

RECOGNIZING THE PROBLEM OF SOLIDARITY: IMMIGRATION IN THE POST-WELFARE STATE

REMARKS OF DAVID ABRAHAM

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We have just listened to two talks very close up to the data at the micro-level of the immigration experience, and those are important objects of study for us as scholars and engaged intellectuals. That said, I am going to back away a little bit and speak more abstractly and about a dilemma we have to confront, however difficult it may be for us. And that is the dilemma of *failing social solidarity and the place of immigration in the neo-liberal order* that dominates us now and will continue to dominate us for the foreseeable future.¹

We have been using the phrase “comprehensive reform” throughout this Symposium without being able really to identify the leitmotifs that would make such reforms comprehensive. No one here, so far as I can tell, advocates tightly securing the borders, massive deportations of those illegally present, the withdrawal of all social benefits from alien residents, and the reduction of legal immigrant flows. That would be a form of “comprehensive reform,” if the immigration policy and problem to be reformed were taken to be an excess of immigrants and presumably attendant problems of lawlessness and social expenses. But that is not the kind of “comprehensive reform” imagined or advocated here.

Rather, it is safe to say that the assumptions here are of a different, “liberal” sort. By “liberal,” I mean to invoke *both* of the very different meanings of the term; the technical and internationally understood meaning, namely market-driven, individualistic, state-minimizing, classical liberalism, and the colloquial and (technically incorrect) use of that term in American politics, namely to indicate a simultaneous commitment to a libertarian and democratic vision of individual rights and sympathy for and support of government action to mitigate the “inegalitarianism” of market society and especially discrimination against disfavored groups.

The liberal market, the free market, including the labor market is profoundly undemocratic insofar as it operates independently of and in

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1. See DAVID HARVEY, *A BRIEF HISTORY OF NEO-LIBERALISM* (2005), for the constitution, dynamics, and function of this social regime.

spite of the wishes of political democracy. The people's sovereignty stands incapacitated in the face of the free market, particularly when—as so often in our discussion of immigration—the “market” is naturalized and attains the status of something obvious, indisputable and morally beyond reproach, or at least beyond reach.² Thus, honoring individuals and their market-determined choices is required of liberalism. There is no liberal principle that can be invoked to counter the choice of an individual to move from Tijuana to San Diego and no liberal principle that can justify the good fortune of place of birth.³ Liberalism is about merit, and a good place of birth is an unmerited but rather substantial benefit. Inevitably, liberal thoughts of this kind impel one toward thoughts of free human movement and a borderless world.⁴ In the end, this is the liberalism of human rights.

It is this kind face of liberalism that has had the floor so far here and also dominates enlightened debate generally. It seems to me, however, that liberals face dilemmas, dilemmas of which we should be more aware and troubled by. Most immigration scholars are these days allergic to the concept of “sovereignty.” Indeed, few doctrines are in greater disrepute than the “plenary power” doctrine that has been extrapolated from the foundation of sovereignty.⁵ But if “the people,” the “we,” are sovereign, then should the market, especially the liberal market, tell us what to do?

“Comprehensive immigration reform” must address the fear of lost popular sovereignty and lost social solidarity. One reason, for example, that the border discussion is so heated among ordinary Americans is because borders mark sovereignty and define the “we” of the “people.”⁶ Whether we are talking about immigration or banks or other areas of market dominance, there is great disenchantment in nominally democratic countries today when the voice of the people seems not to

2. See the classic work of GOSTA ESPING-ANDERSEN, *POLITICS AGAINST MARKETS* (1985); GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990); GOSTA ESPING-ANDERSEN, *THE SOCIAL FOUNDATIONS OF POST-INDUSTRIAL ECONOMIES* (1999); and ADAM PRZEWORKSI, *CAPITALISM AND SOCIAL DEMOCRACY* (1986).

