

OXFORD CONSTITUTIONAL THEORY



The Cultural Defense of Nations

A Liberal Theory of Majority Rights

LIAV ORGAD

OXFORD CONSTITUTIONAL THEORY

Series Editors:

Martin Loughlin, John P. McCormick, and Neil Walker

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For my father
Eliyahu (Eli) Orgad
1953–2005

Abstract

The changing patterns of global immigration have initiated a new form of majority nationalism. In recent years, liberal democracies have introduced an increasing number of immigration and naturalization policies that are designed to defend the majority culture. This trend is fed by fears of immigration—some justified, some paranoid—which explain the rise of extreme right-wing parties in the West. Liberal theory and human rights law seem to be out of sync with these developments. While they recognize the rights of minority groups to maintain their cultural identity, it is typically assumed that majority groups have neither a need for similar rights nor a moral basis for defending them. The majority culture, so the argument goes, “can take care of itself.” This book shifts the focus from the prevailing discussion of minority rights and, for the first time, directly addresses the cultural rights of majorities. The findings reveal a troubling trend in liberal democracies, which, ironically, in order to protect liberal values, violate the very same values. The book criticizes this state of affairs and presents a liberal theory of “cultural defense” that distinguishes between justifiable and unjustifiable attempts by majorities to protect their cultural essentials. It formulates liberal standards by which liberal states can welcome immigrants without fundamentally changing their cultural heritage, forsaking their liberal traditions, or slipping into extreme nationalism.

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I have always looked forward to writing the acknowledgements part of the book yet now, as I begin work on it, I am at a loss for words realizing how many individuals and institutions assisted me in this endeavor. During the years in which this book took shape, I was privileged to obtain the help of many friends and colleagues who inspired my thinking on issues pertinent to this topic. Ideas grow and develop over time and it is almost impossible to pinpoint all the people whose sage advice and guidance have made the book possible. Acknowledgements, however detailed, are a poor medium by which to express my heartfelt thanks for the support I have received.

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Writing in an inspiring academic environment and a lively intellectual community is a valuable gift for an author. A number of universities have hosted me in the course of writing the book. At Columbia Law School, I learned a great deal about loyalty and the concept of “nation” from George Fletcher, and became familiar with U.S. immigration law in a seminar taught by Theodore Ruthizer. Their unwavering support and friendship is the biggest asset that I secured at Columbia. They have followed this project from its inception and forced me to rethink my positions and reflect on the arguments. At Harvard Law School, I was honored to be supervised by Sanford Levinson, Frank Michelman, and Gerald Neuman—all of whom have profoundly influenced my thinking, writing, and views on citizenship and constitutionalism; they generously shared their time and knowledge with me, welcomed me into their seminars, and commented on my

articles. In such ideal conditions, it is no wonder that my year at Harvard was incredibly stimulating and productive. At NYU's Tikvah Center for Law & Jewish Civilization I began to reflect on the philosophical foundations related to majority rights. The academic seminars, led by Joseph Weiler and Moshe Halbertal, galvanized me into considering new ways of understanding citizenship and the depth of the parallel between religious affiliation and political membership, religious rituals and citizenship ceremonies. After spending a few years in the United States, I could not land in a better place to continue pursuing this project than the European University Institute in Florence. I am grateful to Rainer Bauböck for granting me the opportunity to benefit from this unique academic environment. The scholarly insights I received from members, fellows, and students during my time in Florence were truly thought-provoking. At Freie Universität Berlin, my gratitude goes to Philip Kunig, who opened a window into German constitutional law and the German academic world; his encouragement was central to the completion of this work.

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The book incorporates, in modified forms, ideas that were previously published elsewhere: “Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe,” *American Journal of Comparative Law* 58, no. 1 (2010): 53–105; “Creating New Americans: The Essence of Americanism under the Citizenship Test,” *Houston Law Review* 47, no. 5 (2011): 1227–1297; “Race, Religion and Nationality in Immigration Selection: 120 Years after the Chinese Exclusion Case,” *Constitutional Commentary* 26, no. 1 (2010): 237–296 (with Theodore Ruthizer); *A Strategy for Immigration Policy in Israel*, Ruth Gavison, ed. (Jerusalem: The Metzilah Center, 2010) (with Shlomo Avineri and Amnon Rubinstein). Permission to use these materials is gratefully acknowledged.

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This book is dedicated to my father (and best friend), Eli Orgad, who did not live to see its publication.

Liav Orgad
Herzliya and Berlin
FEBRUARY 2015

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List of Abbreviations

CDU	Christian Democratic Union Party (Germany)
CSU	Christian Social Union (Germany)
EEA	European Economic Area
HCJ	High Court of Justice (Israel)
ICCPR	International Covenant on Civil and Political Rights
INA	Immigration and Nationality Act (1952) (United States)
OECD	Organisation for Economic Co-operation and Development
StAG	Staatsangehörigkeitsgesetz (1913) (Germany)
StAR-VwV	Allgemeine Verwaltungsvorschrift zum Staatsangehörigkeitsrecht (2000) (Germany)
SVP	Swiss People's Party
TFR	Total Fertility Rate
UNESCO	United Nations Educational Scientific and Cultural Organization
USCIS	U.S. Citizenship and Immigration Services

A Note on the Cover

The cover illustrates a world-famous painting, *The Threatened Swan* by Jan Asselijn (c. 1650), exhibited in the Rijksmuseum Amsterdam. The swan, conceived as an elegant, non-aggressive bird, feels threatened by a curious dog which, barely seen in the lower left side, seems intent on attacking the swan's nest. The swan is transformed into a raging beast, ferociously attacking the dog. Unlike its peaceful image, the swan is on the warpath.

