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## The Citizenship Shibboleth: Is the American Dream Everyone Else's Nightmare?

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## BOOK NOTICE

### THE CITIZENSHIP SHIBBOLETH: IS THE AMERICAN DREAM EVERYONE ELSE'S NIGHTMARE?

Emily Marr\*

THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY. By Ayelet Shachar. Cambridge and London: Harvard University Press. 2009. Pp. xiii, 273. \$39.95.

#### INTRODUCTION

The American Dream is a trope with global reach.<sup>1</sup> Although the “city upon a hill”<sup>2</sup> may have lost some of its luster in recent years,<sup>3</sup> the idea that America is a country where citizens can rise above “the fortuitous circumstances of birth or position”<sup>4</sup> largely continues to resonate.<sup>5</sup> Professor Ayelet Shachar’s<sup>6</sup> provocative new book, however, suggests otherwise.

In *The Birthright Lottery*, Shachar condemns birthright citizenship laws as a feudal anachronism analogous to an inherited-property regime. For her, birthright citizenship in a prosperous nation confers a morally arbitrary windfall that determines life opportunities (pp. 4–7). Shachar further argues that in a world of material inequalities, the winners of the “birthright lottery” live large at the losers’ expense (pp. 10–11, 22, 70, 98), often with deadly results (pp. 12, 105).

Shachar’s arguments, if embraced, profoundly undermine both the feasibility and the desirability of the American Dream.<sup>7</sup> If birthright

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\* J.D. Candidate, May 2011. I would like to thank my book notice editor, Dave Fautsch, as well as Howard Kaplan, Ray Mangum, Bryn Pallesen, Sarah St. Vincent, and Matthew Talley for their helpful feedback.

1. Professor Shachar’s introduction, which recounts the story of five men from the Dominican Republic risking life and limb to make it into America, offers an illustrative example. See pp. 1–2.

2. John Winthrop, *City upon a Hill* (1630), available at <http://www.mtholyoke.edu/acad/intrel/winthrop.htm> (altered).

3. JOHN E. SCHWARZ, *ILLUSIONS OF OPPORTUNITY: THE AMERICAN DREAM IN QUESTION* (1997).

4. JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 404 (1931).

5. See pp. 1–2.

6. Professor of Law, University of Toronto.

7. While Shachar’s theoretical analysis is directed at a global audience, her mandate for change is aimed primarily at affluent countries and the vast majority of her examples are specific to the United States. See, e.g., pp. 31–32, 39–41, 58, 63–64, 80–83, 116–19, 122–23, 128–130,

citizenship is akin to entailed property, it is impossible to meaningfully exercise the agency embodied in the American Dream. And if birthright citizenship really is a zero-sum game, anybody living the American Dream is necessarily responsible for somebody else's nightmare.

Shachar offers two remedies. First, she proposes a redistribution of opportunity on a global scale through a "birthright privilege levy" on prosperous nations (p. 96). Second, she advocates the rejection of the birthright citizenship regime in favor of a "*jus nexi*" approach where citizenship is based on a "genuine connection" to a sovereign (p. 164).

This Notice commends Shachar's contribution to the well-trod citizenship debate, but argues that both her indictment of birthright citizenship and her proposed solutions ultimately fall short. Part I situates *The Birthright Lottery* in the context of the literature and celebrates its contributions. Part II challenges Shachar's citizenship-as-entailed-property analogy, which she presents as the foundation for her analysis (p. 3). Part III considers Shachar's two proposals for citizenship reform. A consideration of *The Birthright Lottery* in the context of the American Dream concludes.

#### I. SHACHAR'S CONTRIBUTIONS TO THE CITIZENSHIP DEBATE

Shachar describes her book as a "comprehensive and iconoclastic" critique of worldwide birthright citizenship laws (p. xi). This grandiose characterization is fitting: her multidisciplinary analysis covers enormous intellectual territory<sup>8</sup> with impressive originality.

