

## Birthright citizenship as occupancy or possession

### ABSTRACT

This article explains civil freedom as a condition of choice that is not itself a choice. Birthright citizenship, called *jus soli*, resolves otherwise contradictory ideas of occupancy and property. For example, the California Missions were an extension of *jus soli* citizenship under Iberian law after the mid-17<sup>th</sup> century Portuguese Restoration. *Jus soli* came into question in California with 19<sup>th</sup> century capitalism. Pablo Tac was a California Indian educated in Rome at the end of the Mission era. His good humor is explained as a sufficient condition of California's self-renewing social context.

### RESUMEN

Este artículo explica la libertad civil como una condición de elección que no es en sí misma una elección. La ciudadanía por derecho de nacimiento, llamada *jus soli*, resuelve ideas contradictorias de ocupación y propiedad. Por ejemplo, las Misiones de California fueron una extensión de la ciudadanía *jus soli* bajo la ley ibérica después de la Restauración portuguesa de mediados del siglo XVII. *Jus soli* entró en duda en California con el capitalismo del siglo XIX. Pablo Tac era un indio de California educado en Roma al final de la era de la Misión. Su buen humor se explica como una condición suficiente del contexto social auto-renovador de California.

## I. THE THEME

*“... it is not only about foreigners;  
it is about all those in existential peripheries who,  
together with migrants and refugees, are victims of the throwaway culture.”*

Pope Francis on the World Day of Migrants and Refugees,  
Sept. 29, 2019 <sup>1</sup>.

Here I hope to add something to a discussion of the difference of *jus soli* and *jus sanguinis* as two claims to citizenship. I shall explain the difference between ownership or dominion on the one hand and occupancy or possession on the other. I want to point out in particular that the difference between occupancy and property parallels that between work and labor. I suggest that this parallel is “real” not so much in a metaphysical sense as in the sense that people feel it is not a matter of choice. I like to think this is what underlies the position of Pope Francis just quoted. Of course, this is always discussable.

## II. THE SCENE

Book Two of *De los nombres de Cristo* by Fray Luis de León, O.S.A., continues the conversation of the illusory master Marcelo with his two disciples, Sabino and Juliano. The moment is early summer, about 1583. The three are at ease on a bank of the Río Tormes at La Flecha, a monastery farmstead near Salamanca. The subject at hand is the meaning of name “King” (*Rey de Dios*) as written on a piece of paper in Hebrew letters. Marcelo is making the name as tangible and real as the letters themselves. Sabino understands him to mean that citizenship in messianic times comes as naturally as birth itself, without regard to family connections or social status or property.

Aquí Sabino, volviéndose a Juliano. –Nobleza es –dijo– grande de reino ésta, Juliano, que nos va diciendo Marcelo, adonde ningún vasallo es ni vil en linaje ni afrentado por condición, ni menos bien

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<sup>1</sup> m.vatican.va › documents › papa-francesco\_20190929\_omelia-migranti.

nacido el uno que el otro. Y paréceme a mí que esto es ser rey propia y honradamente, no tener vasallos viles y afrentados. (de León, II, 589).

Marcello is no doubt aware of the huge numbers of Christian neophytes in Mexico (even California), Peru and the Philippines as he makes clear what is written but difficult to say about the Hebrew name. American citizenship is of the messianic kind, an inalienable birthright. But this would not be so if one should lose sight of what the written word can show is true about things that the spoken word alone leaves undisclosed,

Así ha sido siempre desde su principio el Evangelio, y como el sol, que, moviéndose siempre y enviando siempre su luz, cuando amanece a los unos, a los otros se pone, así el Evangelio y la predicación de la doctrina de Cristo, andando siempre y corriendo de unas gentes a otras, y pasando por todas, y amaneciendo a las unas y dejando las que alumbraba antes en oscuridad, va levantando fieles y derrocando imperios, ganando escogidos y asolando los que no son ya de provecho ni fruto. (Ibid., 607).

Marcelo knows how citizenship in Germany was once by natural birth and that suddenly it was not. This happened when Charles V Habsburg was elected Emperor in 1519 despite not being German born as required by ancient constitutions. Martin Luther's indulgence-selling nemesis the Archbishop of Mainz Albrecht of Brandenburg was also chancellor of the Empire. Albrecht determined that German parentage was enough to make the emperor a citizen when being a citizen was not enough to make him an emperor. (Caramuel, 142-5). This eventuality made occupancy on earth just as transactional as indulgences made occupancy in heaven. The scandal of making occupancy transactional in both places had profound implications. It motivated the Protestant Reformation as is well known. But it also motivated the Portuguese people to rise up against Castile in 1640 and reestablish their political sovereignty as Marcelo had seen citizenship in America to be in the written word "*Rey*".

Marcelo's rather special understanding of American citizenship is important because what was small then is big now 436 years later. What was on a scrap of paper is reality. The following sections develop reasons to think so.

### III. THE ARGUMENT

#### 1.1. Beyond “the throwaway culture”

Markets are like a vast ocean. Values are constantly being bought and sold. There are violent currents. But there is no homeport in sight, no calm place to measure conflicting claims to global satisfaction. The philosopher Hannah Arendt (1906-1975) (*The Origins of Totalitarianism*) called such a measure “...the right to have rights...”. U.S. Chief Justice Earl Warren (1891-1974) (dissenting in *Perez vs. Brownell*, 1958) wrote “citizenship is the right to have rights.” No “right to have rights” has yet been found in the United States Constitution. But it has a name that people in California might well recognize. A right is a claim against another to do or forbear. A “right to have rights” is an inalienable claim to citizenship. The claim arises from place of birth, literally “of the soil”, or occupancy or possession of a place called home or in Latin *jus soli*. *Jus sanguinis*, by contrast, is a claim to citizenship and land arising from parenthood, literally “of the blood”, passing as property does within family lines.

