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CHALLENGES OF PUBLIC POLICIES AND SOCIAL PRACTICES.

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## DOSSIER :
## Migration, citoyenneté et inégalités globales

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# DOSSIER
# MIGRATION, CITOYENNETÉ ET INÉGALITÉS GLOBALES

MARTIN PROVENCHER
UNIVERSITÉ McGILL

La migration est un phénomène qu'on ne peut comprendre qu'à partir d'une perspective globale. Les êtres humains se sont toujours déplacés pour améliorer leur sort, c'est-à-dire dès qu'ils ont eu des raisons de croire que le fait d'aller vivre ailleurs leur procurerait de meilleures chances. On s'entend cependant pour admettre que l'ampleur de ce phénomène est aujourd'hui inédite. Certes, seul un faible pourcentage de la population mondiale se déplace encore, à peine 3 %, mais cela représente plus de 214 millions d'individus. Et l'on estime que ce nombre augmentera. Qui plus est, plusieurs de ces individus migrent et continueront de migrer vers les pays riches du Nord dans lesquels la proportion de personnes nés à l'étranger a augmenté de 10% au cours des dernières années[1]. Cette intensification de la mobilité internationale des individus intervient dans un contexte économique dominé par la globalisation néolibérale du monde qui accentue les inégalités entre les pays et où les États riches rivalisent entre eux pour attirer les migrants qualifiés et non qualifiés. Ces circonstances auraient pu inciter les gouvernements à reconnaître la migration comme un phénomène normal que rien ne saurait arrêter et à adapter leurs politiques publiques en conséquence. Mais elles se sont produites à un moment où la souveraineté des États, mise à mal par le développement des technologies de la communication, la densification des réseaux transnationaux, l'émergence d'une multitude de nouveaux acteurs sur la scène internationale et la formation d'entités politiques inédites, effectuait un retour en force. L'obsession de la sécurité, alimentée par les attentats terroristes, la récession économique et le populisme, a en effet servi de prétexte aux États pour resserrer le contrôle de leurs frontières en adoptant des mesures très restrictives qui ont contribué à fragiliser la condition des migrants les plus vulnérables, notamment les irréguliers et les demandeurs d'asile.

Cela explique sans doute pourquoi la plupart des débats sur la migration cherchent à déterminer la meilleure manière de contenir les flux migratoires et de garder les migrants à l'extérieur des frontières des États[2]. Or, dans la mesure où l'une des causes principales de la migration est la pauvreté, il est établi au moins depuis les années 40 que le moyen le plus efficace pour atteindre cet objectif est de fournir de l'aide aux États dans le besoin[3]. C'est aussi la solution que prône Ayelet Shachar dans *The Birthright Lottery: Citizenship and Global Inequality*, un livre qui a le mérite de renouveler le discours normatif en faveur de cette

solution[4]. À l'instar des Amartya Sen, Jonathan Wolff et autres Colin Farrelly qui jugent plus important de faire reculer l'injustice dans ce monde que d'établir les conditions idéales de la justice, Shachar commence par reconnaître la réalité du pouvoir de l'État et de ses catégories légales dans la détermination des chances de vie des individus à l'échelle globale. Elle avance ensuite une ingénieuse analogie entre la transmission intergénérationnelle de la citoyenneté par droit de naissance et celle de la propriété privée au Moyen Âge pour en atténuer les effets les plus injustes. Son argument comporte deux volets. Le premier montre que l'allocation de la citoyenneté par droit de naissance a toutes les apparences d'un privilège hérité quand on la compare à l'une des fonctions du droit à la propriété privée qui est de préserver la richesse. La transmission de la citoyenneté par voie « naturelle », entendons par *jus sanguinis* ou *jus soli*, prend alors l'allure d'une vaste opération de détournement des ressources mondiales au détriment des plus mal lotis, en l'occurrence ceux qui ne peuvent accéder à la citoyenneté de leur choix et aux chances de vie qu'elle protège. Shachar en déduit que les États riches ont des obligations de justice qui commandent non d'abolir la citoyenneté, ni d'ouvrir les frontières, mais de compenser la perte que subissent les plus mal lotis du fait de la loterie de la naissance en leur assurant un seuil minimal de bien-être dans leur État d'origine. Inspiré de la théorie de la propriété, le mécanisme compensatoire suggéré revêt la forme originale d'une taxe globale sur la citoyenneté par droit de naissance, ce qui présuppose qu'on peut lui attribuer une valeur quantifiable.

Il ne suffit pas cependant d'offrir de l'aide à ceux que la misère pousse à quitter leur pays, car certains migrants vivent déjà depuis des années dans des États plus riches que celui où ils sont nés, même si leur situation dans leur nouveau pays d'accueil est irrégulière. Le second volet de l'argument de Shachar s'attaque à ce problème résiduel d'exclusion interne en proposant un critère plus juste et complémentaire à la citoyenneté pour régulariser le statut légal de ces migrants : le *jus nexi*. Faisant toujours fond sur l'analogie avec la théorie du droit de propriété privée dans laquelle un individu entré illégalement en possession d'un bien peut en devenir le possesseur légitime si le propriétaire originel n'entreprend aucune démarche pour récupérer son bien à l'intérieur d'une période de temps déterminée (la règle dite d'usucapion), le *jus nexi* propose de fonder la reconnaissance légale de l'appartenance à la communauté des migrants irréguliers en fonction des liens sociaux qu'ils ont développé dans leur État d'accueil et du temps écoulé depuis leur arrivée. L'argument de Shachar se présente donc d'abord comme un plaidoyer en faveur d'un cosmopolitisme enraciné pour justifier l'obligation d'aider les citoyens des États pauvres qui auraient autrement des raisons légitimes d'aspirer à vivre ailleurs et il montre ensuite comment on peut étayer de manière créative le concept arendtien d'un « droit d'avoir des droits » afin de régulariser le statut des migrants en situation irrégulière sans faire appel à la nationalité[5].

Les contributions réunies dans ce dossier soumettent cet argument au test de la pensée critique et ils en explorent les implications en mobilisant les ressources du droit, de la philosophie et des sciences politiques. Duncan Ivison adopte le

point de vue des tentatives récentes de la théorie démocratique libérale de dénouer le lien entre la citoyenneté et l'identité nationale pour évaluer le livre de Shachar. Il apprécie l'originalité de sa démarche en fonction des deux stratégies dominantes qui ont cherché soit à atténuer ce lien, soit à le transcender. À la lumière de la première, l'analogie entre la propriété et la citoyenneté n'explique pas vraiment le phénomène de la rareté de la citoyenneté, qu'on peut attribuer à d'autres causes, et elle fait l'impasse sur la fluidité de cette dernière. De plus, le fait de taxer celle-ci à l'échelle globale risque d'entraîner des conséquences imprévues qui pourraient s'avérer non libérales. Si l'on adopte plutôt la seconde stratégie, c'est la prétention de Shachar d'avancer un argument légal en faveur des plus mal lotis de la planète qui paraît infondée, car elle ne pourrait être convaincante qu'en présence d'institutions cosmopolitiques, ce qu'elle refuse. Ivison en conclut que l'auteure ne parvient pas à échapper au dilemme des théories politiques libérales actuelles. Víctor Muñiz-Fraticelli souligne d'entrée de jeu pour sa part la force de l'idée qui consiste à appliquer à la citoyenneté la critique de la propriété héritée développée par les théoriciens libéraux au fil des siècles. Cela ne l'empêche nullement de montrer les limites de l'analogie entre la transmission de la propriété au Moyen Âge par l'institution de la taille (ou de l'entaille) et la citoyenneté par droit de naissance. Il fait ensuite valoir qu'une taxe sur la citoyenneté globale ne permettrait pas de s'attaquer aux obstacles d'ordre structurel qui nuisent à la croissance pour conclure que les meilleurs possibilités d'améliorer les perspectives de vie des plus mal lotis dépendent encore des arguments plus conventionnels en faveur de la libre circulation des biens, du travail et du capital. Optant résolument pour une interprétation centrée sur l'aide au développement, Speranta Dumitru passe les présupposés de l'argument de Shachar au crible d'un point de vue non nationaliste. Il ressort de son analyse qu'on ne peut pas défendre en même temps l'égalité des chances à l'échelle globale et la ségrégation territoriale, que l'égalité matérielle ne saurait compenser les restrictions à la mobilité et qu'une taxe globale sur la citoyenneté devrait en tenir compte. En conclusion, elle propose une nouvelle formule pour calculer la taxe sur la citoyenneté et recommande de la concevoir comme une amende plutôt qu'un impôt. Noah Novogrodsky, quant à lui, se livre à une exploration créatrice des implications du *jus nexi*. Il relève d'abord que l'idée de quantifier la valeur de la citoyenneté peut très bien s'appliquer aux autres statuts légaux alternatifs à la citoyenneté, dans une perspective globale, pour déterminer quels sont ceux qu'il convient de considérer comme des privilèges hérités et quels sont ceux qu'il vaut la peine de posséder. Parmi les relations de travail et celles des réseaux identitaires, il examine ensuite celles qui pourraient satisfaire le critère de lien social authentique du *jus nexi*. En guise de conclusion, il met en garde contre les excès auxquels pourrait conduire la tentative de faire du *jus nexi* un véritable critère alternatif à la citoyenneté en prenant comme exemple le contexte américain. Enfin, Peter J. Spiro dans un texte aussi bref que dense questionne la prémisse fondamentale sur laquelle repose l'argument de *The Birthright Lottery*, à savoir l'idée que la citoyenneté est une ressource précieuse. C'est la résidence permanente qui serait plutôt convoitée par les individus aujourd'hui. Il montre également que le critère du lien social dans le *jus nexi* ne saurait reposer sur la seule présence territoriale et qu'il ne répondrait pas de deux

phénomènes en croissance : celui des *denizens* qui refusent la naturalisation et celui de la migration circulaire. Pour conclure ce dossier, Ayelet Shachar nous fait l'honneur de répondre à ses critiques en regroupant leurs arguments sous deux rubriques, soit celles qui portent sur l'analogie entre la citoyenneté et la propriété et celles dont l'enjeu est la valeur de la citoyenneté. En complément à ce dossier, nous proposons une traduction française de l'introduction du livre de Shachar.

## NOTES

1 Cf. Piché, V., « In and Out the Back Door : Canada's Temporary Worker Programs in a Global Perspective » *in* Geiger, M., et Pécoud, A., *The New Politics of International Mobility : Migration Management and its Discontents*, Osnabrück, University of Osnabrück Press, Vol. 40, 2012, p.117.

2 Cf. Arnold, G., *Migration. Changing the World*, London, Pluto Press, 2012, p.16.

3 Arnold, *ibid*. Arnold renvoie au livre de Joanna Macrae, *Aiding Recovery* (London, Zed Books, 2001), pour une perspective historique sur l'aide étrangère. Comme il le souligne lui-même, toute démarche de ce type risque de contribuer à alimenter le phénomène qu'elle cherche à prévenir, ce qui est paradoxal.

4 Shachar, A., *The Birthright Lottery : Citizenship and Global Inequality*, Harvard, Harvard University Press, 2009.

5 Pour un traitement exhaustif de ce concept, cf. Kesby, A., *The Rights to Have Rights : Citizenship, Humanity and International Law,* New York, Oxford University Press, 2012.

# TRANSCENDING NATIONAL CITIZENSHIP OR TAMING IT ? AYELET SHACHAR'S *BIRTHRIGHT LOTTERY*

DUNCAN IVISON
UNIVERSITÉ DE SYDNEY

## ABSTRACT

Recent political theory has attempted to unbundle *demos* and *ethnos*, and thus citizenship from national identity. There are two possible ways to meet this challenge: by taming the relationship between citizenship and the nation, for example, by defending a form of liberal multicultural nationalism, or by transcending it with a postnational, cosmopolitan conception of citizenship. Both strategies run up against the boundedness of democratic authority. In this paper, I argue that Shachar adresses this issue in an innovative way, but remains ultimately trapped by it. My argument has two parts. In the first one, I look at the analogy between property and citizenship on which Shachar rely to justify the obligations of wealthy states towards the global poor. I suggest that it does not work well to explain the rarity of citizenship and that the idea of taxing its value at the global level, however intuitive in liberal theory on property, could yield unexpected and non-liberal consequences. Nevertheless I also assess its merits. In the second part, I suggest that Shachar's claim that her argument generates a legal obligation toward the global poor is not binding. It could only be so with the kind of cosmopolitan political institutions that she eschews. Thus we return where we begin.

## RÉSUMÉ

La théorie politique récente a tenté de dénouer les liens entre le *demos* et l'*ethnos* dans les sociétés libérales, ainsi que le lien entre la citoyenneté et l'identité nationale. On peut répondre à ce défi de deux manières différentes : soit en apprivoisant le lien entre la citoyenneté et la nation, par exemple, en défendant une forme de nationalisme multiculturel libéral, soit en le transcendant à l'aide d'une conception postnationale ou cosmopolitique de la citoyenneté. Ces deux stratégies présentent toutefois des difficultés du point de vue de l'autorité démocratique. Dans cet article, je soutiens que Shachar apporte une contribution originale à ce débat, mais qu'en dernière analyse, elle demeure prisonnière de ce dilemme. Mon argument procède en deux parties. Dans la première, j'examine l'analogie entre la propriété et la citoyenneté sur laquelle Shachar fonde les obligations morales des États riches envers les pauvres. Je fais valoir qu'elle répond mal au problème de la rareté de la citoyenneté et que l'idée de taxer la valeur de cette dernière à l'échelle globale, pour intuitive qu'elle soit dans la pensée libérale, pourrait avoir des conséquences imprévues et non libérales. Je reconnais néanmoins ses mérites. Dans la seconde partie, je montre que la prétention de Shachar à l'effet d'avancer un argument qui comporte une obligation légale envers les pauvres de la planète n'est pas fondée. Elle ne pourrait l'être que si l'on disposait d'institutions politiques cosmopolitiques globales, une possibilité qu'elle rejette. Or, cela nous reconduit à notre point de départ.

Ayelet Shachar's new book addresses some of the most pressing issues of our times in a creative and theoretically innovative way. The two big ideas she proposes that will concern me here are first, the analogy between citizenship and property; and second, the attempt, through this analogy, to provide a new way of justifying the obligations of wealthy states and their citizens towards the global poor. I want to begin by making some general remarks about the relation between citizenship and membership and then turn to these two ideas. I will conclude with a brief set of critical remarks — or at least a puzzle — about what I take to be Ayelet's central moral claim.

## 1

There are at least three dimensions to citizenship: self-government, protection and membership. Citizenship is meant to embody our status as a member of a self-governing community, a status that is both legal and moral: It represents a form of public standing based on public recognition and respect (a status held by individuals, but whose value is communally generated, to borrow one of Shachar's formulations). As a citizen, I am not only both author and addressee of the law, but also offered protection with regard to some of my most basic interests, and entitled to a set of valuable goods and resources; that is, nothing less than the structure within which to lead a decent life. To become a citizen is to acquire, therefore, the capacity to some form of self-government and to become a member of a bounded political community. *Ethnos* and *demos* overlap when one's membership in a *demos* is linked in some way to one's membership of a particular national community.

In recent political theory there has been an attempt to unbundle *demos* and *ethnos*, and thus citizenship from national identity. The moral claim (aside from any empirical or pragmatic one) is that in diverse, multicultural societies, citizenship should not be dependent on national identity, since this would make the important goods linked to citizenship (autonomy, membership and protection), dependent on a potentially narrow and exclusive form of identity. There are, at least, two possible responses to this kind of worry: (i) to defend a form of liberal multicultural nationalism, such that citizenship and national identity overlap, but that national identity is multicultural and inclusive, as opposed to narrow and exclusive; and (ii) to detach citizenship from nationality and states in general, and link it instead to discourses of human rights and membership in some kind of global political community, cosmopolitan solidarity, or 'humanity'. The first move seeks to 'tame' the relation between citizenship and the nation, the latter to transcend it.[1]

Here we face a familiar paradox or tension: The universalism of our ethics — that each individual is of fundamental equal worth and dignity — runs up against the boundedness of democratic authority. To define citizenship, no matter how inclusively, requires saying something about who should be denied that status.

How can we justify such exclusions? A democratic people can't, by definition, democratically define itself, since in order to do so it would already need to be a people. For example, the Maastricht definition of European citizenship awards citizenship to members of any constituent state: this immediately excludes the large 'resident alien' population present in Europe — one upon which many European economies depend[2].

One of the most striking developments in global politics in recent years has been the rise of the discourse of human rights and the slow emergence of transnational modes of governance and rights protection (once again, the EU is an example). Thus cosmopolitan or postnational citizenship is the idea that citizenship is defined by one's membership not in any particular political community (and therefore vulnerable to being revoked or denied according to particularistic considerations), but by one's membership in 'humanity', or some kind of postnational political order. But for postnational or cosmopolitan citizenship to be meaningful it must be the case that cosmopolitan norms of justice are both binding outside of the state and authoritative within it. They can't simply be imposed on the basis of pre-given philosophical authority (either via God or Kant or whomever), but must appeal to some notion of democratic self-determination. Our universal ethics must be reconciled with the particularity of democratic authority and law. At the very least, the validity of cosmopolitan norms of justice must be grasped from within the perspective of the *demos* in some way. But here we face some difficult questions: Why and how would the *demos* incorporate those norms? How do we mediate between the seemingly unavoidable boundedness of democratic authority and the universal values associated with cosmopolitan justice[3]?

A number of political theorists have emphasized the extent to which citizenship and human rights are beginning to become entwined in various ways. One way to think of what is happening is the slow unbundling of rights from citizenship. That is, that the gap between the protections and obligations of citizenship and those owed to any person who finds themself within the boundaries of a state should narrow — and eventually disappear. Clearly, states and others have obligations to protect the basic human rights and liberties of whoever is present within their borders (as difficult as this has been to ensure in practice). A further claim is that states are obliged to enable non-nationals to secure the means to various other important interests — for example, to accommodate various religious practise, to provide voting rights, to provide access to education, welfare and other services. What is important to notice about this argument, however, is that it can go in two different directions.

If unbundling is not accompanied simultaneously by the liberalization of the means to become a citizen (ie. the liberalization of naturalization), then it risks entrenching a division between citizenship and what we might call *subjecthood*.

The distinction between citizenship and non-citizenship, in other words, becomes meaningful for all the wrong reasons. This is arguably what happened with Turkish migrants in Germany, where they were originally admitted as guest-workers and allowed to stay for long periods of time, but remained cut off from the full range of civil and social rights possessed by German citizens. There has been increasing debate about the extent to which greater rights and a more liberal naturalization process should be extended to migrants in Germany, as well as in other parts of Europe. To the extent that unbundling occurs without the liberalization of naturalization, it can entrench inequality as opposed to mediating it[4]. To the extent that unbundling occurs with the liberalization of naturalization, it arguably serves as a process of 'proto-citizenship' — socializing both non-citizens and citizens into the wider political system and helping to create the conditions for trust and legitimation of important political institutions.

But note how this argument repeats the tensions mentioned above. Is the idea that we should be seeking to transcend the nation-state and national citizenship altogether, or rather tame it by making national citizenship more inclusive and compatible with basic human rights norms? The problem is that almost every liberal democracy, Australia included, has at one time or another promoted a vision of national identity (and thus accompanying processes of naturalization and integration) that was hostile to many of the peoples seeking refuge on their shores (as well as those who were here long before European settlement). And this leads some to suggest we should renounce the link between citizenship and nationality altogether.

Consider, for example, the kind of language found in the recent *Becoming an Australian Citizen policy* document, one motivated by a desire to be more explicit about the nature of Australian citizenship[5]. The discussion paper refers to common 'Australian' values — such as respect for equal worth and dignity of the individual, freedom of speech and association — reflect "Judeo-Christian ethics, a British political heritage and the spirit of European Enlightenment"[6]. The idea of a citizenship test, in other words, seems targeted at a very specific sub-set of the population, as opposed to a genuinely inclusive community-building exercise. As I mentioned before, another key test is whether the push towards a more explicit definition of citizenship is accompanied by a liberalization of not only naturalization processes (which has occurred in Australia and Canada), but also the continued unbundling of rights and citizenship in relation to the most vulnerable non-citizens — eg. asylum seekers and refugees (which arguably has not).

However, as I have suggested, it is not immediately apparent that a notion of post-national citizenship can escape these tensions and dilemmas either. If there is such a thing of global citizenship then it remains vague and difficult to see how it can effectively deliver the goods of citizenship — self-government, protection

and membership. And it also remains to be seen to what extent the validity of the universal norms of justice to which it appeals can be grasped by a demos in such a way that they acquire genuine democratic authority.

## 2

As in her previous book, *Multicultural Jurisdictions*[7], in her new book Shachar takes aim at many of the standard distinctions and assumptions in the field and provides a fresh re-orientation of the existing conceptual landscape. In that earlier work, Shachar provided a deft diagnosis of the 'multicultural dilemma' ("your culture or your rights"), followed by an innovative set of arguments and case studies that sought to dissolve (or at least lessen) the dilemma through a careful balancing of the accommodation of cultural and ethnic difference with the rights of women and vulnerable minorities.

In *The Birthright Lottery*[8] she performs another set of deft conceptual manoeuvres. This time she takes aim at some of the dilemmas I have outlined above and at what she claims are the unjustified privileges encased in the principle of birthright citizenship, whether understood in terms of *jus soli* or *jus sanguinis*. If the goods and resources associated with citizenship of a particular political community are significant — as they clearly are — then how can the mere circumstances of birth serve as the core determinants of one's entitlement to these goods and resources? This way of framing the question has a very powerful effect of turning around a common perception about the moral basis of the relationship between citizenship and immigration — that citizenship (and thus immigration) is a privilege, whose distribution is a matter of discretion for those who already possesses it. Instead, Shachar asks whether our practices and policies are not, in fact, constrained by duties to those who are excluded from the goods of citizenship. Once again, she proposes a fresh angle on a familiar response to this challenge: She embraces neither the cosmopolitan open borders argument, nor variations of the communitarian and democratic self-government argument. Instead, she introduces the idea of a 'Birthright Privilege Levy' (BPL), which is essentially — given her account of citizenship as a form of property — an inheritance tax. So she assumes that bounded political communities will continue to exist and indeed that states will continue to be the dominant political form in global politics for some time to come, but proposes that we tax the benefits citizenship confers to improve the opportunities of those excluded by the boundaries of the well-off states.

One of the key planks in the structure of her argument is the analogy between citizenship and property. It's the key analogy in the book and much of her argument depends on our accepting it. Shachar provides two general pictures or conceptions of property, a narrow and a broad view. The narrow view she associates with the kind of 'possessive individualism' described by C.B Macpherson and Robert Nozick. According to the narrow view, the emphasis is on property en-

tailing a strong right to exclude others from what you legitimately own, and acts as an equally strong constraint on what can legitimately be asked of you in terms of your obligations to others. She ties this concept of property to a general conception of social life as well — one in which "all inter-social interactions are characterized as 'trades'" and where "social atomism and unrestricted commodification rule, and where self interest is the core motivation for human action"[9].

According to the broader view of property, on the other hand, property is understood not primarily as a narrow, exclusive right to the tangible things to which it often refers, but rather as a "human made and multifaceted institution that creates and maintains certain relations among individuals in reference to things" (27). As Jeremy Waldron puts it (cited by Shachar), property relations offer a "system of rules governing access to and control of scarce resources" (29). Ownership and possession of property affects peoples' life-chances, opportunities and freedoms and thus conflicting interests arise around access, use and control of those goods — both tangible and intangible — that are scarce. This means, argues Shachar, that changes in social relations and values will modify our sense of what counts as protected property as well as (at least potentially) what the very nature of property is. And here is where her argument goes to work: the claim is that (a) citizenship is indeed property in this broader sense; and (b) that we should thus modify our existing practices and understandings of citizenship as property in such a way that the social relations they generate (and reify) are transformed.

Citizenship is a form of property then, in the sense that "what each citizen holds is not a private entitlement to a tangible thing, but a relationship to other members and to a particular (usually the national) government that creates enforceable rights and duties"[10]. If so, then it follows that it is patently wrong to distribute citizenship on the basis of the circumstances of someone's birth given the entitlements it delivers to the holder. The fact that I was born in Montreal, have an Australian partner and live in Sydney should not be the crucial factor in determining whether my children will have the resources and opportunities to lead decent lives, as opposed to children growing up in Somalia. It's not that birthright citizenship creates global wealth disparities in itself, but that it reifies and perpetuates very different life prospects[11].

I want to pause here and consider the analogy between property and citizenship a bit more closely. There is no question that it is an enlightening way of approaching the issue of global justice and our obligations to those excluded from our borders. It is one of the important contributions this book makes to our thinking about global justice today. However, I think the analogy needs some further analysis.

