

**THE RIGHT TO DREAM: AN ETHICAL PERSPECTIVE ON THE
DREAM ACT AND CURRENT CITIZENSHIP LAWS IN THE
UNITED STATES**

A Senior Scholars Thesis

by

KENDALL FUNK

Submitted to Honors and Undergraduate Research
Texas A&M University
in partial fulfillment of the requirements for the designation as

UNDERGRADUATE RESEARCH SCHOLAR

May 2012

Major: Political Science

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ABSTRACT

The Right to DREAM: An Ethical Perspective on the DREAM Act and Current Citizenship Laws in the United States. (May 2012)

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This paper discusses the DREAM Act and current United States citizenship laws from a normative perspective. I argue that there are certain moral claims to citizenship that a non-citizen may hold and that citizenship status is not constituted by legal status alone. Furthermore, liberal democratic states should provide a pathway to citizenship that accounts for these certain moral claims. The principles of *jus sanguinis*, citizenship through bloodline, and *jus soli*, citizenship through birth within the territory of a state, have dictated citizenship laws thus far. These principles are problematic from a moral standpoint and scholars have largely failed to criticize the moral arbitrariness of this system of “birthright entitlements” to citizenship. United States citizenship laws, based on the principle of *jus soli*, fail to recognize people who should be considered U.S. citizens based on their long-term residence and membership within the political community. The law does not account for one’s relationship with the political community and other members of that community and thus fails to identify who should be considered a citizen of the state. Rather, the law provides for a superficial sort of

citizenship that states that one's place of birth is relevant to, and definitive of, one's membership within a polity. The DREAM Act poses one practical solution to compensate for this flaw in the U.S. legal system created by morally arbitrary citizenship laws. First proposed to Congress in 2001 and recently reintroduced in 2011, the DREAM Act provides a way for undocumented college students and members of the armed forces to acquire legal status and be put on a pathway that would allow them to acquire full citizenship status eventually. This piece of legislation provides a practical policy solution to morally problematic citizenship laws and takes into account the normative claims of non-citizens. I argue that the DREAM Act should be passed not only because it offers one practical solution to the issue of illegal immigration but also because it offers an appropriate response to the larger issue of morally arbitrary citizenship laws.

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CHAPTER I

INTRODUCTION

The issue of undocumented immigration in the U.S. has sparked much debate over recent years. The majority of the debate is centered on practical and economic concerns and fails to take into consideration the moral issues that arise as a result of undocumented immigration. This paper offers an ethical perspective on the debate and sheds light on recent innovative arguments for the passage of morally sound and reasonably pragmatic legislation. When evaluating public policy, it is important to take into consideration that the implementation of a new policy has real consequences that affect human lives both negatively and positively in many different aspects. An evaluation of both the practical and the moral implications of public policy are needed in order to fully understand all of the effects of such policy. Often, the practical implications of a policy are thoroughly evaluated while the moral aspect is left understudied. This paper aims to compensate for this shortcoming by offering an evaluation of public policy from the ethical perspective and providing a coherent argument for why a certain policy should be implemented from a moral standpoint. I argue that the principles of *jus sanguinis* and *jus soli* are morally problematic and citizenship, understood as membership in a political community, is not constituted by legal status alone. Rather, there are certain moral claims to citizenship that certain non-

This thesis follows the style of *Ethical Theory and Moral Practice*.

citizens hold and liberal democratic states should provide a pathway to citizenship that accounts for these moral claims. For the case of the United States, I argue that the DREAM Act should be passed as a practical solution to the moral dilemma present in the U.S. legal system of citizenship.