3. See Ran Hirschl and Ayelet Shachar, *Citizenship as Inherited Property*, 35 *POLITICAL THEORY* 253 (2007).

4. See JOSEPH CARENS, *CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS* (2000); PETER SPIRO, *BEYOND CITIZENSHIP: AN IDENTITY AFTER GLOBALIZATION* (2008).

5. See ALEX ALEINIKOFF, DAVID MARTIN, & HIROSHI MOTOMURA, *IMMIGRATION LAW AND CITIZENSHIP: PROCESS AND POLICY* 192-236 (6th Ed. 2008); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (the foundational exclusion case); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (the foundational deportation case).

6. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* (2006) (elaborating on inside/outside conundrum). The current Arizona hysteria cannot be understood without taking this seriously.

matter vis-à-vis the market—whether for labor, goods, or money. This issue of surrendering popular sovereignty troubles that second set of liberals who believe in popular sovereignty and, despite their believing in individual freedoms, do not accept naturalization of markets. At times, these two principles are at war with each other within the liberal discourse. Kevin Johnson's plenary remarks earlier today largely (though not entirely) presume the naturalness of labor market demands.⁷ An effective immigration policy, an immigration policy in the national interest, is one that responds to labor market demands, markets that are presumed to be segmented.

Why accede to that proposition? If I am an employer, it's obvious: the cheaper and weaker the workers the market sends me, the better it is for me. If I am the Mexican peasant we discussed earlier, dislodged by NAFTA and the commercialization of Mexican agriculture,⁸ it also makes sense. Immigration to the United States, even illegally with all of its attendant dangers and costs, might be an attractive alternative to life in a favella shantytown in Mexico City or a maquiladora in Monterrey or in Central America. This leads then to matters such as the competition between "one's own" poor and unskilled immigrants—both direct competition for jobs and the spiral of social estrangement that leads to declining solidarity and the refusal to redistribute goods in the welfare state.⁹

The much noticed 2005 faux pas—if it was a faux pas—of former Mexican President Vincente Fox is illustrative. Visiting Washington and

7. Kevin Johnson, Address at the Wayne Law Review Symposium (Feb. 4, 2010).

8. This process of course resembles nothing so much as Marx's description of the immiseration of the British peasantry in the *Communist Manifesto* leading to Friedrich Engels's trenchant discussion of the urban migrants in *The Conditions of the Working Class in England*. KARL MARX, *THE COMMUNIST MANIFESTO* (1848); FRIEDRICH ENGELS, *THE CONDITIONS OF THE WORKING CLASS IN ENGLAND* (1887). See also KARL POLANYI, *THE GREAT TRANSFORMATION* 163-68 (1944).

9. This competition is real and significantly to the detriment of the native unskilled. Despite widespread desires to reject the evidence, it is there and increasingly irrefutable. See, e.g., Alberto Alesina and Eliana La Ferrara, *Who Trusts Others?*, 85 J. OF PUB. ECON. 207 (2002); Alberto Alesina, Reza Baquir and Wiliam Easterly, *Public Goods and Ethnic Divisions*, 114 Q. J. ECON. 1243 (1999); Gary Freeman, *Migration and the Political Economy of the Welfare State*, 485 ANNALS AM. ACAD. POL. & SOC. SCI. 51 (1986); Claudine Gay, *Seeing Difference: The Effect of Economic Disparity on Black Attitudes toward Latinos*, 50 AM. J. POL. SCI. 982 (2006); DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE (2007); Susan Olzak and Suzanne Shanahan, *Racial Policy and Racial Conflicts in the Urban United States, 1869-1924*, 82 SOCIAL FORCES 481 (2003); Lonnie Stevans, *Assessing the Effects of the Occupational Crowding of Immigrants on the Real Wages of African American Workers*, 26 REV. BLACK POL. ECON. 37 (1998); CULTURAL DIVERSITY VERSUS ECONOMIC SOLIDARITY (Philippe von Parijs, ed., 2004).

