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ORIGINAL ARTICLE

Inventing Birthright: The Nineteenth-Century Fabrication of *jus soli* and *jus sanguinis*

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Abstract

Formal membership in a state has been an essential political status for well over a century. It is typically gained at birth, either *jus soli* or *jus sanguinis*. *Jus soli* assigns nationality by birth in a nation's territory; *jus sanguinis* assigns children their parents' nationality. This article provides an alternative intellectual history of the modern dominance of these principles for attributing nationality. Contrary to prior scholarship, *soli* and *sanguinis* were not restatements of existing principles. The *soli*/*sanguinis* binary was a nineteenth-century invention. Old-regime European empires attributed membership in the community under one or another single natural law principle. Parentage and birthplace were mostly evidence of conformity. In the early nineteenth century, officials in multiple jurisdictions began prioritizing positive law above natural law and transformed parentage and birthplace into competing principles for assigning nationality. This movement crystallized in 1860 when Charles Demolombe introduced *jus soli* and *jus sanguinis* to nationality law as competing, ostensibly ancient legal traditions. The framework spread quickly because it was a useful way to assign nationality despite states' conflicting approaches to political membership. Yet, as its role in *United States v. Wong Kim Ark* (1898) helps illustrate, the invented tradition has also obscured our understanding of more complex historical dynamics.

Introduction

Formal membership in a state—what is today called nationality—has been an essential political status for well over a century. Those who lack nationality cannot exercise most political rights. Today, nationality is necessary to benefit from social programs, and it is linked to key duties of belonging.[1] The vast

[1] Note that the converse is not true: nationality alone does not confer the full range of citizenship rights on most individuals. See, e.g., Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Utah, Supporting Plaintiffs-Appellees, 8–13, no. 20-4017, *Fitisemanu v. United States*,

majority of people acquire their nationality at the moment of birth.[2] Modern jurists recognize two mechanisms for this attribution: *jus soli* and *jus sanguinis*. *Jus soli*, the "law of soil," assigns nationality to persons born in a nation's territory; *jus sanguinis*, the "law of blood," assigns children the nationality of their parents. The two mechanisms are conceptually distinct, though they can be combined or overlapped with one another, or limited in extent.

Scholars of nationality law have interpreted the modern, two-headed regime of *jus soli* and *jus sanguinis* as a nineteenth-century restatement of methods for attributing allegiance that had long existed in two distinct premodern legal traditions. One was the English common law, which from the medieval period onward treated those born within the king's territory as his subjects. This tradition, scholars have argued, was ancestor to the modern principle of *jus soli*. The other was early modern "Roman" or civil law, prevalent on the European continent, which modeled itself on certain ancient Greek and Roman practices that passed political membership from father to son. This tradition gave rise to the modern *jus sanguinis* rule, which confers nationality based on the nationality of the parents. On this interpretation of the emergence of the modern models for assigning allegiance, nineteenth-century legislators and jurists melded two distinct European legal regimes to create a bipolar and universal system for assigning nationality at birth.[3]

This article provides an alternative intellectual history of how *jus soli* and *jus sanguinis* came to be the principles for attributing nationality at birth in the modern era. Far from being a restatement of ancient law, the *soli*/*sanguinis* binary was a nineteenth-century invention. The two principles began to take shape during the first third of the nineteenth century, emerging from the rapidly shifting legal landscape of the age of Atlantic revolutions. French courts during the 1840s and 1850s were among the first to sharply distinguish birth

2021 U.S. App. LEXIS 17819 (10th Cir. 2021); Frederic R. Coudert, Jr., "Our New Peoples: Citizens, Subjects, Nationals or Alien," *Columbia Law Review* 3 (1903): 29–32.

[2] Many people have had little reason to secure formal recognition of their nationality at birth. When the status became relevant later in life, such individuals could face difficulties demonstrating that the circumstances of their birth qualified them for nationality. See, e.g., Polly J. Price, "*Jus Soli* and Statelessness: A Comparative Perspective from the Americas," in *Citizenship in Question: Evidentiary Birthright and Statelessness*, eds. Benjamin N. Lawrance and Jacqueline Stevens (Chapel Hill, NC: Duke University Press, 2017), 27–42.

[3] Polly J. Price, "Natural Law and Birthright Citizenship in Calvin's Case (1608)," *Yale Journal of Law & Humanities* 9 (1997): 78, contends that "both the *jus soli* and the *jus sanguinis* are in the first instance products of medieval law." Kunal M. Parker, *Making Foreigners: Immigration and Citizenship Law in America, 1600–2000* (New York: Cambridge University Press, 2015), 52, refers to the "*jus soli* or birthright citizenship rule of Calvin's Case [1608]," and Linda Kerber describes *jus soli* as a "common law principle" with "deep roots in medieval England." Linda K. Kerber, "Birthright Citizenship: The Vulnerability and Resilience of an American Constitutional Principle," in *Children Without a State: A Global Human Rights Challenge*, ed. Jacqueline Bhabha (Cambridge, MA: MIT Press, 2011), 287–68. On *jus sanguinis*, see Alexander Porter Morse, *A Treatise on Citizenship, by Birth and by Naturalization* (Boston: Little, Brown & Co., 1881), 12, and Patrick Weil, *How to Be French: Nationality in the Making Since 1789*, trans. Catherine Porter (Chapel Hill, NC: Duke University Press, 2008), 23–25, who uses the term "jus sanguinis" to describe the jurist Tronchet's late-eighteenth-century theory of nationality.

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on soil and descent as competing principles for attributing nationality at birth. A French law professor, Charles Demolombe, crystallized this novel jurisprudence in an 1860 commentary on the French Civil Code, and it spread rapidly from his writings into the legal vocabulary on both sides of the Atlantic.

The novelty of the *soli/sanguinis* binary becomes clearer when set against the backdrop of the law governing membership in European empires during the seventeenth and eighteenth centuries. Each of these empires attributed membership at birth primarily on the basis of one or another single overarching legal principle, supposedly grounded in natural law. For some empires, the most important principle for assigning membership was birth under the "protection" of a sovereign. For others, it was demonstrating "love" toward the community. Jurists paid attention to birth on territory and descent as two among a number of criteria or mechanisms that determined whether a controlling principle was applicable in a particular case. But under the old regime, neither birth on territory nor descent was dispositive in itself of a child's allegiance.

The revolutions that coursed through the Atlantic empires between 1765 and 1825 ushered in a period of uncertainty and rapid flux in nationality law. The United States, France, and the republics of South and Central America all produced constitutions and legal codes that redefined the nature of political membership, including the criteria by which it was assigned. Many of these codes named birthplace and descent explicitly as criteria for membership at birth, elevating their importance in the new states' nationality jurisprudence. Yet there was no clean break from the old regime. Jurists in the post-revolutionary states continued to invoke pre-revolutionary principles to resolve difficult cases. The rise in military conscription and international migration in the early nineteenth century created difficult and sometimes novel questions about how to assign membership at birth. As jurists wrestled with these cases, they struggled with how to apply old and new principles for assigning membership within and across international borders.

Legislators and judges in multiple jurisdictions during the first decades of the nineteenth century slowly converged on a common solution: transforming parentage and birthplace into two distinct principles for the assignment of nationality at birth. The process was long and halting but the direction was clear. Legislators deemphasized the role of natural law in creating political membership, and they and jurists became more explicit in relying on birthplace and descent as discrete principles for assigning membership. Judges in France developed a distinctive version of this jurisprudence: they framed parentage and birthplace as *competing* rules for assigning the quality of French-ness at birth. It was this interpretation that Charles Demolombe systematized in 1860. Borrowing the terms *jus soli* and *jus sanguinis* from private law, he formulated a putatively clean dichotomy between two principles for assigning nationality at birth, each of which he assigned a fictive origin in a discrete legal tradition that existed from time immemorial.

Demolombe's distinctive and original repackaging of nationality law spread rapidly and widely after 1870, adopted wholesale by jurists and officials around the world, including in Great Britain and the United States. The new

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framework, cloaked in a simulacrum of antiquity, spread quickly because it was so useful. It offered a universal method for assigning nationality, applicable to all states, from democratic republics to kingdoms to empires, regardless of their internal constitutions. Using birthplace and parentage as the sole principles for assigning nationality simplified or evaded difficult questions about how states with different notions of sovereignty created political membership. The new paradigm also offered a new and potentially powerful instrument to those seeking to remake the law of political membership in the age of empires. U.S. white supremacists tried to use the concept of *jus sanguinis* in *United States v. Wong Kim Ark* (1898) to challenge the settled meaning of the Citizenship Clause of the Fourteenth Amendment. In swatting down their claim, the U.S. Supreme Court crafted its own fiction, a supposed immemorial North American *jus soli* tradition.

Recovering the story of how *jus soli* and *jus sanguinis* were invented casts new light on the development of nationality law and the construction of historical knowledge by legal practitioners. The story reveals an unknown piece of how jurists forged the nationality regime of the nineteenth century out of the materials of old regime allegiances: by transforming two of the old regime criteria for measuring natural belonging, birthplace and parentage, into principles for the assignment of nationality at birth. This process developed out of jurists' efforts to rationalize and systematize revolutionary-era reconfigurations of nationality law. The process took place through a dialogue between civil law and common law jurisdictions, showing how even before the rise of modern international law, the law of nationality was being forged in an inter-polity space. The story of *jus soli* and *jus sanguinis*'s creation and uptake is also an exemplary illustration of how legal practitioners adopt doctrinal innovations cloaked in an aura of historicity, and the unexpected effects this process can have. Unlike many other historical arguments made by courts, the *soli/sanguinis* binary had a definite origin point in the recent past. Its rapid and uncritical uptake by jurists in the late nineteenth century illuminates the instrumental character of historical knowledge in legal decision making.