This is no small accomplishment. Citizenship is one of the most hackneyed topics in both the academic and political arenas, and Shachar manages to make contributions in both realms. In the academic context, she engages three bodies of literature: "[C]itizenship studies in contemporary political and legal scholarship, global inequality debates, and sociological accounts of the demise of borders in the context of post-national theorizing" (p. 13). Although her work is informed by these writings, she transcends each of the genres by "juxtaposing these different lines of inquiry" and "highlight[ing] the paucity of attention paid to *birthright* membership" (p. 14).

Shachar also addresses the citizenship debates in popular political discourse. Although "the topic of immigration nowadays attracts considerable attention," immigrants comprise less than 3 percent of the global population (p. 11). Rather than follow "the typical strategy" of "focus[ing] almost exclusively on the situation of nonmembers," Shachar argues that "the basis for entitlement of those who 'naturally' belong must also be examined" (p. 6). By adopting an analytical framework that "shift[s] our gaze from the immigrant to the citizen" (p. 7), Shachar exposes citizenship as a legal construct that

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143-44, 155. Given Shachar's emphasis on the United States, this Notice considers the implications of *The Birthright Lottery* in that context.

8. In addition to rooting her book in a multitude of intellectual traditions, Shachar also invokes history, pp. 38-42, 153; economics, pp. 58-61, 68-69; and philosophy, pp. 56, 73-75, 88-90.

shapes the polity from the inside-out, and not just the outside-in. This is significant because the status of 97 percent of the world's population—those who keep their citizenship assigned at birth—is typically ignored in citizenship debates (p. 11).

By thoroughly examining who belongs in a polity and why, *The Birthright Lottery* earns Shachar's "iconoclastic" label (p. xxi). As she explains, the current citizenship debate obscures "the presumed naturalness of birth-based membership" (p. 26). The perceived naturalness of birthright citizenship is at least partly responsible for exclusionary anti-immigrant rhetoric: citizens routinely invoke their status with a striking sense of moral superiority. In this context, even the simple reminder that there is "nothing apolitical or neutral about these birthright regimes" is powerful (p. 10). Shachar's book exposes the reality that birthright citizens enjoy the spoils of the birthright lottery only because of morally arbitrary legal constructs. In doing so, she makes possible a new kind of conversation about citizenship. Given the centrality of citizenship—in terms of both global politics and individual identity—this alone makes the book worth reading.

## II. CITIZENSHIP AS INHERITED PROPERTY

Shachar's citizenship-as-inherited-property analogy permeates the entire book. For her, the analogy "creates a space in which to explore membership entitlement in the broader context of today's urgent debates about global justice and the distribution of opportunity."<sup>9</sup> This Part argues that while the analogy is rhetorically powerful, it is ultimately unpersuasive.

### A. *The Analogy*

Shachar employs her citizenship-as-inherited-property analogy to identify "surprising commonalities in both form and function between . . . antiquated approaches to property transmission and present-day birthright principles that regulate access to bounded membership" (p. 23). The antiquated approach to property that Shachar condemns is the "long discredited institution of the *fee tail*" (p. 38). Its function, she explains, was to create a "legal means of restricting future succession of property to the descendants of a designated person" (p. 38). Shachar argues that birthright citizenship similarly takes the form of an intergenerational wealth transfer (pp. 24–27) that is itself a valuable form of property (pp. 33–38). For Shachar, the function of birthright citizenship is to "advantag[e] those who have access to the inherited privilege of membership, while disadvantaging those who do not" (p. 10). Once the commonalities between entailed property and birthright citizenship are revealed, Shachar concludes, the analogy should be self-evident (p. 10).