This paper first tackles the overlying question “what is citizenship?” and then offers a few contemporary conceptions of citizenship that describe what it means to be a citizen of a liberal democratic state. The moral logic of birthright entitlements to citizenship, as dictated by the principles of *jus sanguinis* and *jus solis*, is evaluated and a thorough critique of these principles is offered in order to demonstrate how citizenship laws based on these principles of birthright entitlements fail to identify the true citizens of a polity, defined as the members of a political community. I suggest the DREAM Act as a way to compensate for these flaws in the U.S. legal system and then explain how the act could be used as a stepping stone towards the creation of morally-improved legislation to deal with issues of immigration and citizenship. Future implications of the DREAM Act, if passed, could lead to the implementation of laws based on the principle of *jus nexi*, citizenship based on one’s status as a stakeholder and member in the political community, rather than the principles of *jus sanguinis* or *jus soli* that depend upon matters of birth to determine one’s belonging in a political community.

CHAPTER II

CONCEPTUALIZING CITIZENSHIP

The Stanford Encyclopedia of Philosophy identifies a citizen as “a member of a political community who enjoys the rights and assumes the duties of membership” (Leydet 2011). There are three general ways to conceive of citizenship (Cohen 1999, Kymlicka and Norman 2000, Carens 2000). The first equates citizenship to a legal status that is characterized by civil, political, and social rights. The second identifies citizens as political agents who actively participate in the functions of a society’s political institutions. The third form conceptualizes citizenship as membership in a political community that “furnishes a distinct source of identity” (Leydet 2011). In addition to these three conceptions of citizenship are two philosophical models that have evolved over time: the republican and liberal models of citizenship. The republican model of citizenship requires a great deal of active participation in the decision-making processes of the state, is characterized by civic self-rule, and places emphasis on the political agency of an individual citizen. The liberal model characterizes the possession of citizenship as a mere legal status wherein citizens are protected by the law but do not necessarily participate in its formulation or execution. Some scholars have argued that these two models go hand-in-hand (Constant 1819; Walzer 1989; Ackerman 1988) and most all conceptions of citizenship have agreed that the necessary framework for citizenship is the sovereign territorial state.

The republican and liberal models of citizenship may be united through their emphasis on the rule of law. This notion is common throughout both traditions and supplies a platform upon which I may further develop my argument. When thinking about undocumented immigrants, it may seem at first as if the rule of law has been severely broken. However, a second thought arises after considering undocumented immigrant children, especially those to which the DREAM act applies. Because children have limited autonomy and virtually no say in the choice to immigrate illegally, they cannot be held morally responsible for the actions of their parents. Notwithstanding the initial act of entering the country illegally, these immigrants are generally law-abiding, responsible members of society, and good neighbors. Candidates for the DREAM act follow the rule of law and contribute to the common good in society. They satisfy the liberal conceptions of citizenship by obeying the law and pursuing their individual private interests without impeding on the freedoms of other citizens. These immigrants also fulfill republican notions of citizenship by adding to the common good and participating as active members in the community. Keeping this in mind, even if one argues that the liberal and republican models of citizenship are not compatible, one may see how candidates for the DREAM Act satisfy both conceptions of citizenship.

There are three main components that comprise citizenship: 1) membership in a political community, 2) the collective rights and benefits associated with membership, and 3) participation in the community's political, economic, and social processes. These areas can be simplified into membership, rights, and participation. However, it has been

suggested that the most significant component of citizenship is membership in the political community. “Membership lies at the heart of citizenship. To be a citizen is to belong to a given political community” (Bellamy 2008, 52), and “historically, citizenship has been linked to the privileges of membership of a particular kind of political community” (Bellamy 2008, 1). One of the premises to the argument I offer in this paper is that membership is integral to, if not definitive of, citizenship. However, the membership component of citizenship is not reflected in current citizenship laws. The legal classification of citizenship is inadequate because current laws identify someone who is not a citizen, but someone who has a connection to the polity through a mere chance of birth.