The single principle of belonging in the European old regime

In the Atlantic empires of the seventeenth and eighteenth centuries, jurists and political theorists believed that individuals belonged to their political communities by the action of a single, natural principle. Theorists in early modern France and England/Britain, which were constructed as communities of subjects owing allegiance, identified a sovereign's "domination" or "protection" as the overarching principle that created a bond of allegiance and a relation of subjecthood.[4] Allegiance was a "natural" or "spiritual" bond, as one recent

[4] This and the following paragraphs concern the attribution of formal allegiance to sovereigns in early modern Europe. As compared to later periods, such allegiance was less important then and other, more local forms of belonging were relatively more important. See particularly Tamar Herzog, *Defining Nations: Immigrants and Citizens in Early Modern Spain and Spanish America* (New

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scholar has put it, created automatically between subject and ruler at the moment that the individual came under the sovereign's exclusive "power" or "protection."[5] As Sir Edward Coke explained in 1608, "power and protection draweth ligeance" (allegiance).[6] The transatlantic Spanish empire imagined itself in different terms: not as "a community of allegiance" but as a society united by "love" for the community and "integration" within it. The principle of "love" or "integration" that defined who was a Spanish "native" was understood to be rooted in the natural order of society. Jurists recognized the power of "love" as the rule creating the community; they did not legislate it.[7]

The condition of being a "natural" subject was consequential and created by a power beyond even that of kings. In the British and French empires, only natural-born subjects could exercise full property rights, and both empires limited offices of trust and responsibility to native-born subjects.[8] Castilian law held that only Castilian "natives" were allowed to hold ecclesiastical benefices and other offices.[9] The king himself could not usually create the condition of native-ness after birth. The French king could naturalize foreigners, but these naturalizations could not lift all "civil incapacities" attendant on foreign-ness. The Spanish monarchs conceded in the early modern period that they could grant only a subset of the rights and privileges of "natives" to foreigners.[10]

Haven, CT: Yale University Press, 2003) and Simona Cerrutti, *Étrangers; Étude d'une condition d'incertitude dans une société d'Ancien Régime* (Paris: Bayard, 2012). For a similar claim about the place of citizenship in the early U.S. republic, see William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in *The Democratic Experiment: New Directions in American Political History*, eds. Meg Jacobs, William J. Novak, and Julian E. Zelizer (Princeton, NJ: Princeton University Press, 2003), 85–94.

[5] Hannah Weiss Muller, *Subjects and Sovereign: Bonds of Belonging in the Eighteenth-Century British Empire* (New York: Oxford University Press, 2017), 25. Blackstone refers to this as the "intrinsic allegiance" owed by a subject to his or her sovereign: see William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765), 1:369.

[6] Edward Coke, "Report of *Calvin's Case*," in *Selected Writings of Sir Edward Coke* (Indianapolis, IN: Liberty Fund, 2003), 1:188, 196–97. For an excellent discussion of this case and its conclusion, see Price, "Natural Law and Birthright Citizenship," 114. For the definition as identical to "allegiance," see "ligeance, n." in *Oxford English Dictionary Online* (accessed October 16, 2018). Pothier, the author of an influential eighteenth-century summa of French law, wrote that "true and natural Frenchmen" were those "born within the reach of French power." Robert-Joseph Pothier, "Des Personnes," titre II, sect I, in *Oeuvres posthumes de M. Pothier* (Paris: Barrois le jeune, 1778), 2:573. There is some ambiguity in these terms: *étendue* can refer to a physical measure (distance), but is also used figuratively (cf., English "extent"). "Domination" might refer to the physical realm, but the *Dictionaire de l'Academie Française* suggests a more figurative meaning: "power" or "sovereign authority."

[7] Herzog, *Defining Nations*, 30.

[8] On the *droit d'aubaine*, see Peter Sahlins, *Unnaturally French: Foreign Citizens in the Old Regime and After* (Ithaca, NY: Cornell University Press, 2004); on inheritance rights in England, see Blackstone, *Commentaries on the Laws*, 1:374. See also Sahlins, *Unnaturally French*, 66: naturalization "never fully protected the foreigner from all the civil incapacities" that attended on foreign-ness.

[9] Herzog, *Defining Nations*, 64.

[10] Ibid., 76–80; Simon Stern, "Legal Fictions and Legal Fabrication," in *Fictional Discourse and the Law*, ed. Hans Lind (Oxford: Routledge, 2020), 191–99, identifies doctrines such as corporate personhood and civil death that use everyday words and so can be deployed in ways that shape vernacular

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Jurists in each empire considered that there were multiple mechanisms or criteria by which "love," "power," or "protection" created this crucial condition of native-ness. British and French jurists emphasized the role of a sovereign's territory and the authority of fathers as crucial vectors for the action of a sovereign's "power" and "protection." The territorial extent of royal power meant that those born within a king's territorial ambit were his natural-born subjects. For the French jurist Pothier, the zone of royal "domination" included any country "subject to the jurisdiction [*l'obéissance*] of the King," including "French colonies" and "countries [*pays*] where the French have factories [*établissemens*]."[11] Much the same was true of the English king, as Coke illustrated in his report of *Calvin's Case* with a lengthy list of regions whose inhabitants were then or had once been natural-born subjects of the British king.[12]

In the British and French empires, royal "power and protection" extended to some classes of children born to subjects physically outside the realm. During the seventeenth and eighteenth centuries, the French crown came to view the king's "power" as extending to the children born abroad of a French father, provided that the child would (in theory) return to live in French territory.[13] By the mid-eighteenth century, most British jurists agreed that it had become a principle of the common law that the children born to English fathers outside of the realm were also natural-born Englishmen.[14] This principle was further extended by early-eighteenth-century statutes, which held that "all children, born out of the king's ligeance, whose fathers (or grandfathers by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves."[15]

meanings as well technical legal interpretations. The capacity of parliamentary and royal "naturalizations" to be used in these ways seems to have been limited by jurists' insistence on distinguishing their rights and duties from their "natural" counterparts.

[11] Pothier, "Traité des Successions," titre I, sect I, in *Oeuvres posthumes*, 2:2. For the translation of "obéissance" as "jurisdiction," see *Le Petit Robert de la langue française* (Paris: Le Robert, 2003).

[12] Coke, "Report of *Calvin's Case*," 1:220. He closely analogized the situation of the Irish to that of inhabitants of Calais and Gascony (p. 219) and noted that certain aspects of English law (he mentions treason law) extended to Ireland (p. 220).

[13] Sahlins, *Unnaturally French*, ch. 1, esp. 62–64; and see Pothier, "Traité des Successions," titre I, sect I, in *Oeuvres posthumes*, 2:2: "Ceux qui sont nés en pays étrangers, mais d'un pere François qui n'y étoit point établi, & qui n'avoit point perdu l'esprit de retour en France, sont aussi, par leur origine, François." This is a version of the *animus revertendi* test for residence and/or nationality.

[14] This principle began as a 1541 statute, which declared that children born to English parents abroad were English. This measure was intended to encourage English commerce by assuring English merchants that they could establish themselves abroad without risking that their heirs born overseas would lose their right to inherit in England. See Blackstone, *Commentaries on the Laws*, 1:373. This development, following Blackstone, has often been attributed to a statute of 1351, *De natis ultra mare*, for which, see Price, "Natural Law and Birthright Citizenship," 83. However, Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge, UK: Cambridge University Press, 2001), 155–58, shows convincingly that this is an erroneous interpretation of the earlier statute created (perhaps by accident) by a later editor and commentator, John Rastell.

[15] Blackstone, *Commentaries on the Laws*, 1:372–73. In this passage, Blackstone is quoting the language of a 1730 statute, 4 Geo. 2 c.21, which deemed the children of natural-born subjects, born outside of the king's domains, to be natural-born subjects of the king themselves.

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The father's legal power within the family underlay the British and French insistence that the father's status, not the mother's, should guide the allegiance attributed to children born outside of the realm. At first blush, the legal primacy of fathers in determining allegiance at birth might seem to be derived from inheritance law: by this reasoning, just as legitimate children inherited their father's property, they also inherited his allegiance. But these were not the terms on which legal thinkers framed the question. British and French jurists and commentators instead invoked the father's legal power over his minor children to explain why his allegiance determined that of his child. The father's power within the family meant that he could compel his family to move or act in ways that affected subjecthood. The theme of "power" determining allegiance thus extended into the family itself.[16]

In the Spanish empire, as in the French and British, there were multiple criteria to consider in deciding whether someone was a "native." Birth in specific Spanish territories and descent from Spaniards were important criteria, to be sure. But neither territory nor descent were dispositive in themselves; they sat alongside other factors, such as religion and race, which could render one a legal non-native.[17] And the requisite relationship could ripen (or go stale) at any point in a person's life.[18]

The different principle that defined the Spanish community led to different outcomes than those in the English/British and French scenes.[19] Spanish "nativeness" could be extended to people of foreign birth who were long resident in a Spanish kingdom and had fully integrated into the community. Conversely, it excluded some persons born in a Spanish kingdom who were considered to be outside of the community for reasons of religion, race, or other causes.[20] The difference from French and English/British principles is particularly visible in the case of the children of subjects born abroad. Spanish kingdoms generally required that in order to be members of the "community," children had to be born within Spanish territory to Spanish parents. Specific exceptions were made in Castilian law for the children of those on royal business or temporary travel, but these were regarded as carve-outs from the general rule.[21]

In sum, across the main Atlantic empires of the seventeenth and eighteenth centuries, jurists defined membership by means of one or another single,

[16] See Pierre-Antoine Fenet, *Recueil complet des travaux préparatoires du code civil*, 15 vols. (Paris: Videcoq, 1836), 7:9 ("la volonté du père décide de l'état du fils").

[17] Herzog, *Defining Nations*, 9–13.

[18] Ibid., 41–42.

[19] Ibid., 70–76, 194, 199. Herzog also emphasizes the "exceptional" role of "local citizenship" in defining and policing the boundaries of belonging into the eighteenth-century Spanish context, by comparison to Italy, France, and England/Britain.

[20] Ibid., 70–76, 121.