While it is unknown what Jan Asselijn meant by this awe-inspiring painting, later owners added three inscriptions on the painting. One of the eggs is engraved "*Holland*"; above the dog's head appears the caption "*De Vijand van de Staat*" (enemy of the state); and underneath the swan it is stated "*De Raadspensionaris*" (Grand Pensionary)—the political title given to Johan de Witt (1625–1672), the most important political figure of his time in the Republic of the United Provinces. These three inscriptions have transformed the painting into a political allegory. The painting has become synonymous with Holland defending itself and the swan has become a symbol of a Dutch hero, de Witt, who led the wars against England and France and, as a republican, struggled against the return of the House of Orange to the throne. Thus, the swan can be regarded as defending the Dutch Republic against both external and domestic enemies.

The painting represents a conundrum. We do not know whether the dog is indeed threatening the swan—it may be that the swan is overestimating the threat—or whether the swan's reaction is overprotective. The painting, however, may be given a contemporary interpretation that is relevant to the subject of this book. The prosperous and usually docile West feels threatened by the influx of immigration. Is the threat, symbolized by the dog, real or perceived? Is the frightened reaction to it by the West, symbolized by the swan, just or unjust, proportional or disproportional? And is there a way of coping with the real or perceived threat other than through an aggressive defense? This book attempts to answer these questions.

Introduction: *Citizen Makers*

To understand what a constitution (*politeia*) is, we must inquire into the nature of the city (*polis*); and to understand that—since the city is a body of citizens (*politai*)—we must examine the nature of citizenship.

—Aristotle¹

Liberal democracies are citizen makers. They have a long tradition of attempts to “Protestantize” Catholic immigrants and “Westernize” non-Western immigrants. In contemporary liberal democracies, the ultimate goal of the naturalization process is to “liberate” the illiberal and channel immigrants into the dominant customs, beliefs, and values of the dominant majority—by, for example, Anglifying or Germanizing the immigrants. This process is tricky—how to be citizen makers without being law breakers? More importantly, in order to make “good” citizens out of immigrants, liberal states must define not only the qualities that make one a good citizen, but also the specific qualities that make one a good *national* citizen (American, German, etc.). To answer this challenging question, states must explore who they are and which elements define their national character. The process which a non-citizen undergoes to become a citizen is one of the most fascinating disciplines through which to explore constitutional identity.

Immigration has become the topic of the day. Never in human history has so much attention been paid to human movement. Numbers matter. By 2013, the number of international immigrants soared to 232 million—10.8 percent of the total population in the developed regions. Numbers, however, are merely one factor. Other factors are the pace of immigration and its character. In some countries, the annual growth rate of immigration is rapidly increasing and the ethno-cultural composition

¹ Aristotle, *Politics*, Ernest Barker, trans. (Oxford: OUP, 1995): p. 84 (Book III, I).

of immigrants is relatively homogeneous. Contemporary immigration yields demographic shifts of historical significance between dominant majorities and immigrant communities. The changing patterns of immigration are linked to the changing nature of Western societies. The West faces an unprecedented population decline and has become more dependent on immigration due to demographic and economic needs. Alongside these transitions, the usual cultural changes brought about by immigration are strengthened by global forces—free markets, satellite television, and the Internet. Trans-cultural diffusion is greater today than in any other period in human history. The “other” is present in the national boundaries not just physically, but also spiritually.

The long-term cultural impact of immigration is uncertain at this point. It is too early to predict the consequences of immigration on sovereignty, self-determination, and the nation-state. Three consequences, however, are evident even at this early stage: the effect of massive population movements on the cultural composition and self-image of Western democracies—their national identities; the backlash against multiculturalism in immigration policy; and the rise of majority nationalism, or “cultural defense policies.”

WHO WE ARE

Surveys show that a high percentage of British citizens “feel British.” But what exactly does it mean to feel “British”? What do people have in mind when they state that they feel “British”? People may think differently about this question, and perhaps it is also British to give various meanings to British identity. Nevertheless, what does feeling “British” really mean: can you choose the top three characteristics without which one cannot feel or become British? If this is too difficult, can you define what is un-British or non-British, be it a pattern of behavior, a belief, or a way of doing things? Does feeling British entail devotion, identification, or faith?