Shachar wants to draw an analogy between the legal notion of entail — the hereditary transfer of an estate that binds the hands of future generations in var-

ious ways — and the 'entail' of political membership. The discrediting of the former should cause us to question the seeming continuation of the latter. This is a powerful analogy and quite persuasive. But at least in some respects, the entail of political membership strikes me as importantly different from the case of inherited property. Citizenship is (at least in principle) much more fluid and changeable in nature then property tends to be. This is partly to do with the fact that the determination of political membership involves the construction and exercise of a certain kind of group right. A polity is free to amend its definition of membership in a range of ways (even the boundaries of itself — although that raises a host of problems). Moreover it's not clear that citizenship is an inherently scarce good — like land or natural resources — but is made so by states. So although both property and citizenship can be inherited, they also strike me as quite different things in themselves. However, perhaps this begs the question that Shachar is ultimately posing about the relation between property and citizenship.

Shachar draws a fairly stark dichotomy between what is usually present in any reasonable conception of property. As we know from as far back (at least) as John Locke, property is both inclusive and exclusive in nature. To have property in something is to have the right to exclude others from it, but never absolutely and always subject to various other conditions. I can exclude strangers from my house, but not if they are starving, or in need of urgent shelter or protection. Shachar embraces a relational and non-exclusive conception of property, but in doing so she risks undermining the rationale for thinking about citizenship as property in the first place. If property is as non-exclusive and relational as she suggests then why focus on taxation at all? Why would anyone have the right to exclude others from their property in the first place? Why not simply cut to the chase and attack the idea of birthright citizenship directly?

The answer no doubt is partly linked to Shachar's desire to take states as they are, at least to a certain extent, as a concession to what is genuinely possible in the world today. And yet this move is aligned with — at least along one dimension — a fairly radical re-conceptualization of property as it is generally understood in the world, as we know it. On the other hand, Shachar is appealing to the eminent reasonableness of not allowing inherited wealth to account for large social inequalities, a principle many advanced democracies already accept. And so, if citizenship is akin to inherited property, and if most liberal democratic polities accept the legitimacy of some form of inheritance tax on intergenerational transfers of wealth, then most should also accept something like the BPL. However, persisting with the analogy to property does leave some hostages to fortune, just insofar as it risks (perhaps unintentionally) reifying the very exclusive aspects of the concept — however much Shachar wants us to embrace the inclusive and relational model[12]. One need only consider the debate over the repeal of inheritance tax in the United States to see how easily the core assumption at the heart

of Shachar's argument about the reasonableness of taxing intergenerational wealth can be undone[13]. The revaluation of what counts as protected property can go in many directions — not all of them welcome from the perspective of liberal justice.

But having expressed two concerns about the analogy with property, let me mention two ways in which the analogy is particularly helpful. First of all, the vision of an inclusive and relational conception of property that is shaped by a more complex sense of our relational and mutual obligations across borders is a very welcome contribution to debates around distributive justice more generally. It bears an intriguing resemblance to the way legal and political theorists have been thinking about the property rights of indigenous peoples, for example, and the way they can not only be accommodated within western legal systems, but help transform them as well.[14]

Secondly, the argument generates a nice analogy for the second part of Shachar's project — what she calls the 'jus nexi' membership rule[15]. If our legal systems can allow someone who possesses property belonging to another for a sufficient period of time without the owner's permission to acquire title to that property — so long as the occupation is peaceful, continuous and visible — then so should long term residents, having settled and participated in public life in various ways, be entitled to citizenship (as opposed to merely nominal heirs). This is an attractive way of rethinking what we mean by 'naturalisation'.

My final comment concerns Shachar's claim that her argument generates not simply moral but legal obligations towards the global poor. The core of her moral argument against birthright citizenship is that those of us who have benefited from the arbitrary distribution of advantages have a positive duty to help those disadvantaged (in morally unacceptable ways) from being excluded (compare this with Thomas Pogge's claim that wealthy states have a negative duty to not to contribute to the maintenance of structures that entail the violation of basic human rights)[16]. A legal system should not entrench barriers to equal opportunity on the basis of morally arbitrary traits like the circumstances of one's birth. Shachar claims that her proposal moves claims for redistribution "from the realm of charity or morality to that of legal obligation, one that grows coherently from the analogy to inherited property"[17]. But I am not sure that it does: Or at least, I am not sure I how it does in ways that Thomas Pogge or Peter Singer's arguments, for example, don't, which she seems to imply. What makes her moral claim any more likely to be legally binding than Pogge's or Singer's? The BPL certainly follows from her core moral claim, but that in itself doesn't establish its legal bindingness. Moreover, if it were to be genuinely legally binding, then it would seem to require the kind of cosmopolitan political institutions that she elsewhere eschews. How else would such a legal claim, for example, be enforced? This returns us to some of the paradoxes and tensions with which we began between cosmopolitan and national citizenship.

## NOTES

1 This language is from Will Kymlicka. *Multicultural Odysseys: Navigating the New International Politics of Diversity,* Oxford, Oxford University Press, 2007.

2 Etienne Balibar, *We, The People of Europe? Reflections on transnational citizenship,* Princeton, Princeton University Press, 2004.

3 For reflections on this particular question, see for example Seyla Benhabib, Another Cosmopolitanism (Cambridge, Cambridge University Press, 2006).

4 Of course, in some cases, migrants might not want to naturalize and so the issue of subjecthood might not seem to arise. But I think in some circumstances, even if migrants do not wish to naturalize and therefore do not resent or feel constrained by barriers to naturalization, it might still be a problem from the perspective of egalitarian justice.

5 Attorney General's Office, Commonwealth of Australia (2007)

6 *Ibid*, p. 5.

7 *Multicultural Jurisdictions: Cultural Differences and Women's Rights,* Cambridge, Cambridge University Press, 2001.

8 *The Birthright Lottery: Citizenship and Global Inequality*, Cambridge Mass., Harvard University Press, 2009.

9 *Birthright Lottery*, p. 00

10 *Birthright Lottery*, p. 29

11 Birthright Lottery, p. 26.

12 I discuss the idea of rights more generally conceived as property in *Rights,* Stocksfield, Acumen, 2008, chapter 3.

13 See Michael J. Graetz and Ian Shapiro, *Death by a Thousand Cuts: The Fight over Taxing Inherited Wealth,* Princeton, Princeton University Press, 2005.

14 See some of the contributions in Duncan Ivison, Paul Patton and Will Sanders eds. *Political Theory and the Rights of Indigenous Peoples*, Cambridge, Cambridge University Press, 2000; also N. Pearson, "Principles of Communal Native Title", 5 (3), 2000, *Indigenous Law Bulletin*, p. 4; and some of the interesting comments in the judgment in Western Australia v Ward [2002] HCA 28, 8 August 2002. For the broader argument alluded to here see Duncan Ivison, *Postcolonial Liberalism,* Cambridge, Cambridge University Press, 2002.

15 *Birthright Lottery*, p. 185.

16 Thomas Pogge, *World Poverty and Human Rights,* Cambridge, Polity Press, 2002.

17 *Birthright Lottery*, p. 101

# WHAT JUSTICE ENTAILS [1]

VÍCTOR M. MUÑIZ-FRATICELLI
McGILL UNIVERSITY

## ABSTRACT

In *The Birthright Lottery*, Ayelet Shachar subjects the institution of birthright citizenship to close scrutiny by applying to citizenship the historical and philosophical critique of hereditary ownership built up over four centuries of liberal and democratic theory, and proposing compelling alternatives drawn from the theory of private law to the usual modes of conveyance of membership. Nonetheless, there are some difficulties with this critique. First, the analogy between entailed property and birthright citizenship is not as illustrative as Shachar intends it to be; second, the mechanism of the birthright privilege levy is insufficient for addressing structural impediments to growth; and third, the principle of ius nexi, while an important corrective to currently dominant principles of nationality, will likely have effects both unnecessary and insufficient to correct the injustices that Shachar identifies. In the end, the most significant improvements in the lives of the neediest persons on the planet are more likely advanced through conventional arguments for the lowering of barriers to the circulation of goods, labor, and capital. This shift in attention from opening borders to extending citizenship risks being a distraction from more effective means of addressing the injustices associated with global inequality.

## RÉSUMÉ

Dans son livre *The Birthright Lottery*, Ayelet Shachar soumet l'institution de la citoyenneté par droit de naissance à un examen rigoureux, en appliquant à la citoyenneté la critique philosophique et historique de la propriété héritée construite pendant quatre siècles de théorie démocratique libérale, et en proposant aux modes habituels d'attribution de la citoyenneté une alternative séduisante tirée de la théorie du droit privé. Néanmoins, cette critique comporte certaines difficultés. Premièrement, l'analogie entre la transmission de la propriété par l'institution de la taille et la citoyenneté par droit de naissance n'est pas aussi éclairante que le soutient Shachar ; deuxièmement, le mécanisme de la taxe sur le privilège du droit de naissance est insuffisant pour s'attaquer aux obstacles structurels à la croissance ; et troisièmement, le principe du jus nexi, bien qu'on puisse le considérer comme un important correctif du principe de nationalité actuellement dominant, aura vraisemblablement des effets à la fois non nécessaires et insuffisants pour corriger les injustices que Shachar identifie. En fin de compte, les améliorations les plus significatives dans la vie des personnes les plus démunies de la planète sont vraisemblablement mieux défendues à l'aide des arguments conventionnels en faveur d'une baisse des barrières à la circulation des biens, du travail et du capital. Ce déplacement de l'attention de l'ouverture des frontières à l'extension de la citoyenneté risque de nous distraire des moyens plus efficaces de nous attaquer aux injustices associées à l'inégalité globale.

In *The Birthright Lottery*, Ayelet Shachar subjects the institution of birthright citizenship to close scrutiny in the best of the interdisciplinary tradition, applying to citizenship the historical and philosophical critique of hereditary ownership built up over four centuries of liberal and democratic theory, and proposing compelling alternatives drawn from the theory of private law to the usual modes of conveyance of membership. While most of her legal theory is drawn from the Common Law tradition, she also takes pains to explain the practice of legal systems rooted in the Civil Law. To scholars working across the law and the humanities and social sciences, this is a very welcome sight, as the law is often seen as a recipient of methods and models from other disciplines — economics, philosophy, or history — rather than a contributor and innovator.

The founding insight of the book is that birthright citizenship — that which vests on a person because of the circumstances of their birth, whether their parentage (*ius sanguinis*) or their birthplace (*ius soli*) — is a kind of entailed property, a remnant of a social order dominated by naturalized hierarchy and structural injustice. Just as the feudal institution of entailed ('fee tail') property preserved exclusive ownership of land in a few families over countless generations, so birthright citizenship preserves the benefits of membership in a political community — a kind of property in that it is similar to a participatory share in a company — to a few privileged persons, and excludes from its enjoyment the better part of humanity. As we have overcome the medieval 'fee tail' and replaced it with forms of ownership more liberal and modern[2], so should we replace feudal citizenship with more liberal and modern avenues to membership, and to the benefits that follow admittance in well-off, liberal polities.

Shachar's argument is right in many respects: the obstacles to membership in the most well-off countries are altogether too high and rising; the way that boundaries have been drawn is often morally arbitrary, as is the treatment to which potential and recent immigrants are subjected; and in some cases the benefits of citizenship are bestowed on undeserving candidates who strategically exploit the chancy circumstances of their birth to avoid civil or criminal responsibility. Most importantly, in my view (and this aspect is often overlooked in moral and political discussion), Shachar's attack on birthright citizenship succeeds rhetorically in denaturalizing citizenship and making it more amenable to much-needed reform.

Still, I am not sure that the argument succeeds, at least not to the extent intended by the author. In the following pages, I will address three related issues that I find problematic with the argument in *The Birthright Lottery*: first, the analogy between entailed property and birthright citizenship, which I think is not as illustrative as Shachar intends it to be; second, the mechanism of the birthright privilege levy, which despite Shachar's intention is a welfarist proposal that is insufficient for addressing structural impediments to growth; and third the principle of *ius nexi*, which I agree is an important corrective to the principles of nationality that are currently dominant, but will likely have effects both unnecessary and insufficient to correct the injustices that Shachar identifies. In

the end, the most significant improvements in the lives of the neediest persons on the planet are more likely advanced through conventional arguments for the lowering of barriers to the circulation of goods, labor, and capital[3]. This shift in attention from opening borders to extending citizenship risks being a distraction from more effective means of addressing the injustices associated with global inequality.

## 1. CONCEPT

An attack on entailed property can be understood as either a critique of the arbitrariness of transmission by accident of birth (in which case the shape of the final distribution of goods precipitated by the fee tail is of no consequence), or as a critique of the inequality of a scheme of distributive justice (in which case the method of transmission is not very relevant). Which is it? Although, at times, Shachar seems to object to the arbitrariness of transmission by birth in and of itself, her main concern seems to be about the very deep and undoubtedly unjust inequalities between the world's rich and poor[4]. The system by which citizenship is assigned mainly by birthright is one way — Shachar would say the main way — in which rich countries perpetuate differences in status that translate into differences in welfare and opportunity. Those with the status of citizen in a wealthy polity accede to privilege; those with a status of citizen in a poor polity have a much harder time obtaining it.

But is it true that birthright citizenship is the main culprit in the system of global inequality? I have my doubts, and they are grounded on what I think is a misconception of the calculus of power that arises from the analogy between birthright citizenship and the fee tail. The fee tail, I will explain, is obsolete because it rests on a connection between power and possession of land, which makes control of the possession of land an object of intergenerational quasi-constitutional struggle. Once the focus of economic institutions changes from landed property to mercantile and industrial property, that link is severed, but this just means that the transmission of wealth by inheritance takes other forms. The evolution, and eventual obsolescence, of the fee tail shows that inequality can easily survive the abolition of institutions that transmit privilege through automatic and indefeasible inheritance. If so, the focus on birthright citizenship is misplaced. Some other mechanism must be sought to abolish this inequality.

The fee tail — to recapitulate Shachar's explanation, in part — is a form of title created when a grantor (call him George) leaves a gift of land by inheritance to a tenant (call him Thomas) and to the "heirs of his body." These would be the lineal descendants of Thomas: his children, grandchildren, and so on. One effect of the fee tail was to restrict the inheritance of property to a single line of descent, when otherwise the law prescribed that the closest blood relative (whether a lineal descendant or not) would inherit[5]. Another effect was to prevent the alienability of land by an heir as long as a qualified lineal descendant survived. Thus, if Thomas dies and is survived by his daughter and grandson, his daughter cannot sell the land, but can at most convey it to a third person for the duration of her (the daughter's) life, since upon her death Thomas' grandson will inherit,

subject to the same constraint[6]. The fee tail, on the one hand, allows George (and his descendants) to retain control of what happens with the land if those he intends to benefit no longer exist; title in the land returns to him (or his descendants) instead of being automatically transferred to whomever the law assigns as the default heir, who may be someone that George doesn't intend to benefit. On the other hand, the fee tail restricts the will of later generations, effectively pre-committing them from alienating the family estate, whether motivated by debt or ennui[7].

In its origins in the twelfth century, the main use of the fee tail was to prevent collateral heirs — siblings or cousins and their descendants — from inheriting landed property[8]. Thomas, for instance, could die childless but be survived by his siblings; had George left him an inheritance not subject to a fee tail, Thomas' sister (call her Betty) could inherit the land, which would then continue to pass down to Betty's descendants, as opposed to Thomas' descendants. A cursory reading of medieval history shows that the ties of familiar affection among the landed gentry often gave way to naked ambition and callous betrayal, so the fear of grantors was well founded.

Moreover, the fee tail "enabled a grantor to avoid the unwanted consequences of the rules of inheritance and of grants being enforced by Henry II's new legal machinery"[9] which, naturally, worked to the advantage of the King, rather than the nobles. At a time when title to land equaled military power and political authority, grantors feared losing control over the basis of their legitimacy. When power depends on possession of land, it is a zero-sum game: an increase by one is a decrease in another, Betty's gain (and that of her descendants) is George's (and his descendant') loss. And since Betty's claim was created and enforced by a legal system imposed by the King, George's loss was likely a gain for the Crown as well. Thus, rather than a merely exploitative instrument designed to exclude the poor from access to land, the fee tail was, in its origins, a mechanism to sort out the difficult relations, more political than economic, among the elite. It was a constitutional instrument of a sort, through which landed nobles could construct a legal order distinct from that prescribed by the Common Law which was, after all, not the law of justice or of the people, but mainly of the King.

This changes somewhat in later centuries, as the fee tail becomes a way of keeping landed wealth in a family — an interest that, naturally, only wealthy landed families had. The abolition of the fee tail, however, seems to have been only a minor setback that the wealthy quickly overcame; with but a little legal ingenuity, the great American landowners managed to keep transmitting their wealth to their issue for many generations[10]. Once commodities, retail goods, financial instruments, and the simple accumulated goodwill of a company replaced landed estates as the principal engines of wealth, the rich found new and better ways of preserving their privilege, of which the family trust was the most prominent. As political power became more widely distributed and economic power shifted from agricultural to mercantile and industrial endeavors, the institution naturally declined. Families whose wealth and power was grounded on more fungi-

ble assets could have little use for entails, as did individuals who wished to use the land as mere collateral for more "modern" investments[11]. In its origins, when the institution was effective, the fee tail was much more concerned with preserving political power against other nobles than with preserving wealth against the poor. In later centuries the preservation of family privilege became a principal concern, but by then the fee tail proved irrelevant or counterproductive.

Shachar acknowledges this, but gives it little weight, putting her emphasis on how transmission of entailed land through many generations serves to preserve the wealth and status of the privileged few at the expense of the increasingly enfranchised democratic masses[12]. Yet, the reasons why the feudal institution of the fee tail is today obsolete have very little to do with distributive justice, and everything to do with the development of capitalist modes of production, on the one hand, and the ideological ascendancy of political voluntarism, on the other. I will take these in reverse order.

## 1.1 THE DEAD HAND OF THE PAST, THE LIVING HANDS OF STATES

The fee tail should be understood as a quasi-constitutional instrument, a way for a previous generation to create a legal order that future generations will not be able to defeat. This is the way that constitutions naturally operate: in order to protect a citizenry distant in time (on a liberal reading) or the integrity of the state as a whole (on a communitarian reading) the hands of intermediate generations are tied so that they may not squander the wealth of the state, subvert its institutions, or otherwise destroy the ongoing project of political community for those who will come after them. In the case of the fee tail, the inheritance to be preserved was the family land, on which the medieval lord's power depended; a prodigal son would not be able to blow an entailed estate and leave the good grandchild with nothing but an empty title. Perversely, the interests of the founding generation may therefore run counter to the interest of some, or even all, subsequent generations. The children and grandchildren may wish to divest themselves of the land to make better investments or simply to give themselves up to other pursuits, but they are not allowed to do so because of the entail. The entail thus preserves the original grantor's interest in a political settlement regardless of economic calculus. When combined with the right social mores, it also has a profound conservative effect on the psyche of the heirs; they are tied to the land, but not by choice, and nothing in their choice can liberate them from their bond. This enforces a sort of *noblesse oblige* familiar from apologists for hereditary monarchy: the heirs may not shirk their obligations by abandoning their title, since they cannot abandon their title.

The critique of the fee tail should therefore pass first through a critique of the power wielded by the "dead hand of the past" over the fate of present persons, regardless of the benefits that may or may not be derived from the ensuing distribution. This was Jefferson's logic. In line with his adage "'that the earth belongs in usufruct to the living': that the dead have neither powers nor rights over it" he rejected not only a natural basis for inheritance, but also the basis of constitutionalism. All laws, he argued, including constitutions and laws of inheri-

tance, should expire after a certain period (20 years was his count) in order to allow every generation the right to the unencumbered exercise of its sovereign will[13]. Madison, who Shachar notes was opposed to the fee tail, nonetheless defended constitutionalism in general, on the grounds that it afforded great benefits to future generations, of which stable property rights was the most important[14]. It shouldn't surprise, then, that Madison saw no contradiction in abolishing the fee tail and defending property rights in a constitutional framework. Revisiting the characters above, when George grants Thomas an estate in fee tail, he not only creates a property right for Thomas' children, but also limits Thomas' own right (and the rights of his descendants) to dispose of his property. The defense of property is perfectly consonant with a condemnation of the fee tail, if we focus our attention on the acts of past grantors rather than future beneficiaries. The invocation of the "dead hand of the past" — a favorite boogieman of political voluntarists such as Jefferson — does not always yield a decisive blow to an institution, but sometimes it is a reasonable objection, especially when the interests of future persons are not served by deference to past enactments.

Now, the analogy between the fee tail and birthright citizenship only goes so far. The objection to the fee tail as extending the grip of the dead hand of the past to the wills and interests of present individuals is only obliquely available to the critics of birthright citizenship since, after all, the grantor of an estate in fee tail dies, and with them die their will and interests, but the stipulations of the entail are preserved long afterwards — that's the point of the institution. But states aren't dead, and have present interests that may be important reasons for the preservation of birthright citizenship. Yet, on this level, the analogy between the fee tail and birthright citizenship is illuminating, although not exactly in the way Shachar intends. Because the interests primarily preserved by birthright citizenship, just like those preserved by the fee tail, are those of the grantors, any benefit to the recipients is incidental. For those especially well placed in social and economic hierarchies, the institution of birthright citizenship, like that of the fee tail, may be at best instrumental, at worst inconvenient, and perhaps simply irrelevant. Just like their analogues among the children of the landed gentry, they are likely to find much more effective institutions by which to preserve their privilege than that provided by birthright citizenship. Too sharp a focus on the benefits provided by birthright citizenship will likely obscure these. Moreover, just like the fee tail was a mechanism to sort out the political relations among the elite, so may birthright citizenship be a mechanism for governments to sort out which state may lay claim to (and assume responsibility for) which persons; there may be benefits for citizens but they are incidental to the jurisdictional interests of governments.

## 1.2 THE ZERO-SUM OF US

The metaphor of the fee tail is also illuminating if we can differentiate the different situations in which the beneficiaries of birthright citizenship find themselves. What makes citizenship valuable in one state and not in another is not the fact of birthright transmission of citizenship, but the fact of inequality within

and between societies. In other words, it is the size of the estate inherited and not the title by which it is transmitted that makes a difference. In a world in which all countries transmit citizenship on the basis of birthright, we are all tenants in tail, though some of more land than others[15].

One trouble is that we citizens are not, in fact, tenants of land or its functional equivalent. As I've mentioned, entailed membership was promoted because of the connection between political power and a certain kind of rivalrous, excludable good — namely land — which made competition between members of the elite into a zero-sum game. Land, in other words, was held as a pure private good. But citizenship is not actually a pure private good; in many (and probably most) cases, it is more akin to a "club" good: excludable yes, but also non-rivalrous, in that distributing it among more people doesn't diminish the benefits of those who already have it. The control of power and influence may still be a zero-sum game among states, thus justifying (from their perspectives) institutions like birthright citizenship. But the extension of citizenship to an immigrant does little to detract from the benefits already enjoyed by a natural born citizen. It may, in fact, increase them if it adds to the productivity of the national workforce and therefore expands the economic pie that includes (but not limited to) government benefits served up to members of the community.

Now, there are some inequalities that are directly distributed through citizenship in which extending the sphere of distribution might compromise the benefits given to current members. In these cases, there may, in fact, be something of a zero-sum dynamic between immigrants and citizens. For the poorest citizens of the richest countries, it may be the case that new unskilled immigrants could put a strain on means-tested welfare programs, take up scarce jobs, or drive down wages. From the perspective of the least well-off in the most well-off societies, the form of labor protectionism that birthright citizenship institutes is an attractive option, but it is for that matter an unattractive option for the even less well-off outsiders knocking at their door. But for the most well-off in these societies — and for that matter, for the trans-nationally well off (I hesitate to speak of a global society just yet) — birthright citizenship offers meager benefits. They are true global citizens, or rather the opposite of this; they trade not on birthright entitlements handed down by the state, but on networks and connections, some inherited through non-governmental avenues, others acquired through business and education.

In a capitalist economy managed through sophisticated financial instruments, money has no citizenship and connections determine wealth. I suspect that the wealthiest citizens of the wealthiest countries could give up their birthright citizenship or open it to all applicants, but so long as they retained their email contact lists, the distribution of global wealth over the generations would hardly budge. These individuals, who benefit the most from trans-national economy, are precisely those least invested in birthright citizenship. Birthright citizenship has a significant effect in the margin between the poorest of the rich and those (not necessarily poorest, as I discuss below) of the poor who knock at the doors of

the first world. But it will not affect the more basic sources of inequality of welfare and opportunity: educational credentials, liquid assets, personal and professional connections with those similarly situated. The benefits of membership in a nation may easily be replaced by membership in the Rotary Club or in the Harvard Alumni Association.

## 2. REMEDIES

In response to the problem of arbitrariness that she identifies in the acquisition of birthright citizenship, Shachar proposes two mechanisms to address the ensuing injustices: the birthright privilege levy and the principles of *ius nexi*. These two proposals pull in different directions, but are meant to be complementary. The birthright privilege levy is a redistributive mechanism that diverts a portion of the benefits that citizens of the wealthier countries derive from having received their membership credentials at birth, to the less privileged citizens of poorer countries; it is therefore intended to benefit the citizens of poor countries who stay home because they are incapable or unwilling to migrate to wealthier countries. The principle of *ius nexi*, on the other hand, is a criterion of membership that either complements or substitutes the currently dominant principles of *ius soli* — citizenship given to all born in a place —, or *ius sanguinis* — citizenship given to those born to a certain lineage — with the criterion that membership in a country should track real and effective ties to that country, not mere accidents of fortune. I believe that Shachar intends the two principles to operate in tandem, and I will treat them as such.