[21] On this point, see ibid., 74–75, and on the laws of Navarre in particular see a decree of 1692 that declared "ser Natural deste Reino...el que fuere procreado de padre, o madre natural habitante en este dicho Reino," and specified that "la palabra *habitante*, se entienda *habitante actual*": *Novissima Recopilacion de las leyes de el reino de Navarra, hechas en sus cortes generales desde el año de 1512 hasta el de 1716 inclusivè...* (Pamplona: Martinez, 1735), 1:426.

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empire-specific natural principle that existed prior to manmade law. This was the sovereign's "power" or "protection," which created allegiance in the French and British empires, or in the Spanish empire the individual's "love" for and "integration" into the community. These principles operated through a number of vectors, including birth on the sovereign's territory, descent from the sovereign's subjects, or (in the Spanish case) long residence and integration in the community. But these were merely pathways or mechanisms through which the underlying principles of "power" or "love" acted on individuals, or which provided measures of whether "power" or "love" were present. They were not the principles themselves that created "natural" subjects or "natives."

Birthright belonging in the Atlantic revolutionary era, 1780s–1820s

The revolutions of the late eighteenth and early nineteenth centuries transformed the law governing the attribution of membership at birth in the United States, France, and the former Spanish empire. Conventions, legislatures, and jurists rewrote the rules about who would be part of the national community, and on what terms. Yet the transformation of the revolutionary period was not a sharp break. From the 1790s through the 1840s, legislators and jurists wrestled inconclusively with the problem of assigning membership in revolutionary and post-revolutionary states. They continued to invoke old regime principles for assigning membership at birth, such as "power" and "love." But the vectors or mechanisms by which these principles had operated in the old regime gradually evolved into principles in themselves for attributing nationality.

Jurists in the early-nineteenth-century United States continued to use the language of "power" and "protection" to describe who would be assigned the status of American citizen at birth. In his influential 1804 *Lectures on Law*, James Wilson, a framer of the U.S. Constitution and a key figure in early U.S. jurisprudence, used language to describe membership at birth that was virtually identical to that of eighteenth-century British jurists. A "citizen as soon as he is born, is under the protection of the state, and is entitled to all the advantages arising from that protection; he, therefore, owes obedience to that power, from which the protection which he enjoys is derived." This passage merely swapped "citizen" in for "subject."[22] Justice Joseph Story concurred in a U.S. Supreme Court's decision rendered some 25 years later (*Inglis v. Trustees of Sailor's Snug Harbor* [1830]). He stated as a maxim, echoing Coke, that "birth within the protection and obedience, or in other words within the ligeance of the sovereign" was the basis for assigning U.S. citizenship at birth.[23]

Early U.S. legislators and jurists followed eighteenth-century British precedent as well in seeing the principle of "protection" as operating through both

[22] James Wilson, "Lectures on Law," in *The Works of the Honourable James Wilson*, ed. Bird Wilson (Philadelphia: Bronson and Chauncey, 1804), 1:313.

[23] *Inglis v. Sailor's Snug Harbor*, 28 U.S. 99, 155 (1830).

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birth-on-territory and descent. The major Federal statements of citizenship law during the early republican period, the 1790 Naturalization Act and its revisions in 1795, 1798, and 1802, all suggested that those born within the "limits and jurisdiction" of the United States were native-born citizens. They also declared that children of U.S. citizens born abroad "shall be considered as natural born citizens." The text of the statute could be read to suggest that Congress intended to distinguish between descent and birthplace as distinct and unequal means of acquiring U.S. citizenship at birth.[24] A considerable body of contemporary legal opinion, however, argued that the language of the Naturalization Acts did not in fact mean that the United States distinguished sharply between birthplace and descent.[25] The most explicit statement on the subject was an 1844 decision written by New York Vice-Chancellor Sandford in *Lynch v. Clarke*, a case concerning the citizenship of a woman born on U.S. soil to British parents. Sandford argued that the common law principle of citizenship-by-descent had been incorporated into U.S. law.[26] The language in the Naturalization Acts pertaining to children of U.S. citizens born abroad had been written purely out of "superabundant caution" to ensure that their status remained clear. The principle of "protection," acting through the two mechanisms of birth-on-soil and descent, was still how the United States attributed citizenship.[27]

[24] Nationality Act of 1790, 1 Stat. 103, 104 (1790); United States Naturalization Act of January 29, 1795, 1 Stat. 414, 415; "An Act to Establish a Uniform Rule of Naturalization, and to repeal the acts heretofore passed on that subject" (April 14, 1802). On how deeming can be read as creating tightly bounded exceptions or generative metaphors, see Simon Stern, "Legal Fictions and Exclusionary Rules," in *Legal Fictions in Theory and Practice*, eds. Maksymilian Del Mar and William Twining (New York: Springer, 2015), 168–71; James Kent, "Of Aliens and Natives," in *Commentaries on American Law*, 5th ed. (New York: printed for the author, 1844), 2:33–34, took a similarly territorial view of the extent of U.S. "protection" and citizen-making.

[25] David Ramsay, historian and politician, in an often-cited 1789 dissertation on citizenship law, stated that "citizenship is the inheritance of the children of those who have taken a part in the late revolution," strongly suggesting that citizenship could pass to children. David Ramsay, *A Dissertation on the Manner of Acquiring the Character and Privileges of a Citizen of the United States* ([Charleston, SC,] 1789), 4. Justice Story argued that it was a principle of the "law of nations" that "persons who are born in a country are generally deemed to be citizens and subjects of that country." But he noted immediately after that this principle would not apply to the children of parents who retained domicile in their home country. Since he thought the "native domicil easily reverts," his view conforms to the single principle of allegiance (power and protection) making citizens out of the domestic- and foreign-born: see Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* (Boston: Hilliard, Gray & Co., 1834), 44–49.

[26] See *Lynch v. Clarke*, 1 Sand. Ch. 583 (1844). On African-Americans and birthright citizenship in the antebellum period, see especially Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (New York: Cambridge University Press, 2018). Other exceptions also existed. For cases involving minors at the time of American independence, see *Inglis v. Sailor's Snug Harbor*, 28 U.S. 99 (1830). On debates over the citizenship status of American Indians, see, e.g., Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790–1880* (Lincon: University of Nebraska Press, 2007), 180–201. On the children of ambassadors, see Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton, NJ: Princeton University Press, 1996), 171.

[27] *Lynch*, 248.

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The idea that "power" or "protection" produced citizenship should have extended fully to free Americans of African descent. Yet the status of free people of color remained, as it had been in the colonial period, a terrain of debate. There is abundant evidence that Black men and women who were born free in the colonial period had been considered subjects of the king in some form.[28] They were entitled to key benefits of subjecthood, including the right to petition and call upon the king's protection.[29] They were also subject to its duties, including (in some instances) the obligation to muster with the colonial militia.[30] (Enslaved people, considered property rather than persons under the law, were not considered subjects in the British empire.[31]) Yet free Black men and women during the colonial period were subjected to forms of legal constraint that would not have been accepted for free white Britons. In Virginia and other slave societies, free Black people faced limits on their ability to marry White individuals and to testify in court. In other jurisdictions, legislators and the courts limited their ability to vote and exercise other rights of subjecthood.[32]

Advocates of Black rights in the antebellum United States leaned into the old principles of "protection" and "power" to argue that free Black people were citizens. The "doctrine of natural allegiance," wrote the New York abolitionist William Yates in 1838, had no exception for color. It "reaches the man of one complexion as much as that of another" for one "*is not a citizen to obey, and an alien to demand protection.*"[33] The anti-slavery lawyer Joel Tiffany agreed. He cited Blackstone for the proposition that people of color were "natural born" into "national allegiance" "immediately upon their birth" in the United States because they were "under the king's protection; at a time too, when they are incapable of protecting themselves."[34] For additional authority, one had to look no further than Chancellor Kent's authoritative *Commentaries on American Law*. According to Kent, "at common law, all human beings born within the ligeance of the king, and under the king's obedience, were natural born subjects.... I do not perceive why this doctrine does not apply to these

[28] See Kent, *Commentaries on American Law*, 2:257.

[29] Ibid.

[30] Ira Berlin, *Slaves Without Masters: The Free Negro in the Antebellum South* (New York: Pantheon, 1974), 8.

[31] Ibid. On the same principle applying in the antebellum United States, see William Yates, *Rights of Colored Men to Suffrage, Citizenship, and Trial by Jury* (Philadelphia: Merrihew and Gunn, 1838), 38 ("slaves are not citizens ... because they are held as *property*").

[32] For examples of the equivocal, subordinate place of free people of color in British colonial North America, see Alejandro de la Fuente and Ariela Gross, *Becoming Free, Becoming Black: Race, Freedom, and Law in Cuba, Virginia, and Louisiana* (New York: Cambridge University Press, 2020), 27–33, 73–75; Berlin, *Slaves Without Masters*, 4–10.

[33] Yates, *Rights of Colored Men*, 36–37; Jones, *Birthright Citizens*, 4–5. The Federal government's decision to issue certificates of citizenship to African-American sailors starting in 1796 also showed that the government sometimes recognized African-American citizenship, even if only for instrumental reasons: Nathan Perl-Rosenthal, *Citizen Sailors: Becoming American in the Age of Revolution* (Cambridge, MA: The Belknap Press of Harvard University Press, 2015), 13–15.

[34] Joel Tiffany, *A Treatise on the Unconstitutionality of American Slavery* (Cleveland, OH: J. Calyer, 1849), 92–93; Yates, *Rights of Colored Men*, 47.

