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BOSNIAK'S *The Citizen and the Alien* AND AYELET SHACHAR'S
The Birthright Lottery

The Geometry of Inside and Outside

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The Geometry of Inside and Outside*

David Abraham

Abstract

These are two important books. *The Citizen and the Alien* provides a rigorous and illuminating scrutiny of the conundrum faced by making out current concept and politics of citizenship work within liberal moral and political philosophy. *The Birthright Lottery*, a book with many virtues, recasts birthright citizenship in a manner analogous to the end of entailed property transmission brought about by liberal reform. This essay suggests that Bosniak is unduly pessimistic about bounded communities and that Shachar is unduly optimistic about the relationship between property rights and democracy.

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“...the national community *within which* universal citizenship is championed is a community that is constituted by boundaries that keep nonmembers out.... To what extent is the achievement of economic justice... within the national society contingent upon such restriction? What obligations do we owe to people whose opportunities for decent work in their own societies have been thwarted, in part, by a system of international political economy that has served to benefit our own nationals?” (Bosniak 2006: 114).

“[Some say] that without a common national identity, there is nothing to hold citizens together...[But] this reifies the status quo where the nation state currently serves as an important source of social solidarity.... Yet if we reverse the order of things, it might well be possible to generate compatriot feelings at other levels of identification as well...” (Shachar 2009: 150).

“Though not in substance, yet in form, the struggle of the proletariat with the bourgeoisie is at first a national struggle. The proletariat of each country must, of course, first of all settle matters with its own bourgeoisie.” –Marx and Engels, *The Communist Manifesto*

A specific outrage and frustration animates each of these two slim but important books. In the case of Linda Bosniak it is that the status and insecurity of “outsider” never leaves an alien even once s/he is inside his or her new country. The same “citizenship” that creates rights and identity and enables participation for some, justifies excluding and disempowering others. Further, while “immigration control” is at the core of “bounded citizenship,” American law has never succeeded at keeping the boundary at the border. A mere four years after establishing the inside/outside distinction in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), American law brought the outside inside, establishing deportation as we know it in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), and creating the insecurity of alienage that so vexes Bosniak.

The “outside” remains a key element of the life of even a permanent resident alien physically “inside.” Despite all the progress that has perhaps been made on the “personhood” and “human rights” fronts, this stubborn fact of insecurity (and associated disabilities) for aliens (Bosniak 2006: 47, 69) renders noble liberal efforts around the concept of “citizenship” both incoherent and exclusionary. Because the status of citizen is important, its “circumscribed universalism” is intolerable. “Citizenship” simultaneously promises good things while making sure that those who are not citizens can’t get them. Thus, as an emancipatory concept, “citizenship stands against itself” (16). As a progressive, Bosniak would perhaps like to extend the benefits of citizenship. More

significantly, she would like not to limit the class of beneficiaries of those rights to those who are citizens, adopting instead the possibility of something like “alien citizenship,” citizenship rights for those nominally and formally not citizens. In the end, Bosniak demonstrates the hopelessness of making our current concept and politics of citizenship work within liberal moral and political philosophy. Hence it is that Bosniak returns repeatedly to engage and criticize Michael Walzer’s communitarian liberalism, with its “soft on the inside, hard on the outside” solution to the problem of justice for all. We will return to this core issue below.

The fundamental outrage for Ayelet Shachar consists of the anomalous place of birthright citizenship (both *jus soli* and *jus sanguinis*) within a liberal ideology and praxis defined by merit and choice. The consequences of having the “right” citizenship are powerful. Not only does citizenship have a “gate keeping” or border function, but it also has a solidarity or “opportunity enhancing” function. Birthright citizenship for Shachar is like entailed property: it is inherited without being earned and is fundamentally unjust. Why should the accidental, “morally arbitrary” fact of being born in San Diego rather than Tijuana make such a difference in everything that happens subsequently? Such false wealth preservation is, for her, not natural and at odds with the modern liberal project itself. But that alas is a fallacy to which we will return.