### 2.1. FROM BIRTHRIGHT PRIVILEGE LEVY TO NATURAL ARISTOCRACY?

It is true that, as much as states set up, maintain, and monitor the boundaries transmission of citizenship, the citizens of the state also benefit by automatically and effortlessly acquiring their country's protection and support. The problems of agency and justice intersect and lead to a complicated calculus of responsibility. The question, then, is who is to pay the birthright privilege levy? Is it a duty that is discharged by one country to another, or by each individual citizen of a rich country to each individual citizen of the poorer one? Shachar wavers, referring to the good of membership as imposing a collective obligation, but also modeling the birthright privilege levy on an estate tax paid by those who inherit the benefits of citizenship, with the more privileged members of an already privileged society paying more than the less well-off[16]. But the wealthiest few in a rich society, who would be expected to pay the greater share of the levy if it is calculated on an income-sensitive scale, may also be those for whom birthright citizenship represents the least significant cause of their wealth. This would make the birthright levy a global tax on income, rather than one having much to do with citizenship.

The ambivalence illustrates the problem with the model: every individual who is a citizen of some state received a (roughly) equivalent right not to be excluded from that state, and is (roughly) equally impeded from acceding to membership in another state. This leads to a problem of justification: is the birthright privilege levy justified on the basis of fair equality of opportunity, or is it justified in

spite of it? The birthright privilege levy operates like an estate tax, and is dischargeable automatically upon accession to citizenship by birthright, as opposed to being demanded of every citizen individually, as a duty of justice that applies to each person as opposed to the basic structure of society. In this, it seems to share the institutional approach of John Rawls' theory of justice as fairness. The levy is intended to operate more or less at the level of the Rawlsian principle of fair equality of opportunity, by promoting investment in institutions that improve the life prospects of those denied citizenship in more prosperous polities, institutions such as schools, sanitation, systems, and the like.

But opportunity to access primary goods such as these isn't equality of opportunity in Rawls's sense[17]. In his system citizens are to be compensated for inequalities of fortune, such as the social condition of their parents, so that they can have a fair equality of opportunity to enter all important offices and positions in society[18]. This principle is intimately related to the conception of society as a "cooperative venture for mutual advantage"[19]. But this conception is absent from Shachar's remedial program because of the joint operation of the mechanism of the birthright privilege levy and the principle of *ius nexi* (which I discuss below). Shachar is interested as much in elevating the condition of citizens of less well-off countries as in allowing the citizens of all countries, rich or poor, to retain control over their borders for the goods of "a secure legal status, enforceable bundle of rights, and a meaningful sense of collective identity"[20]. But because of this later interest, the justification of the mechanism of the birthright privilege levy ceases to be attached, in any meaningful way, to a principle of fair equality of opportunity. There may simply be no common set of offices and positions for individuals to aspire to, since no state is obliged to open the set of positions they control — namely their citizenship — to others. This limitation is reflected in a problem with the principle of *ius nexi*, which I discuss below. In the absence of a requirement of open or at least considerably more permeable borders, the mechanism of the birthright privilege levy is justified by something like a global difference principle unconstrained by a principle of equality of opportunity, which Rawls classified as a system of "natural aristocracy"[21]. This, I am sure, is not what Shachar intends, but the operation of the birthright privilege levy may lead to precisely the kind of results that we'd expect to see in a natural aristocracy.

There is something oddly perverse about such a mechanism as a remedy for global inequality. It reads like a massive pay-off to the world's poor, a bribe that makes it justifiable to keep the borders of rich countries closed, and make no further structural reforms to the systems of migration, trade, and finance that, by crimping the developing world's comparative advantages, perpetrate injustice and perpetuate inequality. The birthright privilege levy distributes resources — it "supports the creation of a transnational transfer system of knowledge, services, and infrastructure" — but it doesn't increase the quota of work permits and liberalize the labor market for immigrants, eliminate tariffs on textiles and agricultural products, or facilitate the injection of funds into local economies, whether through remittances or foreign direct investment[22]. The birthright priv-

ilege levy, in effect, allows privileged countries to say: "We have secured our benefits though citizenship and wish to continue to do so, so we will pay a lump sum to your corrupt governments to invest in a stagnant infrastructure and hope for the best. Now you have no complaint against our border policies and we kindly ask that you stop knocking on our door."

Finally, there is a feasibility critique of the birthright privilege levy that grates against Shachar's usual realism about the possibilities of structural reform. Shachar points out that states have recently moved towards a harsher regulation of borders, and that the feasibility of opening borders is remote, given the current political climate[23]. She finds this argument especially damning of the open borders argument[24]. But how is a trans-national tax on the transmissibility of citizenship by birthright any more feasible? There is no agency to collect or distribute the tax, and national governments are unlikely to create one. Current official transfer payments between rich and poor countries take the form of foreign aid, which at least in the United States has a very fragile level of popular support.

Yet less radical measures that could immediately improve the welfare of the least well-off have an established institutional basis. The more liberal extension of work permits, rather than citizenship, could be politically acceptable and slowly create more hospitable attitudes towards migrants, leading perhaps to further reforms in the future. The removal of barriers to the trade of textiles and agricultural products — from which many of the world's poor derive their livelihoods — would fit the ideological drive towards market liberalization that the privileged countries promote, as well as find an institutional home in established institutions like the WTO. And financial liberalization in both rich and poor countries could lead to a greater flow of remittances and foreign direct investment that could inject considerable capital into poorer nations, without being hostage to the shifting winds of interventionism and isolationism that seem to blow the opinion of well-off publics to and fro[25]. There are more properly structural measures that go beyond distribution of resources, to production of resources and access to markets — labor, trade, and financial markets —, in short, to opportunities for citizens of developing nations, rather than welfare transfers. Individually, any of these measures may fail to improve the condition of the least well-off, and some straight-up redistribution may be required as a matter of justice or humanity[26]. But, taken collectively, these measures are likely to promote greater growth in developing countries without arousing significant popular opposition in richer ones, as they have little to do with citizenship and indeed bypass the controversial issues of membership entirely[27].

## 2.2. YOU NEED A NEXUS TO GET A NEXUS

The principle of *ius nexi*, I have already mentioned, is a compelling proposal. One of the reasons for this, as Shachar points out, is that even without being named it is already gaining ground in national legal systems.[28] The principles of *ius sanguinis* and *ius loci* are well understood and have been debated for some time; the principle of *ius nexi*, although it is a sensible criterion for the con-

veyance of citizenship, as practice bears out, is undertheorized. Similar principles have been elucidated by Joseph Carens and others[29]. But Shachar's discussion moves the debate from the domain of political theory to that of legal theory, which is fruitful in that it brings a new focus to the issue, which makes it possible to relate the problems of citizenship to other areas of legislation, and makes the principle of *ius nexi* suitable to guide the reform of positive law.

I have concerns, however, that it will not be sufficient, even in conjunction with the mechanism of the birthright privilege levy, to address the problems of the poorest of the poor. The reason for this is that the arrow that drives the principle of *ius nexi* goes in only one direction — from the existence of real and effective ties to the grant of citizenship. This may give rise to two problems, which would be ripe for empirical study: first, it may ignore the consequences of pointing the arrow in the opposite direction — to citizenship creating, not only responding, to ties of loyalty and mutual support; and second, it may require the presence of real and effective ties to claim citizenship, but these ties are available only to those who are already established (or who have family established) in a privileged country, not to those unable to create these ties.

Throughout Shachar's argument, citizenship is a status that is conceived as following an empirical determination of real and effective ties to a polity. Shachar alludes to the state of international law as holding that the social fact of attachment is the basis for the legal bond of citizenship[30]. Of course, there can be substantial disagreement between states as to what constitutes a proper social fact of attachment — some states have more instrumental views of citizenship than others — which may make a formalistic rule less arbitrary than a case-by-case analysis. But I find interesting that, while Shachar's reference is to public international law, the reasoning behind the *ius nexi* argument seems to track more closely the principles of private international law, specifically the "significant contacts methodology" sometimes used in choice-of-law disputes, or the more complex (and now predominant) set of principles suggested by the American Law Institute.[31]

If citizenship always and only follows social facts, this would be a reasonable way of addressing the problem of the 'nominal heir' — "the child born abroad to parents and families that have long lost their ties with the country of birthright membership" —, and the 'resident stakeholder' — "the person who participates in the life of the polity but lacks citizenship due to the weight presently given to ascriptive factors"[32]. But that isn't always the case. States may have political motives for extending citizenship to someone and, while these motives may sometimes be unprincipled and strategic, they nonetheless may create social ties after the fact. We have, then, a chicken and egg problem. Social facts should be the basis of membership, but membership sometimes creates social facts of attachment. An obvious response to the problem would be to withdraw from states the ability to grant or maintain citizenship without a prior and independent basis of attachment[33]. This would be a mistake, however, both as a pointless infringement on state sovereignty (offering citizenship seems an obvious prerog-

ative of states) and because it might weaken the ability of especially poor states with large diasporas to offer the status of citizen in the ancestral land as a way to build and strengthen attachments that could otherwise be lost. These attachments might prove important especially in times of crisis, when the capacity of a state to call upon second and third generation co-nationals now residing in more prosperous states may rely on sentimental ties. Nominal citizenship could exert a significant pull in these circumstances, although how strong the pull would be is open to empirical investigation.

The second problem is perhaps more pressing. The principle of *ius nexi* applies only to individuals who have established ties to a country, who already "participate in the life of the polity." Those who have immigrated, even if they are in a precarious political condition, are presumably better off than those who were unable to leave. The latter are often the recipients of remittances and other aid from the former, but while this benefit their welfare it doesn't benefit their status. In the end, *ius nexi* benefits the best-off of the worst-off, rather than the significantly worse-off that are left behind. In tandem with the mechanism of the birthright privilege levy, the effect could be less than desirable: the citizens of well-off polities could agree to pay the birthright privilege levy, extend full membership to those immigrants that are already participants in the polity, and close its doors to the rest in perpetuity. While I think that in the short term this scenario might be an improvement on the current situation, it would eventually lead to a world in which status would be even more ossified than it is now. If we think that justice requires only distribution of welfare, this might be sufficient, but if we think that status (in the form of the social bases of self-respect) or opportunity are also important distributable goods, this scenario is less attractive.

Finally, I am also concerned that the focus on the arbitrariness of citizenship, which underlies Shachar's argument throughout the book, tempts her to overstate her case. Specifically, I am bothered by the intent to make *ius nexi* not only a complement to current principles of *ius loci* and *ius sanguinis*, but also a replacement for them. This is likely to have two perverse effects: first, it may weaken the links between diasporas and their native (or in some cases ancestral) countries and thus deprive developing countries of support motivated by real or imagined national ties represented by citizenship.

Second, the extension of citizenship to immigrants long-established in a country, yet presently excluded from membership (the problem of under-inclusion) is in no way improved by the retraction of citizenship from persons who acquired citizenship by birthright, but have no effective ties to the country in which they were born (in the case of *ius loci*) or in which their parents were citizens (in the case of *ius sanguinis*). To put it in a somewhat Rawlsian framework, extending membership to long-established migrants benefits the worst-off, the 'resident stakeholders' who are classed in a vulnerable legal status despite having a considerable investment in their adopted home. But withdrawing membership to 'nominal heirs' who are citizens of a country by accident but have no effective ties to it doesn't make anyone better off. What is the point of objecting to over-

inclusion, then? The only possible objection is a principled commitment to egalitarianism for its own sake, a revulsion against arbitrariness even when it makes little practical difference. And while arbitrariness is never a justificatory principle, in the absence of a positive effect in the welfare of the worst-off, it is not by itself grounds for condemnation. That some get an undeserved and unequal benefit is not a moral problem unless that benefit puts the privileged in a position to tyrannize over others, or unless the benefit can be distributed to others less well-off.

## NOTES

[1] I'd like to thank Tara Mrejen, Larissa Smith, Talia Smith, and Nancy Termini for their valuable research assistance. The research for this article benefited from a Supplemental Research Grant from the Faculty of Law at McGill University, and a Nouveaux Chercheurs-Professeurs grant from the Fonds Québécois de Recherche sur la Société et la Culture.

[2] The 'fee tail' is still discussed in major property treatises, but mainly because of its historical value, and because a handful of US states and one Canadian province retain it. Sheldon F. Kurtz, *Moynihan's Introduction to the Law of Real Property*, 4th Edition, St. Paul, Minn., Thompson/West, 2005, p. 54.

[3] This is not exclusively a libertarian argument; it is strongly defended by associations across the political spectrum. See, e.g. Emily Jones, "Signing away the future," *Oxfam Briefing Paper* #101, Washington, D.C., Oxfam International, March 2007.

[4] This emerges in Shachar's discussion of specific judicial decisions in international law, where her complaint is as much about the legal consequence of an accident of birth (the concession of citizenship), as about the inequality of distribution that results from that consequence (Shachar, 182-84). Elsewhere, Shachar asks us to "[i]magine a world in which there are no significant political and wealth variations among bounded membership units... In such a world, nothing is gained by tampering with the existing membership structures." (Shachar, 5).

We may object, of course, to the assumption that the transmission of citizenship by birth is arbitrary, but that is not obvious; here I am merely following Shachar in that assumption, but I want to note some objections to it. The *ius soli* principle may help ensure that one has citizenship in the country where one grew up and is more likely to remain, the *ius sanguinis* principle guarantees that one shares a citizenship with one's parents and siblings, and both principles help reduce statelessness and increase social cohesion. There may be an element of arbitrariness in the choice of one principle over another, or on the procedures for recognition of citizenship, but these do not rule out principled justifications for considering the circumstances of birth as a relevant condition of membership. I thank an anonymous reviewer for these observations.

[5] Thus "[t]he estate in fee tail was so called because it was an estate of inheritance the descent of which was cut down (in Latin "*talliatum*"; in French "*taille*") to the heirs of the body of the donee." Kurtz, *Moynihan's Real Property*, p. 50.

[6] Kurtz, *Moynihan's Real Property*, p. 51.

[7] Shachar explains this on p. 38.

[8] Joseph Biancalana, *The Fee Tail and the Common Recovery in Medieval England,* Cambridge, Cambridge University Press, 2001, pp. 9-20.

[9] Biancalana, *The Fee Tail*, p. 10.

[10] John V. Orth, "After the Revolution: 'Reform' of the Law of Inheritance," *Law and History Review* 10 (1): p. 41ff.

[11] The common recovery — the contrived legal fiction invented to liberate estates from entailment and transform them into alienable fee simples absolute — was not created in furtherance of justice or republican virtue, but at the request of tenants who wished to sell the land, or to transfer it within a family but out of the direct line of descendants. Biancalana, *The Fee Tail*, p. 313ff.

[12] Shachar, p. 38ff.

[13] Thomas Jefferson, Letter to Madison of 6 September 1789, in P. B. Kurland and R. Lerner (Eds.), *The Founders' Constitution*. Chicago: University of Chicago Press, Vol. 1, Ch. 2, Doc. 23. I discuss Jefferson's and Madison's views in "The Problem of a Perpetual Constitution" in *Intergenerational Justice*, edited by Axel Gosseries and Lukas Meyer, Oxford: Oxford University Press, 2009, pp. 382-85.

[14] James Madison, Letter to Jefferson of 4 February 1790, in *The Founders' Constitution*, Vol. 1, Ch. 2, Doc. 24.

[15] The transmission of citizenship by birthright is a feature of the laws of every country, not just the wealthiest, and there seems to be, in fact, very little correlation between the wealth of a country and the criteria for immigration and citizenship. See United States Office of Personnel Management, *Citizenship Laws of the World*, 2001 Edition, www.opm.gov/extra/investigate/ IS-01.pdf (Accessed 12 April 2010). But the common element of birthright should not obscure — and perhaps ought to highlight — the great differences from one country to another in the positive rules of acquisition of citizenship.

[16] Shachar, p. 101ff.

[17] Rawls's theory of justice as fairness is only applicable, as is well known, to the domestic sphere, not to the international, but I will leave that aside for the sake of the following illustration.

[18] Rawls, *Theory of Justice: Revised Edition,* Cambridge, Mass., Harvard University Press, 1999, p. 73ff.

[19] Rawls, *TJ*, p. 4.

[20] Shachar, p. 44.

[21] Rawls *TJ*, p. 57ff.

[22] The suggestion that the levy could be discharged through public service only complicates things; if the service is truly volunteered, then the levy is clearly an individual responsibility, but if it is collective and laid on a country, the public service takes on an air of conscription (Shachar, 103).

[23] Shachar, p. 63.

[24] Shachar, p. 74f.

[25] Shachar discusses remittances in detail (p. 75f), and they are indeed one of the most effective ways of distributing aid from developed to developing countries, since the aid reaches the population directly and isn't subject to confiscation by the state. The World Bank has extensive information about remittances in its *Migration and Remittances Factbook,* Washington, D.C., World Bank, 2008, available at http://www.worldbank.org/prospects/migrationandremittances.

[26] Thomas Pogge has argued that open border policies are unlikely to improve the condition of the world's poorest, as they systematically benefit the well-placed and well-connected in developing countries. Thomas Pogge, "Migration and Poverty" in *Citizenship and Exclusion*, edited by Veit Bader, New York, St. Martin's Press, 1997. This is probably true of open borders as an isolated policy, but less true if joined with policies directed at transferring capital and opening markets for those who stay.

[27] In fact, there need not be a contradiction in policy between the birthright levy and the liberalization of the flow of labor, goods, and capital if we understand the levy less like a transfer of goods and more like a transfer of welfare (or at least of opportunity for greater welfare). If these structural changes in policy improve the condition of the least well-off, then some part of the obligation that underlies the levy may have been discharged without the need for transfer payments (and be a Pareto-improvement).

[28] The prehistory of *ius nexi* could be traced to the medieval principle of "Stadtluft macht frei nach Jahr und Tag" — the air of the city makes one free after a year and a day — which was an avenue for serfs to escape the indignities of feudal bondage by developing social attachments in urban centers. Harold Berman, *Law and Revolution,* Cambridge, Mass.: Harvard University Press, 1983, pp. 43, 368-69, 386, 396.

[29] See, e.g., Joseph Carens, "On Belonging: What we owe people who stay" *Boston Review* 30(3-4): pp. 16-19 (2005); "The Case for Amnesty" *Boston Review* 34(5-6): pp. 7-11 (2009).

[30] Shachar, 166

[31] American Law Institute, *Restatement (Second) of Conflict of Laws* § 6 (1971). See also, Symeon C. Symeonides, "Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey" *American Journal of Comparative Law* 57(2): 269-329 (2009).

[32] These useful terms are defined in Shachar, p. 165.

[33] There is some reason to think that international law does this already. States are free to grant or deny citizenship with respect to municipal law, but the recognition of such grants of citizenship by other states is subject to its conformance with principles of international law, especially the principle that "the legal bond of nationality accord with the individual's genuine connection with the State," enunciated in *Liechtenstein* v. *Guatemala* (The Nottebohm case), 1955 ICJ 4, 23. The decision applies only to international disputes over citizenship, and would have little effect on the distribution of political power or goods within a state, but it should be noted that, from the moment it was pronounced, the decision was criticized as leading to inconsistencies in status and an increase the likelihood of statelessness. See J. Mervin Jones, "The Nottebohm Case" *The International and Comparative Law Quarterly* 5 (April 1956): pp. 230-44.

# MIGRATION AND EQUALITY: SHOULD CITIZENSHIP LEVY BE A TAX OR A FINE?[1]

SPERANTA DUMITRU
UNIVERSITY OF PARIS DESCARTES & CERSES, CNRS

## ABSTRACT

It is often argued that development aid can and should compensate the restrictions on migration. Such compensation, Shachar has recently argued, should be levied as a tax on citizenship to further the global equality of opportunity. Since citizenship is essentially a 'birthright lottery', that is, a way of legalizing privileges obtained by birth, it would be fair to compensate the resulting gap in opportunities available to children born in rich versus poor countries by a 'birthright privilege levy'. This article sets out a defence of three theses. The first states that equality of opportunity is incompatible with, and cannot be achieved in, segregated territories. The second posits that to believe that material equality compensates the injustice of restrictions on movement is to commit a 'sedentarist mistake'. The third affirms that any citizenship levy, including the egalitarian and non-sedentarist formula I'm proposing, would be better understood as a penalty rather than a tax.

## RÉSUMÉ

Il est souvent dit qu'une aide au développement peut et doit compenser les restrictions à l'immigration. Une telle compensation pourrait, selon un argument récent de Shachar, être prélevée comme un impôt sur la citoyenneté, payé par les pays riches, pour faire avancer l'égalité mondiale des chances. La citoyenneté étant fondamentalement une « loterie de la naissance », qui légalise des privilèges obtenus par naissance, il serait juste de compenser l'inégalité des chances qu'elle produit entre les enfants nés dans les pays riches et ceux nés dans les pays pauvres, par une taxe sur ces mêmes privilèges de naissance. Cet article défend trois thèses. Premièrement, l'égalité des chances est incompatible et ne peut pas être réalisée par une ségrégation territoriale. Deuxièmement, croire que l'égalité matérielle compense l'injustice des restrictions sur la mobilité, c'est commettre une « erreur sédentariste ». Troisièmement, toute charge sur la citoyenneté, y compris celle dont je propose une formule de calcul égalitariste et non sédentariste, serait mieux comprise comme une amende, plutôt qu'un impôt.

The idea that people should not be treated according to the circumstances of their birth is generally regarded as a minimal requirement of justice. However, when it comes to national circumstances of birth, most social justice theorists become hesitant about what justice minimally requires. Ayelet Shachar's latest book will not make that reluctance easier to bear[2]. In *Birthright Lottery: Citizenship and Global Inequality*, she shows that citizenship is essentially a way of granting rights according to circumstances of birth. While in *jus sanguinis* regimes, being born to the right parents is a source of rights, in *jus soli* regimes, being born in the right place insures full membership protection. Thus, by connecting rights to the luck of one's birthplace or ancestry, citizenship is the opposite of what justice minimally requires in terms of equality of opportunity.

Shachar frames her argument in the language of equality of opportunity[3]. Since she believes that global equality of opportunity can be achieved in a separate nation-states world, she proposes two reforms of citizenship law. The first is meant to address inequality. In a world with unequal places and parents, a legal system that grants rights according to birth circumstances is likely to increase inequalities; therefore, no such system should be permitted unless it mitigates its own effects by reducing the inequalities in children's life opportunities. Shachar's solution is to tax citizenship: if citizens of rich countries want to continue to bestow membership according to birthright, they should pay citizens of poor countries a *birthright privilege levy*. The second reform is intended to correct two other unfair side-effects of both *jus soli* and *jus sanguinis*. Indeed, both birthright regimes may exclude from citizenship people who live in, and have substantive ties to, the polity (the 'underinclusion' effect) and may grant citizenship to people who meet the criteria of birthplace or parentage, but emigrated or never lived into the country (the 'overinclusion' effect). To correct these effects, Shachar's second proposal is to introduce a *jus nexi principle*, a principle that grants citizenship rights only to genuine members of the polity.

Would citizenship, thus amended, conform to what justice minimally requires? My aim here is to show that it does not, as long as citizenship is defined as implying a 'right to exclude'.

The paper is in three parts. In Section 1, I argue that equality of opportunity is incompatible with segregated territories and I claim that the equal value of opportunities provided in each territory brings in equal discrimination, not equal opportunity. In Section 2, I discuss the equality of outcomes: while it is compatible with separate territories, its achievement is not enough to remove the injustice of restrictions on movement. To believe it is, is to commit a 'sedentarist mistake', as I will call it. In Section 3, I build on Shachar's ideas to propose a way of calculating the citizenship levy, which is not sedentarist and is compatible with an equality of outcomes approach. However, I will suggest that the citizenship levy is better understood as a penalty rather than a tax.

## 1. SEPARATE BUT EQUAL... OPPORTUNITIES?

Like most contemporary political thinkers, Shachar includes two objectives on her political agenda. The first is the reduction of inequalities in a world of separate nation-states. Let us call it the 'separate but equal' principle. By 'separate' nation-states, I specifically mean states that control entry to their territory[4]. The second objective specifies the sort of equality to be achieved. Again, like many political thinkers, Shachar endorses an equality of opportunity approach[5]. But do these two objectives constitute a coherent political agenda?

One should take this question seriously and not succumb to the rhetorical effect of the slogan 'separate but equal'. Indeed, the slogan is a sad echo of the doctrine upheld by the United States Supreme Court in the 1896 decision, *Plessy vs. Ferguson*. At that time, the Court reaffirmed Louisiana's racial law giving "equal but separate accommodations for the white and coloured races". It maintained that separation alone neither abridges one's privileges, immunities or property, nor denies the equal protection of the law. Fortunately, the ruling was quashed by the 1954 Supreme Court decision in *Brown vs. Board of Education*. Without contesting the existence of material equality, the Court concluded that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are "inherently unequal", because they have detrimental effect on children, who interpret them as a sign of inferiority.