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United States.... [I]f a black man be born within the United States, and born free, he becomes thenceforward a citizen."[35]

White resistance spurred Black Americans and their allies to develop novel principles on which to base their claims for Black citizenship. States and territories enacted laws making it hard or impossible for Black individuals to move in or to stay once present. The threat of forcible expulsions hung in the air.[36] Black Americans and their allies responded by asserting new principles that they argued guaranteed them citizenship from birth. These included a principle of long presence (the United States was the only country they had ever known and the land of their ancestors), a principle of civic and military engagement (based on Black Americans' economic and military contributions to the United States), and even an invocation of statelessness (if they were not Americans, they had no country).[37]

In response to these multi-faced citizenship claims, antebellum white jurists elaborated a counter-theory, what might be called a negative-descent principle, that would have rendered all Afro-descended people ineligible for citizenship. South Carolina lawyer and historian David Ramsay had hinted at such a doctrine in his 1789 treatise, arguing that "citizenship... *as a natural right*, belongs to none but those who have been born of citizens since" independence. Presuming that colonial residents of African descent had not become part of the original people of the United States, he concluded that "Negroes are inhabitants, but not citizens" of the United States.[38] As Attorney General of the United States in 1834, Roger B. Taney formalized this unique, descent-based exclusion of Black Americans from citizenship. Taney asserted that the "African race in the United States even when free, are every where a degraded class." Black Americans held "privileges of citizenship," if at all, "by the sufferance of the white population." Hence, he concluded in terms that others soon echoed, African Americans "were never regarded as a constituent portion of the sovereignty of any state" or "as a portion of the people of this country."[39]

[35] Kent, *Commentaries on American Law*, 2:257–58.

[36] Berlin, *Slaves Without Masters*, 103–7, 200–5, 360–64, 372–80; Leon F. Litwack, *North of Slavery: The Negro in the Free States* (Chicago: University of Chicago Press, 1961), 20–26, 66, 70–75, 94–97, 252–53, 275–79; Jones, *Birthright Citizens*, 1, 40–41, 89–94; de la Fuente and Gross, *Becoming Free*, 142, 159–70; Leslie M. Harris, *In the Shadow of Slavery: African Americans in New York City, 1626–1863* (Chicago: University of Chicago Press, 2004), 5, 49–50, 118; Julie Winch, *A Gentleman of Color: The Life of James Forten* (New York: Oxford University Press, 2002), 286–95.

[37] Jones, *Birthright Citizens*, 63–64, 89–91; Berlin, *Slaves Without Masters*, 204–6; Litwack, *North of Slavery*, 25–26; Tiffany, *A Treatise on the Unconstitutionality*, 93; Yates, *Rights of Colored Men*, 39–43; Patrick Rael, *Black Identity and Black Protest in the Antebellum North* (Chapel Hill, NC: University of North Carolina Press, 2002), 238, 262; Floyd J. Miller, *The Search for a Black Nationality: Black Emigration and Colonization, 1787–1863* (Urbana, IL: University of Illinois Press, 1975), 129; Leslie M. Alexander, *African or American? Black Identity and Political Activism in New York City, 1784–1861* (Urbana, IL: University of Illinois Press, 2008), 27, 72, 80, 86, 122, 136, 144, 152.

[38] Ramsay, *A Dissertation on the Manner*, 1, 6 (emphasis added); Earl M. Maltz, "Fourteenth Amendment Concepts in the Antebellum Era," *American Journal of Legal History* 32 (October 1988): 342–43.

[39] H. Jefferson Powel, "Attorney General Taney & the South Carolina Police Bill," *Green Bag* 5 (2001): 75, 84–85, 90; Litwack, *North of Slavery*, 52–53; Maltz, "Fourteenth Amendment Concepts,"

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The conflict over the citizenship of Black Americans in the antebellum United States thus pushed both advocates and opponents of Black citizenship to begin looking past the old principle of "power and protection" as the source of membership. Supporters of Black Americans' citizenship rights found "power and protection" to be too thin a reed on which to rest citizenship claims, so they invoked other principles for conferring citizenship. Those hostile to Black citizenship, conversely, veered toward elevating descent into a novel *negative* principle for denying citizenship to Black Americans. Chief Justice Roger B. Taney's infamous 1857 opinion in *Dred Scott v. Sandford*, which declared that people of African descent were "beings of an inferior order" who had never been "part of the people" of the United States and were thus ipso facto ineligible for citizenship, was the most decisive (albeit short-lived) exposition of this theory.[40]

Jurists in Spain and Latin America during the early decades of the nineteenth century continued to rely on a single principle to determine who was entitled to membership in the empire and the emerging independent states. The 1812 Constitution of Cadiz, produced by the general Cortes held in the aftermath of the Napoleonic invasion of Spain, prominently echoed the old regime language of "love of country" and defined as "Spaniards" all "men born free and domiciled [*avecindados*] in the dominions of the Spains [*las Españas*], and their sons."[41] While this formula singled out birth as a distinct basis for allegiance, it neither established a hierarchy between descent and birthplace nor clearly distinguished them as competing or alternative factors. It was only in the Spanish Constitution of 1837, 25 years later, that legislators framed an "explicit" (as one commentator puts it) distinction between descent and birthplace. And even then, they did so only to affirm that citizenship was acquired at birth by both means.[42]

When debating the citizenship status of non-white people in Spanish America during the early nineteenth century, legislators on both sides of the Atlantic continued to use the old regime principle of "love" or "integration" as the primary yardstick for determining membership. This continuity was visible in debates about the citizenship of Native and Black people in the Americas both before and after South American independence. During the discussions in the Cortes about the 1812 constitution, attachment to the community was the hinge on which the delegates tried to distinguish between the situations of Indians and free people of color. The delegates agreed that Indians, who were clearly "natives" of the New World and had been formally members of the old regime polity, were clearly subjects in the sense envisioned by the

343–44; Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America*, 2 vols. (Philadelphia: Johnson & Co., 1858), 1:316.

[40] Opinion of Justice Taney in *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[41] *Constitución politica de la Monarquía Española* (Cadiz, 1812).

[42] See *Constitución de 1837*, Titulo I, Articulo 1 and F. Garcia Goyena, *Concordancias, motivos y comentarios del código civil español*, 4 vols. (Madrid: F. Abienzo, 1852), 1:29. See also the discussion of the writing of the Mexican Constitution of 1857 in Erika Pani, *Para pertenecer a la gran familia mexicana: procesos de naturalización en el siglo XIX* (México: Colegio de México, 2015), 43, which in similar fashion was remarkably unclear on the implications of choosing birth versus descent.

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Constitution. Views of free people of color in the Cortes were more divided. The debate assimilated them to "foreigners," since they had come to the Americas against their will. The question became whether and how free people of color could demonstrate their "love" of and integration into the community.[43]

American states that gained their independence from Spain during the 1810s and 1820s continued to invoke the principle of "integration" as the main rubric for determining who was a citizen. Independent Mexico's 1828 nationality law maintained "local enracination" as the principle of membership in the national community. As had been the case under the old regime, Mexican law took into account multiple criteria, including Catholic faith, in addition to birthplace and parentage, in determining whether an individual was sufficiently "enracinated" to be considered a Mexican. The constitution of Cartagena, in what is now Colombia, made "*vecindad*," the quality of local appurtenance that defined membership in the old regime, the basic criterion for citizenship. The post-independence states all extended some form of limited citizenship to free people of color, though in most places it fell short of full inclusion.[44]

There were similar continuities in how French legislators in the 1790s and early 1800s conceptualized membership in the polity at birth. These continuities were embedded in a significant ideological shift: French law during these years turned away from the principle of "power and protection" and adopted instead the principle that attachment to the nation determined who was French. Yet as they had under the old regime, legislators continued to identify a number of mechanisms by which the principle could operate; descent and birth-on-territory were just two of the criteria, and not always the most important ones.

The transformation in French law began in 1791 with the debate over the drafting of the France's first written constitution. The Constituent Assembly's discussion of principles for assigning French citizenship, departing from old regime doctrine, presumed that a strong attachment to the nation was what made one a citizen. Yet the legislators retained the old regime view that multiple mechanisms could create the necessary attachment. These included not just birth in France and descent from a French father but also owning property, residence in France, swearing an oath, running a commercial business or farm, marriage to a French woman, or some combination of several of these.[45]

[43] Herzog, *Defining Nations*, 158–62.

[44] Pani, *Para pertenecer*, 41; Rodrigo de J. García Estrada, *Extranjeros, ciudadanía y membresía: política a finales de la colonia y la independencia en la Nueva Granada 1750–1830* (Bogotá: Editorial Universidad del Rosario, 2016), 144–47. For an interesting discussion of the role of the category of "creole" in discourses of native-ness in this period, see Tamar Herzog, "Los americanos frente a la Monarquía. El criollismo y la naturaleza española," in *La monarquía de las naciones: patria, nación y naturaleza en la monarquía de España*, eds. Bernardo José, García García, and Antonio Álvarez-Ossorio Alvariño (Madrid: Fundación Carlos de Amberes, 2004).

[45] In a non-definitive preparatory report, the drafting committee also allowed that the citizenship of children born of an unknown father or mother, who had established domicile in France, "could not be contested." *Archives Parlementaires de 1787 à 1860. Première série* (Paris: Paul Dupont, 1888), 29:303.

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The representatives ultimately settled on granting citizenship by birth in three circumstances, none of which relied on descent or birthplace alone as the mechanism for creating and proving attachment. French citizens were those born of French fathers in France; those born of foreign fathers in France, provided that they settled in France; and those born of French fathers abroad provided that they settled in France and swore the civic oath.[46]

The Assembly's sharp focus on attachment to the nation as the principle for allocating citizenship had the predictable effect of raising doubts about the status of children born to French fathers abroad. There had been little question under the old regime that the king's "power" extended over his subjects abroad who intended to return to France. The elevation of attachment changed the question. Were these individuals and their children really as attached to France as those who never left its borders? Some deputies, such as Dominique Garat, argued that because everyone born in France must "cherish" and feel "affection" for France, expatriate Frenchmen's children should definitely be French. Others, including deputy Isaac Le Chapelier, suggested that individuals who had gone abroad might have "renounced their fatherland" and "taken an oath of loyalty" to a foreign sovereign. The solution codified in the 1791 Constitution split the difference: it granted children born to citizens abroad citizenship-from-birth, provided that they settled in France and swore the civic oath.[47]

The Napoleonic Civil Code, drafted just over a decade later, retained the 1791 Assembly's idea that attachment to the nation was the principle that determined who should be French. The reports of the committee sessions in which the Code was drafted suggest that Napoleon himself framed the nationality question in these terms. Arguing at one point in favor of attributing French nationality to all persons born on French soil, he observed that even though these children might not own property in France, they had "the French spirit, French habits; they have the attachment that everyone naturally has for the country in which they were born."[48] Although this precise proposal was not adopted, the debate continued to turn on the question of which children had the requisite attachment to the nation to be granted French citizenship at birth.[49]

The legislators involved in the redaction of the Civil Code were more explicit and more selective than their predecessors had been about the mechanisms by which attachment to the nation (and thus membership) were created. The rapporteur who presented the initial draft Code to the legislature cited two potent mechanisms for creating attachment. French "blood" was one. Even a child

[46] Weil, *How to Be French*, 25–30.