Shachar grounds the similarities between entailed property and birthright citizenship in a historical exploration of the early common-law

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9. P. 3; *see also* p. 43.

mechanisms of entailed estates (pp. 38–43). She notes that while “the legal institution of entail . . . migrated to North America with the English colonists . . . [i]t should come as no surprise that this aristocratic method for preserving land in the sole dominion of certain families . . . sparked the ire of American revolutionary reformers” (p. 39). Americans ultimately rejected<sup>10</sup> this “feudal encrustation[.]” (p. 39), she explains, for three primary reasons (pp. 39–41). First, it created an aristocratic class in perpetuity by “guarantee[ing] entitlement to successive descendants simply by virtue of their status” without imposing any criteria upon the recipient of the wealth transfer (p. 40). Second, because “heirs of such families knew that they could not be cut off from the chain of birthright transmission . . . the republican concern was that they would become disobedient and socially unproductive members of the polity” (p. 40). Finally, there was an efficiency concern: “[T]hose who were guaranteed wealth as a matter of birthright . . . had little incentive to maximize the value of their estates” (p. 40).

After sketching out the rationales underpinning the United States’ rejection of entailed property, Shachar concludes that birthright citizenship principles in our modern society should seem incongruous when juxtaposed against those of entailed property. She observes: “Whereas the archaic institution of the hereditary transfer of entailed estates has been discredited in the realm of property, in the conferral of citizenship we still find a structure that strongly resembles it” (p. 41). Birthright citizenship is a “striking exception to the modern trend away from ascribed status” and demands a “coherent explanation” to this “puzzling” aberration (p. 42).

### B. A Critique of the Analogy

The most coherent resolution to Shachar’s dilemma is also the simplest: birthright citizenship has persisted despite the demise of the entailed property regime because birthright citizenship and entailed property are very different. Although the mechanism of transmission for both institutions involve superficially similar legal constructs,<sup>11</sup> none of the animating principles that Shachar identifies as reasons for rejecting entailed property apply to the essence of birthright citizenship. Toward that end, Shachar’s own discussion of citizenship undercuts her analogy.

Shachar discusses citizenship at length in two sections designed to tee up her analogy (pp. 27–38). In the first section, “Property Theory: Some Key Distinctions,” Shachar establishes citizenship as a form of “*new property*” (p. 29), which is “[u]nlike traditional forms of wealth . . . held as private property” because its value “derive[s] specifically by holding a legal status that is dispensed by the state alone” (pp. 29–30). As such, Shachar

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10. Shachar’s language here, and elsewhere in the book, pp. 39–43, suggests that the fee tail is a complete vestige of the past. Although the fee tail is rare, it is not yet extinct: some incarnations of the fee tail remain in force in four states (Delaware, Maine, Massachusetts, and Rhode Island). See DUKEMINIER ET AL., PROPERTY, 200–01 (7th ed. 2010).

11. See *infra* Section II.C.

endorses a “broad (or ‘trusteeship’) conception of property,” where property forms “part of a web of social and political relations, wherein people depend upon others ‘not only to thrive but even just to survive’ ” (p. 30). Understood this way, citizenship “provides each right-holder with a concrete and enforceable claim to participate in the governance of the commonwealth, to share its burdens, and ideally, attain a threshold-level of well-being” (p. 33).

In the second section, “Property and Citizenship: Several Analogous Functions,” Shachar explores the “gate-keeping” and the “opportunity-enhancing” functions of citizenship vis-à-vis property (pp. 33–38). She observes that both citizenship and property serve “gate-keeping” functions that “protect the interests of those designated as legitimate title bearers, while imposing severe legal sanctions against those who are perceived . . . as unauthorized entrants who breach them” (p. 34). The “opportunity-enhancing” function of citizenship, “[l]ike other types of property . . . allows its possessor to exercise freedom and autonomy through what is legally his or hers and to protect their rights against the world” (p. 35).

