

## The 1.5 Generation On *Jus Nexi*, Rootedness, and Citizenship<sup>1</sup>

Joel Sati

*The City College of New York College*

---

### Abstract

Citizenship debates pit the consensualism view against the *jus soli* view. Consensualism argues that citizen consent overrules humanitarian obligations to outsiders and is necessary for sovereignty. The strictness of a state's immigration policy is a marker of consent; if a people elect their legislators, there is a connection between the electorate and the laws, which reflect a people's ideals. Consensualists argue that *jus soli* – or citizenship based on birthplace – violates a basic liberal principle that citizen consent determines membership. In criticizing consensualism, I cite Robin Jacobson, who argues that consensualism allows for racist policy as opposed to racially egalitarian *jus soli*. However, both views exclude the 1.5 generation, who are not first-generation immigrants (they immigrated at a young age), and are not second generation (they were not born in their new state). I argue for the *jus nexi* view, which allows for earned citizenship upon genuine ties toward the political community. I utilize Ayelet Shachar's work to argue this view, using the 1.5 generation as an example for how *jus nexi* can complement current citizenship practices.

### I. Introduction

Conversations on citizenship base themselves on the consensualist/ *jus soli* dichotomy, a dichotomy I consider false.<sup>2</sup> However, an exposition of the two is important in arguing for alternate conceptions of citizenship. In this essay, I will provide an overview of consensualism through Peter Schuck and Rogers Smith, who argue that 'consent of the governed' is superior to

---

<sup>1</sup> Scholar, Skadden, Arps Honors Program at The City College of New York. Fellow, City College Fellowship. I would like to thank my City Fellows mentor Benjamin Vilhauer, whose philosophy of law class inspired the project and whose mentorship is invaluable. I would also like to thank Professors Lynda G. Dodd, Vera Albrecht, Jennifer Morton, and Richard B. Bernstein. Finally, I would like to thank David Jacobson, Carlos Andre Pazmino, and fellow City Fellows Robert Dalva, Rene Cordero, Shaila Bora, and Joestin 'Boo Boo' Benjamin for their feedback on earlier iterations of this paper.

<sup>2</sup> Due to space constraints, I refrain from an analysis of *jus sanguinis*, another important type of citizenship distribution.

any humanitarian obligations to outsiders. More importantly, they argue that *jus soli* – or citizenship based on birthplace – violates a basic liberal principle that membership in a society should be determined by the consent of the governed.<sup>3</sup> In criticizing consensualism, I draw on the work of Robin Jacobson, who argues that consensualism allows for racially exclusive policy as opposed to *jus soli* citizenship, which is racially egalitarian. However, both consensualism and *jus soli* leave out an important demographic – the 1.5 generation.<sup>4</sup> The 1.5 generation are not first-generation immigrants in the sense that they immigrated at a young age and thus could not choose to immigrate, and not second generation in that they were not born in the state they reside in. To include them, I argue for a third option, *jus nexi*, which uses rootedness as a standard for political membership. *Jus nexi* allows for earned citizenship upon the real, and genuine ties toward the political community.<sup>5</sup> I draw on the work of Ayelet Shachar to argue that consensualist arguments against inclusion of the 1.5 generation base themselves on what I call the appeal to ‘original sin’. I counter this appeal in analyzing how *jus nexi* is valuable to the formation of contemporary citizenship policy relative to current *jus soli* and *jus sanguinis* practices.

## **II. Consensualism and *Jus Soli* as Incomplete**

A philosophical exposition of consensualism and *jus soli* is necessary, as I argue that the inadequacy of these two frameworks is the backdrop for the normative argument for *jus nexi* citizenship. A citizen is a member of a political community who enjoys the rights and duties of membership in a polity.<sup>6</sup> Consensualism posits that the source of the nation-state’s legitimacy is the consent of the governed to admit or deny citizenship to immigrants.<sup>7</sup> Consensualism draws on Locke’s ideas about the social contract.<sup>8</sup> Lockean consensualism is based on the relationship that children have with their parents and with the government. In his *Second Treatise on Civil Government* he writes, “[a] child...is born a subject of no Country and Government...till he come

---

<sup>3</sup> Matthew Lister, “Citizenship, in the Immigration Context,” *Maryland Law Review* 70 (2010): 175-233

<sup>4</sup> A term found in Shachar, 2010 (see below)

<sup>5</sup> Ayelet Shachar, “Earned Citizenship: Property Lessons for Immigration Reform,” *Yale Journal of Law & the Humanities* 42 (2010): 5.