[47] *Archives Parlementaires*, 29:302.

[48] Fenet, *Recueil*, 7:6. Napoleon's argument was instrumental, intended to serve "the interest of France": he hoped to acquire population and increase the population available for taxation and military recruitment. Tronchet, a key player in both the 1791 and Civil Code discussions, responded to Napoleon that this was true, but only if they were "really acquired" by France.

[49] For instance, debating the status of children born in France to foreigners, some argued that they should be deemed French only if they chose not "to remain attached [*attaché*]" to their fathers' homelands. Ibid., 7:167.

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born to a French father overseas, he argued, was "made of [*formé du*] French blood" and should be considered French. Immediately after, he noted that territory also had the "natural power to imprint" a connection to a country, suggesting that those born on French soil, regardless of their parentage, should be French. Yet even at this late stage of the Civil Code's creation, it was not obvious that one had to choose one or another mechanism, or that one was obviously superior to the other in legislators' eyes.[50]

The final version of the Civil Code recognized both descent and birthplace as mechanisms for creating attachment to the nation—while clearly favoring descent. The Code granted automatic French nationality at birth only to those whose attachment was expressed through a family tie in the father's line: that meant the children of French men born either in France (implied) or abroad (Article 10) were automatically French from birth.[51] But the Code recognized the significance of birthplace as well. The Code's Article Nine allowed the children of foreign or unknown fathers born on French soil to become French at the age of majority by affirmatively fixing their domicile in France (or declaring their intention to do so).[52] This was not a naturalization: it was a form of French nationality-by-birth with an asterisk, granted only to those who *might* later be able to show sufficient attachment to be deemed French from birth.[53]

The revolutionary decades of the late eighteenth and early nineteenth centuries marked a transitional period in the law governing the attribution of nationality at birth in the Atlantic world. Constitutions and statutes in multiple states began to single out birthplace and descent as privileged mechanisms for assigning nationality at birth. In certain instances, jurists made efforts to elevate birth on territory or descent into a principle in its own right for assigning membership at birth. In the antebellum United States, the struggle over the rights of free Black Americans revolved around competing principles for attributing citizenship. In France, the idea of French "blood" became increasingly important in deciding who would benefit from French citizenship from birth. Yet the older principles of "protection" and "attachment" continued to be an important part of the debate in each of these jurisdictions.

Territory versus descent in the French courts, ca. 1820–1860

The legal transformations that took place during the age of Atlantic revolutions set the stage for the development by French courts of a nascent *jus soli/jus*

[50] Ibid., 7:139–41: "en est-il moins formé du sang français, et doit-on moins le considérer comme Français? n'est-ce pas là le cri de la nature?"

[51] *Code Civil* § 10 (1803).

[52] Fenet, *Recueil*, 7:3–7. For the final text see *Code Civil* §§ 9–10 (1803). For the lack of retroactivity of these principles, see Jean-Charles Demolombe, *Cours de Code Napoleon*, 5th ed. (Paris: Durand, 1869), vol. 1 § 163, and Weil, *How to Be French*, 38–40.

[53] The commentator C. B. M. Toullier, *Le droit civil français, suivant l'ordre du Code*, 21 vols. (Paris: Renouard, 1830–1843), vol. 1 § 261, noted that the child of a non-French father born in France could "claim" French status in the year after his majority, and that this status would then extend back to his "birth." Only if he did not claim it did he have to "naturalize."

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sanguinis binary during the decades after 1820. The Civil Code had gone some of the way toward elevating birthplace and descent as competing principles-in-themselves for attributing French-ness at birth. Starting in 1826, French courts faced multiple cases brought by men claiming to be exempt from conscription in the French army by virtue of ancestors who had supposedly lost their French nationality. The outcome of these cases turned on how one adjudicated conflicts between birthplace and parentage as sources of French-ness.[54] In order to arrive at a consistent line in these cases, French judges sharpened the conflict between the principles of birthplace and descent and began to associate them with old regime and new regime law, respectively. Some of these cases have been discussed before in the literature, but their central role in the genealogy of the *soli*/*sanguinis* binary has not been previously noticed.[55]

Among the many nationality-law cases that early-nineteenth-century French courts confronted,[56] those brought by men who claimed to be foreigners because their fathers had lost their French nationality after 1804 ranked among the most difficult. Between 1826 and 1850, the appeals court in Douai, in northeastern France near the Belgian border, decided at least seven such cases. Five of the parties claimed to be ineligible for conscription. Each stated that his immediate adult paternal ancestor at the 1814 creation of Belgium had become Belgian. Under the provisions of the Civil Code, which favored French-ness by descent, these ancestors had then passed on their foreign-ness to the plaintiffs.[57] The two other parties hoped for a reverse outcome on similar facts. One, for instance, sued to have his French-ness affirmed so that he could vote.[58]

Part of what made these cases so difficult was that they presented fact patterns in which the idea that nationality flowed from the father, as the Civil Code strongly preferred, pointed simultaneously in opposite directions. The young men in question or their ancestors had unambiguously been born to

[54] Weil, *How to Be French*, 38–43. On resistance to conscription see Jean-Paul Berthaud, *La Révolution armée. Les soldats-citoyens et la Révolution française* (Paris: Laffont, 1979); Alan Forrest, *Conscripts and Deserters: The Army and French Society during the Revolution and Empire* (New York: Oxford University Press, 1989); Annie Crépin, *La conscription en débat ou le triple apprentissage de la nation, de la citoyenneté, de la République* (1798–1889) (Arras: Artois Presses Université, 1998).

[55] Weil, *How to Be French*, 31–43, discusses some of these cases. However, his analysis views them as merely expressions of settled law, rather than (as we do) as the site in which new legal principles were being articulated.

[56] For instance, see Cassation, 17 juillet 1843, *Préfet des Ardennes, Recueil général des lois et des arrêts: en matière civile, criminelle, commerciale et de droit public*, eds. L.-M. Devilleneuve and A. A. Carette (Paris, 1843), vol. 43, 1:745–46. The young man who brought the case argued that he was a foreigner and thus not subject to conscription because his grandfather, a Habsburg subject from what is now Belgium, lived in France but had never formally "acquired the quality of Frenchman."

[57] See, e.g., Cour de Douai, March 28, 1831, in *Recueil général des lois et des arrêts: en matière civile, criminelle, commerciale et de droit public*, eds. J.-B. Sirey and L.-M. Devilleneuve (Paris, 1831), vol. 31, 2:193.

[58] See Cour de Douai, March 28, 1831, *Recueil général*, eds. Sirey and Devilleneuve (Paris, 1831), vol. 30, 2:67–68.

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Frenchmen. It would thus seem clear that they were Frenchmen by birth under either the old or the new regime. But when their fathers lost their French nationality, the Civil Code principle of attachment to the nation through the father suggested with almost equal force that they should be stripped of their French-ness in order to "follow the quality of the father," as one court explained.[59]

Over the quarter century from 1826 to 1850, the Douai court developed a jurisprudence of nationality that constructed descent and birthplace as conflicting principles for constituting French-ness. This solution to the conundrum of conflicting nationalities emerged out of what appeared to be a series of inconsistent rulings. In one of their first decisions on these nationality cases, issued in 1826, the judges found that a minor son whose father had reverted to Belgian nationality had remained French: the French-ness he had by virtue of birth on French territory, they argued, trumped the pull of his father's new nationality.[60] In 1829, the court ruled to the contrary that even a child "born in France" followed his father's change in nationality. The judges rejected the plaintiff's argument that birth of French soil had put him in an "entirely different position" from his father.[61] Two years later, in 1831, the court seemed to reverse itself again, ruling that a young man born when his father was French remained French even when his father became Belgian. "He could not lose" his French-ness, the court opined, "through any fault of his father." Once again, they invoked birthplace as a trump card: born on "French territory," they wrote, the young man remained indelibly French regardless of what happened to his father.[62] Then in 1835, they reverted to the position that the child's status always followed the father's, which they held to in subsequent decisions in 1848, 1849, and 1850.[63]

In spite of their inconsistent outcomes, the Douai court's rulings followed a logic that was both consistent and novel. In all of these cases, the judges systematically invoked birthplace and parentage as competing principles for determining when the individuals in question had French nationality. Following in the footsteps of revolutionary-era legislators, the court discarded both the old regime principle of "power" and the principle of "attachment" that French legislators had adopted during the republican decade. The Douai judges invoked birthplace and parentage as principles in their own right for determining who should benefit from French nationality. The judges went further than the revolutionary-era legislators, however, by defining these principles as operating in competition with each other. Doing so enabled the judges to transform the tangled theoretical question of how descent operated when

[59] Cour de Lyon, 2 août 1827, *Recueil général*, eds. Sirey and Devilleneuve (Paris, 1828), vol. 28, 2:89.

[60] *Jurisprudence de la Cour d'appel de Douai* (Douai: chez l'éditeur, 1851), 9:9.

[61] Cour de Douai, November 16, 1829, *Recueil général*, eds. Sirey and Devilleneuve (Paris, 1830), vol. 30, 2:67–68.

[62] Cour de Douai, March 28, 1831, *Recueil général*, ed. Sirey and Devilleneuve (Paris, 1831), vol. 31, 2:194.

[63] See Cour impériale de Douai, in *Jurisprudence de la Cour impériale de Douai* (Douai, 1855), 13:71 ln. 1–2. In none of these cases did the court's reasoning turn on whether the French territory in question had ever or had never been part of or become part of Belgium.