Both of these sections frame citizenship as strikingly different from the fee tail. First, although both entailed property and birthright citizenship involve a *transmission*, only entailed property is a form of intergenerational wealth *transfer*. Parents do not relinquish their citizenship rights to their children; a new citizenship title is created at birth. In contrast, entailed property is transferred only upon the owner’s death; unlike citizenship, Blackacre is a finite resource. Second, unlike entailed property, citizenship is interactive. A central part of citizenship is “the core democratic right of equal participation in collective decision-making processes” (pp. 32–33). Citizenship derives its value from being communally generated (p. 30), and citizens are duty-bound to serve as “equal partners in the common enterprise of governing the commonweal” (p. 32). Further, the contours of citizenship evolve through continuous negotiation.<sup>12</sup>

Understood this way, citizenship simply is not analogous to the fee tail. Whereas the fee tail confers a static inheritance, citizenship is a dynamic process with reciprocal duties and obligations. Consequently, Shachar’s analogy to the fee tail—premised on the point that the fee tail produces a lazy aristocratic class without any incentive to maximize wealth—is inapposite.

However, even assuming that the fee tail is akin to birthright citizenship, it does not follow that birthright citizenship should be rejected. Although American law largely rejected the fee tail, other means of maintaining intergenerational wealth remain prevalent. For example, future interests, trusts, and wills all empower individuals to devise their personal property to their descendants.<sup>13</sup> Moreover, when a person dies intestate, all states provide that

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12. See, e.g., p. 41; Garrett Epps, *The Undiscovered Country: Northern Views of the De-feated South and the Political Background of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 411 (2004); Natalie Smith, *Developments in the Legislative Branch: Bill Challenges Birth-right Citizenship*, 20 GEO. IMMIGR. L.J. 325 (2006).

13. See, e.g., *DUKEMINIER ET AL.*, *supra* note 10, at 195 (“The fee tail has been replaced by the life estate as a device for controlling inheritance.”); Ronald Chester, *Is the Right to Devise*

the property first goes to the spouse and surviving descendants.<sup>14</sup> As these examples demonstrate, the automatic mechanism of property transmission is alive and well; it is only the fee tail that is the problem. As such, the fee tail's demise does not make it incongruous to retain birthright citizenship.

As Shachar herself notes in a different context, "the 'correct regulative principle' for . . . distribution . . . 'depends on the nature of that thing [distributed].'"<sup>15</sup> Because the nature of birthright citizenship and entailed property are different, it is unsurprising that the legal system has embraced one and rejected the other. While Shachar occasionally qualifies her point by referring to it as a "conceptual" project (p. 3) that compares entities that are "largely analogous,"<sup>16</sup> she never affirmatively explores how her analogy is inexact. Given her definition of citizenship, which produces a noticeable tension with her analogy, this is a surprising oversight.

### C. A Problem of Scope

The natural interpretation of Shachar's analogy is that she views citizenship as a form of inherited property.<sup>17</sup> Indeed, the title of Chapter One, "Reconceptualizing Membership: Citizenship as Inherited Property," would appear to foreclose other interpretations (p. 21). Shachar, however, does not define her terms and fails to use consistent language to describe her analogy. As a result, the precise scope of her project remains unclear even after close analysis. For that reason, it is worth noting two other possible interpretations of her analogy's intended scope.

First, Shachar's analogy might be limited to the transfer mechanism of birthright citizenship (pp. 2, 3, 23, 38, 42). This interpretation offers the closest fit between birthright citizenship and entailed property. Like the fee tail, birthright citizenship is automatically transmitted in perpetuity to its recipients.

Alternatively, it is possible that Shachar views the automatic transmission mechanism of birthright citizenship and the lived experience of birthright citizenship itself as interchangeable (pp. 4, 36, 96). Under this reading, Shachar's point would be that the entire experience of citizenship in the birthright citizenship regime is irrevocably tainted by its transfer mechanism. Although she never makes this argument directly, Shachar endorses it implicitly when she argues that it is the "starting point" that counts in evaluating citizenship's enabling functions (p. 36). Additionally, she occasionally discusses the transfer of citizenship as if it is interchangeable with citizenship itself. For example, her title for the section where she lays out her

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*Property Constitutionally Protected?—The Strange Case of Hodel v. Irving*, 24 Sw. U. L. REV. 1195 (1995); Laura E. Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 HASTINGS L.J. 667 (1997).