elsewhere in the U.S., he proudly announced that Mexicans in the U.S. do the work that even Black people won't do.¹⁰ Fox meant to demonstrate that not only were labor markets so segmented that Blacks and Mexicans did not compete but that there was a virtue to the endurance power of the Mexican peasants. Unlike spoiled American minorities, they could endure so much that they were exactly the people employers would want and should welcome and should solicit. Fox was alas forced into a somewhat odd tête-à-tête a few days later with Jessie Jackson.¹¹ There he did not actually apologize, but they did do a nervous kind of pas de deux. Jackson wound up giving Fox a portrait of Cesar Chavez which of course was extraordinarily ironic because had Cesar Chavez been operating in Mexico, people like Fox would have gunned him down mercilessly. Furthermore, Chavez cooperated with the Immigration and Naturalization Service in order to protect Mexican-American grape and lettuce pickers from the competition of "illegals" as they were called then.¹²

Mexican workers, organized into work-gangs by smugglers, were competing, of course, not with law school professors, but with agricultural unionized workers who were themselves immigrants and attempting to maintain a decent wage floor in agriculture. And whom do we sympathize with? Well, we sympathize with both. We sympathize with the unskilled and unprotected victims of free market economics in the United States and elsewhere, and we sympathize with the people who seek nothing better than to overcome adversity and achieve a better life for themselves and their families. This, unfortunately, does not help create a very comprehensive picture of reform—if anything it makes for a very disaggregated picture.

Liberal market ideology is practically a hegemonic ideology in the United States. I am, in fact, spending this semester in Berlin which is a de-industrialized city grounded in nineteenth century forms of industrial production. But the measure of solidarity in that country is such that its citizens and politicians could never allow a Detroit to happen there, regardless of what the market seem to dictate. Vertical and horizontal redistribution is an essential part of the mechanism of solidarity and social protection that characterize Germany and northern Europe generally. Not accidentally, Germany and other states of northern Europe have greater difficulties than the U.S. does in accepting immigrants—

10. See Ginger Thompson, *Uneasily, a Latin Land Looks at Its Own Complexion*, N.Y. TIMES, May 19, 2005, at A4.

11. *Id.*

12. SUSAN FERRISS, *THE FIGHT IN THE FIELDS: CESAR CHAVEZ AND THE FARMWORKERS' MOVEMENT* (1997).

newcomers from the outside. The German “we” is thicker and more substantial than the American “we”; it is also, and not accidentally, more exclusionary.

Projects of social solidarity relying on social cohesion have found it necessary to rely on the state. The state can act as an integument and as a machine to mitigate the market in the name of equality.¹³ This is not easy to accomplish. Whether we call it at the micro-level “social capital” or at the macro level the “welfare state,” we have to bear in mind that there is a conundrum when we advocate immigration and when we advocate for multicultural policies. There are tradeoffs where we have to seek to minimize the cost of and maximize the efficacy of mechanisms of solidarity.

Among the things that are pre-requisite for a viable socio-democratic conception of justice are toleration, trust, and solidarity. Toleration creates civil rights; it is the dynamic of liberalism and is mostly directed at hand-cuffing the sovereign. The United States is very good at this; nearly everything is to be tolerated and left unsuppressed. Trust is necessary for political democracy, since one has to believe that the other side also plays by the rules. Your side can cede power because you know you can get it back next time if you play by the rules and win.¹⁴ And societies need solidarity, if they are to enjoy redistributive conceptions of justice. Structures and policies have to make it possible for people to sacrifice for other people.

Redistribution in the welfare state requires two things. A weak welfare state, which is what we have, may be sufficient to lead me to imagine *myself* when I’m old, so I will pay social security taxes now so I will get them later. That insurance principle form of redistribution is not so hard to achieve.¹⁵ Yet a more serious “solidaristic” system requires more than acknowledging that I, myself, have as yet unknown or unrevealed vulnerabilities. Thus, it is much harder for me to imagine myself an unmarried mother of a young child—for an assortment of reasons.¹⁶ It is that kind of solidarity, solidarity across broad but

13. See David Abraham, *Solidarity and Particularity: E Pluribus Unum?*, 6 HAGAR: STUDIES IN CULTURE, POLITY, AND IDENTITIES 137 (2005); David Abraham, *Constitutional Patriotism, Citizenship, and Belonging*, 6 INT’L J. CONST. L. 137 (2008).