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post-natal international affairs caused fathers' nationalities to change into a cleaner question: whether birthplace or fatherly choices would take precedence.

French courts in the 1850s and 1860s mapped the sharp distinction they made between birthplace and descent onto the difference between old regime law and the Civil Code—though there was no consensus at first on how exactly these new principles mapped onto the law of the two eras. The Douai court advanced one possible version in an 1855 ruling on yet another conscription case. That case turned in part on the familiar question of whether a child born in 1797, whose father had later become Belgian, remained French. The court held that the child, though born on French soil, followed the condition of his father and became a foreigner. His birthplace, they declared, had been only a "secondary" source of French-ness under the old regime. It was the opinion of the court that descent had always had primacy: "Then [i.e., before 1804], like today, the child born of a Frenchman, wherever his birthplace, has his nationality by virtue of his father's status." Otherwise, the court noted, the child could end up with "his own nationality, distinct and independent from that of his father"—a situation the court clearly hoped to avoid.[64]

In 1862, the *Cour de Cassation*, France's highest appeals court, offered a different account of how to map the principles of descent and birthplace onto the old regime/new regime divide. This case, too, was brought by a man who claimed exemption from conscription on the grounds that he was Belgian. Much of his account was the same as the others': his grandfather had been born a foreigner, had moved to what was then France, had a son there in 1800, and they had both (in the plaintiff's view) become Belgian in 1814. The main difference was that this plaintiff, born in 1838, had come of age after 1851. A law passed in that year had declared that the children of foreigners born on French soil, who were themselves born on French soil, were to be automatically French-from-birth unless they renounced their French nationality in the year after they attained the age of majority.[65] In 1859, at the age of majority, the plaintiff had made the required declaration in due form that he was renouncing his French nationality. He thus claimed exemption from the draft.[66]

The lower courts had accepted the plaintiff's reasoning. Both the court of first instance and the Douai appeals court followed the consistent doctrine of the Douai appeals court since the late 1840s, which held that the nationality of minor children followed that of their father. Ruling in this manner was consistent as well with the principle the Douai court had enunciated in 1855 that under old regime law, a Frenchman's child was French first and foremost because of his descent from a Frenchman, with birthplace playing a merely

[64] See Cour impériale de Douai (1854), reprinted in *Jurisprudence de la Cour impériale de Douai*, 13:70–78, esp. 77. "qu'alors, comme aujourd'hui, l'enfant né d'un Français, quelque fût le lieu de sa naissance, tenait sa nationalité de la qualité qui appartenait à son père ...."

[65] Loi du 16 décembre 1851. See also Weil, *How to Be French*, 42–43.

[66] Comp. Cass., 5 mai 1862, préfet du Nord, *Recueil général*, ed. Devilleneuve (Paris, 1862), 1862 volume, 659.

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secondary role. These principles, which made the petitioner's father a foreigner, made the petitioner eligible to benefit from the provision of the 1851 law that allowed him to renounce his nationality at the age of majority.[67]

The appeals court, in a striking opinion, reversed the decisions of the lower courts. The judges did so by offering a novel account of the relationship between the two known old regime mechanisms for acquiring allegiance at birth. The court first repeated the familiar claim that under the old regime, the rule was that "the child born in France to a foreigner was French." But the court then went further, asserting that birth-on-territory was not just *one* of the ways that one could become French-by-birth under the old regime, but the only one: it was, they wrote, the "general and absolute rule of the old French public law." As such, they argued, this principle had operated on the petitioner's father, born on French soil before the Civil Code, to the exclusion of any other mechanism. It had given him, they wrote in a striking passage that appeared to reply directly to the Douai court's 1855 ruling, "his own nationality, *distinct and independent from that of his father*, resulting from a personal privilege completely foreign to [his father]." Because his nationality flowed from birth-on-territory, and not from his father's status as a Frenchman, the court reasoned that the change in his father's allegiance had no effect on the minor child's status and as a natural-born Frenchman he could not benefit from the provision of the 1851 law.[68]

Demolombe's gambit: the fabrication of *soli* and *sanguinis*

It was in the midst of this ongoing and still unsettled debate in the courts that Charles Demolombe in 1860 published a second edition of his *Cours du Code Napoléon*. The first edition, published in 1845, had already taken its place as a standard commentary on the Civil Code.[69] Demolombe's gloss on Articles Nine and Ten of the Civil Code had reflected the courts' emerging, still-muddy notion that birthplace and parentage were competing principles for attributing nationality. Under "our old law," wrote Demolombe in 1845, a French person "by birth" was one born to French parents or born on French soil. However, under the Civil Code, he asserted, only descent was recognized as a means for transmitting nationality: "today it is only the origin, the blood, and not the birthplace, that makes...one a Frenchman by birth."[70]

[67] Ibid., 659–60.

[68] Ibid., 660–61: "une nationalité propre, distincte et indépendante de celle de son père, résultant d'un privilége personnel complètement étranger."

[69] Elected in 1827 to a post in civil law at the University of Caen, at the astonishingly young age of 23, Demolombe built a distinguished career studying and commenting on the Civil Code. By 1862 he had already been Dean of the Faculty of Law at Caen; a chevalier of the Légion d'Honneur; and was offered a seat on the Cour de Cassation (which he declined). For his biography, see Ferdinand Hoefer, *Nouvelle biographie générale depuis les temps les plus reculés jusqu'à nos jours*, 37 vols. (Paris: Didot, 1854–1866), 13:575; Jean Joubert, "Un grand juriste cotterézien: Jean-Charles Demolombe (1804–1887)," *Mémoires de la Fédération des sociétés d'histoire et d'archéologie de l'Aisne* 22 (1977): 170–73.

[70] Demolombe, *Cours de Code Napoleon*, 1st ed. (Paris: Durand, 1845), vol. 1 § 146. "c'est...aujourd'hui l'origine, c'est le sang, et non point le territoire natal, qui fait seul, de plein droit, le Francais de naissance."

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Perhaps spurred on by the rash of recent cases about nationality, Demolombe decided for the second edition of the *Cours* to develop an ampler explanation of the rules that had governed attribution of nationality at birth under both the old and new regimes. The 1860 revision quadrupled (from about 150 to 600 words) the length of his analysis of the rules for the determination of nationality-at-birth. Under the "old law" [*notre ancien droit*], Demolombe explained, there had been two mechanisms that made a child French from birth. "The child born in France, even to foreign parents, *jure soli*," was French, as was "the child born to French parents, even in a foreign country, *jure sanguinis*." He termed the former the "French system" (meaning based on customary law), and the latter the "Roman system." According to Demolombe, the Civil Code had abrogated the French "system." Only *jure sanguinis* continued to create French nationality at birth, he concluded.[71]

Demolombe packed three significant innovations into this brief, seemingly unassuming summation of French nationality law. The most obvious change was his use of *jure soli* and *jure sanguinis* to describe the mechanisms of attribution at birth. These phrases had never before appeared in discussions of nationality law.[72] Demolombe borrowed both from other areas of civil law jurisprudence. "Jure soli" was a principle of finders' law: a valuable object found on the ground belonged (at least partly) to the owner of the land, "*jure soli*," "by means of the rule of the land."[73] *Jure sanguinis* was part of the family law maxim "*Jura sanguinis nullo jure civili dirimi possunt*" ["The right of blood and kindred cannot be destroyed by any civil law"].[74] It meant that certain rights and duties inhered in parents and children and were not dependent on the civil law status of a marriage or the legal legitimacy of the children.

The metaphors that Demolombe invoked, with his choice of these two phrases, encapsulated and completed the shift away from the old regime view that allegiance derived from a sovereign's protection at the moment a child came into existence. *Jus sanguinis* analogized nationality to a natural inheritance from parent to child. It gave the sovereign no role: a child acquired rights and duties from the parent's status alone. Indeed, *jus sanguinis*, in its original context in inheritance law, described a legal connection that stood above the civil law itself—a natural rule or bond with a super-legal existence. The nineteenth-century commentator Charles Toullier thus declared "no human power" "can make it so that I am not truly the son of my father or my mother: Jura sanguinis...."[75] *Jus soli*, similarly, suggested that individuals were "found" on the territory of the nation. Power and protection did not

[71] Demolombe, *Cours de Code Napoleon*, 5th ed. (Paris: Durand, 1869), vol. 1 § 146.

[72] These terms do not appear in the Civil Code itself in the discussion of nationality, nor do they seem to appear in that part of any of the French commentaries or legal proceedings during the preceding half century. We base this claim on an examination of digital databases of legal texts, particularly The Making of Modern Law, as well as searches in several wide-ranging French-language digital corpuses, notably Gallica and ARTFL. These searches included looking for "jus," "jure," and "jura" forms of the terms.

[73] Jean-Charles Demolombe, *Traité des successions*, 5 vols. (Paris: Durand, 1857), 1:60.

[74] Toullier, *Le droit civil français*, 1:319.

[75] Ibid., vol. 5, part 2, 205.

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matter: nationality was the result of springing forth (as it were) on the terrain of a nation. The effect of both of these metaphorical operations was the same: to finish the process of excising from legal reasoning about nationality the natural principles of belonging (power, protection, or "attachment") that had justified decisions about belonging before the 1820s.

Demolombe's next move was to graft these two principles onto the then-fashionable binary between "customary" (or "Germanic") law and "Roman" law. He identified *jus soli* as a "customary law" principle and *jus sanguinis* as a maxim of Roman law. The distinction between these two jurisprudential traditions, both real and imagined, had already been drawn long before the nineteenth century.[76] But the nineteenth-century debates between "Germanists" and "Romanists," which posited them as two systems grounded in incompatible principles, turned them into opposing models. The "German" and "Roman" models became linked with distinctly different kinds of societies—or, at the least, with aspirations to reflecting different approaches to constructing the social order.[77] By inserting modern *jus soli* and *jus sanguinis* rules neatly into that oppositional frame, which set two allegedly ancient legal traditions against each other, Demolombe rationalized and justified the opposition that the French courts had created between birthplace and descent.

