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Résumé de l'article

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.

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WHAT JUSTICE ENTAILS [1]

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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.