14. This is one reason why *Bush v. Gore*, 531 U.S. 98 (2000) so undermined the standing of American Democracy.

15. Indeed, popular anxieties about Social Security are of two sorts: First, I pay *now*, but will there be money *later* when I need it?; and, second, will money be going to *others*, who are possibly less deserving than I am? See Justice Black’s dissent in *Goldberg v. Kelly*, 397 U.S. 254 (1970) (Black, J., dissenting).

16. It is instructive in this regard to compare Justice Black’s views in *Fleming v. Nestor*, 363 U.S. 603, 621-28 (1960) and *Goldberg v. Kelly*. Why is it that Justice Black

imaginable differences, that helps create a nation of compatriots, a "We the People," a society in which most say "yes" to the question of "am I my brother's keeper?"

For such an arrangement to work requires something of an overarching consensus on core values and appearances and belonging. It requires I be able to envision myself in your shoes, or at least that there are some measure of tradeoffs that we can establish with each other that will make it worthwhile for us to cooperate. I will not address here the wide-ranging discussion of "social capital" and "social cohesion" that has taken place these last years among sociologists and political theorists.¹⁷ But it is imperative that we take seriously the necessity of social capital software for legitimating and making effective the hardware of the redistributive state.

In the absence of strong integrationist policies, about which more below, immigration can be, and indeed has been promoted as a form of diversity and a form of multiculturalism. But, what do we do about what I have been suggesting is a form of tradeoff between solidarity and diversity? Keith Banting and Will Kymlicka¹⁸ and others have argued that such diversity in fact in no way undermines the solidarity necessary for the welfare state to function, for one of 'us' to make sacrifices for our fellows. They reject the notion of a heterogeneity or recognition/redistribution tradeoff and deny that multiculturalism either crowds out redistributive issues, corrodes the solidarity and trust necessary for redistributive politics, or misdiagnoses social conflict as being about culture rather than class.¹⁹

But, the contrary arguments of Philippe van Parijs, Freeman and others are at least as plausible and well-documented.²⁰ Trust is a very fragile thing, and heavy immigration and diversity may disincline people from contributing to either redistribution or public goods, especially as tolerance and solidarity may *follow from* trust, rather than preceding it.

can feel such sympathy for an older male deprived of his Social Security money by a combination of anti-communism and flexibility but cannot identify with a single mother in New York City who is about to lose her family welfare benefits? See *Fleming*, 363 U.S. at 621-28; *Goldberg*, 397 U.S. at 254.

17. Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THE THEORY OF RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241 (James Richardson ed., 1986); Mark Granovetter, *The Strength of Weak Ties*, 78 AMERICAN JOURNAL OF SOCIOLOGY 1360 (1973); Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANNUAL REVIEW OF SOCIOLOGY 1 (1998).

18. KEITH BANTING & WILL KYMLICKA, *MULTICULTURALISM AND THE WELFARE STATE: RECOGNITION AND REDISTRIBUTION IN CONTEMPORARY DEMOCRACIES* (2006).

19. *Id.*

20. See Freeman, *supra* note 9; see also Van Parijs, *supra* note 9.

Indeed, open immigration could constitute a serious threat to trust and the democratic state, if not to its constitutional structure then to its ability to carry out its core functions. In turn, any real cosmopolitanism has to be built *on* functioning democratic states rather than *replacing* them - an understanding that returns us to the *Declaration of the Rights of Man and Citizen*.²¹

Here, we find that even the most procedural and legalistic conceptions of democracy, such as Habermasian “constitutional patriotism,”²² must be grounded in identity, and identity, as I have argued, requires some closure.²³ As Veit Bader has observed, even neutral laws put into practice reflect the norms of dominant majorities.²⁴ Further, the history of “the nation” shapes the institutional arrangements of all polities—along with any liberal universalist commitments—while the political culture and civic virtues of a society inevitably reflect majority “particularism,” or what the Germans call the *Leitkultur* or “lead culture.”