Finally, Demolombe enfolded old regime nationality law fully into the novel vocabulary that he had created. As we have seen, old regime French jurists understood allegiance-at-birth to have been created through the operation of a single principle (power or protection). Birthplace and parentage mattered as criteria or mechanisms for assessing whether such "protection" existed, but they were not dispositive in themselves. Demolombe's restatement of old regime law in terms of *jure soli* and *jure sanguinis* reinforced and clarified the shift toward seeing birthplace and descent as the principles themselves. By positing *jure soli* and *jure sanguinis* as doctrines that had existed in the old regime and in modern nationality law, he effectively rewrote old regime nationality law in the image of the nineteenth century.

Each one of Demolombe's three moves, on their own, marked a significant and innovative reworking of nationality law. He imported hitherto unused terms into that area of the law, transforming mechanisms into principles; he identified the two mechanisms for attribution-at-birth as belonging to distinct legal traditions; and he universalized both mechanisms across the old regime/new regime divide. These innovations were the magic of the juridical expositor: identifying a relatively untheorized, emergent, doctrinal simplification, and providing it with the trappings of history, precedent, legalese, systematization, and principle. Each of these innovations was significant in its own right. Taken together, they constituted a package of reforms that altered the complexion of nationality law in significant and durable fashion.

[76] For a thorough if somewhat skeptical discussion of the distinction between Germanic and Roman law traditions, see Tamar Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Cambridge, MA: Harvard University Press, 2018), Part Four.

[77] Ibid., 212–14.

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Soli and *sanguinis* go international

Demolombe's new account of nationality acquisition at birth rapidly gained a wide audience. Within two decades of the publication of the revised *Cours*, *jus soli* and *jus sanguinis* had become the dominant way of describing the transmission of nationality across the Euro-American world. Remarkably, given their recent coinage, the terms passed into all-but universal use almost without comment or dissent. Indeed, in both the French and Anglo-American contexts, the adoption of the *soli*/*sanguinis* binary seemed to happen in some instances without jurists being cognizant that they were adopting a brand new doctrine. Whether they comprehended it or not, however, taking up the language of *jus soli* and *jus sanguinis* furnished legal thinkers with a new framework for understanding nationality law, flavored with universality and the presumption that it represented different ways of constructing national communities.

The first widespread use of *jus soli* and *jus sanguinis* occurred around 1870 in France and Britain. In France, it was the result of new jurisprudence over nationality in the aftermath of France's cession of the provinces of Alsace and Lorraine to Germany after its defeat in the Franco–Prussian war of 1870. This cession raised complex problems about the nationality of residents and natives of the ceded territories. In one of a series of articles interpreting the 1871 treaty that ended the war, prominent French jurist G.A. Robinet de Cléry invoked the "opposed" principles of "hereditary nationality (*jure sanguinis*)" and the "right of territoriality (*jure soli*)."[78] Already, even at this early stage of its adoption, the traces of Demolombe's innovations were being felt. The novel phrase "hereditary nationality," for instance, framed political belonging, as Demolombe had done, in terms of the private law of inheritance rather than as a matter of protection, domination, or attachment between subject and sovereign.

In Britain, the main port of entry for *jus soli* and *jus sanguinis* was an 1869 treatise on *Nationality* by Lord Chief Justice of England Alexander Cockburn. Cockburn's treatise, written in preparation for a landmark revision of British nationality law in 1870, analyzed alienage, naturalization, and expatriation law across Europe and the Americas.[79] In summarizing old regime French law, Cockburn drew directly from Demolombe: "By the law of France, anterior to the revolution, a child born on French soil…was a Frenchman…*jure soli*; a child born of French parents outside of French territory, was a Frenchman *jure sanguinis*." Cockburn found Demolombe's language a congenial way to formulate the new view that descent and birthplace were principles in themselves that conferred nationality.[80]

Demolombe's paradigm proved especially irresistible to early proponents of international law. A main problem for international lawyers was the staggering

[78] See Robinet de Clery, "Questions concernant la Nationalite des habitants de l'Alsace-Lorraine," *Revue Critique de Législation et de Jurisprudence*, n.s. no. 2 (1872–1873): 292.

[79] See Alexander Cockburn, *Nationality: Or the Law Relating to Subjects and Aliens, Considered with a View to Future Legislation* (London: Ringway, 1869), chs. 2, 3, and 5.

[80] See ibid., 14. Interestingly, Cockburn made no mention of the Roman/Germanic classification of the two principles.

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political diversity of the world whose state-to-state relations they sought to systematize. In this context, the simplification inherent in Demolombe's terms was a feature, not a bug. Although the law of nations ostensibly governed relations between polities, those polities were just collections of people, so knowing who belonged where and in what ways was crucial. But countries varied widely in their rules for determining allegiance and in the forms of membership that they recognized. Demolombe's approach of focusing on nationality as the key status and on birthplace and descent as its key determinants vastly simplified matters. Countries could be categorized as primarily committed to blood or to soil, with local variations on the rule relegated to the margins. Those words—blood and soil—held particular resonance as the polity's universal building blocks given the nineteenth-century rise of the territory-based nation-state.

Propelled by international law scholars, the *jus sanguinis*/*jus soli* binary spread rapidly during the 1870s, becoming a commonplace by the end of the decade. In a treatise on the civil status of foreigners published in 1874, Paul de Royer was already declaring as fact that under the old regime "every child born in France was French *jure soli*, regardless of the nationality of its parents."[81] The prominent U.S. jurist David Dudley Field reproduced the descent/birthplace divide in his *Draft Outlines of an International Code* (1872). A rising Romanian jurist and future minister trained in France, Constantin Stoicescu, published an influential treatise on naturalization in 1876[82] that fully absorbed the *soli*/*sanguinis* binary. In addition to describing nationality transmission in terms of "*jus sanguinis*" and "*jure* [sic] *soli*," he reinforced Demolombe's portrayal of the two regimes as providing rules of nationality at birth that were sufficient unto themselves and products of distinct, implicitly incompatible legal regimes.[83] Stoicescu's treatise found a wide readership, particularly among diplomats and jurists interested in the new principles of international private law.[84] By the time distinguished Columbia professor E.M. Smith penned a treatise on the "Law of Nationality" for the *Cyclopedia of Political Science* in 1883, it was a foregone conclusion that he would employ *jus soli* and *jus sanguinis* as the theoretical framing for his account of the topic. In just over 20 years, in other words, Demolombe's binary had been completely naturalized by the international legal profession.

[81] Paul de Royer, *De la condition civile des étrangers. Législations anciennes, législation romaine, législation française* (Paris: Plon, 1874), 73 (emphasis added).

[82] Călin Hentea and Cristina Bordianu, *Brief Romanian Military History* (Lanham, MD: Scarecrow Press, 2017), 95.

[83] Constantin J. Stoicesco, *Étude sur la Naturalisation en droit romain, en droit civil, et dans le droit des gens* (Paris: Marescq, 1876), 286.

[84] See, e.g., Georges Cogordan, *Droit des gens. La nationalité au point de vue des rapports internationaux* (Paris: Larose, 1879), 106–10; Daniel De Folleville, *Traité théorique et pratique de la naturalisation* (Paris: Marescq aîné, 1880), 61; Charles Calvo, *Le droit international théorique et pratique. Précédé d'un exposé historique des progrès de la science du droit des gens*, 3rd ed. (Paris: J. Claye, 1880), 1:109; Isidore Glard, *De l'acquisition & de la perte de la nationalité française au point de vue du droit civil français et du droit international* (Paris: Rousseau, 1893), 179.

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The ambitions of some international lawyers went beyond influencing how people perceived international law; they aimed to shape its development and unify the globe behind a common, far-reaching system of international law. Leading theorists and practitioners in the field founded the Institut de Droit International in 1873 to interpret existing international law, to promote its domestic uptake, to codify the same, and to reform it into alignment with "justice and humanity."[85] One of the desiderata of this new cadre of international lawyers was to create a universal rule for assigning nationality. This would require both selecting a single principle for assigning nationality and codifying it in the domestic legal systems of the world's states.

International lawyers strongly favored *jus sanguinis* as the presumptive basis for a common rule for assigning nationality. Demolombe himself had spun *jus sanguinis* as the more "civilized" rule favored by modern European states. An 1881 treatise, authored by a rising young specialist in international law from Louisiana, Alexander Porter Morse, elaborated the case. Morse believed that standardization of nationality law had become a necessity in order to avoid messy disputes between contradictory rules.[86] He observed that modern states were already disposed against the category of the "man without a country" and declared "double nationality" to be "abnormal and monstrous."[87] Demolombe's invented history provided the solution. "There was a time," he wrote, "when, under the influence of feudal ideas, nationality was determined exclusively by the place of birth, *jure soli*. But … under the laws of the Athenians, as among the Romans, the child followed the nationality of its parents, and it was the tie of blood—*jus sanguinis*—which determined nationality."[88] In 1895, the Institut de Droit International made the tendency official, moving to declare lineage (*jus sanguinis*) the primary principle for attributing nationality at birth.[89]

[85] Institut de Droit International, *Statutes* (trans.), art. 1, September 10, 1873, Ghent, Belgium, https://www.idi-iil.org/app/uploads/2017/06/Statutes-of-the-Institute-of-International-Law.pdf.

[86] G. R. Gillespie, *The Theory and Practice of Private International Law*, 2nd ed. (Edinburgh: William Green & Sons, 1892); Irving Browne, "Letter from America," *The Law Journal* 30 (November 23, 1895): 689; William Henry Rattigan, *Private International Law* (London: Stevens and Sons, 1895); *The Solicitors' Journal* 40 (October 24, 1896): 840.

[87] There was a long history of regarding double nationality in this negative light. The English judges of Common Pleas who decided *Craw v. Ramsay* in 1668 regarded the possibility of a subject having "two natural Soveraigns" as an impossibility: it was no more imaginable to them than the idea of a person having "two natural fathers, or two natural mothers." *Craw v. Ramsay*, 124 E.R. 1072, Vaughan 283.