Now, let us try to imagine a segregation scheme that is immune to this criticism. Its basis is not racial, but territorial: people born in separate territories are bound to live in them for the rest of their life, but each territory provides accommodations and facilities of a strictly equal value. Such equality might have been achieved by Shachar's birthright levy or by other means. Most importantly, equality has achieved another of Shachar's goals: it has strengthened "the enabling function of membership everywhere"[6]. So, unlike African-American children, nobody in this imaginary world interprets segregation as a sign of inferiority and some even take pride in belonging to separate nations. Would segregation be a policy of equal opportunity, then?

One might answer in the affirmative: if available opportunities in each territory are of equal value and are unanimously regarded as such (i.e., no one interprets separation as a sign of inferiority), the policy must be one of equal opportunities. But to answer this way is to understand the question "can segregation be a policy of equal opportunity?" as simply inquiring "are the available opportunities really equal in each territory?"

Two features of the concept of opportunity press us to set apart the above questions. The first is related to the distinction between opportunities and their value. Despite considerable research on equal opportunities, too little has been done to clarify the meaning of an opportunity *tout court*[7]. In fact, having an opportunity

is in no way equivalent to possessing the wealth associated with it. On the contrary, when one has an opportunity, it implies that one lacks something that one values but can get it by doing something[8]. An opportunity refers to an *uncertain* gain. As Hansson put it, "if I am certain to receive payment to my bank account for this month's work (…) [it] would seem unnatural to say that I have an opportunity to receive my salary"[9].

If Hansson's intuition is right, it seems that Shachar's aim "to redistribute opportunity globally" cannot be achieved by merely "placing a tax-like burden on the automatic membership-entitlement transfer locally"[10]. Money redistribution is neither a necessary, nor a sufficient, condition for the distribution of opportunities. Why is this so?
Giving someone the money or the value of an opportunity is compatible with depriving that person of an opportunity. If I were to apply for a job for which I am perfectly qualified, but you refused to consider applications from women, you would deprive me of a job opportunity; this would still be the case if you offered to pay me the entire amount of money I would have earned. In this sense, redistributing the value of opportunities is not a sufficient condition for distributing opportunities. But receiving money is not a necessary condition for having an opportunity, either. If your hiring procedure was irreproachable, but I had changed my mind and did not come to the interview, I had had a genuine opportunity even if I derived no money from it. Having an opportunity is having only a chance to get something valuable. Since money can buy many valuable things, including the means to access opportunities, it often stands in as a measure of the level of opportunity. But opportunities are not synonymous with money.

The distinction between opportunities and their value suggests that the proper *distribuendum* of an equal opportunity policy is neither money, nor the value of opportunities, but opportunities themselves. Though, the distribution of opportunities, unlike that of garden plots, cannot be limited by boundaries.

To see why boundaries cannot equalize opportunities, imagine a policy dividing professions: half of them being set aside for women and half for men, so that no woman is entitled to exercise a profession reserved for men, and *vice versa*. The distribution is equal in all respects: remuneration levels in each category are the same (i.e., the best job for men is as highly-paid as the best job for women and this holds for any wage level), distribution profiles of jobs within each group are the same (i.e., there are as many men as women occupying well-paid jobs, a proportion strictly observed for lower-paid jobs), and the symbolic value of jobs is equivalent (jobs for men have as much social dignity as jobs for women). Shall we call this professional segregation an equal opportunity policy? One would more appropriately call it a policy of equal discrimination: men and women are equally discriminated when they are given separate, though equal, opportunities.

Why are equal opportunity and equal discrimination different policies? To answer this question, let us move on to the second feature of the concept of opportunity: opportunities are conceptually linked to actions. As a matter of fact, English language dictionaries define an opportunity as "a favourable juncture of circumstances" and, more precisely, as "an occasion or situation which makes it possible to do something that you want to do or have to do, or the possibility of doing something"[11]. Therefore, opportunities are circumstances, favourable circumstances, but the way they favour us is not the same as the way digestion and nutriments' absorption favour good health. They are favourable, provided that we choose to act and to transform them according to our ends[12]. The fact that opportunities are linked to actions is recorded by the word's grammar: one cannot have an opportunity period; 'opportunity' is an unsaturated expression, it is always an opportunity to do something. By its link to action, an opportunity becomes a favourable juncture, not of circumstances but of circumstances and choices to act. The conceptual link between opportunities and actions is recognized by luck-egalitarianism, which provides the equality of opportunity with a philosophical justification based on the distinction between choice and circumstances. But how does the link to action explain that equal opportunity differs from an equal discrimination policy?

There are at least two consequences of noticing that opportunities are linked to actions and objectives. The first is that one cannot decide if two opportunities are of equal value without considering the agent's ends. Suppose a man's objective is to work as a lawyer, but according to the imagined policy above, only women can be lawyers. To claim that giving him the possibility to work as an accountant (an equally worthy and well-paid job) is to give him an equal opportunity is to assume that he was looking for whatever job secures him a specific level of welfare. Of course, the man could have defined his professional goal in a broader-grained way and, in this case, equal discrimination and equal opportunity policies have similar effects on him. But, if he had not, he would be astonished to learn that he has been given, and not deprived of, a job opportunity. Opportunities are not 'naturally substitutable'[13]. They are substitutable precisely inasmuch as the individuals' objectives are[14]. The fact that opportunities are distributable by opening access and removing obstacles, and not by boundaries, is why we may not confound equal discrimination with equal opportunity.

The second consequence of linking opportunities to actions is that it helps us to understand why 'separate but equal opportunities' results in an incoherent political agenda. Both segregation scenarios described above limit available opportunities according to individual circumstances of birth (birthplace in the first case, sex in the second). What is so wrong with dividing opportunities according to the circumstances of birth? Perhaps the fact that no matter how favourable the opportunities a person encounters throughout her life, and no matter how much effort she is willing to make, nothing can be done to go beyond the bounds set at birth. Yet, this is just the opposite of equality of opportunity.

In a sense, any philosophy of opportunity is built on a Promethean ideal. Its core idea is that individuals should (be able to) act and transform circumstances according to their objectives. This idea is widely shared by people of different political preferences. On the right, conservatives emphasise everyone's responsibility for one's own wealth, thus suggesting that everyone acted, or should have acted, to convert opportunities into wealth. On the left, luck egalitarians stress that unfavourable and unchosen past circumstances impose unfair disadvantages, which make people less able to manipulate present circumstances as they wish. Hopefully, no one denies that nobody is responsible for the circumstances of one's own birth. So, if opportunities are about transforming circumstances according to one's objectives, how can one claim that a policy which separates people at birth, and confines them to circumstances they could not have chosen, is a policy inspired by a philosophy of opportunity? The doctrine of 'separate but equal opportunities' always results in an incoherent agenda.

To better represent the difference between (equal) discrimination and equality of opportunity, I suggest ranking policies depending on the degree to which they allow individuals to transform circumstances according to their objectives. At one end of the spectrum, nothing can be done to go beyond birth circumstances: it is the extreme form of a discriminatory policy. As we advance on this continuum, discrimination weakens as the imposed limits become less insurmountable (like a policy conditioning access to jobs based on marital status, which is discriminatory but not insurmountable)[15], up to a point where policies can be properly considered to offer equal opportunity. At this point, there is a formal or minimal equality of opportunity since, as Rawls put it, "all [individuals] have at least the same legal rights of access to all advantaged social positions"[16]. Beyond this point, there are policies which increasingly facilitate access to opportunities (by providing supplementary means, such as education, welfare, etc.).

To sum up, if equality of opportunity minimally requires opening all positions to all individuals, then segregation cannot be compatible with it. Shachar implicitly recognises that exclusion is incompatible with equal opportunity, when she refers to the "*opportunity*-enhancing" function of citizenship as to a "right *not to be excluded*". Why, then, maintain a right to exclude or a "gate-keeping" function of citizenship?

## 2. EQUALITY AND SEDENTARISM

One may support the 'separate but equal' principle under an equality of outcomes reading. Separate citizenship has, according to Shachar, two functions[17]. The first is 'opportunity-enhancing' and consists of granting each member the right not to be excluded, that is, legal protection from deportation, as well as from economic and political exclusion. The second is the 'gate-keeping' function and refers to the members' power to control access to membership and, on this basis, to refuse non-members access to the land. Now, egalitarians cannot

be comfortable with enhancing opportunities for some while shutting out others that are poorer. But, if each membership structure was equally endowed, would separate citizenship still harm someone?

One can answer in the affirmative: preventing people who live in separate membership structures from moving and meeting each other is a serious violation of individual rights. As a matter of fact, restrictions on movement harm not only poor countries' citizens, and have not only socio-economic effects. Since mobility conditions a wide range, if not all, of our actions, restrictions on mobility result in limitations on freedom that go far beyond economic aspects. Preventing people — just because they are citizens of different countries — from visiting or receiving friends in their homes, marrying people of their choice or developing new relationships is a serious violation of their fundamental liberties. Generally, we would describe any political regime which deprives people, even a minority, of such civil liberties as highly oppressive. However, when it comes to the international level, we tend to have more clemency with such rights' violations and forget that freedom of association and the rights to fund a family and to lead a meaningful life are still recognized as universal human rights. Therefore, insofar as it imposes restrictions on movement, the 'gate-keeping' function of citizenship harms both outsiders and insiders[18]. And contrary to the commonplace, closed borders do not harm only outsiders from poor countries: poor and rich countries' insiders and outsiders have their fundamental freedoms curtailed.

Shachar seems to believe that while membership's benefits always outweigh its costs in ideal conditions, this kind of harm would rarely occur. Not because individuals' freedom of movement would be secured, but because ideal conditions are such that nobody would be motivated to move. She writes:

> Imagine a world in which there are no significant political and wealth variations among bounded membership units. (...) In such a world, nothing is to be gained by tampering with the existing membership structures. In this imaginary and fully stable world system, *there is no motivation for change and migration*[19]

Two remarks can be made about this thought experiment. The first is that it seems to show that one of Shachar's reforms of citizenship is redundant. If the birthright levy ends up equalising wealth and strengthening citizenship bonds everywhere, the *jus nexi* principle becomes pointless. As noticed earlier, the *jus nexi* principle is meant to link "citizenship and the *social fact of membership*"[20] by granting citizenship rights to people who have genuine connections with a community. But, if no one is motivated to leave one's birthplace, nor to go to a different one, there is no "social fact of membership" as distinct from legal membership. It is the levy that mechanically solves the problem of underinclusion and

overinclusion effects. And neither *jus nexi* nor another principle is able to "reduce the weight of birthright in allocating citizenship titles"[21]. In a world without change and migration, *jus soli* and *jus sanguinis* are conflated and the weight of birthright is at the highest possible level, since there is no way to be born on a territory without originating from a member and *vice versa*.

The second remark is that the thought experiment suggests that a world without mobility and change is a desirable one. Elsewhere, I called the position that gives priority to sedentary preferences over preferences implying mobility 'sedentarism'[22]. Sedentarism is a bias: dominant in social sciences[23], it is overtly value-laden in political theory. Here, mobility is depicted as an 'abnormal' condition, uncharacteristic for 'human beings' and caused mainly by catastrophes[24]. Since mobility is rarely viewed as a genuine choice, preferences that are satisfied though mobility appear eccentric and lacking a real purpose:

> Persecution, oppression and lack of economic opportunity are surely the principal migration incentives. (…) An individual might seek to migrate in order to get as far away from his family as possible, to master a foreign language or to live in a country where people take siestas. *For simplicity, I will assume that such preferences can be expected not to favour one country over another*. [25]

The difficulty of figuring out movement as a choice leads many scholars to commit what could be called the sedentarist mistake. The sedentarist mistake comes in many forms. One is hasty generalisation, which goes from the observation that presently, most people's movement at the international level is forced by persecution and poverty, to the conclusion that all movement comes about from (coercion by) persecution and poverty[26]. Hasty generalisation leads, for instance, to reduce the claims made upon rich countries to admit more needy foreigners to claims about redistribution: "if this is a worthy cause, it is so in virtue of the protection it affords to persons who are very badly off"[27]. Such positions neglect that needy people have rights other than those related to their economic condition. Another common form of the sedentarist mistake is a deontic version of the fallacy of the inverse of the following form: since poverty causes migration and reducing poverty is a worthy goal, then reducing migration must be a worthy goal[28]. For instance, it is often argued that if poverty causes migration and if rich countries should fund development of poor ones, then "funding should aim at a near-term target of immigration-pressure equilibrium"[29]. In each case, premises about inequality and forced migration are converted in a conclusion about migration. Acknowledging that mobility can be a choice (even for the poor) would have avoided the sedentarist mistake.

Now, while a world where "there is no motivation for change and migration" looks like a dead world, a liberal would neither approve nor disapprove of peo-

ple's preferences for immobility and stasis. A liberal would only say that if a majority, however large, forcefully imposes its sedentary preferences on others and prevents them from moving, then this majority violates those individuals' rights. And wealth alone cannot change their harm into freedom, just as golden bars do not make cages a liberty symbol. To avoid the possibility of such harm, a liberal would disconnect citizenship from the power to control movement and entry into the land.

Sedentarism does not only establish abusive links between mobility and wealth inequality; it claims a conceptual relationship between mobility and citizenship, too. How is this happening? On the one hand, the presupposition that everyone has sedentary preferences might explain why anyone who moves by crossing a border is regarded as having the intention to settle in that place forever. The reason is that movement is considered only as a means to becoming sedentary. On the other hand, control of entry is often viewed as important for citizenship. Citizens, it is often said, have the right to choose their country's destiny and on this basis, to control who becomes a member. The perceived link between citizenship and control on mobility seems to be the following: as anyone who crosses a border is regarded as having the intention to settle and to apply for citizenship, and as those who are already citizens feel entitled to control newcomers' access to citizenship, then citizens have a right to control newcomers' entry into the land. But this argument is not valid. If it is possible — and there is a lot of evidence that it is — both to have a right of entry and to be permanently denied citizenship rights, then there must be no conceptual relationship between controlling citizenship and refusing access to land.

Shachar builds her argument on the presupposition that 'gate-keeping' is a function of citizenship that excludes non-members not only from membership benefits, but also from the right to entry. Unfortunately, while her book provides an illuminating analysis of citizenship, the absence of a clear account on what just immigration policies would look like leaves her *jus nexi* proposal unspecified. The question of why, how and which foreigners are allowed to establish genuine connections with a community could be important for her proposal.

## 3. HOW TO CALCULATE THE CITIZENSHIP LEVY

Sedentarist presuppositions lead many egalitarians to believe that the only harm resulting from borders is the increase of existing inequalities between nation-states. To compensate for this harm, Shachar proposes a birthright privilege levy that rich countries should pay to poor countries. While the idea of a global levy is not new[30], no one before Shachar has more clearly shown that citizenship is a legal instrument for reproducing global inequalities over generations. To express the idea of intergenerational transfer, Shachar's method to calculate the citizenship levy focuses on 'begetting':

> (...) we can envisage a formula based upon [the country's] annual birth rate (typically calculated as the number of live births for every 1,000 people) multiplied by a fixed dollar base (...)"[31]

The intuition behind this is that each time a rich country privileges a child, by giving her at birth the advantage of citizenship in a well-off society, that rich country should compensate the children who are excluded and disadvantaged by their birth in a poor country.

There are at least three kinds of reasons for not indexing the levy on countries annual birth-rates. The first is demographic. As a matter of fact, childbirths in rich countries are relatively low and decreasing. If the levy varies with them, the smaller the number of childbirths, the less a country will pay. Moreover, if one chooses the birth rate (i.e., the annual number of childbirths per 1,000 persons) rather than the fertility rate (i.e., the average number of children born to a woman over her lifetime), then one choses to make the levy dependent on the age distribution of the population. That means that the more the life-expectancy increases, the less a country will pay, the number of childbirths being equal. If the two trends (decreasing childbirths and increasing life-expectancy) last in the rich countries, as it is expected, then the levy does not "generate *a viable and reliable* source of revenue to ensure that no child falls below a certain threshold of life-expectancy and well-being"[32]. In other words, either the funds raised will decrease, or the multiplier (the "fixed dollar base") should be adjusted. In the last case, one must assume that the birth rate is not elastic to the tax increase (i.e., neither the individual decisions, nor the government's policies make dependent the number of children born in rich countries on how much they should pay for poor countries' children[33]).

The second kind of reason deals more explicitly with *justice*. As noticed, the levy (L) is the product of birth rate (B) and an amount of money proportional to the country's wealth (*W*):

$$L = W \times B$$

This formula allows for less wealthy countries with higher birth rates to pay as much as wealthier countries with lower birth rates. For instance, suppose that countries with very high human development such as Norway and Canada (ranked 1st and 4th in the 2009 Human Development Index), should pay less than the high human development countries Mexico and Venezuela (ranked 53rd and 58th in the 2009 HDI). That could happen thanks to the birth rates, which are half as much high in the former countries (around 12 and 10‰ in Norway and Canada compared to 21 and 19‰ for Venezuela and Mexico). If that happens, those countries could argue that they are unjustly impoverished. Thus, in a sense, the citizenship levy backfires. For, if the harm done by citizenship is the increase of inequalities, the citizenship levy can make it worse.

The third kind of reason concerns the significance of birth. Imagine that individuals from rich countries, after finding a wonder drug to extend life infinitely and have eternal youth, decided not to make children anymore. They are not under the obligation to pay the citizenship levy (zero birth rate multiplied by any amount of dollars equals zero). Besides, they decide to keep all the wealth for those who are already members. Arguing from the "collective good of citizenship", they make an excessive use of its "gate-keeping" function and refuse all entry to foreigners. According to Shachar, citizenship grants a right to exclude. Is there something wrong with citizenship?

If there is something wrong, it is not the transfer of wealth through birthright, since those citizens are no longer having children. Accordingly, if there is something to be taxed, it is not the birth rate. But what is it?

To better grasp it, imagine a world exactly like ours except that rich countries have decided to keep the number of citizens unchanged. They put this clause into their constitutions so that from then on, every citizen has a legal right to choose whether to have one child or to admit one immigrant, given that they keep the number of members constant[34]. For various reasons (individual preferences or poor fertility), birthright is considerably reduced in these countries. The consequence is that rich countries would pay a low citizenship levy and global inequalities will persist. Is there still something wrong with the richest countries' constitutions?

For someone concerned by global inequalities, the constitutional clause is objectionable, but not because of the remaining birthright. After all, if wealth is concentrated in the hands of a limited number of people, an egalitarian does not care so much whether people's control over resources is given by birth or by naturalization. Of course, the possibility of choosing immigrants instead of having children allows rich countries' citizens to reduce the weight of birthright and to avoid the levy. But what an egalitarian would object to is that citizens have the power to choose who controls resources, not that those who are chosen are babies rather than immigrants.

Yet, this power is not created by the constitutional clause: it is part of the definition of citizenship. What both scenarios above suggest is that citizenship is wrong not (only) because rights are given at birth, but because people who happen to be citizens (either by birth, or by naturalisation) have the power to decide to whom they further distribute citizenship rights. Whether the beneficiaries are children at birth or adults born abroad is a secondary problem. Thus, if Shachar is right in connecting the levy to those to whom advantages are *mainly* transferred, the exclusive focus on native children is misleading. A citizenship levy should tax the power to transfer citizenship rights and not their transfer to children. How would this change the initial formula?

Shachar's formula, L = *W* x B, supposed that the levy should be raised each time a rich country privileges a child, by giving her at birth the advantage of citizenship in a well-off society. An egalitarian is neutral as to whom the privilege goes and finds the power to privilege objectionable. Does this mean that naturalizations should be added to citizenship attributions at birth, so that L = *W* x (B+N)?

Not at all. What an egalitarian finds objectionable in a privilege is not the advantage given to some, but the disadvantage it occurs to others, by the same token. Therefore, the levy should not be increased each time that someone is advantaged, whether it is by birth or otherwise. What should be taxed is the so-called 'right to exclude' or the 'gate-keeping' function of citizenship. It is the exercise of this power, by two channels — the power to control membership and the power to refuse entry to non-members — that puts others at disadvantage. As I suggested, these two powers should be disconnected: intention to entry into a land is not necessarily an intention to apply for citizenship. Then the formula can take the following form:

$$L = W \times (\Delta e + \Delta c)$$

In this formula, 'Δe' refers to the difference between the total number of applications for entry into the land and the number of accepted applications, while 'Δc' refers to the difference between the total number of applications for citizenship rights and the number of the actual attributions of citizenship. To sum up, the citizenship levy increases as the country's welfare (*W*) increases and as the power to exclude, either by refusing entry, or by refusing citizenship applications, increases.

## 4. EPILOGUE: A CITIZENSHIP FINE

The idea to tax exclusion has several advantages. First, it conforms to egalitarian defenses of citizenship, by putting the 'gate-keeping' function to the service of global equality. Second, it is not excessively sedentarist: those who have sedentarist preferences are allowed to impose them for others in exchange for fees. Third, it applies to all countries, judiciously: as poor countries are the destination of more than 40% of today's global migrants, there is no reason to exempt these countries from paying the levy. However, their power to control membership and entry is equivalent to that of rich countries, in that it is multiplied by a value *W* proportional to their wealth.

A question remains: if exclusion is wrong, why should be one be permitted to pay for acting wrongly? Indeed, exclusion based on circumstances of birth is, as I argued in the first section, the opposite of equality of opportunity. Exclusion by denial of entry to a territory can be, as I suggested in the second section, a violation of individual rights — of those who intend to enter as well as of those who intend (or would intend, if allowed to establish ties) to receive them. How-

ever, money does not change the moral qualification of exclusion. On the contrary, fines and penalties are usually prescribed against wrongful conduct and rights violations. In this sense, the citizenship levy can be interpreted as a fine or a penalty against exclusion.

## NOTES

[1] I am very grateful for their suggestions to Ryoa Chung, Marc Fleurbaey, Anca Gheaus, Jacob Levy, Catherine Larrère, Erik Malmkvist, Victor Muniz-Fraticelli, Olivier Nalin, Adina Preda, Martin Provencher, Marc Ruegger, Hillel Steiner, Jean-Baptiste Jeangène Vilmer, Daniel Weinstock, to participants to the GRIPP seminar (Montréal) and to the Journées interuniversitaires (Paris), as well as to the four anonymous referees of this journal.

[2] Shachar, Ayelet, *Birthright lottery: Citizenship and Global Inequality*, Cambridge Mass. and London, Harvard University Press, 2009.

[3] A simple search in her book gives 104 results for the word "opportunity" and 27 for the word "chance".

[4] Separate nation-states are, of course, compatible with freedom of movement as historical reality shows. For an account on the origins and construction of the exclusionary power of the states, see e.g., Plender, Richard, *International Migration Law*, Leiden, A. W. Sijthoff, 1972, esp. Ch. 1-3. Nowadays, European Union is a clear example of nation-states where separate jurisdictions are compatible with the right to freely move for their citizens.

[5] Philosophers of different political orientations have recognized equality of opportunity as a popular ideal, whether they endorsed this ideal themselves or not. See e.g., Schaar, John "Equality of Opportunity", in *Nomos IX: Equality*, ed. James Pennock and John Chapman, NY, Atherton Press, 1967, p. 228; Nozick, Robert, *Anarchy State and Utopia*, London, Blacwell, 1974, p. 235; Levin, Michael, "Equality of Opportunity", *Philosophical Quartely*, vol. 31, 1983, p. 110; Moellendorf, Darrell, *Cosmopolitan Justice*, Westview Press, 2002, p. 49.

[6] Shachar, *Birthright*, p. 96, p. 105.

[7] The recent revival of equality of opportunity research is owed to authors like Richard Arneson, Gerald A. Cohen, Amartya Sen, James Fishkin, and John Roemer, among others. Since the debate has been focused on the concept of equality and its relation to responsibility, this literature lacks, except for Arneson's writings, a clear definition of the word "opportunity". For literature defining the concept of opportunity, see note 7 below.

[8] My aim here is not to provide a complete definition of the word 'opportunity' but to clarify some of its aspects useful to my argument. For some definitions found in literature, see Lloyd Thomas, D.A. "Competitive Equality of Opportunity", *Mind*, Vol. 86, No. 343, 1977, pp. 388-404 ("One has an opportunity to do something or to have something provided that one can do it or have it if one choses. One has no opportunity to do something or to have something if one cannot do it or have it even if one wishes" at p. 388); Westen, Peter, "The Concept of Equal Opportunity", *Ethics*, vol. 95, 1985, pp. 837-850 (identifying three elements of the concept of opportunity: an agent, a goal and a relationship between them); Green, S. J. D. "Is Equality of Opportunity a False Ideal for Society?" *The British Journal of Sociology*, Vol. 39, No. 1, 1988 pp. 1-27 ("An opportunity is a chance of getting something if one seeks it. It is about the presence or absence of obstacles limiting what an agent may do or have if he wishes" at p. 4); Goldman, Alan H. "The justification of equal opportunity", in *Equal Opportunity*, Ellen Frankel Paul, Fred D. Miller, Jeffrey Paul and John Ahrens, asil Blackwell, 1987, pp. 88-103 ("An opportunity is a chance to attain some goal or to obtain some benefit. More precisely, it is the lack of some obstacle or obstacles to the attainment of some goal" at p. 88); Arneson, Richard, 1989, "Equality and Equality of Opportunity for welfare", *Philosophical Studies*, vol. 56, No. 1, pp. 77-93 ("An opportunity is a chance of getting something if one seeks it" at p. 85).