One lesson from this that we must draw, and one that many urging “comprehensive immigration reform” are very reluctant to recognize—and even more loathe to advocate—is that rapid integration, not assimilation but integration, of new immigrants is an important policy goal. Scholars and advocates concerned with the well-being of working people must come to grips with the realization that it is very subversive of social welfare states to have people that are strangers to each other attempt to share and cooperate.

Why is it that so many of us are so uncomfortable with this? In goodly part it is because we inhabit a society that has overwhelmingly accepted the core liberal values of toleration, pluralism, recognition of difference and indeed all the later reaches of the Civil Rights Movement and its offshoots in identity politics and multiculturalism.²⁵ A generation has grown up transformed, believing not so much in equality as in equal respect for difference. This leaves us as liberal advocates being of two hearts and two minds. One is the heart and mind of non-discrimination, the commitment to propounding and furthering equal chances for all, the

21. DECLARATION OF THE RIGHTS OF MAN AND CITIZEN (1793).

22. For a stout defense of “constitutional patriotism” as more than mere legal proceduralism, see JAN-WERNER MÜLLER, CONSTITUTIONAL PATRIOTISM (2007).

23. See *supra* note 13.

24. VEIT BADER, SECULARISM OR DEMOCRACY? ASSOCIATIONAL GOVERNANCE OF RELIGIOUS DIVERSITY (2007).

25. DAVID HOLLINGER, POSTETHNIC AMERICA; BEYOND MULTICULTURALISM (1995); STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY (2000).

kind of human rights liberalism principle structured around free choice that I discussed earlier.

Again, it is an accident when one person is born in San Diego and another one in Tijuana. There is absolutely no moral ground from which we can say to the person born in Tijuana that he should stay there and suffer all the consequences of that while the other person enjoys the lifelong benefit of being in San Diego. In the arena of immigration this post-communitarian liberalism leads to some very unusual alliances. So the *Wall Street Journal*, for example, looking for lower labor costs and desiring to undermine labor rights, finds itself allied in seeking “immigration reform” with La Raza and other similar organizations who want to mitigate ethnic discrimination and give the poor a chance. Again, this view—this form of liberalism—is associated with free trade the global left, the politics of recognition fairness multiculturalism, etc.²⁶

The second heart and mind of liberalism is focused on “communitarian” social justice. Its principles are organized around the interests of “an ethical and historical community of obligation.”²⁷ Many find this school of liberalism less persuasive today than in the allegedly pre-globalized past. Identities are too multifaceted, unstable, and thin, according to some. But its advocates argued—and they still do—that the extension of those principles of trust and solidarity cannot be endless and cannot be predicated on simple humanity. Furthermore, a community and polity’s ability to control the evolution of one’s own society, including immigration and the expectations of immigrants, cannot be surrendered to something like the market. The polity and its historical community must instead maintain solidarity and democratic governance.

I close with a shorthand tale of whence we have come on the matter of immigrants and social solidarity and where we seem to be going now. Let me compare the recommendations of the last three Congressional or quasi-independent Immigration Task Forces: the first under Notre Dame University President Father Theodore Hesburgh in 1981, the second under Congresswoman Barbara Jordan (D-Texas) in 1994, and the most recent from 2006 under former U.S. Senator Spencer Abraham (R-Mich.), former Congressman Lee Hamilton (D-Ind.) and former INS Commissioner Doris Meissner.²⁸

26. See Slavoj Žižek, *Multiculturalism, or, the Cultural Logic of Multinational Capitalism*, 225 NEW LEFT REVIEW 44 (1997).