<sup>6</sup> “Citizenship,” *Stanford Encyclopedia of Philosophy*. Published Fri Oct 13, 2006.

<sup>7</sup> This definition borrows from the one used by Peter Schuck and Rogers Smith

<sup>8</sup> Although he does not use the term.

to Age of Discretion”<sup>9</sup> Locke argues that a child cannot be the government’s subject because being a subject is based on tacit or explicit consent that one can only affirm when able to reason.<sup>10</sup> Although consensualist citizenship stems from Lockean ideas, it expands on it and argues that consent is necessary for the legitimacy of a nation-state. Consensualism encourages genuine personal commitment and development and permits affirmation of one’s values through voluntary and mutual affiliation with others. The assumption is that if citizens willfully join a body politic, they will be able to protect their interests, maintain harmony in their community, and achieve a sense of shared values with fellow citizens. Thus, consensualism’s normative value is a nation-state in which its members will be linked politically by bonds of mutual agreement.<sup>11</sup>

Consensualism raises the question – does the idea that we consent to a government that holds this power over a citizenry imply that we can legitimately deny others admission to our social contract? Political philosopher Michael Walzer argues yes. He holds that a community’s ability to shape its own destiny through the inclusion or exclusion of new members is important in the protection of interests, maintenance of harmony, and the achievement of a unifying set of values.<sup>12</sup> Exclusion is important to the social contract. However, the idea of consent conflicts with the liberal principle that a state ought to secure the basic human rights of all people as fully as possible. In other words, is it possible to reject admission to immigrants while still respecting their rights? Moreover, is respect for the immigrants’ rights superior to a state’s sovereignty? Shuck and Smith answer in the negative by arguing that even if moral obligations to those outside the contract are compelling, they do not imply *jus soli*.<sup>13</sup> To Schuck and Smith, humanitarian obligations are secondary to a people’s self-determination; government cannot have the consent of the governed if obligations to immigrants are superior to current citizens. In other words, granting full political membership to ‘outsiders’ without the consent of those already ‘inside’ means the state is not acting in the interests of its people. Thus, consensualism is diametrically opposed to *jus soli*, or citizenship by birthplace.

---

<sup>9</sup> John Locke, *Second Treatise on Civil Government*. (1689)

<sup>10</sup> Peter Schuck, & Roger Smith, “Citizenship Without Consent,” *The Social Contract* (1996): 20.

<sup>11</sup> Peter Schuck, & Roger Smith, “Citizenship Without Consent,” 20.

<sup>12</sup> Walzer, M. from Peter Schuck, & Roger Smith, “Citizenship Without Consent,” 20.

<sup>13</sup> Peter Schuck, & Roger Smith, “Citizenship Without Consent,” 22.

In its weak iteration, *jus soli* must grant citizenship to anyone who is born in *and* lives in the state long enough to have ‘availed’ herself of the protection and benefits that the state provides.<sup>14</sup> This is in contrast to *jus soli*’s strong iteration, which grants automatic citizenship to every person born in the state *at the moment of birth*.<sup>15</sup> It is important to note that because members of the 1.5 generation immigrated to the state, both weak and strong *jus soli* do not apply to them. Consensualists object to *jus soli* citizenship on the grounds that it violates liberal citizenship<sup>16</sup> in that it deprives both the community and the individual gaining citizenship of the opportunity to come to reasoned conclusions about citizenship.<sup>17</sup> Consensualists argue that *jus soli* citizenship removes from the subject the right to actively pledge his or her allegiance to a nation-state. It also allows those who enter a community in violation of established laws to use their citizen children to acquire citizenship against the wishes of citizens. For the purpose of argument, suppose that a majority of the American electorate is against immigration, and there are strict laws in America concerning immigration. A consensualist argument is that the majority of voting Americans would not consent to immigrants, as elected legislators create and maintain legislation that reflects a majority of said electorate’s view on immigration. Consensualism argues that it is morally questionable to reward those who break the law by conferring citizenship on those who made the conscious decision to immigrate illegally, i.e. the first generation. Moreover, since consensualists argue that the society did not consent to irregular migrants, society also does not consent to their offspring. (This includes both the 1.5 and second generation). Moreover, it is even more questionable to guarantee *jus soli* in the contract.<sup>18</sup> As former congressman Mark Foley (R-FL) stated,

Just government requires the unanimous consent of [the governed]. Not only must the individual consent to being governed, but [the community as a whole must also accept

---

<sup>14</sup> Matthew Lister, “Citizenship, in the Immigration Context,” 207.

<sup>15</sup> For an in-depth exposition, see Lister (2010)

<sup>16</sup> Matthew Lister, “Citizenship, in the Immigration Context,” 212.