It is surely true that countless struggles within liberalism have been organized around the market-derived concepts of “choice” and “merit,” and birthright citizenship directly violates and even contradicts the ideology. And whereas in the property arena, for example, entailed powers and privileges have been limited over time, or so Shachar thinks, no such trend has been afoot in the citizenship arena. Shachar proposes two remedies for this sad state of affairs: first, a birthright privilege levy that would redistribute resources from have countries to have-not countries as a kind of payback for the unmerited privilege of being born in a rich place or to parents of a rich nationality, and, second, a *jus nexi* citizenship allocation principle that mostly would over the generations disenfranchise disengaged expats while integrating even illegal arrivals through recognition of a statute of limitations or adverse possession principle for acquiring citizenship.

* * *

As a matter of principle for Bosniak, all Walzerian efforts to separate the sphere of controlled national membership from the sphere of equal national membership must come up short. No disability is more threatening to resident non-citizens than deportation. And whereas Walzer can do no better in Bosniak’s view than

encourage swift naturalization—not such a bad thing, I would think¹—Bosniak is unrelenting in her concern with the disabilities of alienage. Aliens are people whose very personhood rights are “subject to defeasance” (Bosniak: 70) through deportation. Yet citizenship very much matters for Bosniak. She rightly recognizes that ordinary people do not live in a transnational or post-national world and therefore cannot be satisfied with “personhood rights” alone. They need something like “alien citizenship” rights (81-96, 183, 193-195) that go beyond personhood and the protections “persons” receive. Because she appreciates the enabling, solidarity, vertical dimension of citizenship that unites people within a society through rights and obligations, she is all the more frustrated by its inherent and unrelenting bordering and exclusionary horizontal dimension. Consequently too, her most persistent criticism is leveled at theorists like David Miller, “ethical nationalists” who insist—rightly, I should say—that the bounded nation is a *prerequisite* for rather than impediment to struggles for justice and that immigration controls are therefore neither coercive nor immoral.

Bosniak will not be reconciled to “universalism framed within the boundaries of [a] national society” (116). What seemed obvious to the revolutionaries of 1791 in their “Declaration of the Rights of Man and Citizen” seems less apparent now: namely that the “rights of man” are indeed universal but that their *realization* depends on the construction of specific states (most likely, nation-states) that will allow for “citizens” to exercise power to achieve those rights. The worst indignity one can therefore suffer is not exclusion from this or that country but statelessness as such, the lack of a country or state to which one belongs and which will recognize the propriety of attempting to achieve the rights of man. In a sense, Shachar also begins with the French Revolution. It was, after all, the Abbé Sieyès who insisted that merit and achievement, not birth, should determine status and standing, though not nationality.

One cannot blame either Bosniak or Shachar for omitting discussion of the most lamentable development of the past two generations, namely the defeat in most parts of the world of efforts to achieve popular sovereignty and social equality. First, from the mid-1950s to mid-1970s, in places from Guatemala to Iran, Indonesia to Cuba, and the Congo to Chile, popular egalitarian movements were systematically crushed throughout what used to be called the Third World. Then, from the mid-1970s onwards, and culminating after the demise of the Soviet Union, the social democratic states of the prosperous north, insofar as they were based on disciplined labor movements, were in turn systematically

¹ In my view, both Bosniak and Shachar undervalue naturalization as a resolution of some of the problems they analyze. It seems to be an undertone in much liberal immigration scholarship, though not in these two books, that it is somehow unfair to compel people to surrender their authentic identities by adopting and professing new ones, especially if disabilities “back home” might result.

disciplined and starved by increasingly-mobile and transnational capital. What remains in them is the skeleton of popular sovereignty, in most countries a framework for popular self-government but not one that the demos is able to exercise very often.