The notion of a false choice, “the throwaway culture”, comes up when people do not want to give up the industrial growth and social progress that capital makes possible. On the other hand, no one wants to see land occupancy made impossible by pollution or climate change. Public debate about these things seems to reduce to a choice. For example, the Trump administration wants to roll back California’s auto emissions standards. California’s resistance has been dubbed Governor Newsom’s “checkmate” because there is no choice about the standards. Californians agree it must be done to preserve their occupancy. The resistance is thinking that there is still a choice to make about it. A close look at the Constitutional meaning of *jus soli* explains why there is a reason for Americans to think that occupancy is a choice.

Let us go back in time a little to a report by Patrice Teddonio aired on the Public Broadcasting Service on September 22, 2016:

It was April of 2011. For weeks, Donald Trump had been fanning the flames of the “birther” movement and attacking President Barack Obama on television – demanding that Obama produce his birth cer-

tificate, implying that he was not born in the United States, and questioning the religious identity and legality of his presidency.

But on April 30, the tables were turned. Trump was the recipient of President Obama's jokes at the White House Correspondents' Dinner – and Trump political advisor Roger Stone tells FRONTLINE in *The Choice 2016* that the dinner was a turning point for Trump.

"I think that is the night he resolves to run for president," Stone says in the opening scene of FRONTLINE's two-hour documentary on Trump and Clinton, ... ."

"I think that he is kind of motivated by it: 'Maybe I'll just run. Maybe I'll show them all,'" Stone adds.

Stone isn't the only Trump surrogate to tell FRONTLINE that Obama's mockery that night was a motivating moment in Trump's journey from flamboyant businessman and reality TV star, to the Republican presidential nomination.

"I thought, 'Oh, Barack Obama is starting something that I don't know if he'll be able to finish,'" says Omarosa Manigault, a former Apprentice contestant who was at the dinner that night, ... .

"Every critic, every detractor, will have to bow down to President Trump," she adds. "It's everyone who's ever doubted Donald, whoever disagreed, whoever challenged him – it is the ultimate revenge to become the most powerful man in the universe."<sup>2</sup>

The Constitutional provision (II, 1, 5) that the President of the United States must be a "natural born citizen" is taken by the "birthers" to be an example of *jus soli*. The 14<sup>th</sup> Amendment is an entitlement to citizenship for all born in the United States or its territories. This is also identified as a Constitutional *jus soli*. As reported on KTLA on August 21, 2019, "'We're looking at this very seriously, birthright citizenship,' Trump told reporters ..., echoing his administration's previous vow to unilaterally end the process by which babies born in the country automatically become citizens."<sup>3</sup> Citizenship in

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2 <https://www.pbs.org/wgbh/frontline/article/watch-inside-the-night-president-obama-took-on-donald-trump/>

3 <https://www.politico.com/states/california/story/2019/08/23/this-is-checkmate-newsom-thrives-on-trumps-ire-over-auto-deal-1152154>

countries outside the Americas is most often “*jus sanguinis*”. If people have to make a choice between *jus sanguinis* and *jus soli*, it cannot be both ways at once. This is why President Trump has said that many American Jews are disloyal either to Israel or the United States <sup>4</sup>. If they do not make *jus sanguinis* the test of citizenship, one cannot be loyal to both. One must choose.

Others would say there is no choice to make because one is born an American citizen regardless of parentage. But this is where President Trump has turned the tables on President Obama. Most people in 2011 knew that President Obama could prove he was born in Hawaii. But Obama ridiculing Trump showed that he had missed or ignored the “birthers” tacit point, which was to discount people’s (Indians, Africans, etc.) occupancy at birth as sufficient reason for citizenship. No doubt Obama believed that it was. But Trump demonstrated that the “natural birth” of an African President was transactional by winning the next Presidential election.

Being a citizen by an inalienable birthright is not about a geographical location or biological differences as the “birthers” say. It is about official letters with an embossed seal declaring birthright citizenship to be inalienable. Such letters would be generally acceptable the way being at home is warm and inviting and not in a restless crowd filling space. An inalienable birthright is not a choice because this is how home is. This is not the only kind of citizenship. Citizenship can be a choice. One can choose to be both a Swiss citizen and an American citizen if one has Swiss parents. But the point of documenting birthright citizenship is to show that one can have both at once without having to choose one over the other. So far as I know, no such documentation exists under the federal Constitution, however much Chief Justice Earl Warren argued that the Constitution itself is that documentation.

*Jus sanguinis* citizenship is being advanced in the absence of the new digital world itself being such documentation. It is shocking that one’s image of home can be a virtual ship on an ocean of binaries. It is

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<sup>4</sup> WEISS, B., «Donald Trump and the Disloyal Jews», Opinion, New York Times (Updated 8/23/19).

also exciting questioning things taken by Obama for settled. “Online, the universe appeared to be nothing so much as an array of patterns in search of an explanation, provided to people unwilling to trust to any authority but that of their own fevered, reckless, and thrill-seeking political imaginations.” (Lepore, 726-7). Sailing has its risks but it is not about lifeboats. In an ocean of binary choices, social media are like lifeboats offering binary choices that inevitably make one fear and angry and displace one’s peaceful home. This is birthright occupancy being persistently turned upside down electronically. If birthright citizenship were a ship on our ocean, it took a big dip in 2016.