<sup>17</sup> Elizabeth F. Cohen, “Carved from the Inside Out: Immigration and America’s Public Philosophy of Citizenship,” in *Debating Immigration*, ed. Carol M. Swain (Cambridge University Press, 2007), 32-46. From Matthew Lister, “Citizenship, in the Immigration Context,” 212.

<sup>18</sup> Robin Jacobson, “Characterizing Consent: Race, Citizenship, and the New Restrictionists,” *Political Research Quarterly* 59 (2006) 645-653.

him]. Granting citizenship to all persons within the geographical boundaries...*is conferring citizenship without the consent of the whole people.*<sup>19</sup>

Consensualists argue that *jus soli* citizenship undermines the electorate and its ability to affect policy through legislation and unreasonably favors outsiders.

According to consensualists, unauthorized immigrants and their children are outsiders who, through *jus soli*, force citizens to treat them as fellow citizens without their consent. Consensualists argue that because these immigrants entered the country illegally, the act disqualifies these immigrants from meeting the ‘good moral standing’ standard necessary for citizenship. This is consensualism’s appeal to ‘original sin’: because undocumented immigrants broke the law entering as they did, and because they are using the welfare state and *jus soli* for their children, they must be ineligible for any path toward citizenship.”<sup>20</sup> Arguments similar to this question the immigrant’s loyalty and fitness for political membership by asserting that by breaking the law, undocumented immigrants do not know what it means to be part of a morally functioning society. I find this position confusing from a moral standpoint. One could note that arguments similar to this are usually applied against the adults that bring the children here and not the children themselves; these arguments thus have a negative effect on the 1.5 generation when acted upon because this generation had no moral responsibility in the decision to enter the nation without the consent of the citizens. This is an astute point, though I want to refine that further. The point here is that if citizens should not assign direct blame to the 1.5 generation for unauthorized entry because they do not deserve such blame, they should see the seemingly inevitable negative consequences of assigning such blame to their parents on the 1.5 generation as troubling at the very least because the 1.5 generation does not deserve that either. Children of undocumented immigrants are, morally speaking, just like any other child born in a particular state.<sup>21</sup> The status of the parent is morally irrelevant to the status of the child; to deny the protection of a state to a child based on a decision in which he or she had no part represents unjust exclusion. Consensualism allows for unjust exclusion because it adversely affects the relationship the children of undocumented immigrants have with their parents by placing them in a subclass

---

<sup>19</sup> Mark Foley from Robin Jacobson, “Characterizing Consent: Race, Citizenship, and the New Restrictionists,” 648.

<sup>20</sup> Ayelet Shachar, “Earned Citizenship: Property Lessons for Immigration Reform”

<sup>21</sup> Matthew Lister, “Citizenship, in the Immigration Context,” 214.

based on morally irrelevant criteria.<sup>22</sup>By ‘adversely affecting’, I mean that children of undocumented immigrants may face an undue burden such as fear of family separation. Such fear is based on morally irrelevant criteria.

To see the insufficiency of consensualism as a model, it is important to differentiate between (1) racial exclusion as a necessary consequence of consensualism and (2) racial exclusion as a possible consequence of consensualism under circumstances where the majority of existing citizens are racist. Even if supposing (1) is unnecessary, the fact that consensualism allows for (2) makes it a dangerous, unreliable paradigm for normative citizenship policy. Robin Jacobson argues, “[Consensualist] versions of citizenship have a long republican history supporting the idea of a community’s need for homogeneity in order to maintain a functioning republic.”<sup>23</sup> She then adds that consensualist arguments are combined with a racialized view of immigration, leading to contemporary calls for restricting citizenship.<sup>24</sup> In the consensualist/*jus soli* dichotomy, *jus soli* seems the more egalitarian citizenship. However, that is a fallacy.

*Jus soli* is itself an insufficient citizenship model for two reasons, one theoretical and the other pragmatic. *Jus soli*, although racially egalitarian, does not solve the arbitrariness objection. Birthplace is also arbitrary from a moral perspective. Race may be more sensitive and *jus soli* is a lesser of two evils, but *jus soli* is no better than consensualism in surmounting the arbitrariness objection. Some may argue that it is *because* it is arbitrary that *jus soli* is egalitarian with regard to race. However, racism is as arbitrary as discrimination based on birthplace, so moral arbitrariness does not imply non-racism. Pragmatically speaking, both consensualism and *jus soli* exclude a central demographic not only from citizenship, but from conversations on citizenship. This demographic is ‘the 1.5 generation.’ The 1.5 generation are immigrants who either immigrated to a state at a young age illegally or through legal means that have since expired.<sup>25</sup> More importantly, they have resided in that nation-state long enough for their sense of self to be shaped by it – I expand on this later. Those in the 1.5 generation cannot fit in the consensualist model because they could not have consented to immigration, thus they are not first-generation.