27. See, e.g., JOHN RAWLS, *THE LAW OF PEOPLES* (1999), particularly as they distinguish what is due “one’s own” from what is due “others.”; MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

28. Hesburgh chaired the Select Commission on Immigration and Refugee Policy (SCIRP), which as the National Commission on Immigration and Refugee Policy, authored the 1981 *U.S. Immigration Policy and the National Interest: Final Report*.

Hesburgh issued a report entitled *U.S. Immigration Policy and the National Interest*. At the time president of Notre Dame University, Hesburgh was the former head of the U.S. Commission on Civil Rights. Hesburgh, revered in labor and civil rights circles, advocated a national ID card and the strict exclusion of illegal immigrants from employment. The conservative Reagan administration largely ignored the report and expanded legal immigration while also tolerating growing illegal immigration, largely in the name of the free market.

The second commission, under the equally-revered leftish African-American former Congresswoman Barbara Jordan, was organized at the start of the Clinton presidency and released a first report in 1994. "If we are to preserve our immigration tradition and our ability to say 'yes' to many of those who seek entry, we must have the strength to say 'no' where we must," Jordan said as she presented the plan to Congress.²⁹ "Any nation worth its salt must control its borders," Jordan insisted.³⁰ Though lavishly praised by Clinton, her report was ignored by an increasingly free-trading and globalist administration. In contrast, the Abraham-Hamilton report unabashedly seeks "to reconcile the need to meet strong economic and social demands for legal immigration with the imperative to strengthen enforcement and safeguard national security."³¹ While indulging in much post-9/11 hand-wringing over security, and acknowledging some negative effects at the low end of the workforce, the report simply takes as a given that economy and society "demand" large-scale immigration.

The leitmotif for Hesburgh had been the equitable treatment of a certain number of immigrants and their absorption into America and its institutions with the least disruption. That of the Jordan Commission was the wish to protect working Americans while welcoming a limited

Jordan, until her death, chaired the bipartisan United States Commission on Immigration Reform, which operated from 1991 to 1997. It issued a number of reports, most importantly, *U.S. Immigration Policy: Restoring Credibility* (1994) and *Becoming an American: Immigration and Immigrant Policy* (1997). Reflecting the zeitgeist, the 2006 report was delegated to a third-way policy institute task force, co-chaired by Spencer Abraham and Lee Hamilton. Doris Meissner et al., Migration Policy Institute, *Immigration and America's Future: A New Chapter* (2006).

29. Quoted in Jerry Kammer, *American Dreamers*, NOTRE DAME MAGAZINE (Winter 2006), available at <http://www.nd.edu> (accessed from homepage by selecting "Search" and entering keywords "American Dreamers").

30. *Id.*

31. Press Release, Migration Policy Institute, *Bipartisan Panel Calls for "New Chapter" in U.S. Immigration Policy Current Impasse Highlights Need for Forward-Looking Politics* (Sept. 20, 2006) available at <http://www.immigrationpolicy.org> (accessed from homepage by selecting "Search" and entering keywords "Bipartisan Panel Calls for").

number of newcomers. Like Cesar Chavez, the Mexican-American founder of the United Farm Workers and others before her, Jordan recognized that the poor are generally forced to compete with each other.³² That of the Abraham group is to secure a competitive economy in a land of mobility and opportunity through increased immigration.

All of these figures are carriers of liberalism, but liberalism of different sorts. All three of these figures are representative of the package of tropes and elements that make up the liberal ideology in which immigration reformers are embedded. And that contradictory ideology is among the reasons why it is so difficult to formulate something that is indeed “comprehensive”—we have two ultimately incompatible visions of a just society operating simultaneously.

32. See, e.g., Michael Lind, *Liberals Duck Immigration Debate*, N.Y. TIMES, Sept. 7, 1995, at A27.