The 2011 dinner was an early tipping point. If Obama wanted to ridicule Trump, he should have demonstrated an inalienable form of citizenship. People in the room, being Americans, took it for granted that citizenship is a birthright or they would not have laughed at Obama’s joke. But the Constitution does not say that per *Perez vs. Brownell*. Those of the press and media mostly reinforced the “birther” position by taking sides as if the difference were a choice. Does citizenship have a homeport in *jus soli*? It is not in sight. One doesn’t hear it is from the people with sufficient clarity to be sure. But let us look more closely at the case of California.

## 1.2. Occupancy and Property in California

Since hardly anything is more discussable than the value of real estate, one can understand *jus soli* citizenship and the effort to dislodge it in favor of *jus sanguinis* with a rough idea of the distinction between property (e.g. things of value) and occupancy or possession (e.g. birthright citizenship). There is land to own and land to occupy or possess. This is an historic difference with political consequences. California was once one of the very last parts of the world to occupy. No one owned it at first. Indeed, sophisticated people in the early 19<sup>th</sup> century found that California was irrelevant to any discussion of values. The Italian poet Giacomo Leopardi (1798-1837) considered California to be the most remote place in the world the inhabitants of which, according to reports, were hardly different from brutes. What need had they of values and rights? Others thought the aboriginal “Californians” as they were called, however primitive, had a birth-

right claim on the land. Spanish political leaders authorized Catholic missionaries to make contact with the “Californians” on this basis. The missionaries would later attempt to check property claims of colonists to the land that the “Californians” considered theirs to occupy. The Spanish considered the tribes to be sovereign and their people citizens of their own nations. But birthright citizenship had absolutely no value as Leopardi observed. Who wanted to be a “Californian”? President Trump is asking somewhat the same question. Who needs birthright citizenship when it has no value?

California now is largely property. Property is an investment of labor. Property in the colonial Americas was mostly in agriculture or mining. At the end of the 17th century revenue from ranches and other real estate began to be donated for the support of the Indian missions through the Pious Fund of the Californias (1697-1966). The Milanese priest Juan María Salvatierra, S.J. (1648-1717) and his associates established it to promote *jus soli* claims in favor of the Indians in lieu of Spanish government financial support. The Fund went into a government trust after the Jesuits were suppressed (1767). In 1842, the Fund’s real estate was monetized by President Santa Ana and the proceeds were deposited in the Mexican treasury. No value was lost because Mexico returned the money to the Fund’s beneficiaries in a 1966 settlement. But something went missing in the meantime. The land of Indian occupancy had been developed by labor and bought and sold. The Indians found themselves socially marginalized. Citizens with property heeded not at all. Who needed *jus soli*?

The monetization of the Pious Fund happened when wealth was fast severing its previous ties to the land. The gold and silver extracted from the land enabled a new industrial and social complex based on capital. With the availability of new money, capital grew more rapidly in the vast spaces where governments could be moved to favor colonists against native populations. Claims to citizenship based on occupancy of the land were often ignored and property and home came to mean the same thing as they do to many today. But property and occupancy are different things.

In 1823 the U.S. Supreme Court (*Johnson vs. McIntosh*) found that Indians have a “right of occupancy” but not property rights



against U.S. citizens. The Court stayed a patent given by English King James I in 1608 for a huge area in North America. Thomas Jefferson in his *Notes on the State of Virginia* (1781) discussed a similar patent given by King Henry VII (1496) to the Cabot brothers. Those patents recognized property ownership in America directly. Goods shipped to England were taxed. The Court referenced *Romanus Pontifex* (1455), a bull of Pope Nicholas V that declared Portuguese kings have a claim of occupancy in un-evangelized overseas territories to do business there. The terms of *Romanus Pontifex* were expanded (1506) to become the legal basis of claims to occupancy in California for both the Spanish and the Indians as mutually respective sovereignties. *Romanus Pontifex* included more than Johnson vs. McIntosh about the right to occupancy or possession and nothing at all about the right to property. The right of occupancy is not to be confused with the “rights given by discovery” that have to do with dominion over property. Chief Justice John Marshall made this distinction when he wrote:

Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed in on the rights given by discovery. Portugal sustained her claim to the Brazils to the same title.

There were two different land claims: The grant of the Pope about the right of occupancy reserved to the people of a place, and the right of discovery or dominion over property reserved to government. The question left by the Court was how the two claims co-exist. Such co-existence would be the case if occupancy were an inalienable birth-right. The tension between the two claims can be released because the opposition is not one in principle. Each claim has its own principle.

### 1.3. Labor and Work

I am not competent in legal terms like ownership and dominion and possession and occupancy, least of all in Danish ones. Greenland might be for sale<sup>5</sup>. But it is not for sale from Denmark in a 21<sup>st</sup> century

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<sup>5</sup> <https://www.politico.com/magazine/story/2019/08/23/donald-trump-greenland-purchase-sovereignty-denmark-227859>

juridical sense. Greenland's people are its possessors or occupants. This example shows only how many are the ways of getting one's hands on what citizenship is. And *jus soli* is one of them and it is under scrutiny as to what it is, or if it "is" at all. The distinction of work and labor is another way.