[9] Hansson, Sven Ove "What Are Opportunities and Why Should They Be Equal?" *Social Choice and Welfare*, vol. 22, 2004, p. 306

[10] Shachar, *Birthright*, p. 96

[11] The definitions come, respectively from the Merriam Webster Online http://www.merriam-webster.com/dictionary/opportunity , and from Cambridge English Dictionary

http://dictionary.cambridge.org/dictionary/british/opportunity (Accessed August 4 2012).

12 Economists and social choice theorists are neglecting the action aspect when they define opportunities as 'sets of options'. This account is incomplete unless options are not defined in terms of choices between actions. Thus, having to choose between two goods (e.g. red and green apples) does not necessarily imply having an opportunity, while a set of two options-actions with respect to a single good (taking or not taking one apple) can mean having an opportunity.

13 This argument is meant to refute David Miller's claim that 'cultural understandings' explain why "football pitches and tennis courts are naturally substitutable as falling under the general rubric of sporting facilities, whereas schools and churches are just different kinds of things, such that you cannot compensate people for not having access to one by giving them access to the other" (cf. Miller, David "Against Global Egalitarism", *Journal of Ethics*, vol. 9, n° 1-2, 2005, p. 62).

14 Assumptions about substitutability can be used to classify political theories: the more a theory presupposes that opportunities are substitutable, the more illiberal it is.

15 The example comes from Peter Western: "the marital obstacle differs from insurmountable obstacles like race, color, and sex because marriage in America is a legal status that a person himself may change", cf. "The Concept of Equal Opportunity", *Ethics*, vol. 95, 1985, p. 840.

16 Rawls, John, *A Theory of Justice*, Oxford University Press, 1999, p. 62 (my emphasis).

17 Shachar, *Birthright*, pp. 33-43.

18 For a similar argument, see Steiner, Hillel, "Hard Borders, Compensation and Classical Liberalism" and Lomasky, Loren "Toward a Liberal Theory of National Boundaries", in Boundaries and Justice. Diverse Ethical Perspectives, Miller, David and Hashmi, Sohail (eds.), Princeton and Oxford, Princeton University Press, 2001, pp. 55-88.

19 Shachar *Birthright*, p. 5 (my emphasis).

20 Shachar *Birthright*, p. 165 (my emphasis).

21 Shachar *Birthright*, p. 112.

22 Dumitru, Speranta "L'éthique du débat sur la fuite des cerveaux", *Revue Européenne des Migrations Internationales*, No. 25, vol. 1, 2009, pp. 119-135.

23 There is great asymmetry between the number of studies trying to find out the causes and motivations of the people's movement and the number of studies trying to explain sedentary, though suboptimal, conduct. For an exception, see Hammar, Tomas and Tamas, Kristof "Why do People Go or Stay"; Fischer, Peter A., Martin, Reiner and Straubhaar, Thomas 'Should I Stay or Should I go?" in *International Migration, Immobility and Development. Multidisciplinary Perspectives*, Hammar, Tomas, Brochman, Grete, Tamas Kristof and Faist, Thomas (eds.), Oxford, NY, Berg, 1997, pp. 1-20 and 49-89; Fischer, Peter A., Holm, Einar, Malmberg, Gunnar and Straubhaar, Thomas,"Why do People Stay? Insider Advantages and Immobility" HWW Discussion Paper 112, Hamburg Institute of International Economics, 2000 http://www.econstor.eu/dspace/bitstream/10419/19439/1/112.pdf (Accessed August 4, 2012).

24 According to Walzer "human beings move about a great deal but not because they love to move. They are most of them inclined to stay where they are, unless their life is very difficult there." *Cf.* Walzer, Michael, *Spheres of Justice: a defense of pluralism and equality,* Basic Books, 1983, p. 38.

25 Cavallero, Eric, "An immigration-pressure model of global distributive justice" *Politics, Philosophy & Economics*, Vol. 5, No. 1, 2006, p. 105 (my emphasis).

26 Compare to "most people who eat are forced by hunger, then eating is about hunger's coercion".

27 Pogge, Thomas, "Migration and Poverty" in Robert Goodin and Philip Pettit (eds.) *Contemporary Political Philosophy: An Anthology*, Oxford, Blackwell, 2005, p. 713.

28 Compare to "political oppression generated a new literary style; struggling against political oppression is a worthy cause, then struggling against the new literary style is a worthy cause".

[29] Cavallero, Eric, "An immigration-pressure…" p. 97.

[30] For once, political institutions are almost in advance on philosophical proposals: in 2000, heads of State and Government adopted the United Nations Millennium Declaration and assumed shared responsibility for eight "millennium developement goals", including halving poverty, by 2015. It is noteworthy that the last United Nations Report on Human Development is concerned by the contribution of migration to development; see Human Development Report, *Overcoming barriers: Human mobility and development*, New York, Palgrave Macmillan, 2009 http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf (Accessed August 4, 2012). For theoretical defenses of a global fund, see e.g., Bhagwati Jagdish and Delalfar W., "The Brain Drain and Income Taxation", *World Development*, vol. 1, no. 2, 1973, pp. 94-101; Steiner, Hillel, *An Essay on Rights*, Oxford, Blackwell, 1994 and Steiner, Hillel "Just Taxation and International Redistribution" In *Global Justice*, I. Shapiro and L Brilmayer (eds), New York University Press, 1999, pp. 171-91; Pogge, Thomas, "Eradicating Systemic Poverty: Brief for a Global Resources Dividend" *Journal of Human Development*, vol. 2, no. 1, 2001, pp. 59-77.

[31] Shachar, *Birthright*, p. 102.

[32] Shachar, *Birthright*, p. 104 (my emphasis). While in this paper I assumed that Shachar's position is egalitarian, some paragraphs seem to indicate that she defends a modest form of *sufficientarianism*. (See e.g., the idea that the levy should "make birthright citizenship *a less significant* distributor of well-being" (*Ibid*. p. 105).

[33] This is one reason why Shachar should not envisage a bilateral scheme for the redistribution: "the country ranked number one [in terms of human development] will be obliged to make transfers to the country [ranked] 200th", cf. Shachar, *Birthright*, p. 103.

[34] One can notice that by its consequences, the imagined constitutional rule looks more just than the *jus nexi* principle. *Jus nexi* is partly morally arbitrary because establishing genuine connections with a community, while at first sight seems largely due to foreigner's choices, it actually isn't possible without the luck of being accepted inside the country. Our constitutional rule seems more morally arbitrary, since being in a rich country entirely depends on others' choices. Nevertheless, *jus nexi* has no counterpart about new people's admission (it operates as a one-shot principle: applied once, there is no certainty that it will benefit to others), while our rule make a constitutional provision of the possibility to choose immigrants. Therefore, by the number of people potentially affected, the constitutional rule seems more just than the *jus nexi* principle.

# THE USE AND ABUSE OF *JUS NEXI*

NOAH BENJAMIN NOVOGRODSKY
UNIVERSITY OF WYOMING

## ABSTRACT

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

## RÉSUMÉ

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

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

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

## I

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

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

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

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

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

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

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

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

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

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

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

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

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

## II

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

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

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

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

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

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

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

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

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

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

## III

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

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

The source of both the legal right and the opening to attack it is the 14th Amendment to the U.S. Constitution which provides that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"[31]. This language granted citizenship rights to African Americans born in the United States whose status

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

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

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

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

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

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

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

## NOTES

1 See generally, Howard F. Chang, "The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory", 41 Cornell Int'l L.J. 1 (Winter 2008).

2 Increasingly harmonized global refugee standards mean that what is true for naturalization and long-term visitors is generally true for asylum seekers too: affluent, well-educated asylum applicants are more likely to succeed than poorer, less educated refugees. See Margot Mendelson, "The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women", 19 Berkeley Women's L.J. 138 (2004).

3 See, e.g., Immigration and Nationality Act § 201(a)(1)-(3).

4 There are only two paths to citizenship: birth and naturalization. *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898).

5 INA 203(b)(5) ("Employment Creation: (A) In general. - Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership).")

6 *See* http://www.telegraph.co.uk/sport/football/international/8253092/Qatar-will-use-World-Cup-as-a-catalyst-to-improve-conditions-for-migrant-workforce.html (Accessed August 4, 20120) (According to the International Organization for Migration, temporary contractual workers constitute 86 percent of Qatar's population of 1.6 million people.).

7 Stephen Yale-Loehr, Christina Sherman, Christoph Hoashi-Erhardt & Brian Palmer, "T, U and V Visas: More Alphabet Soup for Immigration Practitioners", 6 Bender's Immigr. Bull. 113, 113-14 (Feb. 1, 2001) (noting that approximately 50,000 persons, predominately women and children, are trafficked into the United States every year for purposes including prostitution and 'slavery-like labor').

8 Bruce Ackerman & Anne Alstott, *The Stakeholder Society,* Yale University Press, 1999.

9 Hannah Arendt, *Origins of Totalitarianism*, Schocken Books 2004, p. 376.

10 INA § 201(b)(2)(exempting immediate family members from quotas); INA § 203(a)(listing the preference for family-sponsored immigrants); see also, Karen A. Woodrow-Lafield, Poch Bunnack, "Family Reunification and Citizenship for Recent Chinese Immigrants", New York City, Presented at the annual meeting of the *Population Association of America*, Los Angeles, March 29-April 1, 2006 (examining the ease with which Chinese immigrants naturalize and the great number of family members they sponsor for immigration); Ramah, McKay, Family Reunification (May 2003), online: Migration Policy Institute http://www.migrationinformation.org/feature/display.cfm?ID=122 (Accessed August 4, 2012) (examining the U.S. family-sponsored immigration program and identifying its accountability for two thirds of immigration to the U.S. annually).

11 See e.g., Aniz Alani, "'To Construe and Apply': Does the Immigration and Refugee Protection Act Assign Priority to International Human Rights Law?" 64 Univ. of Toronto. Fac. L. Rev. 107 (2006)(identifying the family unification objective of IRPA as consistent with international human rights instruments to which Canada is signatory).

12 See generally, Eleanor Brown, "Outsourcing Immigration Compliance", 77 Fordham L. Rev. 2475 (2009)(tracking the visa-compliance of Jamaicans working in Canada).

13 Thomas F. Pettigrew, "Reactions toward the New Minorities of Western Europe", Annual Review of Sociology, Vol. 24 (1998), 77, 80-81 (see http://www.jstor.org/stable/223475) (explaining Germany's Gastarbeiter guest worker program and its natural development into a migratory chain as families joined the workers.)

14 Ayelet Shachar, *The Birthright Lottery,* Harvard Univ. Press, 2009, p. 26.

15 See, e.g., Human Rights Watch, "Building Towers, Cheating Workers, Exploitation of Migrant Construction Workers in the United Arab Emirates", Nov. 11, 2006, available at: http://www.hrw.org/en/reports/2006/11/11/building-towers-cheating-workers-0 (Accessed August 4, 2012).

[16] *See* Gils Beets, Frans Willekens, "The Global Economic Crisis and International Migration: An Uncertain Outlook", Netherlands Interdisciplinary Demographic Institute (November 2009). Also published in Vienna Yearbook of Population Research 2009, pp. 19-38 (discussing the effects of economic crisis on labour migration including reduction of remittances and noting that low wages do not alone prevent migration during economic recession).

[17] *See* Andrew Coyne, "Our Feudal Immigration Policy," *Literary Review of Canada*, July/August 2009 (accepting the inherited property analogy but arguing for greater numbers of immigrants rather than global redistribution of citizenship privilege).

[18] INS 1994 Statistical Yearbook, Table K, cited in Stephen H. Legomsky & Cristina M. Rodríguez, *Immigration and Refugee Law and Policy*, 5th ed., Thomson Reuters/Foundation Press, 2009.

[19] Barbara Demick, "Korean Moms Want 'Born in the U.S.A.' Babies," *Los Angeles Times*, May 26, 2002.

[20] Sasha Baglay, Book Review, "The Birthright Lottery: Citizenship and Global Inequality", 155 [2009] 47 Osgoode Hall Law Journal.

[21] INA § 316(a) and INA § 312(a)(1).

[22] *Matter of Acosta*, 19 I. & N. Dec. 211, 233-34 (BIA 1985); *Al-Ghorbani v. Holder*, 585 F.3d 980, 996 (6th Cir. 2009)("a particular social group may be made up of persons who actively oppose the suppression of their core, fundamental values or beliefs.")

[23] As Omar Khadr, Maher Arar and David Hicks each discovered, the state of nationality is highly relevant in the global war on terror, although it may not always serve as a guarantee of support and advocacy in times of need.

[24] INA § 301(c) (declaring required elements of citizenship by descent when the child was born abroad to two United States citizens parents; INA § 301(g)(declaring required elements of citizenship by descent when the child was born abroad to one citizen parent and one noncitizen parent).

[25] Citizenship Act, R.S.C. 1985, c. C-29 (17 April 2009).

[26] Ayelet Shachar, *The Birthright Lottery,* Harvard Univ. Press, 2009, p. 180.

[27] H .R. 6497, 111th Cong. (Dec. 7, 2010) — Text of the proposed bill online: http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.6497 (On December 8, 2010, the U.S. House of Representatives passed the DREAM Act by a margin of 216-198. On December 18, the Senate held voted 55-41 for cloture on the DREAM Act, meaning the bill did not come to a vote in the Senate. The bill is likely to be addressed again by the 112th or subsequent Congresses.)

[28] *See Zadvydas v. Davis*, 533 U.S. 678 (U.S. 2001)(addressing the deportability of long-term resident of the United States to the country of origin, Cambodia, to which the deportee had attenuated ties).

[29] *See* George Will, "An Argument to be Made About Immigrant Babies and Citizenship", *Washington Post*, March 28, 2010.

[30] Julia Preston, "Citizenship from Birth Is Challenged on the Right," *New York Times*, August 6, 2010 (quoting Sen. Lindsay Graham "We can't just have people swimming across the river having children here — that's chaos.")

[31] U.S. Const., amend. XIV, § 1.

[32] *Scott v. Sandford*, 60 U.S. 393, 406 (1857).

[33] *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).

[34] H.R. 1868, 111th Cong. § b (April 2, 2009)

[35] H.R. 140, 112th Cong. (Jan. 5, 2011) – Text of the proposed bill online: http://www.govtrack.us/congress/billtext.xpd?bill=h112-140 (Accessed August 4, 2012)

[36] *See, e.g.* Arizona's H.B. 2561 and 2562, available at: http://www.azleg.gov/legtext/50leg/1r/bills/hb2562p.pdf (Accessed August 4, 2012)

[37] Peter H. Schuck, "Birthright of a Nation," *New York Times*, Aug. 13, 2010.

[38] This issue raises definitional concerns. Are asylum seekers who give birth in the U.S. illegal immigrants? What about in-status short-term visitors?

[39] Jennifer Van Hook & Michael Fix, “The Demographic Impact of Repealing Birthright Citizenship”, Migration Policy Institute, September 2010, available at: www.migrationpolicy.org.

# CITIZENSHIP AS PROPERTY, NOT SO VALUABLE

PETER J. SPIRO
TEMPLE UNIVERSITY

## ABSTRACT

*With The Birthright Lottery: Citizenship and Global Inequality*, Ayelet Shachar is the first major scholar to put the rich theory of property law theory to work in the realm of citizenship. Assessed on its own criteria, the book delivers on its promise to shake up our thinking on this question. Nevertheless, I argue in this paper that her account is not ultimately persuasive. First, Shachar takes for granted that citizenship is a valuable resource. I suggest that today legal residency is more highly valued that citizenship. Also her defense of the state and the social advantages of having stable citizenship regimes does nothing to confront its decline as the central organizing principle of political life. Last but not least, the modalities of a birthright citizenship levy calls into question the underlying analysis. For instance, the current proposal looks undistinguishable from foreign aid and it would demand much more robust institutional organs of global governance that now exist. The second prong of her argument works at the domestic level as it tackles the problem of under- and over-inclusiveness of birthright citizenship. Here too I have reservations highlighted by modes of implementation.

## RÉSUMÉ

Avec *The Birthright Lottery: Citizenship and Global Inequality*, Ayelet Shachar est la première chercheuse de pointe qui utilise la riche théorie du droit de propriété dans le domaine de la citoyenneté. Jugé à l'aune de ses principes, le livre réussit à secouer nos idées reçues sur cette question. Dans cet article, je soutiens néanmoins que son explication n'est pas aussi convaincante qu'elle en a l'air. D'abord parce qu'elle tend à surévaluer la citoyenneté. La résidence permanente est aujourd'hui plus en demande et a pour cette raison plus de valeur que la citoyenneté. Ensuite, parce que la défense de l'État et des avantages sociaux des régimes de citoyenneté stables ne fait rien pour remédier au déclin de l'État en tant que principe organisateur de la vie politique. Enfin, parce que les modalités d'une taxe sur la transmission de la citoyenneté par droit de naissance ne permettent pas de la distinguer la taxe sur la citoyenneté de l'aide étrangère et que sa mise en œuvre impliquerait des institutions de gouvernance globale plus robustes que celles qui existent actuellement. Le volet domestique de la proposition de Shachar, qui vise à corriger les problèmes de sous-inclusion et de sur-inclusion à l'aide du jus nexi, pose également quelques difficultés. J'émets des réserves qui portent sur la mise en œuvre de cette proposition.

Ayelet Shachar's *The Birthright Lottery: Citizenship and Global Inequality* is an exceptionally important work from one of the leading theorists of citizenship law. It introduces a radical and compelling new framework for confronting the dilemmas of birthright citizenship, one that promises to transform debates in the area.

The book frames birthright citizenship as a matter of inherited property. The vast majority of the world's population acquires citizenship by transmission at birth, on the basis of parentage or territorial location at time of birth. To the extent that citizenship is a valuable resource, then, it is secured on the basis of morally irrelevant criteria. Birthright citizenship is not merely inherited property, but an untaxed form of inherited property. Drawing from property theory, the book thus sets up the moral problem of the unburdened intergenerational transmission of citizenship.

This is powerful stuff. Shachar is the first major scholar to put the rich theory of property law theory to work in the realm of citizenship. Taken on its premise, it is a highly successful effort. Citizenship theory is ripe for destabilization, and the book delivers on its promise to shake up our thinking on the question.

Which is not to say that the account is ultimately persuasive. First, Shachar works from the premise that citizenship is a valuable resource. This is a contestable proposition. Few rights remain distinctively contingent on citizenship status. The book at points conflates the value of legal residency and citizenship status. Legal residents enjoy almost all rights extended to citizens. Even the franchise, which is conventionally conceived as a singular privilege of citizenship, is commonly extended to legal residents, at least in local elections. Other rights of political participation, including the capacity to make campaign contributions, are also available to legal residents. There are otherwise few contexts in which legal residency comprises a disability. Most importantly, legal residency affords the right of entry, which diminishes the costs of transborder mobility (relative to those not enjoying such rights, who may be able to cross borders but at a much higher price). Undocumented status may be a serious disability, but that disability is mostly cured with regularization. Citizenship is more in the way of an afterthought. Legal residency is more highly valued than citizenship.

This can be demonstrated in the property frames of *The Birthright Lottery*. In a hypothetical auction, green cards would fetch a high price from those otherwise ineligible for territorial admission. In some countries, including Canada and the United States, legal residency can be secured through investments; in other words, one can buy residency rights. Even at fairly steep prices (in the U.S., one million dollars) there are takers. Citizenship, by contrast, might well go begging. If decoupled from legal residency, that is, if one could buy citizenship on an a la carte basis discretely from legal residency, the price would be low. In the United States, there is anecdotal evidence that a steep increase in naturalization fees has deterred some otherwise eligible individuals from applying for citizenship. In other words, some individuals do not perceive U.S. citizenship to be worth even a thousand dollars, much less a million. Assume Shachar's birthright

citizenship levy was exacted on an individual basis. Many permanent resident aliens would refrain from naturalization, against the prospect of a tax from which they would otherwise be exempted. Depending on the size of the tax, one could imagine some native-born citizens renouncing their nationality. This demonstrates that citizenship is not in fact 'priceless' (as the U.S. Supreme Court Justice Earl Warren once characterized it). Indeed it may not be worth all that much going forward.

*The Birthright Lottery* thus works from nationalist premises, in the just-liberal sense. That position can no longer be taken as natural, and the book ably defends the state "and the enormous social advantages of having stable citizenship regimes". Shachar concedes the appeal of an unbundling of citizenship, in which territory, authority, and rights (in Saskia Sassen's frame)[1] are decoupled, and the accompanying emergence of transnational identities and internationally-protected rights. She sees these as complementing, not replacing, the shelter and solidarity of the state; and she implicitly dismisses those scholars who engage the unbundling as "celebrat[ing] the demise of protected membership in a collective political enterprise" (67-68).

But the better postnational thinking is not so much celebrating the decline of the state as the location of identity and governance as confronting the fact of its decline. There is a whiff of both fear and wishful thinking in the liberal nationalist meme. The international system of rights and redistribution remains at best provisional; it is not yet up to the task of substituting for the state in its now refined, justice-advancing capacities. (The riff on Churchill might be: The state is the worst form of community, except for all the alternatives.) We hope that the state will remain stable as the central organizing principle of political life. But that will not make it so. There are powerful material forces on the ground that are working to undermine the state as the locus of community, forces that go largely unexamined in this book. To the extent that there is a legible trajectory away from segmentation among states, that is a shortcoming. Global norms and institutions are far from substituting for state-based equivalents, but the relative importance is hardly static. Long term, the state appears in irreversible decline. The sooner that scholars train their sights on the emerging, unformed institutions (and their shortcomings) of that new order, the better. State-based models are likely to be legacy paradigms, salient today ("tak[ing] the world as we find it") (104), less so tomorrow.

Shachar's proposal is inventive nonetheless, seeking to maintain the best of the state as a force for internal community redistribution while confronting issues of inter-community justice. The concept of a birthright citizenship levy is provocative in the best sense of the term. The modalities are another matter. One should not measure a new theoretic by its practicalities (the best academic writing always pushes thinking beyond the policymaking horizon), but in this case the difficulty of implementation raises questions about the underlying analysis. The book proposes that the tax be progressive as extracted within wealthy countries subject to the levy (99). But that again puts the premise of valuable citizenship

into question: if it is valuable in itself, why not individually tax the poorest of the rich, as it were? If not, what does that say about the real value of citizenship status?

The suggestion that the tax be administered on a state-to-state basis, moreover, makes the proposal look indistinguishable from foreign aid as we have long known it, that is, as a mechanism for correcting inequality on a community-to-community basis (which would seem justified on grounds having nothing necessarily to do with citizenship status). The upshot starts to look more like a 'global income tax' than a 'global citizenship tax'. Among other issues here: if the tax is exacted at the level of the state, it will include tax payments made by non-citizens, thus detaching it from the citizenship frame. Shachar's frame does add a distinctive intellectual girder for other justice-based approaches to international redistribution. As with other such proposals, the administration of the scheme would be daunting, to say the least. The book offers some formulas for deciding which countries would get taxed and which would receive the proceeds, but those would obviously be hotly contested. Who would get to decide? The United Nations? Shachar dismisses world government, appropriately, but her scheme would demand much more robust institutional organs of global governance than now exist. The suggestion of in-kind service substitutions, while normatively appealing, would only compound the difficulty of administration. Again, this is not to dismiss the book's powerful theoretical challenge, but it does draw the analytical premises into question.

The book's discussion of birthright citizenship in the global context alone makes this an important work. The concluding chapters on the domestic place of birth citizenship add significant extra value. Here Shachar highlights the under- and overinclusiveness of birth citizenship: underinclusive to the extent that many who are members of the community as a matter of social fact do not enjoy citizenship, overinclusive to the extent that some emigrants who maintain little connection to the community continue to hold citizenship on the basis of descent ('hollow citizens'). The book calls for a squaring of citizenship with actual community on the basis of 'jus nexi', by extending citizenship to the former group and denying it to the latter. Once again the argument effectively draws from property law concepts. The application of the doctrine of adverse possession to the position of undocumented aliens presents a particularly compelling argument for justifying the extension of citizenship to individuals even where they have entered in violation of law.

Here again however I have reservations highlighted by modes of implementation. On the question of hollow citizenship, it is not clear that the proposal would mark much of a change from the existing practice of most states (as Shachar appears to recognize). Nor would it necessarily bolster the meaningful attachment of external citizens. Globalization enables the maintenance of some level of connection, even if not at a level equivalent to those of resident citizens. For instance, external citizens might retain property in the homeland or undertake post-secondary education there, which would appear to satisfy the *jus nexi*

threshold and to evidence a genuine connection. Mechanisms to police attachment inevitably diminish autonomy. Who is to say when a connection has become hollow in any case in which the individual prefers to retain the identity represented by the citizenship tie? Witness the increasing rarity of forced expatriation among liberal democracies. At the same time external citizens will almost always participate in a state-defined society at a lower level of intensity than resident citizens. Any regime to police against lack of attachment could also be gamed for instrumental purposes. To the extent citizenship remains a valuable commodity, at least citizenship in certain states, individuals would act strategically to satisfy the new rules, which would inevitably fall short of actually measuring 'actual membership'.