14. DUKEMINIER et al., *supra* note 10, at 195.

15. P. 170 (quoting JOHN RAWLS, A THEORY OF JUSTICE 25 (1970)).

16. P. 42. At other points, she offers additional qualifying terms, such as when she says that birthright citizenship "closely resembles," p. 38, and "strongly resembles," p. 40, the fee tail.

17. See pp. 3, 13, 24, 43.

analogy is “Entailed Property and Birthright Citizenship: Analogous Transmissions?” (p. 38). In addition, she defines the birthright privilege tax as a levy “on the *transfer* of political membership” and then later in the same paragraph explains the tax as a “levy on inherited *citizenship*” (p. 96; emphasis added).

These readings of the analogy are no less problematic. If Shachar intended to limit the scope of her point to transfer mechanisms, then her analogy is reasonable but superficial. That is, while it is accurate that both birthright citizenship and entrusted property are automatically transferred, that similarity reveals little, if anything, about the essence of either.<sup>18</sup> If, however, Shachar views the transfer of citizenship as interchangeable with the experience of citizenship, then she has created an unacceptable tension between her analogy and her discussion of citizenship (pp. 27–38). As discussed in Section III.B, the nature of the right being conveyed in the fee tail context is very different from birthright citizenship. The fee tail provides unmitigated access to a plot of land that remains the same throughout the ages. Citizenship, by contrast, provides access to an opportunity that requires participation and reciprocal obligations in order for it to have meaningful value. Blackacre will always be Blackacre, but citizenship changes via a process of continuous negotiation. Consequently, an analogy linking birthright citizenship to the fee tail solely because of its transfer mechanism ultimately rings hollow, as does an analogy that conflates the transmission mechanism of a thing with the thing itself.

### III. TWO REMEDIES BUT ZERO SOLUTIONS

Shachar offers two alternatives to the status quo birthright citizenship paradigm: a birthright levy and a *jus nexi* approach to citizenship. Part III critiques both of Shachar’s proposals.

#### A. *The Birthright Levy*

As Shachar explains it, the birthright levy would tax wealthy countries for the privileges of retaining birthright citizenship (p. 86). In doing so, the birthright levy would “reduce the correlation between birthright citizenship and inequality of actual life opportunities” (p. 86).

The animating goal of Shachar’s birthright levy proposal is to “ensure freedom from want” (p. 96) in less-privileged countries. Shachar rightfully notes that this would be “no small improvement” given that “almost a billion people are struggling just to survive” (p. 96). Although Shachar claims to offer a “concrete legal response” (p. 104) to this problem, her birthright levy discussion reads more like a nascent thought experiment than a well-developed plan. Rather than flesh out one proposal for the birthright levy, Shachar sketches multiple possibilities (pp. 96–110). In the end, she does

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18. See *infra* Section III.B.

not offer a workable blueprint, and the hazy contours of her proposal raise concerns about the intellectual coherence of her arguments.

One of Shachar's more developed ideas about the birthright levy takes the form of a public service mandate. She notes that "[t]his active, do-good commitment may be implemented in various imaginative ways," including "the creation of a Global Teaching Fellows Program, the Midwives International Volunteer Corps, or the Society of Engineers for a Safer World" (p. 100). Each of these "imaginative" proposals, however, appears to have a fully realized analog in the status quo. How is the "Global Teaching Fellows Program" any different from World Teach?<sup>19</sup> Does the "Midwives International Volunteer Corps" serve a different function than Doctors Without Borders?<sup>20</sup> Is the fictitious "Society of Engineers for a Safer World" distinct from EngineerAid?<sup>21</sup> Shachar does not answer any of these questions. Given that her project is meant to be both "novel" (p. 97) and "concrete," the lack of guidance here is problematic. Shachar arguably offers some general direction when she broadly frames the birthright levy proposal as a shift "from the realm of charity or morality to that of *legal* obligation."<sup>22</sup> This small clarification, however, only raises more questions: What authority would enforce this birthright levy? Would any wealthy nation states willingly accede to this kind of obligation? Shachar acknowledges that states are likely to remain the key players on the world stage (p. 104). Given this reality, how could any government or organization raise the birthright privilege levy idea in a meaningful way?