According to Hannah Arendt "work" is making things that last indefinitely without necessarily having any use or exchange value; "... against the subjectivity of men stands the objectivity of the man-made world rather than the indifference of an untouched nature, whose overwhelming elementary force, on the contrary, will compel them to swing relentlessly in the circle of their own biological movement ..." (Arendt, 137). Medieval philosophers like Aquinas called work "*actus humanus*". By contrast, labor "swings in the circle of biological movement". Labor was called "*actus hominis*".

The parallel to be drawn between occupancy and property on the one hand and work and labor on the other is "real" to people with a certain history and politics. Images of home never match up the same for every individual, but a whole people's image of itself as being at home on their land can be taken as "real" because it defines them as opposed to another people or an undefined crowd. However much people dispute about things at home, those who have a home do not question its "reality". In other words, home is not a choice as long as one is at home. Likewise being "real" is not a metaphysical truth so much as word that does not admit choice at a level that would deprive the term of its meaning. One is either at home or not. This is not a choice. It is all the less so if Earth and the universe are mankind's home inasmuch as this universe would be "reality" as constituted by all peoples' working to make a home together, no matter their other differences. If it were not so, the work of maintaining one people's difference from another would be no different from labor. "Home" and "reality" would be different things and people would come to violence over the difference in wars over property and dominion. People have, on a world scale. And they also try to prevent it from happening on a world scale.

The parallel of occupancy and property with work and labor being "real" suggests a kind of independence from nature that is embod-

ied in things people make. Losing such things is mourned or regretted by everyone as inhuman. Then too there are positively hopeful things like making marriages quasi-permanent and images for religious devotion and art and peacemaking. “Reality” does not necessarily mean transcendence, but it feels like it for certain reasons peculiar to those to whom humanity matters as such. For them the distinction of work and labor is quasi-permanent whereas labor alone is concerned with replacing a recurring loss.

#### 1.4. *Jus soli* in California apart from Government

When the parallel of occupancy and property and work and labor is “real”, the promulgation of birthright citizens in a public forum is a sufficient reason for it. This is not to make it known. Rather the “reality” of the distinction needs to be effective. The function of the Secretary of State in California is to emboss legislation and other public documents with the people’s seal. This is needed to make laws and institutions effective as the people’s own. Such institutions turn for their “reality” on there being a correct form marked by being open to both sovereign and subject alike and therefore inalienable to one with respect to the other. The people’s rights as occupants are protected from intrusion from the government (i.e. governor and legislature who represent property owners) by having a “seal” representing their “reality”. The specially elected “sealer’s” function is to show that government and the people are different things. This particular official acts apart inasmuch as people have a right of occupancy before government. Property belongs to government to determine. The seal represents occupancy or possession. Correspondingly, the symbol and offices of state are different. The people do not consider the difference of occupancy and property to be a choice. It is constitutional and the two claims to the land coexist in laws in force as they seem to do in California.

This sense of “reality” is not a defining characteristic in all states, as far as I know. California is still one among many suggesting that *jus soli*, work and occupancy are related concepts in a “real” opposition to *jus sanguinis*, labor and property, and that the difference is not a

contradiction. This parallel relation is not open to choice. California is one's homeland only as the relationship is "real".

Californians' view of their own "reality" means that as a people they must feel, smell and taste things, not just hear about them. This is why their seal must be embossed to be tangible, not just seen. This is the lesson of *Gen. 27* where Jacob takes the land of Isaac *jus soli* by a set of deceptions involving feeling, tasting and smelling gaining over seeing and hearing alone (old Isaac was blind and a little deaf). Otherwise the land belonged to Esau by birthright *jus sanguinis*. Esau's view was "*jus sanguinis* citizenship without *jus soli* with them being contradictory choices. But Jacob and Esau were both Isaac's sons and contradiction was not an option. The blessing of Isaac in the story could neither contradict nor be contradicted, any more than work is labor or occupancy is property. The two claims had to coexist. This is a lesson on "reality" open to discussion but not to distortion.

Similar to this lesson, the people and government of California are different things represented by different great offices of state. The great seal represents the people as occupants "really" distinct from government. The seal can have the effect of rendering ears deceptive. By the same token, a light Presidential touch on Twitter can be quite meaningful without one having to believe what it says. The President might be blind and deaf to "reality" like old Isaac. But it is certainly good to be in touch with the people. Imagine the Presidential tweet as a blessing on people's natural birth!

The people of California claim to have an "inalienable" right of occupancy just as the great seal represents the "reality" in which they live for whatever historical reasons. There are many states without an elected secretary of state. And the federal government is different in its own way from California. There is always one reading of seals or blessings of Isaac to set against another. People do choose among them. But in no case where logic prevails can a discussion of their "reality" be contradicted by any amount of speaking without the other senses. The seal is the people's *jus soli* in a meaningful way because it is a case of work that is "really" not labor just as occupancy is "really" not property. The parallels here are as "real" as being at home on a land of one's own. While the "reality" of the parallel is always open

to discussion, one simply cannot erase its meaning. It would be like saying work and labor and occupancy and property mean the same thing when they do not when one is at home.