[88] Morse, *A Treatise on Citizenship*, 12. Morse cited Stoicescu several more times in his treatise and evidently drew a good part of his argument from that book. Given the link between nationality and conscription, some commentators were particularly concerned that sons could be required to take up arms against fathers. For example, see Browne, "Letter from America." On large-scale expansion and systematization of international law in the latter nineteenth century, see generally Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (New York: Cambridge University Press, 2001).

[89] Justitia et Pace Institut de Droit International, 1895 Session, Cambridge, UK, *Principes relatifs aux conflits de lois en matière de nationalité (naturalisation et expatriation)*, http://www.idi-iil.org/app/uploads/2017/06/1895_camb_02_fr.pdf.

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There nonetheless remained a significant gap between declaring the primacy of *jus sanguinis* on the international stage and convincing individual states to adopt it. Morse himself experienced the difficulty of accomplishing the task in his native United States. In 1884, he criticized a U.S. Court of Appeals decision that interpreted the Fourteenth Amendment to the Constitution ("all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States") as imposing a *jus soli* rule in the United States. A child born in California to Chinese parents, the court ruled, was a native-born U.S. citizen. Morse argued that "children of ... *citizens or subjects of foreign States born within the United States*" were not born subject to U.S. jurisdiction. Implying that the U.S. Supreme Court might well agree whenever presented the question, he "presumed States will sooner or later conform" to the rule in Italy's revised code: "'*The child of a citizen is a citizen; the child of an alien is an alien.*'"[90] He and a number of like-minded thinkers, including the racist San Francisco lawyer George Collins, sought over the next decade and a half to convince the courts to find a *jus sanguinis* rule in U.S. law.[91]

Morse's dream to codify a *jus sanguinis* rule in the United States culminated—and collapsed—with *United States v. Wong Kim Ark*, decided in 1898 by the U.S. Supreme Court. The case arose from vitriolic anti-Chinese politics in the United States, especially in California. In 1895, federal officials sought to deport California native Wong Kim Ark as an alien.[92] Wong appealed, eventually reaching the Supreme Court. Pressing Morse's position, Collins intervened on the government's side, aiming to show that the language of the Fourteenth Amendment did not in fact apply to Wong. Government lawyers cited Morse as they argued that ethnic-Chinese children born on U.S. soil were not "subject to the jurisdiction" of the United States at birth, and thus not citizens. Seeking to invent an unbroken U.S. tradition of *jus sanguinis* citizenship out of whole cloth,[93] the lawyers argued that U.S. law should be interpreted in light of

[90] Alexander Porter Morse, "Letter to Editor: Citizenship of Children of Aliens Born in the United States," *Albany Law Journal* 30 (November 22, 1884): 420.

[91] The authors are working on an article giving an account of this process. See, *inter alia*, George D. Collins, "Citizenship by Birth," *American Law Review* 29 (1895): 385; Morse, "Letter to Editor: Citizenship of Children of Aliens Born in the United States,"; and [George D. Collins], "Are Persons Born within the United States Ipso Facto Citizens Thereof," *American Law Review* 18 (1884): 831.

[92] *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). On federal, state, and local roots of violent anti-Chinese politics, see generally Beth Lew-Williams, *The Chinese Must Go: Violence, Exclusion, and the Making of the Alien in America* (Cambridge, MA: Harvard University Press, 2018).

[93] Lucy E. Salyer, "Wong Kim Ark: The Contest over Birthright Citizenship," in *Immigration Stories*, eds. David A. Martin and Peter H. Schuck (New York: Foundation Press, 2005), 51–85; Brief for the United States, No. 449, *Wong Kim Ark*, 169 U.S. 649 (n.d.); Brief of the Appellant, *Wong Kim Ark* (n.d.). Every branch of government had expressly reached the opposite conclusion. During debates over the Fourteenth Amendment and its predecessor statute, the president and lawmakers on both sides agreed that promulgation would bring citizenship to all persons of Chinese ancestry born stateside. 39 *Congressional Globe* 39 (1866): 498, 1679, 1757, 2890. Multiple lower federal courts then uniformly reached the same conclusion, In re Look Tin Sing, 2 Fed. 905 (1884); In re Wong Gan, 36 Fed. 553 (1888); Ex parte Chan San Hee, 35 Fed. 354 (1888), as did assistant secretary of state Alvey Adee: see Adee to Tripp, July 23, 1896, in *Papers Relating to the Foreign Relations of the*

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international law rather than common law, and that the international law rule was *jus sanguinis*.[94] But the Supreme Court made quick work of the government's claim. The better guide to constitutional meaning was the common law, which had an ancient commitment to *jus soli*, the Court reasoned. Wong Kim Ark was a U.S. citizen.[95]

Conclusion

It would be hard to identify a more apt emblem than *Wong Kim Ark* for the strange late-nineteenth-century career of Demolombe's brainchild, the *soli/sanguinis* binary. On its surface, the parties in *Wong Kim Ark* squared off on opposite sides of a titanic divide: the case presented, seemingly, a contest between two diametrically opposed readings of the U.S. Constitution. One, favored by the plaintiff and his lawyers, sought to enforce an inclusive reading of the Fourteenth Amendment, which would confer U.S. citizenship on all children born on U.S. soil. The other, favored by Morse, sought to forestall such a reading of the Fourteenth Amendment in order to keep the way open for the imposition of a *jus sanguinis* regime in the United States. This regime, if successful, would ensure the continuing domination of white men over the country in the face of migration and civil rights agitation.

Yet for all of their disagreements, both sides in *Wong Kim Ark* borrowed their arguments from the same source: the principles for the attribution of nationality that Charles Demolombe had formulated three decades earlier in his *Cours du Code Napoléon*. All of the parties accepted that the supposedly competing regimes of *jus soli* and *jus sanguinis* defined the field of possibilities. Each associated the terms with competing historical traditions, purportedly each with roots that stretched into antiquity and which corresponded to very different kinds of social and political orders ("Roman" as opposed to "German"). One irony of the case, then, was that both critics and defenders of birthright citizenship in the United States in 1898 were reading the Fourteenth Amendment through the lens of legal principles articulated in France, in an entirely different legal context, and which were hardly older than the Amendment whose meaning they were supposed to clarify.

The elegance and simplicity of Demolombe's binary rule, precisely the qualities that made it so attractive to jurists around the world, made it hard to

United States, with the Annual Message of the President, Transmitted to Congress December 2, 1895 (Washington, DC: Government Printing Office, 1896), document 16.

[94] Collins, "Are Persons Born within the United States"; Prentiss Webster, "Acquisition of Citizenship and Application of the Rule to the Case of Chin King, Decided in the United States Circuit Court for Oregon," *American Law Review* 23 (September/October 1889): 759; Prentiss Webster, *A Treatise on the Law of Citizenship in the United States* (Albany, NY: Matthew Bender, 1891); Salyer, "Wong Kim Ark"; Brief for the United States; Brief of the Appellant. See also Marshall B. Woodworth, "Citizenship of the United States and in France (1)," 2 *Revue Legale* (1896): 283–84, 287.

[95] *Wong Kim Ark*, 667 (declaring that the U.S. followed the "ancient rule of citizenship by birth within the dominion," which was broadly consistent with the "ancient rule of France, or rather, indeed, ancient rule of Europe," i.e., the "rule of country of birth, *jus soli*").

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square with the messy realities of late-nineteenth-century politics. It was not long before it became clear that *jus sanguinis* would be inadequate to solving the problem of conflicting nationality laws in a world of ongoing mass migrations. Lawyers noted that if emigrants declined to naturalize, they could found permanent alien colonies in any *jus sanguinis* countries that received them.[96] Even the Institut de Droit International tempered its enthusiasm for *jus sanguinis* by declaring itself in favor of a default rule that would make members of a second generation born in a new country citizens of the new homeland.[97] Officials and legal scholars in England and the United States turned to individual choice as a mechanism to solve the problem of migrants' citizenship.[98] Where individuals ended up with too many nationalities, or too few, rules could exist to force a choice or mimic the likely result of one.[99] *Jus sanguinis* was evidently not going to work as a one-size-fits-all remedy for every difficult question about nationality.

The difficulty of constricting states to any single, simple rule for assigning nationality was very much in evidence in U.S. jurisprudence in the wake of *Wong Kim Ark*. In 1898, the justices had tried to condense the contested Anglo-American legal debate over allegiance at birth into a simple, supposedly age-old "*jus soli*" rule. Over the next 5 years, as the Court wrestled with the constitutional status of newly acquired U.S. territories in the Pacific and Caribbean, the justices discovered that Demolombe's simplification was less congenial than they had initially imagined. The Court's imposition of Demolombe's all-or-nothing version of *jus soli* on the U.S. Constitution seemed to lead inexorably to the conclusion that the inhabitants of these territories were U.S. citizens. So the Court revisited the question by other means. In the *Insular Cases*, the Court invented a new kind of U.S. land, "unincorporated territory," which conferred a second-class form of birthright nationality on those who were born there, *jure soli*: the non-citizen U.S. national was born. It had taken less than 5 years for the Court's adoption of Demolombe's supposedly simple and ancient category, *jus soli*, to spawn a whole new universe of complex statuses, which continue to bedevil U.S. politics and law to this day.

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[96] Browne, "Letter from America."

[97] *Principes relatifs aux conflits de lois en matière de nationalité*, Justitia et Pace Institut de Droit International, 1895 Session, Cambridge, UK.

[98] See, e.g., Rattigan, *Private International Law*, 14–34.

[99] Mr. Olney to Mr. von Reichenau, November 20, 1896, in *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 6, 1897*, ed. Department of State (Washington, DC: Government Printing Office, 1898), doc. 168, https://history.state.gov/historicaldocuments/frus1897/d168; *The Solicitors' Journal* 40 (October 24, 1896): 840; Thomas Barclay, "Conflicts of Nationality," *The Law Journal* 30 (November 23, 1895): 688–89.

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