Meanwhile, the trend in state practice is toward greater tolerance for tenuous ties. States are increasingly reaching out to diaspora communities for instrumental purposes, by way of tapping into the economic power they often represent relative to homeland residents[2]. Among the primary tools for cementing this connection are lowered barriers to the retention or acquisition of citizenship among diaspora populations. There has been a dramatic shift towards acceptance and even embrace of dual citizenship. Emigrants in most cases retain their original citizenship by default even as they naturalize in their new country of residence. More states are allowing non-residents to claim citizenship on the basis of attenuated national lineage, such as single grandparent. Few impose continuing obligations on external citizens; taxes and military service are now mostly contingent on residency[3]. The result is something like ethnizenship, in Christian Joppke's terms[4], a concept at least in tension with Shachar's call to more closely to align citizenship with active engagement. This trend is largely unidirectional. It creates a feedback loop that reinforces the decline of citizenship. Hollow citizens make for hollow citizenship. Shachar may lament the trend, but it will reinforce the erosion of citizenship as an institution. If citizens feel nothing more than a thin ancestral bond with other citizens, it is unlikely to support robust redistributive capacities for the state.

Extending citizenship to those who are already members as a matter of social fact, thus correcting the problem of underinclusiveness, is less problematic. Others have called for the extension of citizenship essentially as of right after a certain period of presence[5]. As with Shachar, these proposals are aimed at achieving a better match between the social boundaries of community and the citizenry, by way of perfecting self-governance values. Under conventional understandings of the society/territory matrix, it is difficult to challenge the logic of these proposals, at least in the frame of liberalism[6].

But those conventional understandings may no longer hold. Territorial presence no longer necessarily reflects social membership. This is evidenced by the growing population of individuals who fail to naturalize even when eligible. Shachar avoids the autonomy-diminishing aspects of Ruth Rubio-Marin's proposal to automatically extend citizenship to long-term residents[7], but that leaves the phenomenon of the persistent denizen — and the challenge it poses to liberal gov-

ernance paradigms — unresolved. At the very least, the refusal to claim membership supplies additional evidence that citizenship is no longer a valuable commodity.

Second, there is a growing population that effectively segregates itself notwithstanding long-term residence and who are not as a matter of social fact members of the community, as territory and community become decoupled at home. This is specially enabled among large diaspora concentrations. Within these groups, it may be both literally and metaphorically the case that residents are not "rubbing elbows at country stores" (172) with members of the existing community. Should those residents be eligible for citizenship? Even persistent territorial presence may not correlate with community solidarities; physical presence and the "passage of time" do not necessarily establish "social connectedness" (179).

It would be interesting to have Shachar's take on citizenship tests, the liberal-democratic purpose of which is to measure some form of community integration[8]. Leaving aside insurmountable problems of design (in multicultural societies, it is increasingly impossible to delineate a common knowledge set shared by members of an existing community), if in theory such a test could measure social connectedness it would seem consistent with the premise of citizenship's social content. But to the extent such tests exclude some residents from citizenship, as with the persistent denizen phenomenon the resulting exclusions detach membership from territory. On the other hand, to the extent Shachar's vision of citizenship has no social content, and *jus nexi* operates entirely on the basis of territorial location, it begins to look arbitrary, too. If territorial proximity does not establish social solidarity, it is not clear why location should result in membership nor how a community so constituted will sustain the political collective.

Finally, it's not clear how the model would confront circular migration. What of the naturalized citizen who returns permanently to her homeland? In the United States, an increasing number of immigrants are naturalizing for the very purpose of permanently returning to their homeland, by way of securing absolute rights of re-entry. Shachar's approach might harken back to long abandoned US nationality regime under which such a citizen would forfeit his citizenship after three years' residence in his country of origin[9]. Meanwhile, the most effective mechanism for policing against attenuated external citizenship would be to resurrect previous bars to dual citizenship, which would effectively raise the cost of maintaining secondary national ties. Where dual citizenship is prohibited, individuals are forced to choose among citizenships for which they are eligible. The necessary ranking that results would tend to advance Shachar's normative agenda insofar as individuals would be most likely to choose the citizenship of the state in which they have the greater level of social connectedness. But Shachar (albeit in a somewhat cursory fashion, at pp. 66 and 179) appears to accept dual citizenship, as she and other liberal nationalists must, for globalization clearly enables individuals now to establish and to maintain actual members in more than one national society.

It is ultimately the binary nature of citizenship that undermines citizenship-based models against the backdrop of deep transnational interpenetrations and scalar national affiliations. In the old world, the one in which state boundaries more closely coincided with community boundaries, citizenship made sense as an organizing principle, reflecting and perfecting social membership on the ground. In that context, Shachar's optic would have had normative traction as a basis for global redistribution. No doubt today there remains an imperative need to devise weapons against global inequality. Highlighting the moral quandaries of birthright citizenship may or may not help advance those efforts.

## NOTES

1 See Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages,* Princeton University Press, 2006.

2 See, e.g., the essays collected in a symposium, "The Construction of Citizenship in an Emigration Context", 81 NYU L. Rev. 1 (2006).

3 The imposition of continuing obligations on non-citizens (especially taxes) would supply a tool to police against hollow citizens. To the extent that an individual maintain no continuing affective attachments, she will presumably be unwilling to pay for it. In fact, the leading motivation for the renunciation of U.S. citizenship is tax avoidance. See "More Americans Expatriates Give Up Citizenship", N.Y. Times, April 25, 2010. That most states do not pursue this strategy is evidence of their weak bargaining position vis-à-vis diaspora populations and the defensive nature of efforts to extend citizenship to emigrants.

4 See Christian Joppke, *Selecting By Origin: Ethnic Migration in the Liberal State*, Harvard University Press, 2005.

5 See, e.g., Joseph Carens, *Immigrants and the Right to Stay,* MIT Press, 2010. A variant calls for the extension to aliens of constitutional status equivalent to citizenship, in Linda Bosniak's conception, "the citizenship of aliens." See Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership*, Princeton University Press, 2006. This strategy for expanding the rights of territorially present noncitizens is vulnerable to the same critique as I here apply to Shachar's work. Both overestimate the value of citizenship and the national territorial segmentation of community boundaries.

6 See Christian Joppke, *Citizenship and Immigration,* Polity Press, 2010, p. 36.

7 See Ruth Rubio-Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States,* Cambridge: Cambridge University Press 2000.

8 For one recent collection of short essays on the subject, see Rainer Bauböck & Christian Joppke, "How Liberal Are Citizenship Tests?", Robert Schuman Centre for Advanced Studies, European Union Institute, Working Paper No. RSCAS 2010/41, 2010 (with contributions from Christian Joppke, Joseph Carens, Randall Hansen, and Dora Kostakopoulou, among others).

9 See Schneider v. Rusk, 377 U.S. 163 (1964) (striking down statute as unconstitutional discrimination against naturalized citizen).

10 See Peter J. Spiro, "Dual Citizenship: A Postnational View", in Thomas Faist & Peter Kivisto (eds.), *Dual Citizenship in Global Perspective*, Palgrave Macmillan, 2008.

# JUST MEMBERSHIP: BETWEEN IDEALS AND HARSH REALITIES

AYELET SHACHAR
UNIVERSITY OF TORONTO

## ABSTRACT

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

## RÉSUMÉ

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## THE CONCEPTUAL ANALOGY TO INHERITED PROPERTY

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

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

fer regime of birthright citizenship.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## WHAT IS THE "WORTH" OF CITIZENSHIP?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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# LE CASSE-TÊTE DE LA CITOYENNETÉ PAR DROIT DE NAISSANCE[1]

AYELET SHACHAR
UNIVERSITY OF TORONTO

## ABSTRACT

This paper is the French translation of Ayelet Shachar's introduction, "The Puzzle of Birthright Citizenship", digitally reproduced by permission of the publisher from *The Birthright Lottery : Citizenship and Global Inequality*, Cambridge, Mass.: Harvard University Press, pp.1-18. © 2009 by the President and Fellows of Harvard College. Translation by Martin Provencher.

## RÉSUMÉ

Cet article est la traduction française de l'introduction du livre d'Ayelet Shachar, "The Puzzle of Birthright Citizenship", avec la permission de l'éditeur, tirée de *The Birthright Lottery : Citizenship and Global Inequality*, Cambridge, Mass.: Harvard University Press, pp.1-18. © 2009 President and Fellows of Harvard College. Traduction de Martin Provencher.

Donnez-moi vos pauvres, vos exténués
Vos masses recroquevillées aspirant à respirer libres,
Les épaves rejetées de vos plages surpeuplées,
Envoyez-les moi, les sans-abris, que la tempête m'apporte
De ma lumière, j'éclaire la porte d'or !
**Emma Lazarus, Le Nouveau Colosse (1883)**

En 2003, cinq hommes originaires de la République Dominicaine se sont cachés dans un bateau à destination de Houston, Texas, à la recherche de la « Porte d'or ». Quand le bateau a été rendu à mi-parcours de Houston, l'un des clandestins est tombé malade. Les cinq hommes ont décidé de faire appel à la compassion humaine de l'équipage et ils ont révélé leur présence. L'équipage du bateau savait qu'il était tenu par les règles de l'Organisation Maritime Internationale de « protéger, nourrir et rapatrier les clandestins ». Mais il savait aussi qu'il obtiendrait également des bonus spéciaux du propriétaire du bateau s'il atteignait les côtes des États-Unis sans passager clandestin. La politique d'immigration actuelle des États-Unis impose des amendes financières salées aux bateaux qui arrivent avec des migrants indésirables et sans papiers, comme les cinq hommes de notre histoire, qui étaient du « mauvais côté des rails » de la prospérité et de la sécurité. Alors les membres de l'équipage ont agi rapidement. Ne montrant aucun signe de compassion, ils balancèrent deux des clandestins par dessus bord et ils abandonnèrent les trois autres sur un radeau en pleine mer. Après quatre heures de navigation dangereuse, les trois hommes ont été recueillis par un autre bateau. Les deux autres furent moins fortunés. Leurs corps, mordus par les requins, ont été retrouvés quelque temps plus tard[2].

Les clandestins croyaient apparemment qu'embarquer dans un bateau à destination des États-Unis, sans aucune documentation appropriée, ni permission d'entrée, était leur seul espoir de réaliser le rêve américain. Comme la cour du Texas qui a entendu la poursuite légale des survivants contre le propriétaire du vaisseau (la personne responsable d'avoir offert la récompense bonus pour une arrivée sans passager clandestin) remarqua de manière sympathique, la croyance des cinq hommes était partagée en réalité par « d'innombrables immigrants qui sont — légalement et illégalement — entrés dans notre grand pays presque depuis qu'il a gagné son indépendance »[3]. Le problème aujourd'hui, pour ceux qui entretiennent toujours cette croyance, est que la porte d'or n'est pas laissée souvent entre-ouverte. De fait, elle est de plus en plus fermée à double clé. Cela est vrai aux États-Unis, mais également dans la plupart des autres nations prospères[4].

Quand nous replaçons la triste histoire des clandestins dans ce contexte plus large, nous réalisons rapidement qu'en dépit des prédictions jubilatoires des postnationalistes selon lesquelles la disparition de la citoyenneté serait imminente, la distinction légale entre membres et étrangers est, c'est le moins qu'on puisse dire, de retour comme pour se venger[5]. Cette distinction a reçu un sens

nouveau, et par moment draconien, dans les années qui ont suivi la tragédie du 11 septembre 2001. C'est ce constat qui informe ma thèse dans ce livre que nous devons prendre du recul et rendre compte de l'importance *persistante* de la citoyenneté, *surtout* à l'ère actuelle de la globalisation. Ce dernier point exige un peu plus de développement. Il ne fait aucun doute que les flux transnationaux croissant d'individus qui traversent les frontières ont créé de nouveaux niveaux d'appartenance et d'affiliations fort riches, opérant à l'intérieur et par-delà les frontières territoriales, comme au-dessus et au-dessous du cadre organisationnel traditionnel de l'État-nation[6]. De telles sources d'identité et d'autorité à couches multiples et qui peuvent se recouper fournissent des droits et des obligations qui fonctionnent à différents niveaux. Mais elles correspondent difficilement à l'importance de la citoyenneté en tant que membre à part entière d'une communauté politique d'égaux et elles ne l'effacent pas non plus. Comme un auteur le remarquait éloquemment, nous pourrions utiliser « le terme *citoyen* dans d'autres contextes, mais seulement en tant que métaphore. (...) Les villes, les provinces et les territoires ont des résidents ; (...) les corporations et les communs ont des actionnaires ; le village global a ses cosmopolites et ses humanistes qui rêvent du jour où il n'y aura plus de divisions territoriales. Mais seul les [États-]nations ont des citoyens »[7].

Cette situation peut, évidemment, évoluer dans le futur. Mais dans le monde d'aujourd'hui, comme je vais l'expliquer dans les pages suivantes, il y a de puissantes forces qui expliquent non seulement la persistance de l'appartenance délimitée (au niveau national ou supranational) mais aussi la préservation de son mécanisme archaïque d'attribution de la citoyenneté en fonction du droit de naissance. En effet, nous ne pouvons pas comprendre la résilience de l'appartenance délimitée (*bounded membership*) — qui défie la vogue de prédictions de sa disparition — sans revisiter l'institution politique et légale de la citoyenneté *par droit de naissance*. Cette institution fournit un appareil soutenu par l'État pour transmettre de génération en génération la sécurité et l'opportunité sans prix liées à l'appartenance dans une société de droit, stable et riche. Elle offre aussi aux membres des communautés nanties une enclave à l'intérieur de laquelle ces dernières peuvent préserver leur richesse accumulée et leur pouvoir à travers le temps. Si nous nous concentrons sur ces mécanismes de *transfert*, nous nous apercevons avec étonnement que les lois sur la citoyenneté par droit de naissance ressemblent aux anciens régimes de propriété qui formaient des règles de transmission des successions (*estate*) régulées de manière serrée et rigide. La citoyenneté par droit de naissance ne fonctionne pas seulement *comme s'il* s'agissait de n'importe quel autre type de propriété héritée ; elle se transmet aussi de génération en génération comme une forme d'entaille, de propriété héritée non taxée[8]. Aujourd'hui un tel transfert « entaille » de propriété est profondément discrédité : il est banni dans la plupart des juridictions et il est, à juste titre, largement associé à un système féodal désuet. Pourtant, nous faisons encore strictement appel à la transmission de titre (*entitlement*) par droit de naissance pour attribuer le bien précieux de l'appartenance politique.

Ce n'est nul autre qu'Alexis Tocqueville qui, dans *La démocratie en Amérique*, nous prévenait de manière fameuse des dangers politiques et sociaux de la propriété héritée devenue la base d'un privilège durable. Il vaut la peine de raconter une histoire similaire pour inciter à la prudence à propos de la citoyenneté par droit de naissance dans un monde inégal comme le nôtre. Ce livre fait exactement cela : en affrontant la complexité du système actuel de transfert de citoyenneté, je me propose de présenter une nouvelle manière de penser l'appartenance politique en m'appuyant sur une analogie conceptuelle entre la citoyenneté par droit de naissance et la propriété héritée. Cette perspective crée un espace pour explorer le titre d'appartenance dans le contexte plus large des débats urgents d'aujourd'hui sur la justice globale et la distribution d'opportunité.

Pour ceux qui ont obtenu une longueur d'avance au départ simplement parce qu'ils sont nés dans une communauté politique florissante, il peut être difficile d'apprécier l'étendue du désavantage des autres en raison de la loterie du droit de naissance. Mais les statistiques globales sont révélatrices. Les enfants nés dans les nations les plus pauvres ont cinq fois plus de risques de mourir avant l'âge de cinq ans. Ceux qui survivent à leurs premières années, selon toute vraisemblance, manqueront d'accès aux services de subsistance de base comme l'eau potable et l'abri, et ils sont dix fois plus à risque de souffrir de malnutrition que les enfants des pays riches. Plusieurs d'entre eux ne jouiront pas même pas d'une éducation de base, et ceux qui n'auront pas accès à l'école risquent d'être davantage des filles que des garçons[9]. Le risque qu'ils soient témoins ou qu'ils subissent eux-mêmes des violations de droits humains est également significativement augmenté. Qui plus est, ces disparités liées à la citoyenneté par droit de naissance ne sont pas une affaire de mérite ou de faute individuelle ; ce sont plutôt des patterns structurels et systémiques. Dans un tel monde, les lois sur la citoyenneté qui attribuent l'appartenance politique par droit de naissance jouent un rôle crucial dans la distribution des conditions sociales de base et des opportunités de vie à l'échelle globale[10].

Mon intention n'est pas de reprendre l'argument familier selon lequel des inégalités de chances de vie aussi extrêmes sont troublantes d'un point de vue moral et éthique. Mon argument ici est plus subtil : en me concentrant sur l'angle souvent négligé du transfert d'appartenance, je souhaite attirer l'attention sur le rôle crucial que jouent les régimes légaux actuels qui allouent le titre d'appartenance politique (en fonction du droit de naissance) dans la restriction de l'accès aux communautés bien nanties et dans le soutien du privilège d'un titre hérité. Je souhaite aussi déstabiliser l'idée qu'un tel appel est « naturel » et, en ce sens, apolitique. Cette dernière idée sert à légitimer (et à rendre invisible) les importants transferts intergénérationnels de richesse et de pouvoir, mais aussi de sécurité et d'opportunité, qui sont présentement maintenus sous le sceau du régime d'allocation d'appartenance par droit de naissance. En mettant en évidence l'analogie avec les régimes de propriété héritée, il devient possible d'attirer l'attention sur les multiples façons dont l'appel à la naissance dans l'attribution de la citoyenneté régularise, naturalise et légitime des distinctions non seulement entre des juridictions, mais aussi entre des héritages grandement inégaux. Dans un tel

cadre, nous pouvons commencer à reconnaître les implications massives et protectrices des successions des régimes de citoyenneté héritée tels qu'ils existent aujourd'hui. En s'appuyant sur le riche corpus de la théorie démocratique et la jurisprudence sur la propriété, ce livre se propose d'exposer — et de remettre en question — le problème moral de la transmission intergénérationnelle de la citoyenneté non taxée.

Il semble incroyable que les circonstances de la naissance servent encore aujourd'hui de principal déterminant du titre de pleine et égale appartenance au corps des citoyens, étant donné l'étendue selon laquelle ce critère a été rejeté dans plusieurs autres domaines de la vie publique[11]. Et pourtant, l'appel à l'accident du droit de naissance est inscrit dans les lois de tous les États modernes et appliqué partout. De fait, la grande majorité de la population globale n'a aucun moyen d'acquérir la citoyenneté *sauf* par les circonstances de la naissance[12]. Pour autant que la citoyenneté est une ressource précieuse, elle est couramment garantie sur la base d'un ensemble de critères moralement arbitraires. Le principe de l'appartenance par droit de naissance qui sanctionne une telle distribution mérite la même analyse critique judicieuse que n'importe quelle autre institution sociale qui bloque la réalisation des opportunités égales. Une telle analyse, cependant, brille par son absence. L'acceptation presque habituelle de l'attribution (*ascription*) comme base pour conférer l'appartenance politique est tellement prédominante que nous avons simplement tendance à la tenir pour acquise[13]. Même ceux qui proposent de resserrer le cercle de l'appartenance ne contestent pas le principe de base d'un titre héréditaire; au lieu de cela, ils ergotent sur la portée de son application. Ce qui demeure non questionné, et de manière remarquable, c'est le présupposé très arrêté que l'appel à la naissance est en quelque sorte un élément non questionnable de l'attribution de l'appartenance politique. C'est ce présupposé (mal inspiré) qui explique le peu d'attention qu'a reçu le casse-tête de la citoyenneté même chez les chercheurs progressifs intéressés à « repenser » la communauté politique[14].

C'est une omission sérieuse : la plus grande partie de la population mondiale acquiert la citoyenneté sur la base de la transmission à la naissance fondée sur les liens de parenté ou la localisation territoriale à l'heure de la naissance. Les faits sont tels que la plupart des individus vivant aujourd'hui, surtout les masses recroquevillées aspirant à respirer libres, demeurent largement « emprisonnés » par la loterie de leur naissance[15]. Cette reconnaissance motive (plus loin dans les chapitres du livre) la tâche difficile de considérer des possibilités réalistes et viables pour réformer le système actuel d'allocation par droit de naissance. Ces possibilités impliquent l'élargissement de la portée de notre analyse au-delà des comptes rendus standard de l'appartenance politique en tant que dépositaire des statuts légaux, des droits et de l'identité collective[16]. Bien que chacun de ces aspects constitue une partie vitale du domaine de la citoyenneté, ensemble, ils ne saisissent pas la pleine portée de sa finalité. Au lieu de m'appuyer sur ces catégories familières, je me propose d'*étendre* notre compréhension de la citoyenneté en lui ajoutant un aspect qui manquait jusqu'à maintenant : penser l'accès à la citoyenneté par droit de naissance en tant que distributeur, ou négateur, de

la sécurité et de l'opportunité à l'échelle globale. Pour découvrir les fonctions plus complexes et multidimensionnelle de la citoyenneté par droit de naissance, nous avons besoin de jeter un regard sans complaisance sur les liens légaux imbriqués entre la naissance et l'appartenance politique.

Une illustration hypothétique plante le décor pour notre enquête. Imaginons un monde dans lequel il n'y a pas de variations politiques, ni de richesses significatives entre les unités d'appartenance délimitée (*bounded*). Il n'y a aucune rareté dans les ressources quelles qu'elles soient et il n'y a pas de conflit fondé sur des facteurs sociaux comme la classe, l'ethnicité ou la nationalité. Dans un tel monde, on ne peut rien gagner en trafiquant les structures d'appartenance existantes. Dans ce système mondial imaginaire et pleinement stable, il n'y a aucune motivation pour le changement ou la migration. Chaque entité politique offre un espace sécuritaire et accueillant dans lequel les individus vivent, aiment, travaillent et, éventuellement, meurent. Si nous présupposons qu'il n'y a pas de désastres naturels dus à l'activité humaine, les enfants et les petits enfants peuvent bien poursuivre la même voie d'appartenance que leurs géniteurs. Plus important encore, l'ensemble spécifique auquel appartient un enfant n'a pas d'importance; des opportunités à peu près égales sont liées au titre de la citoyenneté peu importe la communauté politique dans laquelle il nait.

Quand nous relâchons ces présupposés afin de les ajuster plus étroitement à la réalité de notre monde, avec ses combats et ses conflits omniprésents — un monde dans lequel l'instabilité politique, la mobilité humaine et l'inégalité matérielle continuent de persister — les choses commencent à nous apparaître sous un angle très différent. Dans notre monde, l'appartenance à un État particulier (avec son niveau spécifique de richesse, son degré de stabilité et son bilan des droits humains) a un impact significatif sur notre identité, notre sécurité, notre bien-être, et sur la gamme des opportunités disponibles qui nous est accessible de manière réaliste. Quand on l'analyse dans ce contexte plus large, la pleine appartenance dans une société riche apparaît comme une forme complexe de propriété héritée : un titre de valeur qui est transmis, par le droit, à un groupe restreint de récipiendaires dans des conditions qui perpétuent le transfert de ce précieux titre à « leurs corps », précisément, leurs héritiers. Cet héritage apporte avec lui un immense et précieux faisceau de droits, de bénéfices et d'opportunités.

Bien qu'ils aient un effet pernicieux sur la distribution des perspectives de vie et sur la sécurité humaine, les titres de naissance dominent encore nos lois quand il s'agit de l'allocation de l'appartenance politique dans un État donné. De fait, la richesse matérielle et l'appartenance politique (qui pour plusieurs sont les deux biens distribuables les plus importants) sont les seules ressources importantes pour lesquelles le transfert intergénérationnel est encore largement dominé par les principes de l'hérédité[17]. Alors que les fondements normatifs de ces principes ont été discutés de part en part du point de vue de la transmission intergénérationnelle de la propriété, ils ont rarement été considérés du point de vue de la citoyenneté. Cette omission est aussi étonnante que dérangeante : les

universitaires et les décideurs politiques accordent beaucoup d'attention à la citoyenneté, à l'immigration, aux revendications des groupes minoritaires, aux préoccupations relatives à l'intégration civique et à la manière de rendre l'appartenance politique significative dans un monde d'affiliations qui se recoupent et se font concurrence. Ces vifs débats portent surtout sur la trilogie des statuts, des droits et de l'identité. Ce qui demeure remarquablement absent de ces discussions, toutefois, c'est une analyse sérieuse des implications distributives globales des normes en vigueur et de la pratique légale qui consiste à attribuer l'appartenance sur la base du pedigree ou du lieu de naissance, et des protections et des bénéfices qui l'accompagnent[18]. Lorsqu'il est question de n'importe quel autre titre légal généré et distribué par l'État, l'appel au statut de naissance a été profondément discrédité. Jusqu'à maintenant, toutefois, les lois sur la citoyenneté par droit de naissance ont largement échappé à une telle analyse minutieuse. Je suis convaincue qu'il est temps de réparer ce déséquilibre : nous devons commencer à examiner de manière critique le lien entre la naissance, la définition du *demos*, et la distribution inégale de voix et d'opportunité à l'échelle globale.