For his part, President Trump offers people a choice to make America great again. This offer has a royal precedent. King James I gave patents that are still the basis of property ownership in English speaking America. According to him people never had an inalienable claim of occupancy in their land. Sovereignty in England was divine, transmitted *jus sanguinis*, and not on the people's account. Historian Jill Lepore writes:

King James, citing divine right, insisted that his power could not be questioned and that it lay outside the realm of facts. 'That which concerns the mystery of the king's power is not lawful to be disputed,' he said. To dispute the divine right of kings was to remove the king's power from the realm of mystery, the realm of religion and faith, and place it in the realm of fact, the realm of evidence and trial. (Lepore, 42).

It is important that the "power" in the "realm of evidence and trial" was not *jus soli* but a form of government that did not admit *jus soli*, which is Trump's logic too: one cannot have a right to occupancy and a right to property at the same time.

To the contrary, the great Portuguese patriot Padre António Vieira, S.J., (1608-1697) once remarked that there is a big difference between being our king and the king being ours. One can be "our king" by divine right or right of property. But a "king is ours" when a sovereign people makes one for itself thereby becoming a people at home and ceasing to be a multitude. The Lisbon monarch had to be close to the people to see and touch and feel them, not just hear about them from a distance like the king in Madrid. The Portuguese people's claim to their homeland after 1640 and until 1910 was embodied in a sovereign person who was a natural born Portuguese. This was constitutional of the people and had nothing to do with a right to property or theology or facts determined by evidence of the kind lawyers use to turn labor on the land into property or property into money.

The Portuguese lawyer/diplomat Dr. António de Souza de Macedo (1606-1682) detailed the reasons for this in a book *Lusitania Liberata* (London: 1645) that he presented to Charles I Stuart (1600-1649) at Oxford, the English king's wartime capital. This was done on behalf of King Dom João IV Braganza (1604-1656). This book is the major document of the Portuguese Restoration. It features special illustrations to make its point clear without one having to read it all. Several of its image plates show the dragon or leviathan of *Job* rising out of the slime to protect the people who occupied the land against an intrusive government (i.e. Castile's Habsburg dynasty) that controlled the property. "Will [the dragon] make a covenant with thee? Wilt thou take [the dragon] for a servant for ever"? (*Job* 41: 4 KJV, *Job* 40: 23 Douay). The answer to this rhetorical question is obviously "no". The picture is too powerful, too much like the Portuguese people's experience of being citizen/occupants that prompted their successful uprising against Spanish dominion. King Charles signaled his approval of the Portuguese dragon, but lost England in its civil war. Similarly in Portugal, early 20<sup>th</sup> century Liberal laws exiled the Braganza family to make royal succession *jus soli* impossible. Before 1910, the Portuguese had citizenship like their king, *jus sanguinis* and *jus soli* both at once, and there was no choice between these two positions. Now, it seems, there is.

Two types of claims to the land, one originating with people and the other with government, coexist in California more like the Portuguese arrangement before 1910 than like the English one. There is no royal succession, of course. The citizens constitute a sovereign people *jus soli* and can also have citizenship *jus sanguinis*. The Secretary of State is there to maintain evidence that popular sovereignty belongs to the people as occupants, not owners. In this sense, the sealer/Secretary is like a Portuguese king whose attestation to laws was on his people's behalf, even while his government had dominion over people's property.

The notion of *jus soli* or popular sovereignty remained influential for a long time, particularly in the Americas. Distance from Europe appealed to those whose birthright citizenship had once been sold and whose choices had been turned binary with 16<sup>th</sup> and 17<sup>th</sup> century battles over religion and dominion. California was among the last of

places to go to have occupancy be “real”. When the Portuguese Restoration was secure, Padre Vieira began writing his *History of the Future* announcing a new world coming wherein *jus soli* citizenship would be honored in its solid and tangible form by new nations in America and Asia just as it was replaced by *jus sanguinis* in England or Germany. Red, brown, black and yellow Catholics would replace the white ones lost to a Reformation that included the Catholic Reaction. The odors and tastes of New World spices and woods and fruits and its minerals would be persuasive enough at an economic and commercial level to enable the inalienable right to occupancy to move westward as naturally as the sun sinks over the horizon. The sensory qualities of such things would draw people toward a citizenship that was therefore evidently theirs. The “reality” of *jus soli* was not a choice and so just natural as the sun not reversing course. This is how people experience things.

The point to emphasize is that *jus soli* citizenship is “real” by way of its being represented with all the senses agreeing on an image like the people’s seal. A visual representation of the voice is sufficient for *jus sanguinis*. The ear does not hear all differences of kind, so there seems to be a choice between things at the level of writing representing hearing. But a choice between *jus sanguinis* and *jus soli* claims to the land is not so simple. Upon closer analysis with all the senses involved, these turn out to be different kinds of claims that do not exclude one another logically. As with apples and oranges, there can be no choice of one that would exclude the other, and the coexistence is not open to choice.

The California missions were launched just when Padre Vieira’s long, active life ended in Brazil. The Pious Fund was designed to sustain a birthright claim to citizenship for the Indians just as Vieira had done following the lines of Marcelo’s insight. Vieira had told African slaves the Virgin of the Rosary was their mother. They had a natural right to occupancy no matter that they were property. He had fought the removal of Indians because it undermined the claim to *jus soli* citizenship upon which Iberian national identity and its prosperous world commerce depended. These same battles went on in the California Missions and they do now on a world scale.