These uncertainties make it difficult to evaluate the desirability of the birthright levy. Nonetheless, any incarnation of the birthright levy would raise two serious structural concerns. First, imposing a worldwide mandatory birthright levy directly contradicts Shachar's discussion of life in a vibrant liberal democracy as a valuable component of privileged citizenship.<sup>23</sup> Although Shachar does not acknowledge the tension between valuing democratic choice among nation states and a mandatory global privilege levy, it is difficult to imagine a scenario where any nation state would be in a position to implement the birthright levy. Even if every nation state embraced the mandatory privilege levy, however, imposing a global mandatory levy calls the legitimacy of the democratic process into question if the outcome is a foregone conclusion. In short, Shachar's proposed remedies to the supposed injustice of birthright citizenship are at odds with values like de-

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19. See WorldTeach, <http://www.worldteach.org/> (last visited Nov. 14, 2010).

20. See Doctors Without Borders, <http://www.doctorswithoutborders.org/> (last visited Nov. 14, 2010).

21. See EngineerAid Frequently Asked Questions, <http://www.engineeraid.com/faq.php> (last visited Nov. 14, 2010).

22. Pp. 100–01. This vague pronouncement is made even less clear by the fact that Shachar characterized the birthright levy as a "*moral responsibility* toward those not so fortunate [sic]," p.100 (emphasis added), just one page after describing it as a shift from "morality to that of *legal* obligation," p. 101. Although Shachar insists that the birthright levy is distinct from charity, she never explains how or why.

23. See *infra* Section III.B.

mocracy and sovereignty that she claims to embrace. Shachar's birthright levy would transform the world system, but her claim that it represents a "promising and concrete path toward a more just distribution of opportunity globally" (p. 108) is supremely premature. As sketched out, Shachar's birthright levy raises many questions but provides few answers. Before heralding the birthright levy as "concrete," Shachar should, at a minimum, offer more details about the contours of her proposal and address its seeming contradictions with her other lines of analysis.

### B. Jus Nexi

Shachar's second proposed birthright citizenship remedy is *jus nexi*. Unlike birthright citizenship, *jus nexi* considers "the actual conduct of the person in the context of her social attachments and community ties" (p. 178). *Jus nexi* offers an exciting contribution to the citizenship debate, but its inherently subjective approach demands caution. Consequently, Shachar's blanket endorsement of *jus nexi* irrespective of whether it supplements or supplants birthright citizenship (pp. 165, 179, 188) is too extreme.

*Jus nexi* offers a potentially powerful solution to "one of the most difficult dilemmas for liberal democracies: how to deal with noncitizen residents whose initial entry breached the law of the admitting states" (p. 166). Under *jus nexi*, formalistic solutions are rejected in favor of "trac[ing] the attachment between the individual and the political community on the basis of factual membership and affected interests" (p. 168). Thus, *jus nexi* could pave the way toward legalization for illegal immigrants who have become actively involved with their new communities. Shachar rightfully notes that *jus nexi*'s flexibility can further the goal of "democratic inclusion" (p. 178).

The wrong political environment, however, could easily deploy *jus nexi* principles to further marginalize those in the shadows. Because *jus nexi* "differs from a pure domicile-based principle of membership" (p. 179), it invites value judgments about the nature and quality of an immigrant's ties to the community. This creates the risk of depriving socially subordinated individuals of a voice simply because of their status or because their political affiliations are unpopular. In addition, it punishes the most vulnerable people in a nation state—children, new immigrants, and those in refugee camps—who may not yet have had the opportunity to meaningfully contribute to a polity but nonetheless consider it their home. As the ongoing immigration debate makes clear, these are not hypothetical concerns.<sup>24</sup>