Since it has been generally agreed upon that territorial states are the necessary governing entities of the world, this creates an even greater issue with determining who should be considered a citizen, or member, of the state and who should not. First of all, it seems erroneous to “exclude those who are subject to a given state’s power from full membership, possessing the same rights as other citizens. Second, given that the state you initially find yourself in is an accident of birth, it may seem equally invidious to hinder people from moving to become members of a different state that offers them better opportunities, if they are willing to take on the duties as well as enjoy the rights of citizenship” (Bellamy 2008, 53). The moral arbitrariness of demarcating a state by a territorial border necessarily causes the processes of determining citizenship relative to these territorial borders to be equally morally arbitrary. I believe this to be one of the

reasons why liberal democratic states have adopted immigration policies based on birthright principles. It is simply more economical and time-efficient for policy-makers to adopt jus sanguinis or jus soli principles rather than creating innovative policy measures that would be able to classify the members of a state more appropriately.

The vast literature on citizenship and what it means to be a citizen within a polity concludes that citizenship is characterized by membership, rights, and participation. No modern-day conception of citizenship is characterized by any matter related to one's place of birth. So why do United States citizenship laws continue to use the principle of jus soli, citizenship via birth on U.S. soil, to determine one's citizenship status and membership in the U.S. political community? The principles of jus sanguinis and jus soli, based on birthright entitlements to citizenship, have no correlation whatsoever to any notion of what it is to be a citizen of a liberal democratic state. Below I elaborate more on these two principles and offer an in-depth critique of these principles and how they have come to shape current citizenship laws.

CHAPTER III

CRITIQUE OF JUS SOLI AND JUS SANGUINIS

Current citizenship laws in liberal democratic states are based on the principles of jus sanguinis and jus soli. Jus sanguinis passes down citizenship rights through bloodline, while jus soli allots citizenship status to those who were born within the territorial boundaries of a nation; however, in both cases citizenship status is a matter of a “birthright entitlement”. Scholars, lawmakers, and society at large have failed to scrutinize the moral arbitrariness of this system of “birthright entitlements” to citizenship. The principles of jus sanguinis and jus soli have widely determined citizenship laws throughout many countries of the world and have thus dictated the rights and duties that are provided to certain people living within the polity. The principles of jus sanguinis and jus soli are morally problematic and citizenship, understood as membership in a political community, is not constituted by legal status alone. Rather, there are certain moral claims to citizenship that non-citizens hold and liberal democratic states should provide a pathway to citizenship that accounts for these moral claims.

Shachar and Hirschl (2007) argue that the transgenerational transmission of citizenship is analogous to inherited property wherein political membership is transferred from one generation to the next in the same way that material wealth is transferred. In their own words, “in today’s world, one’s place of birth and one’s parentage are—by law—

relevant to, and often conclusive of, one's access to membership in a particular political community" (Shachar and Hirschl 2007, 254). The principles of jus sanguinis and jus soli are morally problematic because they determine one's starting point in life which translates into very different life opportunities and even perpetuates the inequalities of opportunity between different countries of the world. Demographic factors, such as one's gender, race, social status, or parents' social or economic status are "arbitrary from a moral point of view and so any distribution of life chances that is significantly shaped by these factors is morally questionable" (Cole 2010, 42). The principles of jus sanguinis and jus soli, based on birthright entitlements rather than actual membership in a political community, fail to acknowledge one's relationship with the community and other members in that community.

The conception of citizenship from the republican point of view allows for citizenship to be acquired almost automatically by means of long-term residency in the community. The republican conception of citizenship focuses on the activities of citizenship and the interactions between citizens (Honohan 2010), allowing the definition of citizenship to encompass all those who actively participate in a self-governing community. Citizens of a state are mutually vulnerable, share a common political situation, and are bound to a common future insofar as they share multiple interdependencies imposed on them by the state (Honohan 2010). In the republican conception of nationality and citizenship, the culture and values of a community emerge as the outcome of interactions between citizens rather than being previously established or definitive of a community. Long-

term residency in a state is simply taken as shorthand for determining one's interdependence and common future with other members in a community. Honohan (2010) suggests three to five years as a sufficient amount of time to determine long-term residency.