In 2002, the British government established a committee to investigate the concept of Britishness. After long deliberation, the Home Office published a report on the essence of being British: “To be British seems to us to mean that we respect the laws, the elected parliamentary and democratic political structures, traditional values of mutual tolerance, respect for equal rights and mutual concern; and that we give our allegiance to the state To be British is to respect those over-arching specific institutions, values, beliefs and traditions that bind us all.”² About a decade

² Home Office, “The New and the Old: The Report of the ‘Life in the United Kingdom’ Advisory Group,” 2003; p. 11. See also Commission for Racial Equality, “Citizenship and Belonging: What is Britishness?,” 2005.

later, following the “Trojan Horse affair” in Birmingham, in which Islamic leaders attempted to introduce Islamic ethos in schools, the *Daily Telegraph* published an editorial on what it means to be British, which included the top ten items that constitute the core of “Britishness”:³

We have never been especially good at defining what constitutes British values. . . . There was a time when this would not have been necessary, since they would have been inculcated into everyone in the land through their schools and shared cultural experiences. In an era of mass immigration and the segregation of some communities from mainstream society, as exposed by the so-called Trojan Horse affair in Birmingham, this is no longer so straightforward.

Britain is not the only nation in search of an identity. From Australia to the United States, France to the Netherlands, Germany to Israel, Japan to the Republic of Korea, nation-states seek to construct a unique national character to be shared and celebrated, and find distinguishing identities: what is uniquely Dutch or German National identity debates have become routine. In all cases, the debate has been related to the “other”—Muslims (Europe), Latinos (the United States), non-Jewish immigrants (Israel), the West (Japan), and the American and Chinese influence (Korea).

Immigration, more than anything else, has brought to the fore the question of national identity. Immigrants encourage nation-states to define themselves. As George Orwell rightly observed, “It is only when you meet someone of a different culture from yourself that you begin to realise what your own beliefs really are.”⁴ To a large extent, the substance of the requirements “we” demand of “them” is about “us.” Immigration policy echoes national identity by mirroring not only the qualities that “we” value in others, but also by reflecting the essentials that define “us” as a nation. In a sense, drafting immigration requirements is a form of nation-building.⁵

Until not so long ago, Western countries had no immediate or foreseeable need to set boundaries to their collective identity; it was a given,

³ Telegraph View, “The Core British Values that Define Our Nation,” *Daily Telegraph*, June 11, 2014. See also GOV.UK, “British Values: Article by David Cameron,” June 15, 2014.

⁴ George Orwell, *The Road to Wigan Pier* (New York: Harcourt, Brace and Company, 1958): p. 197; Samuel P. Huntington, *Who Are We? The Challenges to America's National Identity* (New York: Simon & Schuster, 2004): p. 24 (“‘you’ and ‘I’ become ‘we’ when a ‘they’ appears.”).

⁵ Rogers M. Smith, “Foreword,” in *Immigration & Citizenship in the 21st Century*, Noah M.J. Pickus, ed. (Oxford: Rowman & Littlefield Publishers, 1998): pp. xi–xv at xiii; Rogers Brubaker, “Immigration, Citizenship, and the Nation-State in France and Germany,” in *The Citizenship Debates: A Reader*, Gershon Shafir, ed. (Minneapolis: University of Minnesota Press, 1998): pp. 131–164 at 132.

not something that had to be defined. In the post-World War II international system, Western countries did not struggle with the question “Who we are?” or search for a bond to bind them together; they had a solid sense of what was American, British, French, or German. But times have changed. The influx of immigrants, together with globalization processes and the rise of multiculturalism, has led to a new reality where it becomes more difficult to know what it means to have an American, British, French, or German identity. David Miller rightly observes that “People are both less sure of what it means to be French or Swedish, and less sure about how far it is morally acceptable to acknowledge and act upon such identities.”⁶ This process is particularly apparent in European Member States, whose national identities have been challenged by EU institutions.

National identities have traditionally not been legal concepts. Perhaps for the first time in human history, states currently offer, or attempt to offer, a *legal* definition of their national identity. Immigration law is the field (or rather the battlefield) in which this fascinating phenomenon is taking place.

THE CULTURAL DEFENSE

The six months between September 2010 and February 2011 witnessed a fierce attack on multiculturalism in political rhetoric. Angela Merkel, the German Chancellor, David Cameron, the British Prime Minister, and Nicolas Sarkozy, the French President—all denounced multiculturalism and declared that it had “utterly failed.” Multiculturalism puts the emphasis not on what people have in common, but on their differences. Arguably, this has contributed to the reality in which, after years of encouraging people to acknowledge and celebrate ethno-cultural diversity, nation-states have difficulty in finding commonalities. Academically, the retreat from multiculturalism was recognized years earlier. Back in 2001, Brian Barry warned that “multiculturalism was bound sooner or later to sink.”⁷ The scope of the retreat from multiculturalism is disputed, but even the greatest supporters of multiculturalism agree that it is receding. According to Will Kymlicka, the backlash against multiculturalism does not apply to national minorities and indigenous peoples.

⁶ David Miller, *On Nationality* (Oxford: Clarendon Press, 1995): p. 165.

⁷ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001): p. 6. See also Nathan Glazer, *We Are All Multiculturalists Now* (Cambridge: Harvard University Press, 1997): pp. 11, 19–20.