These are only gleanings from California's beginnings that seem still to be characteristic of our times in important ways. Governor Newsom's "checkmate" on auto emissions is only an example of this being so. The people of California have made their position clear on *jus soli*. Their claim to occupancy is not a choice. Occupancy must be preserved. But to make it a choice is to make it "unreal". One has to first determine what "reality" one is discussing. As Alf Hornborg writes, "The problem is more fundamental than capitalism or the emphasis on growth: it is money itself, and how money is related to technology."<sup>6</sup> Is that relation a choice as many think? One must distinguish what is tangible and open to the other senses from what need only be said or read. Symbols are deceptive to one who only hears. Old Isaac was deceived. The one case, *jus sanguinis*, is biological, like labor and wealth, and so it is quickly understood as a choice by hearing that the tangible symbols of *jus soli* are empty, useless and without value. But what if the people's seal on money were about occupancy and property at the same time? The relation of money and technology would be quite different in "reality".

### 1.5. *Jus Soli* as Stone and *Jus Sanguinis* as Flesh

Like Marcelo, I am attempting to piece together a picture of inalienable citizenship by birthright occupancy felt to be "real" in solid and tangible things. I am doing it just because I find it meaningful. Instead of a Hebrew name on a piece of paper, I could carve my Latin letters on clay and make brick tablets. I could tweet, but there is not enough space. But instead I am lettering the silicon chips in my MacBookAir. Instead, I shall picture the soil of my home state on the stone of my tablet (silicon in this case). I take them both as "real" because it feels solid and permanent to do so. I take them as representing feelings and fragrances of home so that the land is inseparable from the lines or bits and pixels that make an image of it. The chips are important because they suggest the full range of the senses, smell

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6 HORNBERG, A., «How localization can solve climate change», BBC, Future, 6 September 2019. <http://www.bbc.com/future/story/20190905-how-localisation-can-solve-climate-change>.



not so much perhaps, but at least the quasi-permanence of touch and even taste. Once composed, there is the land that is mine on silicon, even in its lasting quality, and it is mine with hardly any effort. In the Weldlandschaft school of painting a landscape is recognizable as a particular people's own. Jan Bruegel the Elder's (1525-1569) two Tower of Babel images (c. 1563) are deeply meaningful examples of this sort of Erasmianism. Erasmus (1466-1536) had already summed up the notion in his motto: "*Mors ultima linea rerum*". Death is the last line of things meaning that line (as in writing and drawing or now with bits and pixels) and land and the civilized life on it all were signs of occupancy. Death, on this view, is the end of occupancy, not the end of life. Every people can make a home with its own images as I do. Individual occupants can come and go but the land and the land as pictured remain for a long time being more stone than flesh but "really" both in tension.

A common example of *jus soli* being different and quasi-permanent is how we no longer eat food produced by forced servitude as George Washington and Thomas Jefferson used to do. They did not concern themselves too much if their slaves had no place or time to call their own. Labor on the land and labor saving devices were enough to feed a person or a crowd. But food is about work not just labor because while having to eat is not a choice, food can be flavored, decorated and made very attractive. Cooking is about tasting and smelling and touching more than about staying alive. So is wine making and brewing beer. These make eating more than survival. Cooking is a primary way of being at home and farm produce is now identified and graded with a public stamp for cooks to see. It adds nothing to the food value produced by labor. But slave-produced food has such a bad taste that one no longer will touch it, much less eat it. California winemakers have territorial designations (AVAs) that set their products apart. The stamp and the label bring food home and turn farmers and cooks into workers more like artists than laborers. This makes for public safety because everyone is in occupancy with the farmer and the cook (the ex-slaves). Such stamps imply a certain "reality" or quasi-permanence of things work makes. *Jus sanguinis*, by contrast, enables the transfer of property and slaves are property.

Along these lines, it is not an accident that the first words spoken by man were written in clay (*Gen.* 2:7). The Tower of Babel (*Gen.* 11) was made of bricks meaning that the Tower as written was a product of work different from labor, which difference men ignored to their regret. The commandments of Moses (*Ex.* 20: 2-17) were on stone tablets. Nehemiah walled Jerusalem with stone or brick (*Neh.* 2). The people were only as safe as occupancy and property remained in tension. The Gospel of John noted this by having Jesus write in sand (*Jn.* 8), cure the blind with clay (*Jn.* 9), and pass through a wall (*Jn.* 20) as solid as Nehemiah's. What smells more than the fish in *Lk.* 24:32? What is more touchy than the open wounds in *Jn.* 20:27? What other function do these graphic images have than to make things seem "real"? They are "signs of the times" (*Dan.* 12: 4, *II Pet.* 3: 3-4, *Mk.* 13: 7-8, *Mt.* 24: 14, 23-24, 29-30, *II Tim.* 3: 1-5, *Lk.* 21: 25-26) that reference things or events or actions that are willingly, even eagerly, accepted as "real" and are not matters of choice.

Things are expressed or pictured in these cases by way of a syntactical trick so that smell, touch and the other senses conspire with one another in such a way as to give the tension between occupancy and property the feel and substance of the soil itself. California wines are made of different soils with differing tastes and smells. Enthusiasts can hardly find words to describe the nuances that are "real" to them. To taste them is to delight in purposeful work even while the labor repeats itself endlessly. A depiction on a page can be as "real" as the thing itself. This works when the relation between images and things is fixed so it is not a choice. So it is more meaningful to use stone (or computer chips) than paper to write.