Although national borders are morally arbitrary, they are necessary in order for a liberal democratic state to properly function. Along with the need for territorial boundaries, it is necessary to define who belongs in this political state, or better who should be able to participate politically in that democratic state. Citizenship status is also the medium in which rights and duties are distributed and determines who may benefit from being a member of the polity. Although the practices of membership extend beyond territorial borders and liberal democratic states should allow for the flow of people in and out of the community, political membership must be confined in some way. Out of necessity, the moral arbitrariness of territorial borders is linked to the moral arbitrariness of determining national membership. If national membership depends upon one's physical relationship with the territory of a nation, and that territory is defined by the border that encompasses it, then national citizenship cannot be separated from the moral arbitrariness of territorial borders (Cole 2010). Since it is necessary for a liberal democratic state to define its members in order to function, there must be some type of system that can distinguish members from non-members that is less morally arbitrary than the current *jus sanguinis* and *jus soli* laws and can account for certain moral claims to citizenship that one may hold.

Joseph Carens (2010) offers a viable solution to the problem of morally arbitrary requirements for citizenship. Carens argues that certain moral claims such as age of entrance into the polity, social formation in the country, social and familial ties to the community, marriage to a citizen or legal resident, and long-term residency in the state provide adequate reasoning why someone should be recognized as a citizen in a liberal democratic state. Carens asserts that the moral claim to citizenship strengthens the longer one resides within the territorial boundaries of the state and that membership in the community does not depend upon official permission or legal status but rather upon one's ties to the community and relationships with members of that community. From a republican perspective, citizenship requires a certain commitment to membership and participation in the polity which is "more demanding than the legal duties or thinner virtues associated with the liberal conception of citizenship" (Honohan 2010, 93). Therefore, citizenship is defined by one's activities in the community and relationships with other community members. Carens suggests that five years of residency within the state without any criminal convictions should be sufficient enough to establish anyone as a responsible member of society. Furthermore, liberal democratic states should establish a system in which people may obtain legal status after a fixed period of long-term residency.

One troubling objection to Carens' proposal is the moral arbitrariness of determining citizenship based on the number of years of residency within the state. Simply living within the state for, say, five years does not imply social membership nor does it suggest

that a person is morally entitled to legal recognition or citizenship status within the polity. Determining citizenship based on the sheer number of years of residency within the state is just as morally arbitrary as receiving one's citizenship through birth in the state (*jus soli*) or receiving one's citizenship hereditarily through bloodline (*jus sanguinis*). Additionally, length of residency, although significant, does not actually assess the extent of one's membership in the community. According to the republican conception of citizenship, membership in the community consists of one's relationships with other community members and active participation in the functions of the community (Honohan 2010). The arbitrariness of determining one's membership in the community based on the number of years of residency is especially troublesome if we look at citizenship from the republican perspective. I suggest the DREAM Act as a response to this objection because the DREAM Act accounts not only for long-term residency, but also for other special moral considerations like one's age at the time of entrance into the polity, one's moral character, social formation in the country, and social ties to the political community. This point is elaborated in greater detail later in this paper.

CHAPTER IV

JUS SOLI IN THE UNITED STATES

Section one of the Fourteenth Amendment of the United States Constitution states that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside”. The citizenship clause was added to the 14th Amendment as a response to the overruling of the Dred Scott Decision that excluded African-Americans from being full U.S. citizens. While this clause, based on the principle of jus solis, was essential in ensuring the political and social rights of former slaves, it now renders obsolete and proves to be problematic from a moral perspective. Because U.S. citizenship is based on birth within the state or naturalization, immigrants who arrived in the U.S. as a young child, lived in the U.S. during their formative years, have strong connections to the U.S., have resided in the U.S. for a long period of time, and consider themselves members of the political community are not provided with full citizenship status unless they complete the grueling, and perhaps discriminatory, process of naturalization. Meanwhile, persons who were born in the U.S. but may have lived in a country outside of the U.S. for the majority of their life or possess no sense of social or political connection with the United States enjoy the full rights and benefits of citizenship without participating as an active member in the polity.