---

<sup>22</sup> Matthew Lister, “Citizenship, in the Immigration Context,” 214.

<sup>23</sup> Robin Jacobson, “Characterizing Consent: Race, Citizenship, and the New Restrictionists,” 646.

<sup>24</sup> Robin Jacobson, “Characterizing Consent: Race, Citizenship, and the New Restrictionists,” 646.

<sup>25</sup> I count myself among this group.

They also cannot fit into *jus soli* because they were not born in the state of residence, thus they are not second-generation. To create a normative citizenship policy that includes the 1.5 generation, a *jus nexi* conception, based on the idea of rootedness, is important.

### **III. *Jus Nexi* Includes the ‘1.5’ Generation**

As I mentioned earlier, *jus nexi* allows for earned citizenship arising from the establishment of a real, genuine, and effective link to the nation-state and its culture.<sup>26</sup> It takes seriously the idea that inclusive, democratic citizenship in a liberal state should reflect a nexus between rights and duties as well as between membership and social attachment.<sup>27</sup> Such an approach enables us to welcome those who have already been social members based on presence and participation in the life and economy of the state.<sup>28</sup> If the person has been present in the nation-state and forms ties within it, the person can claim political membership. *Jus nexi* holds normative appeal and contemporary relevance as it develops an equitable standard of citizenship for those who either cannot benefit from existing citizenship and immigration principles or remain barred from naturalization under current law.<sup>29</sup> Shachar argues that this “rootedness principle recognizes the social membership of long-term residents who, as a result of their involvement and stake in the life of the polity, become part of the [community].”<sup>30</sup> It is important to note that *jus nexi* does not force membership upon anyone; it requires that a noncitizen display both intent and effort in the development of these ‘real and effective links’ if they choose to join the society and go down the path of earned citizenship. *Jus nexi* does not depend on physical presence; it also depends upon a concerted effort on the part of the noncitizen to earn full political membership. *Jus nexi* citizenship adds dignity to immigrants’ experience, as it serves as a source for agency in seeking and securing political membership in addition to validating community involvement. This avenue to full political membership is grounded in the ideas of actual membership, real and effective

---

<sup>26</sup> Ayelet Shachar, “Earned Citizenship: Property Lessons for Immigration Reform,” 5.

<sup>27</sup> Ayelet Shachar, “Earned Citizenship: Property Lessons for Immigration Reform,” 27.

<sup>28</sup> Ayelet Shachar, “Earned Citizenship: Property Lessons for Immigration Reform,” 19.

<sup>29</sup> Ayelet Shachar, “Earned Citizenship: Property Lessons for Immigration Reform,” 8. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). Shachar notes that the decision pronounces that there are “two sources of citizenship, birth and naturalization.”

<sup>30</sup> Ayelet Shachar, “Earned Citizenship: Property Lessons for Immigration Reform,” 20.

contribution, and social attachment. The question now becomes, does *jus nexi* have pragmatic value?

*Jus nexi* has pragmatic value, especially with regard to the members of what Shachar and I call the ‘1.5 generation’. The 1.5 generation are not first-generation immigrants in the sense that they immigrated at a young age and thus could not choose to immigrate, and not second generation in that they were not born in the state in which they reside. *Jus nexi* reconciles their legal realities to social transformations and rights wrongs that are not of their making.<sup>31</sup> *Jus nexi* offers the most principled and pragmatic approach in resolving the plight of the 1.5 generation. In fact, the United States has already used *jus nexi* standards to grant deportation relief to the 1.5 generation with the implementation and renewal of the Deferred Action for Childhood Arrivals program.<sup>32</sup> Opening *jus nexi* to the 1.5 generation will not encounter much opposition, even among consensualists, chiefly because 1.5 generation immigrants did not ‘consent’ to break immigration law and thus should not be held responsible for their status.