Thus, the nation-state as *integument* and as *machine*, has fallen on hard times—without being in any serious way replaced by some form of world order as anticipated by UN optimists in the immediate period after the Second World War. A great deal of attention has been paid to this “hollowing out” of the state, and that hollowing out has rather more to do with issues of migration and citizenship than is generally understood. As an integument, the liberal state is less able to facilitate the social solidarity and social cohesion that is necessary for both redistributive policies and identity formation. This is a shame because constitutional, state-based identities can be liberal and capacious in accommodating and integrating “the other,” newly-arrived former strangers. The decline of the state as a machine concerned with economic redistribution, capital accumulation, and social legitimation has also produced grim consequences as the market (sometimes erroneously identified as “civil society”) has rushed in to take over one area after another, including, of course, human mobility and how we think about that mobility. Not many of us are better off in a world where a Green Card is but a step toward a Gold Card and the hopes of the world’s masses rest on remittances and emigration.

Maybe “citizenship” and the promise of a popular and just sovereignty is all that remains of a utopian aspiration that once announced itself as communism, socialism, social democracy, or the welfare state. Both Bosniak and Shachar, while not saying much about the organization of a just society, seem to accept the premise that bounded citizenship is an important lever and an important advantage for those who hold it—at least in the right places. And in that sense, both books value national citizenship and attempt to search for greater justice for the downtrodden, for those bereft of the right citizenship.

* * *

Both Bosniak and Shachar pose difficult tasks for themselves. Bosniak seeks to envision an inside that has no complementary outside, and Shachar tries to denaturalize birth itself, putatively the most natural of all events. Whereas Bosniak seeks to accommodate the alien as an equal, Shachar seeks to mitigate the unmerited and unearned but very substantial entailed advantages that accrue from birthright citizenship. Whereas Bosniak provides rigorous and illuminating scrutiny of the conundrum, Shachar proposes a plan for redistribution of wealth from rich countries to poor via a levy on those who enjoy birthright privilege (Shachar 2009: 99). Let us take a closer look.

Beyond mobilizing the moral sensibility that all people of goodwill will feel bound to endorse in principle, Shachar seeks in practice to recast birthright citizenship in a manner analogous to or informed by the end of entailed property transmission brought about by liberal reform. This is, in my view, a serious misreading of what has happened in property law. The liberal reform of feudal property rights, intergenerational rights included, has proven a very ambivalent development for those who advocate equality. *Pace* Joseph Singer and concepts Shachar likes, such as “stewardship,” “trusteeship,” and “care taking,” these are not liberal ideas at all but neo-feudal ones, Burkean themes that occasionally emerge among socialists as well. “Restraining the right to exclude” (28) would-be immigrants may be desirable but property rights would hardly be a source of succor for advocates.

Property rights are not friendly to democratic decision-making or to access.² Indeed, property has been a barrier to most rights struggles, and not a means of inclusion (32). While there is no question that citizenship is property and property is power, there is also no question that ending entailed (birthright) property did not produce equality. Indeed, the history of the liberal regime of “market and merit” suggests that freedom of disposition increases inequality. As Shachar’s much-admired fellow Torontonian C.B. Macpherson often pointed out, the liberal market principle systematically undermines the liberal equality-of-persons principle and renders ever-fragile the formally democratic political systems that sometimes emerge in liberalism. In fact, there have been only two ways to cabin post-entail property inequality. One was the way opened by the French Revolution and especially Napoleon: namely securing property in as many hands as possible. The same revolution that created the “Declaration of the Rights of Man and Citizen” created a huge and patriotic citizenry of republican nationalist peasant proprietors (still striking to foreign tourists). This does not seem to be a direction in which Shachar would want to go.

The second route to a semblance of equality in the world of property has been refeudalization, i.e. the use of the state, of politics, of popular citizen sovereignty to constrain and regulate free property. Appreciating that adds to the awkwardness of Shachar’s embrace of the property paradigm. Maybe feudal privilege was bad, but property norms are not the answer to today’s problems, in the sphere of immigration and citizenship or much else “global distributive.” When Shachar writes that she intends “progressive” notions of property, she invokes words like “stewardship,” which, of course, is a feudal-communitarian

² Property is a basis for the democratic exercise of freedom only when everyone has it and in roughly equal amounts. That is why Rousseau’s ideal Geneva, petit bourgeois or romantic socialism, is not a viable option.