Bien qu'il y ait eu de nombreux efforts sérieux pour problématiser la citoyenneté et contrer les problèmes de l'inégalité globale et du déficit de légitimité démocratique, la stratégie typique a été de se concentrer presque exclusivement sur la situation des non-membres, de trimer dur pour étendre leurs droits et d'ouvrir les régimes qui permettent aux nouveaux membres de rejoindre le cercle des membres[19]. Il est indéniable que ces objectifs sont importants et qu'ils sont devenus encore plus urgents récemment. Les années qui ont suivi la tragédie du 11 septembre 2001 ont vu les gouvernements à travers le monde étendre et approfondir leur contrôle régulateur sur l'accès au territoire et l'admission de membres en tant que partie d'une stratégie plus large qui consistait à reprendre le contrôle des frontières[20]. Pourtant, d'un point de vue analytique, poser la question de l'appartenance politique de cette manière est omettre quelque chose d'important. Il ne suffit pas de se concentrer uniquement sur la situation de ceux qui n'ont pas d'appartenance; il faut aussi examiner le fondement du titre de ceux qui sont « naturellement » membres. Comment la pleine citoyenneté est-elle acquise en l'absence de migration ? Sur quelle base le titre convoité de la citoyenneté est-il conféré à certains, alors qu'il est dénié à d'autres ? Qui gagne et qui perd quand les principes du droit de naissance sont implantés dans les lois sur la citoyenneté ? Ce sont les questions fondamentales qui m'occuperont dans la discussion qui suit. Pour y répondre, nous devons déplacer notre attention de l'immigrant vers le citoyen et étendre la discussion sur l'appartenance au-delà de la lentille familière de l'identité et de l'appartenance (*belonging*) pour rendre compte du mécanisme de transfert de la citoyenneté par droit de naissance avec ses effets pernicieux sur la distribution de voix et d'opportunité à l'échelle globale.

## L'ATTRIBUTION DU DROIT DE NAISSANCE : LE CADRE LÉGAL DE LA CITOYENNETÉ ET DE LA PROPRIÉTÉ

Quand nous parlons de la naissance comme source de citoyenneté, nous devons distinguer entre deux principes qui définissent l'appartenance dans un État à l'ère moderne : le *jus soli* (« le droit du sol ») et le *jus sanguinis* (« le droit du sang »). Bien que le *jus soli* et le *jus sanguinis* soient typiquement présentés comme des contraires, il est important de noter qu'ils reposent tous les deux sur une conception de l'appartenance délimitée et qu'ils la soutiennent. Ils partagent le présupposé fondamental de la rareté : seul un nombre limité d'individus peuvent acquérir automatiquement la citoyenneté dans une communauté donnée. Une fois introduite l'idée de la rareté, nous nous heurtons au dilemme de l'allocation ou de la définition des frontières : autrement dit, comment déterminons-nous qui sera inclus dans le cercle des membres et qui sera laissé à l'extérieur de ses paramètres ? Les deux principes résolvent ce dilemme de la même manière : en faisant appel au transfert de titre par droit de naissance. La différence entre eux tient au facteur liant utilisé pour délimiter les frontières de leur communauté d'appartenance respective : le *jus soli* repose sur le lieu de naissance; le *jus sanguinis* sur le lien de parenté. Il est tentant de penser qu'une règle qui fait reposer la citoyenneté sur « la contingence du lieu de naissance de l'enfant est en quelque sorte plus égalitaire qu'une règle qui ferait dépendre la citoyenneté par droit de naissance du statut légal des parents de l'enfant »[21]. Mais cette distinction peut facilement nous égarer. Les deux critères pour l'attribution de l'appartenance à la naissance sont arbitraires : l'un est fondé sur l'accident de la naissance à l'intérieur de frontières géographiques particulières alors que l'autre est fondé sur la pure chance de la descendance.

En se concentrant de manière sélective sur l'événement de la naissance en tant qu'unique critère pour allouer automatiquement l'appartenance, les lois existantes en matière de citoyenneté contribuent à masquer le fait que cette attribution n'est rien de plus qu'un acte apolitique de démarcation en matière d'appartenance. C'est de cette manière que les implications distributives potentielles sont cachées de notre vue[22]. En pratique, toutefois, les règles d'attribution par droit de naissance font beaucoup plus que démarquer qui peut être inclus dans la communauté. À l'instar des autres régimes de propriété, ils définissent l'accès à certaines ressources, aux bénéfices, aux protections, aux processus de prise de décision et aux institutions qui améliorent les opportunités et cet accès est réservé d'abord à ceux qui tombent sous la définition des détenteurs de droits. De ce point de vue, la citoyenneté par droit de naissance présente les caractéristiques définitives d'un régime de propriété qui peut largement être caractérisé comme un système de règles qui gouvernent l'accès à, et le contrôle sur, des ressources qui sont rares compte tenu des demandes que les êtres humains ont par rapport à elles[23].

Comme William Blackstone l'avait déjà remarqué il y a plus de 200 ans, « il n'y a rien qui frappe plus généralement l'imagination, ni qui suscite davantage les affections de l'humanité que le droit de propriété »[24]. Invoquer une analogie

conceptuelle avec la propriété et l'héritage exige par conséquent une vigilance et une clarification quand à l'usage que nous entendons faire de ces concepts, tâche que j'entreprends dans le chapitre suivant ; pour le moment, il suffit de dire que la citoyenneté diffère nettement de la conception de la propriété étroite et atomiste (« blackstonienne » pourrait-on dire) qui est devenue synonyme des valeurs d'échange, d'aliénation, ou de propriété « unique et despotique »[25]. Je souhaite mettre de l'avant une vision différente de la propriété dans le contexte de la citoyenneté, qui met l'accent sur l'intendance (*stewardship*) et la responsabilité mutuelle. En tant que bien généré collectivement, la citoyenneté créée un ensemble complexe de titres et d'obligations légaux parmi différents acteurs sociaux et elle constitue un excellent exemple d'interprétations plus contemporaines de la propriété comme réseau de relations sociales et politiques comportant l'obligation de promouvoir le bien public et pas uniquement de satisfaire les préférences individuelles[26] . Cette perspective plus large nous permet de concevoir les régimes de citoyenneté non seulement comme générateurs de règles intrinsèques qui définissent l'allocation de l'appartenance, mais aussi comme porteurs d'effets considérables sur la distribution du pouvoir, de la richesse et de l'opportunité. Ces dernières implications sont particulièrement dérangeantes étant donné que l'accès aux biens dits sociaux est déterminé exclusivement par des circonstances en dehors de notre contrôle. Établir l'analogie avec la propriété héritée et reconnaître le titre de citoyenneté par droit de naissance comme une construction humaine qui n'est pas à l'abri du changement, c'est ouvrir le système actuel de distribution à l'évaluation critique. Une fois certaines relations rangées sous la rubrique de la propriété et de l'héritage, les questions classiques de la justice distributive — c'est-à-dire *qui* possède *quoi*, et sur quelle base, — deviennent incontournables.

## LA CITOYENNETÉ PAR DROIT DE NAISSANCE ET L'INÉGALITÉ GLOBALE

La citoyenneté par droit de naissance fait plus que définir les limites (*boundaries*) formelles de l'appartenance. Elle correspond aussi étroitement aux perspectives de vie très différentes des individus en matière de bien-être, de sécurité et de liberté individuelle. La plupart des chercheurs en droit (et aussi la majorité des philosophes politiques) considèrent toutefois comme étant largement non pertinente la question de savoir quel État doit garantir son appartenance à un individu particulier. De ce point de vue, comme le notait Benedict Kingsbury, « le système de la souveraineté des États a eu pour effet de fragmenter et dévier les demandes que le droit international s'attaque mieux à l'inégalité »[27]. Ceci peut expliquer pourquoi les théories du droit et de la morale ont été trop longtemps aveugles aux conséquences dramatiques en termes d'opportunité et de voix inégales de la citoyenneté par droit de naissance ; mais cela fait peu pour la justifier.

Même les penseurs qui défendent un droit moral ou un droit humain fondamental à l'appartenance le font typiquement à un niveau général, abstrait, et relèguent « le contenu spécifique du droit de citoyenneté dans une communauté

spécifique... [à] la législation spécifique en matière de citoyenneté de ce pays-ci ou de ce pays-là »[28]. Cette division du travail peut bien être motivée par l'idée d'autonomie souveraine ou celle de l'autodétermination démocratique. Hélas, cela a surtout pour effet de renforcer involontairement l'idée que la seule chose qui importe est d'obtenir un droit d'accès à la citoyenneté « dans ce pays-ci ou ce pays-là » au lieu d'explorer les perspectives de vie dramatiquement inégales qui sont liées à l'appartenance dans ce pays-ci ou ce pays-là. C'est ce glissement d'un droit abstrait à l'appartenance à sa matérialisation concrète qui démontre comment le fait de se concentrer sur *l'égalité formelle de statut* rend invisible *l'inégalité actuelle des chances de vie* liées à la citoyenneté dans des communautés politiques spécifiques.

La réponse typique de la théorie démocratique et libérale à l'inégalité d'opportunité causée par des facteurs attribués (*ascriptives*) consiste à travailler fort pour qu'« aucun enfant ne soit laissé derrière » (*No Child Left Behind*). Bien que ce slogan ne se soit jamais complètement matérialisé dans aucun pays, il reflète une aspiration à dépasser les hiérarchies sociales et les barrières économiques qui sont causées par des circonstances moralement arbitraires ou des patterns structurels désavantageux. Il est par conséquent étonnant que la dimension distributive globale de l'appartenance par droit de naissance ait largement échappé à l'évaluation critique. Cette pauvreté de l'analyse s'explique au moins en partie par le fait que l'étude des lois de la citoyenneté était traditionnellement la province des recherches domestiques, souvent à l'esprit de clocher, qui ont tendance à se préoccuper des caractéristiques particulières des normes de leur propre pays et des procédures définissant l'appartenance et l'admission[29]. Le droit international, de son côté, s'est concentré principalement sur les tentatives de résoudre le problème de l'apatridie. Cette explication souligne qu'il est mieux pour l'individu de jouir d'un lien spécial avec une communauté donnée que de demeurer sans aucune protection étatique[30]. Il s'agit clairement d'un argument puissant. Cependant, cette formulation se concentre seulement sur l'égalité formelle de statut. Elle ne fait rien pour rectifier les inégalités corrélées avec l'attribution de l'appartenance par droit de naissance dans « ce pays-ci ou ce pays-là » particulier.

Qui plus est, la concentration familière sur l'égalité formelle de statut (qui exige que tous les individus appartiennent à un État ou un autre) repose elle-même sur une image schématique d'un monde ordonné qui contiendrait des communautés politiques clairement définies. Cette conception du monde est décrite par Rainer Bauböck comme possédant « une qualité de simplicité et de clarté qui ressemble presque à une peinture de Mondrian. Les États sont identifiés par différentes couleurs et séparés les uns des autres par des lignes noires (...) [Cette] carte politique moderne marquent tous les endroits habités par des individus comme appartenant à des territoires étatiques mutuellement exclusifs »[31]. Dans un tel monde, avec ses divisions exhaustives et claires du paysage politique en juridiction mutuellement exclusives, il semble « axiomatique que toute personne doit posséder une citoyenneté, que tous les individus doivent appartenir à un État »[32]. En se concentrant sur cette image mondrianesque de la citoyenneté, il

devient possible de mettre l'accent sur la symétrie artificielle entre les États (représentés par un code de différentes couleurs par région sur la carte mondiale) tout en ignorant les inégalités dans les perspectives de vie actuelles des citoyens qui appartiennent (*belong*) à des unités d'appartenance (*membership*) radicalement différents (et qui sont pourtant formellement égaux)[33].

Sur ce chapitre, les clandestins en savaient plus. Il fallait qu'ils aient une conscience aiguë des inégalités actuelles dans les perspectives de vie pour s'embarquer pour leur voyage fatal, risquer tout, y compris leur propre vie, afin d'obtenir un meilleur avenir dans un pays plus riche et plus stable auquel ils n'appartenaient pas légalement[34]. C'est dans ce contexte que les relations entre la citoyenneté par droit de naissance et l'inégalité d'opportunité viennent au devant de la scène. Bien que les lois sur la citoyenneté existantes ne créent pas de telles disparités, elles les perpétuent et réifient de manière dramatique les perspectives de vie différenciées en s'appuyant sur les circonstances moralement arbitraires de la naissance. En même temps, elles masquent ses conséquences distributives cruciales en faisant appel à la présumée « naturalité » de l'appartenance fondée sur la naissance. Il n'y a cependant rien d'apolitique ou de neutre dans ces régimes de droit de naissance[35]. Ils sont construits et renforcés par le droit, ce qui avantage ceux qui ont accès au privilège de l'appartenance héritée, et désavantage ceux qui ne l'ont pas — exactement comme les régimes héréditaires de transmission de propriété dans le passé préservaient la richesse et le pouvoir aux mains de l'élite.

## L'IMPORTANCE DE LA DIMENSION DISTRIBUTIVE GLOBALE DE LA CITOYENNETÉ

Nous pouvons maintenant percevoir les limites (*boundaries*) de l'appartenance sous un jour plus complexe : non seulement ces limites sont-elles soutenues à des fins d'identité et d'appartenances (*belonging*) symbolique (comme le soutient l'argument conventionnel), mais elles remplissent également un rôle crucial dans la préservation de l'accès restreint à la richesse et au pouvoir accumulés de la communauté. Ce dernier est jalousement gardé à la jonction du transfert de « propriété » de la génération actuelle de citoyens à sa progéniture. En d'autres mots, les mécanismes de la citoyenneté par droit de naissance fournissent une couverture par le biais de leur présumée naturalité pour ce qui est essentiellement une transmission majeure (et présentement non taxée) de successions d'une génération à l'autre. Notre monde est en un de rareté : quand les communautés riches restreignent de manière systémique l'accès à l'appartenance et aux bénéfices qui en dérivent sur la base d'un système strictement héréditaire — qui ressemble à la structure de transmission de l'entaille — ceux qui en sont exclus ont raison de se plaindre[36].

Si nous souhaitons revisiter ces principes de transmission automatique et imaginer comment mieux allouer les bénéfices sociaux présentement liés à la citoyenneté dans une communauté délimitée au-delà des frontières (comme je crois que nous devrions le faire), la première chose à faire est d'attirer l'attention sur le lien implanté entre la naissance et l'appartenance politique. Même si

ses effets se font sentir un peu partout, ce lien a largement échappé à l'attention aussi bien des universitaires que des cercles politiques. Une fois soumis à l'examen, ce système d'allocation ne peut plus être tenu pour acquis, ni ignoré[37]. Ceci pour au moins trois raisons :

Premièrement, la portée et l'échelle de la distribution de la citoyenneté est vraiment grande : elle affecte chaque être humain sur cette terre. Bien que le sujet de l'immigration occupe ces jours-ci beaucoup d'attention, c'est encore par attribution de droit de naissance que les individus obtiennent leur appartenance politique dans « ce pays-ci ou ce pays-là » particulier. Et en dépit de l'attention publique accordée à ceux qui vont habiter à l'extérieur de la communauté dans laquelle ils sont nés, ces derniers représentent moins de 3 % de la population mondiale. Tous les autres — en l'occurrence, 97 % de la population mondiale, ou plus de six milliards d'individus —, reçoivent le bien à vie de l'appartenance par la loterie de la naissance et ils choisissent, ou ils sont forcés, de laisser les choses en l'état[38].

Deuxièmement, les conséquences de ce système de transfert d'appartenance sont profondes. Elles vont bien au-delà de l'emphase habituelle dans les études de la citoyenneté sur les questions d'identité, de diversité et de vertus civiques. Dans un monde inégal comme le nôtre, la citoyenneté par droit de naissance fait plus que démarquer une forme d'appartenance (*belonging*). Elle distribue également les voix et les opportunités d'une manière très inégale. En identifiant légalement la naissance, soit dans un certain territoire, soit de certains parents, comme facteur décisif dans la distribution de la précieuse propriété de l'appartenance (*membership*), les principes de citoyenneté actuels rendent l'appartenance aux communautés bien-nanties inaccessible à la vaste majorité de la population mondiale. C'est de cette manière que nous pouvons penser la citoyenneté comme le titre hérité par excellence de notre temps.

Et de quel titre hérité significatif s'agit-il ! Dans notre monde, les disparités globales sont si grandes que sous les régimes actuels de citoyenneté par droit de naissance, « Certains sont nés pour le doux plaisir », comme le disait de manière mémorable William Blake dans *Auguries of Innocence*, alors que les autres (même s'il ne s'agit pas de leur faute, ni de leur propre responsabilité) sont « nés pour une nuit sans fin »[39]. La réalité de notre monde est que la nuit sans fin est plus répandue que le doux plaisir. Plus d'un milliard d'individus vivent avec moins d'un dollar par jour ; 2.7 milliards vivent sans accès à des conditions sanitaires adéquates et plus de 800 millions souffrent sérieusement de malnutrition[40]. Ajoutez à cela le fait presque incompréhensible que huit millions mourront chaque année, comme un auteur le remarquait de manière poignante, « parce qu'ils sont simplement trop pauvres pour vivre »[41]. Ou pensez à l'atrocité choquante que nous laissons tranquillement se poursuivre à chaque jour : plus de dix millions d'enfants de moins de cinq ans meurent chaque année dans les nations du monde les plus pauvres — la plupart des causes de ces morts auraient pu être évitées[42]. À ceci, nous devons ajouter la prise de conscience cinglante que, — contrairement à l'optimisme de l'histoire conventionnelle qui brise les

barrières imposées (ascriptives) et les remplace par des mécanismes de choix et de distribution équitable — , sous le système actuel de droit de naissance, l'accès aux biens de la citoyenneté n'est clairement pas ouvert à quiconque consent volontairement à l'appartenance ou a un besoin extrême des bénéfices qui lui sont associés[43].

Une fois cette perspective plus critique prise en considération, avec son emphase profonde sur les disparités globales liées à la reconnaissance aiguë de la manière dont les limites de notre appartenance sont régulées de manière serrée, la corrélation qui existe entre la citoyenneté héritée et le bien-être général devient impossible à ignorer. La qualité des services, la sécurité et l'étendue des libertés et des opportunités dont profitent ceux qui sont nés dans des communautés riches sont beaucoup plus grandes, toutes choses étant égales, que les opportunités de ceux qui sont nés dans des pays plus pauvres ou moins stables[44].

Quand nos lois de la citoyenneté deviennent effectivement imbriquées avec les parts distribués dans la survie humaine à l'échelle globale — vouant certains à une vie de confort relatif alors qu'elle condamne les autres à un combat constant pour vaincre les menaces fondamentales de l'insécurité, la faim et la destitution — nous ne pouvons plus accepter cette situation silencieusement. Ces perspectives de vie différenciées de manière dramatique devraient perturber non seulement la foule attentiste des universalistes moraux, mais aussi les défenseurs du libre marché qui croient en la récompense de l'effort et la distribution des opportunités en fonction du mérite, plutôt que sur la base de la station de naissance. Le problème de l'allocation inégale et du transfert, qui a reçu beaucoup d'attention dans le domaine de la propriété, est, de fait, encore plus extrême dans le domaine du titre (*entitlement*) de citoyenneté par droit de naissance.

La troisième raison pour laquelle nous devons accorder une attention minutieuse au casse-tête de la citoyenneté par droit de naissance est, de manière étonnante, que nous continuons de ne pas avoir d'explication théorique cohérente du recours ininterrompue aux circonstances de la naissance dans l'attribution de l'appartenance politique. Ceci, en dépit du fait que la vaste majorité de la population globale reçoit son appartenance politique par attribution (la portée du phénomène étudié), et des implications globales redistributives dramatiques qui résultent de ce système implanté d'allocation d'opportunités inégales (les conséquences du droit de naissance). Si cela se trouve, la persistance de l'attribution dans le plus improbable des domaines sociaux — la définition de qui est inclus et qui est exclus du *demos* (le corps des citoyens), va à l'encontre des explications démocratiques et libérales standard de la citoyenneté en tant que reflet du choix et du consentement des gouvernés[45]. Elle révèle également de sérieuses lacunes dans l'argument conventionnel selon lequel nous pouvons nettement diviser le monde en pays qui se rangent aux deux bouts du spectre de conceptualisation de l'appartenance, soit « civiques » ou « ethniques ». De manière similaire, la prédominance de l'appartenance par droit de naissance est en tension avec la description conventionnelle de la citoyenneté comme reflet du contrat social entre l'individu et la communauté politique, ou ce que divers au-

teurs français ont appelé « *le lien politique et juridique* »[46]. On oppose souvent cette vision post-Lumières à la conception plus ancienne de la citoyenneté du droit romain en tant que statut assigné, avec les droits et les obligations qui en découlent automatiquement comme une conséquence de la naissance et non du choix. Plusieurs des géants de la pensée sociale et politique reprennent et réifient cette distinction (largement fictive), selon laquelle l'allocation de la citoyenneté dans l'État moderne fonctionne comme une affaire de choix et de consentement, ce qui marque une importante amélioration par rapport à la définition précédente fondée sur le statut de la place de l'individu dans la communauté. Ces thèmes triomphants sont peut-être exprimés de la manière la plus fameuse par *Le second traité* de John Locke et le slogan de Henry Maine dans *Ancient Law* qui décrit la transition de l'ancien monde au monde moderne comme un développement de la société et du droit « partant du statut vers le contrat »[47].

Reconnaître les étonnantes similarités de forme et de fonction entre la citoyenneté par droit de naissance et la propriété héritée met en lumière une exception frappante à la tendance moderne qui consiste à s'éloigner des statuts imputés dans tous les autres domaines. Le mécanisme de transmission de la citoyenneté par droit de naissance attribué, qui est toujours en vigueur aujourd'hui, ne peut pas être écarté comme un simple accident historique, étant donné que la question de la légitimité de l'autorité politique et de la propriété est centrale dans les traditions libérale démocratique et républicaine civique. Ce constat ahurissant rend seulement le lien qui persiste entre l'appartenance politique et la position *à la naissance* — un lien qui a été ignoré et tenu pour acquis — plus surprenant et exige une explication cohérente de manière urgente. Corriger cette lacune est le défi que je relève dans ce livre.

## PLACER LE NOUVEAU CADRE CONCEPTUEL D'ANALYSE EN CONTEXTE

Ma discussion est informée par, et, en retour, cherche à enrichir, trois corpus différents de la littérature : les études sur la citoyenneté dans les recherches politiques et légales contemporaines, les débats sur l'inégalité globale et les explications sociologiques de la disparition des frontières dans le contexte des théories post-nationales. Cette littérature s'élève contre les changements de politiques restrictifs actuels mis en place par la plupart des nations industrielles avancées qui ont reformulé récemment leurs régimes de citoyenneté et d'immigration en réponse à l'augmentation de la mobilité transfrontalière croissante et à l'insécurité globale perçues comme des menaces. En juxtaposant ces différentes lignes d'enquête, je mets en lumière la pauvreté d'attention accordée à l'appartenance *par droit de naissance*. Je soutiens également que nous avons besoin de prendre en considération ces discours, qui se recoupent partiellement, si nous voulons trouver un équilibre qui permet de préserver les propriétés facilitantes de la citoyenneté dans une communauté auto-gouvernée et, en même temps, de répondre de manière agressive aux injustices globales perpétrées par le système actuel de transmission de l'appartenance par droit de naissance qui ressemble à l'entaille. Ce mode d'enquête illustre aussi les écarts et les incohérences dans chaque corpus de littérature.

Considérez ce qui suit : la plupart des écrits sur la citoyenneté dans les années récentes avancent des explications nuancées des droits des minorités dans différentes sociétés, des vertus civiques de la citoyenneté, des idéaux de la démocratie délibérative et des possibilités de créer un monde sans frontières, ou du moins avec des frontières moins poreuses. Cette quasi renaissance bienvenue des études sur la citoyenneté a enrichi dramatiquement ce champ, mettant en lumière les nombreuses manières selon lesquelles l'appartenance politique signifie beaucoup plus que « le sens étroit de détenteur de passeport qui consiste à avoir un lien formel légal à un État particulier »[48]. De manière remarquable, toutefois, on a accordé très peu d'attention au mécanisme de *transfert* de l'appartenance par droit de naissance et à ses effets pernicieux sur la distribution de voix et d'opportunité à l'échelle globale.

La littérature sur l'inégalité globale, au contraire, souffre du défaut inverse. Bien qu'elle comprenne de très riches débats quant aux effets de la globalisation sur les inégalités à l'intérieur des pays et entre eux, les unités d'analyse elles-mêmes, en l'occurrence les communautés d'appartenance délimitées (dans leur incarnation présente en tant qu'entités politiques souveraines dans le système interétatique) sont souvent tenues pour acquises. Par conséquent, on n'accorde aucune attention au type de questions qui me concernent ici : comment les limites (*boundaries*) de l'inclusion et de l'exclusion sont-elles définies en premier lieu ? Qu'est-ce qui les soutient ? Pourquoi dans le monde réel, les communautés continuent-elles de s'appuyer sur les circonstances moralement arbitraires de la naissance pour décider qui tombe de quel côté de la frontière de la sécurité et de la prospérité ? En dépit de la fanfare académique des post- et trans-nationalistes qui ont prédit avec joie la disparition des frontières régulées et l'éventuelle dévaluation de l'appartenance délimitée (*bounded*), la citoyenneté profite d'une indéniable résurgence d'autorité actuellement[49]. Ceci rend l'étude du mécanisme de transfert de la citoyenneté par droit de naissance — la dimension perdue de la construction des murs formidables du droit qui établit (et ensuite protège) les limites de l'appartenance qu'ils ont aidé à créer — encore plus pressante.