Up until now, I have argued that *jus nexi* allows for the inclusion of the 1.5 generation. However, I have not argued for a reason why they ought to be included. The reason I posit I call the ‘sense of self’ argument. I define ‘sense of self’ to mean a collection of beliefs about oneself; however, I limit the definition to the extent that these beliefs are contingent on the 1.5 generation immigrant’s presence in and interaction with a nation-state and its culture. Members of the 1.5 generation have formed a connection with that state such that their sense of self has been shaped by the state, i.e. these immigrants have met the ‘real and effective link standard’ that *jus nexi* requires. Meeting this standard happens through various activities that include: attending school, consuming the culture of the society, and going through the culture’s rites of passage.<sup>33</sup> In this sense, there is no pragmatic or significant distinction between members of the 1.5 generation and those of the 2<sup>nd</sup> generation. Moreover, it would be absurd to argue that the 1.5 generation’s investment in the society is disingenuous because it is the very culture of the nation-state that molds the 1.5 generation immigrant’s sense of self. To deny citizenship to the 1.5 generation, whose sense of self is inextricable from the state in which they reside, is morally unjust. This is

---

<sup>31</sup> Ayelet Shachar, “Earned Citizenship: Property Lessons for Immigration Reform,” 35.

<sup>32</sup> “Differed Action,” Published November 16, 2012, [dhs.gov/deferred-action](https://dhs.gov/deferred-action).

<sup>33</sup> Cultural rites of passage can involve interaction with the state. In American culture, obtaining a Drivers’ License is one of these rites. However, depending on the state, this rite may be unavailable to the 1.5 generation.

because denial of citizenship prevents the 1.5 generation from receiving the benefits and protections of political membership to which their personal connection entitles them. Furthermore, to threaten deportation to their former state with which they have no connection would render them stateless; all states have a moral obligation to prevent statelessness.<sup>34</sup> Thus, *jus nexi* grants citizenship in a way that respects the 1.5 generation as individuals who not only invest in the nation-state but consider themselves to be members in a morally relevant way.

I'll spend some time responding to a possible counterargument. One issue with the *jus nexi* view is the very fact that it roots citizenship in the participation in civic life. However, many aspects of civic life are open only to citizens. If all aspects of civic life are open even to non-citizens, one could argue that citizenship is arbitrary as there are no longer any distinctions between citizens and non-citizens. This point does compel me to make my view clearer. I am not arguing that every aspect of civic life should be open to non-citizens; it would indeed make citizenship arbitrary. However, I argue that whatever aspects of civic life are open to non-citizens should, through non-citizen participation in said aspects, lead to citizenship and participation in aspects open only to citizens. As an exercise, let us take one aspect of civic life such as voting. Suppose that non-citizens can vote in local and municipal elections, but not in state and national elections. In my view, voting in local elections can be part of a non-citizen's claim for citizenship such that she can vote in state and national elections. However, these aspects of civic participation open to non-citizens are not limited to the political process. Although those are too numerous to list, the general rule of thumb can be that non-citizen participation in the social and cultural life of the nation (even that of their own culture in the new state) can add to a claim for citizenship under *jus nexi*.

#### **IV. Conclusion**

Conversing on citizenship in purely consensualist/*jus soli* terms represents a false dichotomy. However, an exposition of the two is important. Consensualist citizenship policy is built on the idea that being a citizen includes a citizen's tacit or express consent to be a member of a society and society's right to select who enters the society. Consensualism is built on the Lockean idea that people can only be subject to a government after reaching the age of discretion and willfully

---

<sup>34</sup> Matthew Lister, "Citizenship, in the Immigration Context," 202.

consenting to citizenship. Smith (who has now revised his position)<sup>35</sup> and Schuck expand on this, arguing that citizens have not consented to including undocumented immigrants and their children. Thus, exclusion is a core tenet of consensualism. Jacobson replies that consensualism allows for morally arbitrary standards for exclusion – this includes race-based standards. *Jus soli* aims to remedy this by being racially egalitarian; however, it is subject to the same pitfalls as consensualism. From a theoretical standpoint, *jus soli* does not solve the arbitrariness objection. Pragmatically speaking, both consensualism and *jus soli* leave an important demographic out – the 1.5 generation. To include them, I argue for a third option, *jus nexi*, which uses the idea of rootedness as a standard for political membership. *Jus nexi* relies on a ‘real and effective’ link between a person and the community in which she has not only deeply invested, but to which she intends to pledge allegiance to. I make a normative argument for *jus nexi* by positing the ‘sense of self’ argument, which recognizes the nation-state’s role in the formation of a person’s identity as a morally relevant criterion for receiving citizenship. This is important in developing an equitable standard of citizenship for those who either cannot benefit from existing citizenship and immigration principles or remain barred from naturalization under current law. *Jus nexi* is thus important to a normative definition of citizenship in the modern nation-state.

---

<sup>35</sup> See Rodgers M. Smith, “Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008,” *Journal of Constitutional Law* 11 (2009): 1329-1335.