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### Résumé de l'article

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.



# MIGRATION AND EQUALITY: SHOULD CITIZENSHIP LEVY BE A TAX OR A FINE?<sup>1</sup>

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## 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<sup>2</sup>. 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<sup>3</sup>. 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<sup>4</sup>. The second objective specifies the sort of equality to be achieved. Again, like many political thinkers, Shachar endorses an equality of opportunity approach<sup>5</sup>. 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”<sup>6</sup>. 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*<sup>7</sup>. 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<sup>8</sup>. 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”<sup>9</sup>.

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”<sup>10</sup>. 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”<sup>11</sup>. Therefore, opportunities are circumstances, favourable circumstances, but the way they favour us is not the same as the way digestion and nutrients’ absorption favour good health. They are favourable, provided that we choose to act and to transform them according to our ends<sup>12</sup>. 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’<sup>13</sup>. They are substitutable precisely inasmuch as the individuals’ objectives are<sup>14</sup>. 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)<sup>15</sup>, 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"<sup>16</sup>. 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<sup>17</sup>. 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<sup>18</sup>. 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*<sup>19</sup>

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*"<sup>20</sup> 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”<sup>21</sup>. 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’<sup>22</sup>. Sedentarism is a bias: dominant in social sciences<sup>23</sup>, 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<sup>24</sup>. 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.*<sup>25</sup>

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<sup>26</sup>. 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”<sup>27</sup>. 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<sup>28</sup>. 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”<sup>29</sup>. 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<sup>30</sup>, 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 (...)”<sup>31</sup>

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 chooses 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”<sup>32</sup>. 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<sup>33</sup>).

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 1<sup>st</sup> and 4<sup>th</sup> in the 2009 Human Development Index), should pay less than the high human development countries Mexico and Venezuela (ranked 53<sup>rd</sup> and 58<sup>th</sup> 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<sup>34</sup>. 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,  $L = W \times B$ , 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  $L = W \times (B+N)$ ?

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, ' $\Delta e$ ' refers to the difference between the total number of applications for entry into the land and the number of accepted applications, while ' $\Delta c$ ' 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

- <sup>1</sup> 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.
- <sup>2</sup> Shachar, Ayelet, *Birthright lottery: Citizenship and Global Inequality*, Cambridge Mass. and London, Harvard University Press, 2009.
- <sup>3</sup> A simple search in her book gives 104 results for the word “opportunity” and 27 for the word “chance”.
- <sup>4</sup> 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.
- <sup>5</sup> 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, Blackwell, 1974, p. 235; Levin, Michael, “Equality of Opportunity”, *Philosophical Quarterly*, vol. 31, 1983, p. 110; Moellendorf, Darrell, *Cosmopolitan Justice*, Westview Press, 2002, p. 49.
- <sup>6</sup> Shachar, *Birthright*, p. 96, p. 105.
- <sup>7</sup> 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.
- <sup>8</sup> 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).
- <sup>9</sup> Hansson, Sven Ove “What Are Opportunities and Why Should They Be Equal?” *Social Choice and Welfare*, vol. 22, 2004, p. 306
- <sup>10</sup> Shachar, *Birthright*, p. 96
- <sup>11</sup> 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).
- <sup>12</sup> 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.
- <sup>13</sup> 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 Egalitarianism”, *Journal of Ethics*, vol. 9, n° 1-2, 2005, p. 62).
- <sup>14</sup> Assumptions about substitutability can be used to classify political theories: the more a theory presupposes that opportunities are substitutable, the more illiberal it is.
- <sup>15</sup> 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.
- <sup>16</sup> Rawls, John, *A Theory of Justice*, Oxford University Press, 1999, p. 62 (my emphasis).
- <sup>17</sup> Shachar, *Birthright*, pp. 33-43.
- <sup>18</sup> 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.
- <sup>19</sup> Shachar *Birthright*, p. 5 (my emphasis).
- <sup>20</sup> Shachar *Birthright*, p. 165 (my emphasis).
- <sup>21</sup> Shachar *Birthright*, p. 112.
- <sup>22</sup> Dumitru, Speranta “L’éthique du débat sur la fuite des cerveaux”, *Revue Européenne des Migrations Internationales*, No. 25, vol. 1, 2009, pp. 119-135.
- <sup>23</sup> 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).
- <sup>24</sup> 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.
- <sup>25</sup> Cavallero, Eric, “An immigration-pressure model of global distributive justice” *Politics, Philosophy & Economics*, Vol. 5, No. 1, 2006, p. 105 (my emphasis).
- <sup>26</sup> Compare to “most people who eat are forced by hunger, then eating is about hunger’s coercion”.
- <sup>27</sup> Pogge, Thomas, “Migration and Poverty” in Robert Goodin and Philip Pettit (eds.) *Contemporary Political Philosophy: An Anthology*, Oxford, Blackwell, 2005, p. 713.
- <sup>28</sup> 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”.

- <sup>29</sup> Cavallero, Eric, “An immigration-pressure...” p. 97.
- <sup>30</sup> 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 development 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](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.
- <sup>31</sup> Shachar, *Birthright*, p. 102.
- <sup>32</sup> 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).
- <sup>33</sup> 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.
- <sup>34</sup> 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.