This trick with stone has the prestige of magic but there is no formula to make it happen. "Make America Great Again", on the other hand, is a magic formula because it is a choice set against a "reality" that is not a choice. If being the most powerful man (or nation) in the universe is open to choice, one has only to sell people on the idea that the parallel coexistence of work/labor and occupancy/property is not "real". There are many means of doing so. One would promote *jus soli* and *jus sanguinis* as binary choices.

Nevertheless, computers do represent the difference between work and labor being “real”. Moses did so with his staff and made water run from a rock to mark the difference of occupancy and property (*Ex.* 17:16, *Num.* 20:11). Using a computer to write is like having names written on a stone that none can read but oneself (*Rev.* 19:12). It can simultaneously conceal the one named while revealing one’s difference to others by virtue of the quasi-permanence of the material the name is on. The physician writes a prescription to cure a body actively named as a living person, not a corpse. The prescription fits that one whom one can represent only by some sign of one’s difference. The theologian explains the *symbola fidei*, not oral statements. The *symbola* fit that One. Oral expression, or writing it, is not enough for serious talk when there is no choice about the thing under discussion. To have such a discussion, there have to be jesters to abide the tension lest the dialogue end. However concealing such graphic and tangible signs may be (who can read a doctor’s prescription or 4<sup>th</sup> century Greek?), computers can make such signs and thereby add “reality” to seeing and hearing. It adds touch and can perhaps convincingly represent taste and smell too. Of course one may speak and hear things that leave the other senses aside. But without a degree of humor tolerating the differences the discussion is no longer about “reality” because it leaves the other senses out. One has no choice but to bring in all the senses to indicate there being something more to “reality” than what one says or hears. One has to feel it the way a musician puts feeling into a score. It takes touch and motion to make sound sweet.

An orderly and purposeful tension between inalienable rights to occupancy and transactional rights to property passed so well at the 2011 Correspondents dinner because birthright citizenship seems so obvious to Americans. Nearly everyone present laughed at Obama’s joke. Obama himself did not have to think about the effect of his jest on those who think that a whole nation could aspire to total power over others by creating a series of choices counter to “reality”. Who would say it is not worth wondering about it?

### 1.6. *Jus soli* in the United States

English common law does not entertain a distinction between work and labor that is existential and “real” in the sense it was in early modern Iberian law. Philosopher John Locke (1632-1704) influenced Anglophone Americans like Washington, Jefferson, Hamilton, Madison and Franklin for whom rights to property were called natural. Wealth was concerned with natural needs that were never satisfied. Wealth in the form of money was counted and stored up and consumption was deferred. The idea that wealth did not require work took new legs. Technology could make some people smarter and their life easier. The few could cow the many into submission. This was not a Biblical dragon aroused from the slime to save the people or letters in stone keeping people in occupancy. It was labor without work. Who needed *jus soli* if one had property rights without it?

Since the aboriginal Americans were not considered to have agriculture or to labor they had no wealth and so were left outside a civil society designed around property. The right to occupancy for Indians that the Marshall court ultimately declared to be consistent with the royal patent in *Worcester vs. Georgia* (1832) was discounted in practice. Defying a treaty with President Washington protecting the Indians’ occupancy, President Jackson removed them from Georgia. *United States vs. Wong Kim Ark* (1898) held that birthright citizenship was “ancient and fundamental” and included Chinese, but not Indians. Tribal claims to membership and sovereignty on reservation lands had become transactional and not an inalienable claim to occupancy. The Indians’ history became America’s remote past not a future to share.

After the American Civil War, the 14<sup>th</sup> Amendment assured citizenship for all born in the jurisdiction of the United States (or what would become its jurisdiction) and freed slaves. Whether the Emancipation was simply a release of property in virtue of dominion or the work of a people defining their right to occupancy as inalienable has never been entirely clear. Around the turn of the 20<sup>th</sup> century, Spanish-speaking natives of New Mexico and Puerto Rico found themselves instant citizens as they had in California in 1850. But *jus soli*

was also transactional as was evident soon after Mexico freed itself from Spain. Indians became Mexican citizens but the Mission lands became property granted to ranchers not for Indians to occupy. The U.S. Senate did not ratify the Treaty of Temecula (1852) negotiated with the local Indians by President Taylor's agents. The Cupa tribe failed to file property claims in San Diego County as the ranchers did who thereby got ownership of tribal lands in *Barker vs. Harvey* (1903). Inalienable rights to occupancy were ignored in the politics and the bargaining as if they did not exist. As late as 1958, inalienable citizenship in the United States was rejected with Chief Justice Warren dissenting. The federal courts have, one presumes, left the question with the people to decide for themselves. This brings us to picturing California.

### 1.7. Mirth and Calm

Pablo Tac (1820-1841) was an aboriginal from Mission San Luis Rey who became a student at the Urban College in Rome. The names of his parents and where they lived are known. His people in the area are called Luiseños. Tac made his claim to occupancy about his own people's existence at the end of the Mission era. They had nothing much of value to lose. But he did show why *jus soli* was no less inalienable for those who would call California home in the future. That would be us now including the Indians. It was noted by those who knew him personally in Rome how the young man had "unusual calmness and good humor (*mirabili animi tranquillitate et hilaritate*)".