Mettre en évidence cet écart énorme entre la théorie et la pratique est une partie de ma tâche ici, mais elle s'inscrit dans le cadre d'un projet plus large qui consiste à fusionner l'explication critique des lois sur la citoyenneté existantes et une exploration constructive des possibilités réelles de faire de notre monde un meilleur endroit pour tout ses habitants. J'accomplis ceci en reformulant le principe même du droit de naissance qui alloue actuellement l'appartenance politique sur la base d'une forme non restreinte de titre hérité. Je soutiens dans ce livre que nous devons considérer ces deux sujets ensemble — la citoyenneté par droit de naissance et l'inégalité globale — afin de mieux comprendre le premier et de contrecarrer le second.

## VUE D'ENSEMBLE THÉMATIQUE

Ma discussion procède en deux étapes principales. Dans la première partie du livre, je développe l'analogie entre la citoyenneté par droit de naissance et la propriété héritée dans le contexte d'un monde aux prises avec de sévères inégalités de richesse et d'opportunité. Cette analogie permet de déployer des conditions trouvées dans les domaines de la propriété et de la théorie de l'héritage dans le contexte de l'appartenance ; ce faisant, je propose un modèle qui a le potentiel d'imposer des restrictions sur la transmission illimitée et perpétuelle de l'appartenance — avec l'objectif d'améliorer les inégalités d'opportunités les plus évidentes perpétuées par le système de citoyenneté par droit de naissance. Ce but informe l'idée d'*une taxe sur le privilège du droit de naissance* en tant qu'obligation qui incombe aux récipiendaires d'un titre d'appartenance dans les communautés bien-nanties d'améliorer les perspectives de vie de ceux à qui la loterie du droit de naissance a alloué moins.

Étant donné que la citoyenneté par droit de naissance implique le transfert d'un titre lucratif aux ressources et aux opportunités, elle invite également une réponse légale qui atténue ces transferts intergénérationnels présentement non taxés. Si les communautés politiques riches souhaitent continuer à conférer l'appartenance en fonction du droit de naissance, façonnant ainsi les perspectives de vie des récipiendaires d'une manière qui ressemble conceptuellement à l'héritage des fortunes entaillées, elles doivent accepter une obligation correspondante. De cette façon, l'impératif d'aider les moins fortunés dans l'attribution de leur citoyenneté n'est pas une affaire de charité, mais un devoir légal. Le fondement de cette obligation est plutôt direct. Même les avides défenseurs du droit de propriété résistent à endosser la transmission automatique d'un titre d'une génération à une autre à perpétuité : de tels régimes d'héritage sont traités comme moralement faibles et on peut les remettre en question. Si nous prenons les contraintes existantes sur le pouvoir de transmettre la propriété à travers l'héritage comme notre modèle pour taxer les récipiendaires par droit de naissance d'une citoyenneté héritée dans les sociétés riches, la taxe-privilège offre une façon créative de dénaturaliser le mécanisme similaire à l'entaille qui permet actuellement la concentration sans limite de richesse et de pouvoir dans certains corps politiques. Bien que plusieurs détails aient besoin d'être précisés en ce qui a trait au design actuel et à l'administration d'une telle taxe de droit de naissance sur la citoyenneté par héritage dans les communautés riches, nous pouvons envisager de distribuer ces revenus à des projets spécifiques pour améliorer les opportunités de vie des enfants dans les nations les plus pauvres du monde — peu importe leur lieu de naissance ou leurs ancêtres (non choisis).

Dans la seconde partie du livre, je déplace le centre de l'analyse du niveau global au niveau domestique en explorant les problèmes de sur-inclusion, de sous-inclusion et de légitimité démocratique, et en articulant leurs liens avec le régime actuel de citoyenneté par droit de naissance. Comme avec la discussion de la citoyenneté et de l'inégalité globale, je débute mon exploration des déficiences de l'appel à la naissance dans la définition de l'appartenance à la communauté

en parcourant d'abord le domaine juridique et en le plaçant dans une perspective historique et comparative plus large. Une évaluation critique des défenses normatives en faveur de la préservation du lien entre la naissance et l'appartenance politique suit. Après cette critique, je développe un cadre alternatif pour définir l'accès à la citoyenneté. Dans ce cadre, je mets l'emphase sur le sens de l'appartenance actuelle dans la communauté, par-dessus et au-delà de tout privilège obtenu par titre hérité. J'appelle ce lien authentique le principe du *jus nexi* parce que, comme le *jus soli* et le *jus sanguinis*, il illustre le sens principal de la méthode par laquelle l'appartenance politique est attribuée : par lien, union, ou relation.

Les deux volets de l'analyse adoptée dans ce livre conduisent à des résultats inattendus. Par exemple, ils amènent au devant de la scène l'importance des capacités facilitantes (*enabling*) de la citoyenneté et ils mettent en évidence sa relation complexe avec la fonction de garde-frontière de l'appartenance. Et bien que je critique férocement le mécanisme de la citoyenneté, ma conclusion n'est pas que nous devons abolir le bien collectif de l'appartenance. Je soutiens plutôt qu'un équilibre plus productif peut (et doit) être trouvé entre la protection des précieuses propriétés de l'appartenance et l'amélioration du bien-être de ceux qui sont exclus de la possibilité d'accéder à de tels bénéfices uniquement en raison de l'endroit où ils sont nés ou de leurs géniteurs. Bien qu'il n'y ait pas de solution unique qui s'applique à tous les problèmes, la taxe sur le privilège du droit de naissance supporte la création d'un système de transfert de connaissances, de services et d'infrastructures transnational (ou ce que nous pourrions appeler « un filet de sécurité mondial ») conçu pour s'attaquer aux disparités moralement injustifiables de perspectives de vie qui sont actuellement liées à la transmission perpétuelle de l'appartenance. Elle se présente comme une mesure institutionnelle concrète pour restreindre la transmission du privilège du droit de naissance actuellement illimité. Cette idée, qui pourrait avoir une longue portée, s'enracine dans l'emphase mise sur l'aspect distributif global de la citoyenneté et l'analogie avec la citoyenneté[50].

Il est important de prendre note que la reconceptualisation proposée de la citoyenneté en tant qu'analogue à la propriété héritée n'exige pas que l'on rejette la prémisse en vertu de laquelle nous avons des obligations spéciales ou plus grandes envers ceux qui sont définis comme nos concitoyens dans la communauté politique[51]. Cela signifie simplement que le port de telles obligations spéciales n'est pas un argument contre le fait d'avoir un devoir général parallèle de fournir un filet de sécurité de bien-être et d'opportunité de base à ceux qui demeurent radiés de l'appartenance en raison de l'accident de la naissance[52].

Comme n'importe qui s'intéressant aux affaires internationales et domestiques le reconnaîtrait, on ne saurait trop insister sur l'importance et l'actualité des sujets discutés dans ce livre. La citoyenneté et l'immigration sont des sujets notoires dans la plupart des pays riches du monde et, de plus en plus, dans plusieurs communautés qui envoient des émigrants. La mobilité humaine aussi bien que des préoccupations urgentes de justice, d'égalité et de développement deviennent

de plus en plus des enjeux globaux. Pourtant, nos lois et notre imaginaire conceptuel qui définissent qui peut avoir accès au bien de la citoyenneté sa vie durant et en fonction de quel critère sont encore dominés par les termes quasi féodaux de titre acquis par droit de naissance qui ne suffisent plus à la tâche; le monde social qui a engendré ces catégories a depuis longtemps fait place à d'autres relations et d'autres valeurs. De la même manière, la réalité politique qui nous entoure a changé radicalement ces dernières années, particulièrement en termes d'interdépendance économique toujours plus profonde et de sécurité globale. Ces transformations laissent, évidemment, des traces sur leur chemin. Ce qui manque, toutefois, c'est le vocabulaire approprié pour saisir et évaluer la nouvelle économie politique de la citoyenneté dans un monde encore aux prises avec des inégalités rigides[53].

Il est temps de revoir nos méthodes familières déjà éculées pour définir qui appartient à la communauté politique et sur quelle base. Une tâche tout aussi urgente est de répondre aux soucis et aux demandes de ceux qui demeurent à l'extérieur du cercle de l'appartenance uniquement en raison de l'accident de la naissance. Ce livre met de plus en évidence le besoin de situer le débat sur l'allocation de l'appartenance dans le contexte plus large de considération sur l'inégalité des perspectives de vie et des possibilités de fournir un filet de sécurité globale, peu importe la communauté politique dans laquelle nous sommes nés. Une telle enquête est particulièrement urgente étant donné les craintes croissantes que les immigrants indésirables ne viennent surpeupler les pays riches qui semblent à l'œuvre derrière les politiques restrictives récemment adoptées dans ce domaine. Penser la citoyenneté en tant que forme de propriété héritée est l'une des façons d'ouvrir la réalité limitée actuelle à un nouvel ensemble de possibilités.

Les chapitres qui suivent tentent de répondre à quelques-uns des problèmes les plus cruciaux du droit et de la pratique de la citoyenneté aujourd'hui : dépasser le recours aveugle aux régimes de droit de naissance, qui, au-delà de leurs conséquences distributives globales sévères (le sujet discuté dans la première partie de ce livre), s'avèrent également de faibles prédicteurs pour définir qui appartient actuellement au cercle des membres (la seconde partie du livre) en s'appuyant sur les liens substantiels et réels plutôt que sur n'importe quel statut ou facteur attribués. Je soutiens de plus qu'une fois que l'analogie entre la citoyenneté par droit de naissance et la propriété héritée a été établie, les questions fondamentales de l'accès, du transfert et de la distribution deviennent pertinentes pour la discussion du domaine de la citoyenneté. Bien que nos théories de la justice et de la propriété permettent l'accumulation inégale de richesses et d'autres ressources, elles consacrent des efforts considérables afin de fournir une base justificative pour défendre de telles iniquités dans la distribution des possessions (*holdings*). La reconnaissance que ces théories imposent des restrictions significatives sur les institutions sociales qui génèrent l'inégalité est encore plus importante pour les fins de notre discussion. C'est précisément ce qui manque dans le cadre dominant de la citoyenneté par droit de naissance.

## LE CHEMIN À PARCOURIR

L'appel à l'attribution pour conférer la citoyenneté — peut-être la caractéristique la plus célèbre du paysage moderne — est au coeur de mon enquête dans ce livre : comment est-il possible que l'appartenance politique, qui est si cruciale pour notre identité, nos droits, notre voix politique et pour nos opportunités de vie soit distribuée sur la base d'accidents de naissance ? Reliant ensemble les champs de recherche pertinents (y compris le droit, la philosophie politique, le design institutionnel, l'économie du développement, la citoyenneté et les études globales, et la théorie sociale critique) ce livre présente une réponse exhaustive, et pourtant surprenante, à cette question.

Laissons maintenant le flot des idées parler pour lui-même.

## NOTES

1 Traduction de Martin Provencher. Ce texte est la version française de « The Puzzle of Birthright Citizenship », l'introduction du livre de Ayelet Shachar, *The Birthright Lottery : Citizenship and Global Inequality*, Cambridge, Mass., Harvard University Press, pp.1-18, Copyright ©2009 by the President and Fellows of Harvard College. Nous remercions les éditeurs qui nous ont autorisés à traduire et à reproduire de manière digitale cette introduction.

2 Ces faits sont rapportés dans *Olga de Leon v. Shih Wei Navigation* (2007)

3 *Olga de Leon v. Shih Wei Navigation* (2007), p. 23.

4 International Organisation for Migration 2005.

5 Voir Cholewinski, Perruchoud, et MacDonald 2007; Dauvergne 2007, 489-507.

6 La liste des oeuvres qui dressent l'inventaire de ces changements est trop vaste pour être citée. Mentionnons parmi ses auteurs majeurs Saskia Sassen, Yasemin Soysal, David Held, Rainer Bauböck, Linda Bosniak, Iris Young, Seyla Benhabib, Peter Spiro et Will Kymlicka. J'ai apporté ma propre contribution à ces discussions sur la citoyenneté à niveaux multiples dans le contexe des relations entre l'individu, le groupe et l'État dans Shachar (2001).

7 Ford, 2001, p. 210.

8 L'analogie ici est avec le régime de propriété qui remonte à l'Angleterre médiévale; là, nous trouvons l'institution (aujourd'hui discréditée) de la *fee tail* et de l'*entail*. Dans le langage des débuts de la *common law*, la *fee tail* autorisait la transmission automatique d'une possession terrestre de la personne A à la personne B « et aux héritiers de son corps » et ainsi de suite à travers toutes la lignée générationnelle. Je discute de ce régime de propriété particulier au chapitre 1. Sur les origines et les technicalités de la *fee tail*, voir Simpson 1986.

9 Pour une vue d'ensemble concise des statistiques concernant la fragmentation globale des opportunités en référence à la démocratie et à la participation, à la justice économique, à la santé et à l'éducation, aussi bien qu'à la paix et à la sécurité, voir e.g. PNUD, *Rapport mondial sur le développement humain* 2002; UNICEF, *The State of the World's Children* 2005.

10 PNUD, *Rapport mondial sur le développement humain* 2005; World Bank, *World Development Report*, 2006.

11 C'est l'argument principal avancé par Schuck et Smith (1985). Sur cette base, ils développent un modèle fondé sur le consentement qu'ils estiment plus cohérent avec la théorie libérale. De manière plus controversée, ils appliquent ensuite ce cadre théorique pour recommander la restriction domestique de l'appartenance par naissance aux enfants de citoyens et de résidents permanents. Pour une critique pénétrante de cette interprétation constitutionnelle, voir Neumann (1987). Ma critique du droit de naissance, d'un autre côté, milite plutôt en faveur d'une expansion globale de la distribution des bénéfices sociaux de la citoyenneté. Je fais la promotion d'un plus grand accès à l'appartenance en fonction de l'interdépendance et des liens authentiques actuels de chacun avec la communauté au lieu de faire appel à la lignée sanguine ou à la territorialité.

12 Ce sont les chiffres internationaux officiels. Cf. GCIM 2005, *Migration in an Interconnected World*: *New Directions for Action*, Annex II; United Nations 2004, *World Economic and Social Survey* 2004 : *International Migration*, 25; UNPFA 2006, *State of World Population* 2006, 6.

13 Une exception à cet aveuglement se trouve dans les travaux formateurs des chercheurs comme Joseph Carens, et plus récemment, Peter Spiro. Voir, par exemple, Carens 1987a, 251-273. Mon analyse se concentre sur la valeur de la citoyenneté mais elle critique le chemin que l'on prend pour la transmettre, alors que Carens se passionne pour la question de l'immigration et du droit de l'État de limiter la mobilité à travers les frontières nationales. Cela entraîne également des conclusions différentes sur les politiques, comme je le montre aux chapitres 3 et 6. Voir également Spiro 2008. Les chercheuses féministes et critiques ont tenté depuis longtemps de démystifier la prétendue naturalité de plusieurs institutions sociales, telles que le contrat, la propriété, le mariage et la souveraineté elle-même. Mon tra-

vail s'inscrit dans cette tradition. Cf. par exemple, Pateman 1988; McClintock 1995; Stevens 1999; Cott 2002.

14 Je paraphrase ici le titre d'un livre influent édité par Archibugi, Held et Köhler en 1998.

15 Les soucis à propos de l'accès à l'appartenance par droit de naissance sont aggravés par le fait que la mobilité internationale à travers les frontières n'est pas ouverte également à tous. Comme Paul Hirst et Grahame Thompson l'observent sèchement « à l'exception d'un "club de classe" de professionnels hautement qualifiés, internationalement mobiles (...) la masse de la population mondiale ne peut pas se déplacer facilement ». De plus en plus, soutiennent-ils, « les pauvres [des pays en développement] ne sont pas bienvenus dans les pays avancés ». Voir Hirst et Thompson 1999, p. 267.

De ce point de vue, la rhétorique hyperbolique de la globalisation et la disparition des frontières selon laquelle le bien allouée de la citoyenneté est devenu si « dilué » qu'il fait peu de différence dans la vie de chacun demeure à mille lieues de la réalité que vit la majorité de la population globale. Je m'appuie ici sur la terminologie qui est employée dans le livre au tempo rapide de Peter J. Spiro (Spiro 2008).

16 Voir, par exemple, Joppke 2007, 37-48; Bosniak 200, 447-509.

17 Techniquement parlant, le régime de citoyenneté préserve des mécanismes de transfert intergénérationnels plus stricts et plus rigides que ceux autorisés aujourd'hui pour ce qui est de la propriété héritée. Cette dernière a été assouplie pour permettre à la volonté individuelle de s'exprimer alors que la première fonctionne toujours comme un ensemble de règles par défaut qui sont non révocables et non amendables. C'est l'État qui les régit et les fait respecter au nom du collectif de ses membres.

18 Les exceptions majeures ici se trouvent dans les écrits formateurs de Peter Schuck et Rogers Smith (Schuck et Smith 1985) et Joseph Carens. Voir Carens 1987a. Mon analyse se concentre sur la valeur de la citoyenneté, mais elle critique la voie par laquelle elle est transmise, alors que Carens s'intéresse à la question de l'immigration et au droit des États de limiter la mobilité à travers les frontières nationales. Elle mène également à des conclusions politiques différentes comme je le montre aux chapitres 3 et 6.

19 Pour un excellent traitement de ces questions dans les travaux récents, voir Benhabib 2004b; Bosniak 2006; Motomura 2006a; Cole 2000; Gibney 2004.

20 Voir Shachar 2007.

21 Eisgruber 1997, p. 59.

22 Pour une élaboration plus développée de cette distinction entre les fonctions de «démarcation» et de «distribution» des règles d'appartenance, voir Shachar 2001, p.49-55.

23 Waldron, 1985, p. 318.

24 Blackstone [1766], 1979, p. 2.

25 Blackstone [1766], 1979. Pour une discussion critique, voir Heller, 1999.

26 Pour une vue d'ensemble concise de cette conception, voir Munzer 2001. Cette emphase sur la « propriété comme relations » est aussi cohérente avec les différentes tendances de la théorie féministe qui mettent fréquemment au premier plan les relations et le fait d'être lié (*relatedness*). Pour une discussion éclairante, voir Dickenson 2007. Pour un développement du concept d'intendance en relation à la propriété culturelle des indigènes, voir Carpenter, Katyal et Riley 2009.

27 Pour une exploration détaillée de ce thème, voir Kingsbury 1998.

28 Benhabib 2004b, p. 141.

29 Une cuvée de livres récents vise à rompre avec ce cadre d'étude par simple pays et présente à la place une analyse comparative. Voir, par exemple, Hansen et Weil 2001.

30 Sur les risques énormes et la vulnérabilité de l'existence nue associée à l'apatridie, voir Arendt 1968; Agamben 1998.

31 Voir Bauböck 1997, p. 1. Comme le souligne Bauböck, cette image westphalienne du monde ne peut pas rendre compte de la signification politique des liens et des affiliations transnationales que plusieurs individus éprouvent maintenant envers leur (ancienne et nouvelle) patrie, ni expliquer de manière satisfaisante la réalité de la double nationalité.

[32] Brubaker 1992, p. 31.

[33] Il est bien connu que certains ont soutenu que nous sommes présentement au milieu d'une autre transformation dans laquelle le concept politique d'appartenance peut éventuellement être lié à des niveaux d'affiliations international, supranational, transnational, postnational, anational ou sousnational — en plus, ou à la place, de celui de l'État. Sur cette riche littérature, voir Sassen 2006 ; Bosniak 2000.

[34] Sur la construction historique de la distinction entre les migrants légaux et illégaux, voir Ngai 2004. Voir aussi Torpey 2000 ; Zolberg 2006.

[35] Autrement dit, la citoyenneté par droit de naissance n'est ni un droit naturel, ni un attribut génétique (comme le fait d'être né petit ou grand, beau ou laid, et ainsi de suite), mais plutôt un exemple paradigmatique d'un titre (*entitlement*) créé par le gouvernement. Ceci concorde tout à fait avec la conception influente de Blackstone sur le droit à l'héritage non en tant que droit « naturel, mais simplement [en tant que] droit *civil* ». Voir Blackstone [1766] 1979, p. 11. [Souligné par Blackstone].

[36] Dans le domaine de la théorie de la propriété, J.Singer (2000) a fait puissamment valoir cet argument.

[37] Mon analyse procède ici de l'idée que le droit ne reflète pas seulement les réalités sociales et les relations de pouvoir, mais participe également lui-même à leur constitution. Pour une exploration relative au contexte des régimes de citoyenneté, voir Lopez 1996; Ngai 2004.

[38] Cf. GCIM 2005, Annexe II.

[39] Le travail récent de Joshua Cohen sur la justice globale inspire ici cet appel à Blake (J. Cohen, 2007).

[40] voir PNUD *Rapport sur le développement humain* 2004, p. 129

[41] J. Cohen 2007, p.ix.

[42] Voir, World Bank, *Global Millenium Development Goals*, Goal 4 : «Plus de dix millions d'enfant meurent chaque année dans le monde développé, la vaste majorité de causes qui auraient pu être évitées grâce à une combinaison de bon soin, alimentation et traitement médical. Le taux de mortalité des enfants de moins de cinq ans a baissé de cinq pour cent depuis 1990, mais ce taux demeure élevé dans les pays en développement. Dans les pays en développement, un enfant sur dix meurt avant son cinquième anniversaire, comparé à un sur 143 dans les pays à hauts revenus.»

[43] Autrement, les clandestins n'auraient jamais imaginé la possibilité de s'embarquer en bateau afin d'effectuer leur voyage illégal et, éventuellement, fatal. Ils auraient pu simplement passer, comme beaucoup d'autres avant eux, sous les pieds sans fers de la Statue de la Liberté sur Ellis Island, la porte d'entrée de la porte d'or, où le poème légendaire d'Emma Lazarus a été écrit dans la pierre. Sur la mobilité transnationale non autorisée, voir Jordan et Düvell 2002.

[44] Voir World Bank, 2006b; *World Development Indicators* 2006.

[45] Schuck et Smith 1985.

[46] Voir Weis 1979, p. 30.

[47] Voir Locke 1988; Maine [1861] 1986.

[48] Voir Dobrowsky 2007, p.630. Voir aussi Bosniak 2006.

[49] Les preuves abondent allant des lois sur l'immigration plus sévères aux procédures de naturalisation plus restrictives pour ceux qui ne sont pas encore (et peut-être qu'ils ne le seront jamais) membres. Voir Shachar 2007; Andreas et Snyder 2000; Joppke 2005.

[50] Dans *The Laws of Peoples*, John Rawls s'oppose aux principes de justice distributive globale parce que, comme il le dit, ils leur manquent une « cible et un point limite » (Rawls 119a, 115-116). On peut répondre à cette préoccupation ici en distinguant entre interprétation minimaliste et étendue de l'obligation de la taxe sur le droit de naissance. La première peut traiter la taxe comme une correction temporaire qui expirera si (et quand) les différences draconiennes dans les perspectives de vie en fonction de la distribution nationale ou régionale s'atténuera, alors que la seconde est moins conséquentialiste et met l'accent sur le fondement moral pour restreindre les transferts qui ressemblent à l'en taille en tant que façon de limiter les titres (*entitlement*) hérités. Je reviens sur ces questions au chapitre 3.

[51] Nagel 2005.

[52] Ici je suis en accord avec les auteurs tels que Martha Nussbaum, Amartya Sen, Brian Barry, Bhikku Parekh, Kok-Chor-Tan, Andrea Sangiovanni, et d'autres qui ont défendu de « modestes » principes cosmopolites de justice distributive et acceptés en même temps que des devoirs spéciaux ou des obligations plus élevées s'appliquent aux co-citoyens et co-résidents dans une unité politique partagée. Pour une exposition lucide de cette position, que j'accepte plus que je ne la défends dans ce projet, voir Caney 2005, p. 102-147.

[53] L'explication standard soutient que la globalisation stimule la croissance et le développement mondial, mais que les liens entre la globalisation économique, la croissance économique, l'inégalité et la pauvreté font l'objet de disputes, même parmi les experts dans le domaine. Certains soutiennent que la globalisation économique elle-même exacerbe (au lieu d'atténuer) les inégalités empirant ainsi le sort des pauvres les plus démunis dans plusieurs parties du monde. Pour une vue d'ensemble concise, voir Held et Koenig-Archibugi 2003. Il y a aussi un vibrant débat qui porte sur la question de savoir si ce sont les facteurs culturels ou institutionnels qui sont les plus importants pour expliquer la croissance. Sur ces explications concurrentes, voir Rodrick 2003; Landes 1999.

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**Législation et jugements**

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