concept, albeit rediscovered of late. Notwithstanding our better angels,³ absolutist conceptions of property have not ceded much ground. Indeed, for reasons discussed earlier, they have gained ground over the past 35 years. Shachar's discussion of fee tail contains some very fine aperçus, but it is not clear to me that the liberal market is more social than feudal entail or more likely to provide a discourse advancing "global justice and the distribution of opportunity" (3).⁴

Moving is one rational response to poverty and powerlessness, and often "exit" is easier than "voice." The mass migration of over 10 per cent of all Cubans to the U.S. over the past two generations has been a product of easy exit and easy entry—the Cuban Adjustment Act turns every Cuban who gets to the U.S. into a permanent resident with very few exceptions. It is hard even to imagine the possibilities were such a policy extended to all the world's poor or oppressed. As the cases of countries as politically disparate as Cuba, Mexico, and Israel show, exit facilitates brain drain and elite entrenchment. Many a country would be better off if its people stayed put and fought and struggled where they were. Others, like Haiti today and Poland, Ireland, and Sicily in the past, need or needed to shed millions of people in order to develop. Obviously though, individuals in a liberal conception of the world may not be tasked with being the agents of the collective good and so may wish to migrate—even if the impact on national or global justice is negative.

* * *

Societies only ask themselves such questions as they are able to answer. In this sense, the fact that Shachar can even talk about something like a birthright privilege levy marks progress in recognizing the injustice of birthright. But asking the question does not mean that societies are willing in the end to answer the question. And, indeed, in this case the glimmer of material foundation that Shachar espies for resolving the problem of the unmerited advantage of birthright citizenship, is only that. Just as the UN with its promise of human rights and international governance emerged in that peculiarly progressive historical moment of 1944-48 only to become a vehicle for power politics, so the globalization

³ A fine example of the effort to strengthen these better angels is provided by Hanoch Dagan, *Exclusion and Inclusion in Property*, <http://ssrn.com/abstract=1416580>. Interestingly, the three examples Dagan cites—public accommodations law, copyright fair use, and fair housing—exist *in spite of* property law. In the U.S., one need only recall how the South fought democracy largely in the name of and through the vehicle of property rights. Popular sovereignty overcame property rights, and we always need to consider the impact of proposed measures on the possibility of popular sovereignty.

⁴ For an excellent discussion of what liberalization, including of human mobility, has done for global justice and the distribution of opportunity, see David Harvey, *A Brief History of Neo-Liberalism* (2007) or the work of another fellow Torontonian, Leo Panitch.

moment of 1990's post-Communist triumphalism and its promise of human rights and human mobility has now been shut down—for both better and worse.

Shachar's proposals represent the positive global consciousness of that moment now passed while retaining a healthy appreciation of the state system. Financial transfers, a taxing of privilege, giving money or capital goods to poor countries, may be more useful and no less practicable than loosening borders or facilitating migration. With about three per cent of the world population migratory, something needs to be done to help the other 97 per cent. Shachar would establish a legal duty where now there is only charity or foreign aid.⁵ Migration and redistribution stand in *no determinate relationship*, and it is not obvious that migration from poor countries to rich countries helps the poor countries or the poor within the rich countries.⁶

In addition to a general preference for freer migration to the rich countries, Shachar, as noted, advocates a birthright privilege levy transfer mechanism and a *jus nexi* membership principle that would attempt to determine a person's "real" attachment to the place where they reside. This seems to me a rather dangerous proposition. Should every generation of born citizens prove itself worthy or face denationalization at, say, age 35? I doubt that Shachar would want to be lodged in so utilitarian a camp. Not to mention the very regressive implications of this logic for raising the naturalization bar, which is now quite mechanical and unideological.⁷ Not every country is as liberal or progressive or sparsely populated as Canada. In a frequently intolerant and reactionary country like the U.S., I can imagine "undesirables" being voted off the island and the creation of statelessness as the perverse result. Congress is full of potential members of the next "Un-American Activities Committee," and I fear that Shachar undervalues the arguments made by Yack (146) in this regard. Likewise, Miller's insistence on the centrality of trust and solidarity (150) needs to be taken seriously in this context as well.