*Jus nexi* also runs the dual risk of being both too powerful and too weak. If *jus nexi* were to supplant birthright citizenship, there is no logical reason why these principles could not be applied to eject people from the country of their birth if they were deemed to have insufficient ties to their home

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24. See Birthright Citizenship Act of 2009, H.R. 1868, 111th Cong. (2009) (proposing to deny automatic birthright citizenship to children of illegal aliens); see also Jan C. Ting, "Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration, 4 TEMP. POL. & CIV. RTS. L. REV. 301 (1995).

country.<sup>25</sup> Most likely, these hapless individuals would join the ranks of the nearly fifteen million stateless people, thereby exacerbating an already-serious humanitarian crisis.<sup>26</sup> Alternatively, *jus nexi* is problematic because it is too weak of a tool to help those who need it most. Shachar's *jus nexi* solution is completely unresponsive to the plight of people who are too vulnerable to leave their home country in search of a better life in a more prosperous nation.

A predictable legal framework therefore provides a desirable check on the unrestrained application of *jus nexi*. As American birthright jurisprudence demonstrates, birthright citizenship can empower the politically unpopular and marginalized among us.<sup>27</sup> Shachar is correct to note that birthright citizenship is underinclusive (pp. 117–20); certainly, not all vulnerable people in a polity were born there. However, this is an argument for supplementing birthright citizenship rather than rejecting it: birthright citizenship provides a floor of protections, and *jus nexi* can add to it.

Shachar's *jus nexi* approach is an intriguing theoretical tool motivated by the admirable desire to protect the most vulnerable among us.<sup>28</sup> Depending on the political context, however, those who need *jus nexi*'s protection the most may be the least likely to receive it. While Shachar is right to endorse *jus nexi* as a supplement to birthright citizenship, her endorsement of *jus nexi* in place of birthright citizenship is fundamentally flawed.

#### CONCLUSION

As Parts II and III of this Notice contend, Shachar's book contains notable shortcomings. She devotes substantial energy to developing an analogy that does not quite work, and her proposed solutions to the birthright citizenship do not provide a feasible alternative. Both Shachar's flawed foil and her unworkable blueprints are, unfortunately, a sizable part of her book.

Although Parts II and III of this Notice criticize the way Shachar initiated the discussion, it would be a mistake to conclude that the conversation is not one worth having in the first place. As Part I argues, Shachar's indictment of birthright citizenship is every bit as "iconoclastic" as she hoped, and *The Birthright Lottery* therefore remains an important read. The question, though, is for what purpose?

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25. Shachar asserts rather dismissively that this won't happen, but she offers no elaboration as to why. See p. 158. Given that this is the logical extension of her argument, an explanation might have made her claims more convincing.

26. *The world's 15 million stateless people need help*, UNHCR (May 18, 2007), <http://www.unhcr.org/464dca3c4.html>.

27. See, e.g., *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); see also GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 174–75 (2006); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 67–71 (1988); Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 22 *IMMIGR. & NAT'LITY L. REV.* 625 (2001).

28. See p. 190.

As discussed in the Introduction, Shachar's book reads like a hopeless indictment of the American Dream. Once her problematic analogy and proposed remedies are deemphasized, the reality is far less dire. As Shachar's own discussion of citizenship makes clear, it is possible to exercise agency within a birthright citizenship context. And although Shachar is correct to note that we live in a world of scarcity, the well-developed network of international efforts<sup>29</sup> makes birthright citizenship less of an all-or-nothing proposition than Shachar suggests.

This is not to say that Shachar's call to redirect "our gaze from the immigrant to the citizen" (p. 7) does not implicate the American Dream. By highlighting the privileged position that all Americans enjoy vis-à-vis the rest of the world by virtue of their birth, Shachar makes clear that all Americans enjoy a windfall. Ultimately, Shachar's book sensibly encourages readers to challenge the premise of birthright citizenship rather than reject it outright.

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29. See *supra* Section III.A.