The citizenship predicament created by the 14th Amendment has produced a subset of people that live in a condition of “de facto statelessness” (Bhabha 2011). “People who have a nationality but whose status where they reside is not legal because they are illegal, irregular, or undocumented migrants in their current location” (Legomsky 2011, 217) are considered to be de facto stateless. These people may hold citizenship in a different country; however, their possession of citizenship is practically ineffective because they do not possess legal status in their current location. The phenomenon of de facto statelessness is an especially relevant to undocumented college students and children of undocumented immigrants. Many of these students arrived in the U.S. as a child, not by any choice of their own, and have lived the majority of their lives, including the formative years, within the United States.

Because children have limited autonomy, few options, little access to information, and an undeveloped understanding of the world, they cannot be held morally responsible for their parents’ choice to immigrate illegally. Undocumented children are allowed to complete primary and secondary education in U.S. public schools thanks to the decision reached by the landmark court case *Plyler v. Doe* (1982). However, upon graduating from high school, these students do not have complete access to public institutions of higher education. “When such students are denied access to college, society is denied the social and economic contributions that a college education would have enabled those students to make” (Legomsky 2011, 226). “The limited legalization offered by the DREAM Act would be a sensible and humane first step” (Legomsky 2011, 232). The

DREAM Act is elaborated below along with its implications for the grander issues of citizenship and undocumented immigration.

CHAPTER V

THE DREAM ACT

The Development, Relief, and Education for Alien Minors, or DREAM, Act was first presented to Congress in 2001 and recently reintroduced in May of 2011. The DREAM Act, if passed, provides “conditional permanent resident status” to qualified immigrants. This act is particularly relevant to undocumented college students and members of the U.S. armed forces who arrived in the U.S. as children. Implementation of the DREAM Act would not only provide certain immigrants with legal resident status, but would also provide a path to full citizenship and access to rights and benefits that would otherwise be unattainable for undocumented immigrants. Although the official bill was rejected by Congress, President Obama’s Executive Orders sent to Immigration and Customs Enforcement (ICE) on June 17, 2011 greatly mimic the DREAM Act. These executive orders, however, are ultimately unenforceable and official legislation must be passed in order for the objectives laid out in the DREAM act to become a reality.

The objective of the DREAM act is “to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children and for other purposes” (The DREAM Act of 2011, S.952, H 1842). The DREAM Act would provide conditional legal status to an individual who was younger than 15 years old at the time of entrance into the U.S., has lived in the U.S. for at least 5 years, has graduated from a U.S. high school or obtained a

GED, is a person of “good moral character”, has no serious criminal offenses, and was younger than 32 years old when the law is enacted. Persons meeting these criteria would be able to obtain permanent resident status after completing two years of college or military service. Supporters of the DREAM Act argue that “unauthorized children had no choice in entering the United States illegally, have grown up in the United States, and can make economic and social contributions if allowed to continue their studies. Opponents believe the bill would reward lawbreakers, that only lawful resident students should qualify for resident tuition, and that it could result in added costs to taxpayers” (Morse and Birnbach, www.ncsl.org).

In 1982, the Supreme Court established in *Plyler v. Doe* that any child, regardless of immigration status, is eligible for free primary and secondary public education. The decision was based on the concern that denying undocumented children access to basic education would create a subclass of noncitizens that would most likely reside in the U.S. for the remainder of their lives. These children would be punished for the acts of their parents of which they had no control or influence. Furthermore, the denial of an education to these children would thrust a permanent hardship upon them that would harm both them and the U.S. in the long-run. However, the decision established through this landmark court case does not extend to institutions of higher education and once these undocumented students graduate from a U.S. high school, they are no longer eligible for state education benefits and must apply to public institutions as an illegal foreign alien.

