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CITIZENSHIP AS PROPERTY, NOT SO VALUABLE

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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.