

Even if the concerns grounded in the meaning of citizenship are valid, they may not be insurmountable. After all, participants would only enter the cit-

175. Saul Levmore makes this point when he challenges the sale of citizenship as not only an “unsuitable bargain” but one that is potentially “destructive of community.” Levmore, *supra* note 162, at 832; *see also* Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 *YALE L. J.* 2088, 2096 (2011) (questioning how “market-oriented and calculated citizenship grants are turning membership bonds that in the past might have focused on notions of collective identity and allegiance into far more instrumental bargains.”); *Id.* at 2102 (“[I]nstant membership . . . erod[es] the basic idea that representatives of a country should be members of that society in some meaningful way.”).

176. *See, e.g.*, Peter H. Schuck, *Citizenship in Federal Systems*, 48 *AM. J. COMP. L.* 195, 207 (2000) (finding there are four dimensions to the “range of citizenship’s essential normative and positive meanings . . . political, legal, psychological, and sociological.”).

177. Linda Bosniak, *Denationalizing Citizenship*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 237, 241 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

178. *See supra* Part I.

179. This language was used by Senator Dale Bumpers of Arkansas in opposition to the creation of the United States’ EB-5 investor visa. *See* 36 *CONG. REC.* S7768 (daily ed. July 12, 1989) (“What this bill says is they [immigrant investors] do not even have to love the flag. All they have to do is have \$1 million.”).

180. Charles, after all, is committed to becoming a citizen. This distinguishes him from what cultural anthropologist Bill Maurer has termed “PTs” or persons who are citizens of nowhere, content to always be “passing through.” Bill Maurer, *Cyberspatial Sovereignities: Offshore Finance, Digital Cash, and the Limits of Liberalism*, 5 *IND. J. GLOBAL LEGAL STUD.* 493, 505-506 (1998) (noting PT can also stand for “prior taxpayer,” “perpetual tourist,” “practically transparent,” “privacy trained,” or “permanent traveler”).

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izenship market to the extent they would be happy with its projected outcomes. They want to transfer citizenship to a new country. By calling their new member a citizen, the country uses the language of inclusion. Perhaps the true feelings of membership would follow in time.

## VI. CONCLUSION

This Article has considered whether individuals should be allowed to swap citizenships with each other by means of a plain exchange or an exchange sweetened by a side payment. Allowing individuals to trade and sell their citizenship would capture the benefits identified in the literature on open borders, since it allows for less restricted movement across political boundaries. At the same time, a private citizenship market would address the biggest concern with open borders: numbers. Market trades would be limited to swaps. Countries would gain citizens only to the extent that they lost them. National populations would remain stable.

Few will find the idea of a citizenship market comfortable. It is counterintuitive to be sure, and for many it may be bilious. But right now, the United States and other nations are increasingly commodifying immigration through a government-controlled, centrally directed process. That reality begs the question of why citizenship should not be tradable.

When Jim Macken offered a citizenship swap with a refugee living in one of his country's detention camps, he meant it.<sup>181</sup> He urged his government to "call my bluff anytime they like."<sup>182</sup> While practical concerns would abound, it is hard to doubt that permitting the trade Macken envisioned would be a profound recognition of individual self-determination that would challenge both the concept of arbitrary allocation of citizenship and the increasing commodification of would-be citizens by the very nations they aspire to make their home.

One of the most interesting things about a private citizenship market is how the concept marries progressive open-border ideals and libertarian law-and-economics principles. In the end, perhaps the greatest value of the proposal is its capacity to force a confrontation with fundamental assumptions about citizenship and immigration.

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181. Doherty, *supra* note 1 and accompanying text.

182. See generally Greg Dyett, *This Retired Judge Wants to Trade Places with a Refugee on Nauru or Manus*, SPECIAL BROADCASTING SERVICE (last updated Sept. 1, 2016).