In June of 2011, President Obama issued Executive Orders to Immigration and Customs Enforcement (ICE) entitled “Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens”. The Executive Orders encourage immigration officials to exercise “prosecutorial discretion” to ensure that the agency’s resources are focused on the priority of removing illegal immigrants who pose the greatest threat to U.S. security. Additionally, the Executive Orders state that the following factors should be given particular care and consideration when exercising prosecutorial discretion: the person’s length of presence in the U.S.; the person’s circumstances at time of entry into the U.S., especially if he or she was a child; the person’s status as a veteran or member of the armed forces; the person’s pursuit of education, especially if he or she graduated from high school or college in the U.S.; the person’s criminal history, contributions to the community, personal ties and family relations within the U.S. and other factors. Although these orders may be well-intentioned, they are ultimately unenforceable and do little to alleviate the issue of undocumented immigration in the U.S. In order to initiate significant systemic change in the U.S. immigration system, the DREAM Act must be passed as official legislation.

The DREAM Act provides one practical policy solution to compensate for the inherent moral flaws in the U.S. legal system created by citizenship laws based on birthright entitlements. Though the principle of *jus solis* dictates current U.S. citizenship laws, lawmakers can enact meaningful legislation, like the DREAM act, to make up for the limitations and flaws found in these laws. The DREAM Act may provide the first step to

achieving comprehensive immigration reform in the U.S. and lead to a system that is more compatible with citizenship in liberal democratic states. One innovative system, termed jus nexi, is currently being developed by scholars. Jus nexi determines citizenship based on one's status as a stakeholder in the political community. Below I offer a brief summary of jus nexi and explain how this system may fare better than current citizenship laws in determining the actual members of a political community.

CHAPTER VI

JUS NEXI

Jus nexi, a term coined by Law Professor Ayelet Shachar, proposes an alternative to birthright citizenship. Jus nexi is also referred to as the “stakeholder principle”. Individuals who have a “real and effective link” (Shachar 2009, 165) to the political community or a “permanent interest in membership” (Baubock 2008, 35) should be entitled to claim a right to citizenship. “This new criterion aims at securing citizenship for those who are truly members of the political community, in the sense that their life prospects depend on the country’s laws and policy choices” (Leydet 2011). For practical and ethical purposes, laws based on the principle of jus nexi could be implemented in addition to the laws that already exist in liberal democratic states. The principle of jus nexi is compatible with the principles of jus sanguinis and jus soli. Jus nexi laws need not replace laws based on the principle of jus sanguinis or jus solis. Rather, jus nexi laws may be thought of as an extension of, or supplement to, citizenship laws that already exist within the state. However, the establishment of laws that conform to the principle of jus nexi is essential for the improvement of the current condition of undocumented immigration in the U.S. and imperative to legitimizing morally arbitrary citizenship laws. Implementation of the DREAM Act may provide the first step that pushes U.S. citizenship and immigration legislation in the direction of jus nexi.

CHAPTER VII

CONCLUSIONS

I have argued that modern-day citizenship is characterized by the notions of membership, rights, and participation in a political community. The principles of jus soli, citizenship based on birth within the territorial boundaries of a state, and jus sanguinis, inherited citizenship through bloodline, are arbitrary from a normative perspective. Furthermore, citizenship laws based on these principles of “birthright entitlements” to citizenship are problematic because they fail to identify the true citizens of a state, defined as members of a political community. In the case of the United States, the principle of jus soli has dictated citizenship laws thus far. Therefore, the individuals who may assume the rights and take on the duties of citizenship are determined by “accidents of birth” within the physical borders of the United States and are not characterized whatsoever by membership or belonging in the political community.

Citizenship is not constituted by legal status alone. Rather, there are special moral claims to citizenship that certain non-citizens hold and liberal democratic states should provide a pathway to citizenship that accounts for these moral claims. In the case of the United States, the DREAM Act may pose one viable solution to this moral dilemma and act as the first step in the larger task of creating revised and improved immigration and citizenship legislation. The DREAM Act takes into account the special moral claims of certain non-citizens by supplying them with legal status and providing a pathway to

eventual citizenship. Innovative citizenship laws based on the principle of jus nexi, citizenship based on one's status as a stakeholder and member in the political community, may offer a more just system of citizenship. However, in order for this system to manifest, meaningful legislation like the DREAM Act must first be passed. The DREAM Act may function as a transitional piece of legislation that is able to guide U.S. policy-makers towards creating a more just system of citizenship and immigration.

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