The choice and consent involved in *jus nexi* are very problematic as well, especially for someone like Shachar concerned with the social. Shachar endorses an adverse possession-like principle of *jus nexi* acquisition intended ultimately to benefit those illegally present. On the one hand, we might recall that *Mathews v. Diaz*, 426 U.S. 67 (1976), which she largely endorses, partially subscribed to such a principle, but was about saying "no" rather than "yes" to alien rights and

⁵ Interestingly, the countries making the largest civilian foreign aid contributions are low-immigration, "anti-immigrant" countries whereas the U.S. stands at the low end of foreign aid. Apparently, accepting immigrants is for us a form of foreign aid.

⁶ See David Abraham, "The Liberal Dilemma in Immigration," 33 *Ethnic and Racial Studies* 968 (2010).

⁷ See here the recent debates on the new wave of citizenship tests in Europe: "How Liberal are Citizenship Tests?" <http://eudo-citizenship.eu/citizenship-forum/255?start=10> (visited September 6, 2011), sponsored by the European University Institute's Robert Schuman Centre.

excluded illegal entrants altogether. Shachar's "center of interests" test (168) would change little for legal immigrants, especially given how easy naturalization remains. To the extent that her "resident stakeholder" model is meant to help "illegal aliens"—who bear the overwhelming brunt of so-called anti-immigrant sentiment—this can be done much more modestly. In the U.S., the old §245(i), if brought back, could go a long way to accomplishing a significant remedy. For that matter, even a more generous application of §240A would take this adverse possession logic seriously.

To the extent that a "center of interests" test might dislodge citizenship from disengaged expats, Shachar actually retreats so far that there would be little to be feared. Her behavioral requirements (173) are extraordinarily easy⁸ and amount to an expansion of opportunities for dual or multiple citizenship, not the dilution or loss of a birthright privilege. The admirable Rignano Principle Shachar invokes (172ff), the loss of ownership as the generational distance from the original acquisition increases, is in some ways already around. Thus, Mexico, for example, allows three generations of *jus sanguinis* to Mexicans who become Americans, provided some connections are retained. *Jus nexi* would be a boon, however, for mobile diasporic elites who travel, have or specialize in cultural capital, and can afford multiple residences or otherwise enjoy a Gold Card as much as a Green Card. Would *jus nexi* improve on current problems of over-inclusiveness and under-inclusiveness? Perhaps, although the cases of injustice Shachar reports (118ff) are not terribly persuasive on this score.⁹ Maybe the expansion of dual and multiple citizenships is a good thing—though obviously I doubt it—but it would be ironic indeed to have its expansion be a result of a principle meant to winnow out the undeserving.

In the end, Shachar rightly reminds us that the nexus of territory-authority-rights is still the name of the game, and she is skeptical as to much unbundling. She thus also rightly rejects, despite some flirtations, the world-citizen, transnational, and deterritorialization as well as fortress models of citizenship and identity. But if that is the case, and given the unreality of any birthright privilege levy and transfer mechanism,¹⁰ why struggle in this way and for these things? For

⁸ "Such as establishing residency in the relevant political community, sending remittances, maintaining links with the country or its diaspora by partaking in intercultural or political exchanges, learning the language of the birthright polity or related activities that indicate the person's connectedness...."

⁹ In fact, naturalization (or even advice from a notario) would have obviated most of the problems cited in *Romans v. Canada* and *Matter of Ortiz-Martinez*, while the Child Citizenship Act has already overcome others. At the non-nexis side, the *Sheinbein* case is so extreme as to offer little instruction.

¹⁰ Again, if the UN had developed differently, into a more serious and powerful institution, or if the Willy Brandt-type North-South initiatives had taken off, or if the EU had developed a serious independent foreign policy, this might all be another, different story.

better and worse, in its strengths and in its weaknesses, this pioneering and forceful work is very much a part of liberalism's globalization over the past generation. Hence, even as she retains a grip on the nation-state, its mechanisms, and its inhabitants, Shachar tries to come to grips with what she sees in the world as a whole. That has many virtues but it does not provide us an Archimedean lever to replace the decrepit one of democratic struggle within a bounded nation-state based on the trust and solidarity of a common civic national identity.

* * *

Bosniak is less given to utopianesque or reformist proposals than Shachar, but her critique of existing citizenship relations is both more fundamental and insistent. Beginning with her Judith Butler epigram denying the possibility of universalism—"that which remains unrealized by the universal constitutes it essentially" (vii)—Bosniak relentlessly demystifies the exclusionary prerequisite for the "inclusionary" project of citizenship. Not that there isn't truth to her claims; citizenship, as noted, "stands against itself." One is tempted, however, to reply to this Butleresque fatalism with Walter Benjamin's remark that "just because one believes in progress doesn't mean that it has been achieved." As a principled or definitional matter, there may never be an inside without an outside—neither physical geometry nor cosmology has yet to overcome that dualism. But we may progress in improving the conditions and opportunities of those outside.

Insofar as Bosniak writes here primarily as a political philosopher, her uncompromising insistence on the incoherence and injustice of the Walzer-Miller line of liberal thinking on citizenship is essential. Insofar as Bosniak flirts with post-national and post-modern theory, a reformist agenda is difficult for her to formulate.¹¹ If aliens on the inside should have the right to remain aliens and cultivate multiple identities and yet be treated as citizens ("alien citizens"), we are in a very thick soup indeed. Insofar as both authors—like the rest of us—are disappointed with most of the fruits of popular sovereignty, a collectivist project, such as national citizenship, is hard to (re-)imagine. Bosniak's insights are powerful and often irrefutable. But they are also, I believe, fatalistic and pessimistic. If there is no moral legitimacy to a bounded community (albeit one that welcomes some newcomers), then the efforts at sovereign self-determination by those inhabiting the community ("the demos") can at best be thought of as selfish protectionism. At worst they are acts of exclusion, interfering with

¹¹ Who, after all, can get excited about §245(i) if national citizenship is on its way out anyway. It would simply be another case of shuffling deck chairs on the Titanic. The undervaluation of naturalization in both books also makes more sense seen in this context.

individual human rights in impermissible ways. As imperfect as these undemocratic democratic communities may be, however, the alternative—individual “choice” and market determination—will leave us all worse off, not better.

* * *

If I may conclude on a somewhat provocative note, it would be this: Since the appearance of these important and insightful books, we have witnessed, if not the end, then at least a substantial caesura in the current wave of capitalist globalization.¹² The great debacle of the past two years is hardly over. It is too early to say whether this crisis will lead to world depression and military conflict. But it surely will lead to a renewed focus on the bordered state, and that will continue to be a nation-state, perhaps more pluralistic than before (compare the U.S. of the 1920s to that of the 1880s) but still a nation-state. It might behoove us now to think more about the effective civic integration of those who have recently joined us and less about post-national and global utopias. The dialectic of the unique and the universal will be with us forever,¹³ and the nation-state as an Archimedean lever for mitigating injustice may or may not ever again be what it once was.¹⁴ More than in a very long time, however, issues of immigration need to be linked to issues of social struggle, in the U.S. and in Mexico no less than anywhere else.

¹² The expansion of capitalism, which drives migration, be it in the form of Lancashire wool and cotton that drove both slavery and the Irish peasantry in the 19th Century or NAFTA’s immiseration of the Mexican peasantry in the late 20th, will not end any time soon. As Marx and Engels so presciently wrote:

The bourgeoisie has, through its exploitation of the world market, given a cosmopolitan character to production and consumption in every country. To the great chagrin of reactionaries, it has drawn from under the feet of industry the national ground on which it stood. All old-established national industries have been destroyed or are daily being destroyed. They are dislodged by new industries, whose introduction becomes a life and death question for all civilized nations....

Such expansion is a constant process—the BRICs will not tumble completely. But the process of expansion has always been marked by periods of contraction and retrenchment such as we have now entered.

¹³ See J.L. Talmon, *The Unique and the Universal* (1961); James Joll, *The Second International* (1955).

¹⁴ See, e.g., Gosta Esping-Andersen, *Politics against Markets* (1985) and *Why We Need a New Welfare State* (2002).

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