Mr. Christian Clifford's book, *Meet Pablo Tac*, features (page 11) Tac's drawing of two young male Luiseño dancers. They appear to be friends illustrated for an audience to make telling their story easier. The bigger dancer wears a tall feather on his head. What makes the big-feathered dancer interesting is the suspense Tac created by drawing him. There remains a tension between picturing the dancer and what to say about him. The big feather is not sufficiently explained unless by the dancer, perhaps Tac imagining himself to be one. The material intelligence required to perform the dance's intricate physical motions turns things around to the point that the

feeling of the steps, twists and turns, and the costume must come before saying or hearing what they all mean. The dance is an example of work differentiated from labor. It is graphic occupancy being “real” by way of bodily representations, of which the otherwise ridiculously big feather would be an apt sign. Tac drew these tribal figures in Rome like young friends where, after his companion Agapito Amamix had succumbed, no one else possibly could substitute for his own people. His drawing has a light attractive power. It makes a place for others to occupy that is so clear to see that no one could say California was not “real” or take away Tac’s identity with it. It worked to make people in Rome wonder seriously about the Californians in an airy and amusing way.

The Bologna archive holds many texts by young Tac. Another in Latin entitled *De Californiensibus* provided brief vignettes of various California tribal groups. The Spanish missionaries supposed that hostile tribal groups would relate to one another peacefully in prosperity under a government foreign to them. Tribal leaders had to accept this on their people’s behalf to be rid of their idols. Some of the groups described belonged to the Missions. Others remained hostile (idolaters). What is important to notice is how the syntax Tac used implies that words take meaning from qualities available to all the senses. The writing says more than the sound of letters.

Tac also wrote a short history of Mission San Luis Rey in Spanish that depicted his own people at work successfully abiding the tension with labor. The tribes around San Luis Rey and San Diego had previously been at war constantly. Now they were as safe as his two dancers appear to be in his drawing. The Roman letters used in Spanish still represented sounds, but they implied the tribes’ claim to occupancy under a foreign government in a land that Tac knew was still the Indians’ own. This was the sense of the future also provided by the Latin syntax of *Romanus Pontifex* referenced by Chief Justice Marshall in connection with the Indians’ right to occupancy. In other words, Tac was not writing about his present, now past, but more importantly as a kind of prophet of the future because *jus soli* or an inalienable right to occupancy was global in space and time to him. California was “real” in that large sense or, one might say,

it had future writ small that was going to become big. This is like Marcelo's reading of "*Rey*".

Tac's mentor in Rome was the famous hyper-polyglot priest Giuseppe Mezzofanti (1774-1849). Distinguished people applauded his young protégés from many far-flung places for their ability in reciting little poems in their native languages to indicate how universal and inalienable the right to occupancy was. Reliable reports have Tac doing this repeatedly in "Californian", notably on the occasion of Mezzofanti's elevation to a cardinal's princely purple in 1838. Several such poems in Luiseño, including a grammar, survive although it is hard to tell how much might be the mentor's coaching.

Tac composed *De Californiensibus* by himself in Latin at Cardinal Mezzofanti's request. It was likely meant as documentation for the creation of the Diocese of California (April, 1840) to replace the ecclesiastical jurisdiction of the Missions. Tac ended it with a disclaimer that it was about things he remembered over some length of time. The meaning, however, was not entirely colored by time and distance. It was still quite clear that the first California diocese would take shape to mark the surprise peace among the warring tribes of San Diego and San Luis Rey and their material prosperity anticipated under Mexican rule. Tac's was the picture of California implied in the Latin syntax of the bull *Apostolicam Sollicitudinem* (1840), the diocese's founding document. "Californians" were sovereign occupants of their land *jus soli* because their work had already distinguished them from the disorder of nature. The Latin syntax of *Apostolicam Sollicitudinem* does not differ from that of *Romanus Pontifex* on this point. There was no explicit mention of property rights in the text of either other than the diocese's claim to the Pious Fund that existed solely to witness the existential difference between work and labor that was taken in Rome to be characteristic of California's future.

Pablo Tac died before he could return home as a priest of the new diocese, which he had taken an oath to do. The new bishop arrived in San Diego days later, but was soon deprived of the Pious Fund promised as a condition of establishing the diocese. The rents stopped when its lands were monetized in late 1842, and the new diocese

failed. Then Americans and others migrating to California ignored the tribes, and, much worse, killed many of them off especially in the northern parts. Many had already succumbed to diseases. Peace and prosperity for the tribes seemed hopeless and their extinction certain under a third foreign government. Slavery was practiced and claims to an inalienable occupancy were discounted. The Indians were by this time beyond serious mention as sovereign in their own right.

There are stories of “spiritual realities” being helpful to children. Tac’s poetic reference to the Luiseño divinity *Chan’n’ichn’is* who comes down to earth to save his people is usually read in English translation as one such story. The divinity would be a dubious cause with an imagined effect. But Tac was not writing a child’s story. Had his people not already distinguished themselves from nature? Did they not dance for the “ceremony” of it? Dance was work, not labor, and it made his people’s difference “real” to them. Had his people not believed that men were created of clay from the only natural lake in Southern California? Did they not make great buildings out of adobe and stone like Nehemiah? Was this not also to clarify work’s “real” difference from labor? Were they not improving a place they could occupy in peace and prosperity by farming and other practical arts? Tac noted the collapse of Mission San Juan Capistrano in an earthquake (1812) when many were killed suggesting the irony of allowing utility to overshadow a claim to occupancy.

The syntax that Tac used allows one to identify his face as a friend’s in an otherwise illusory crowd. It is like the feathered dancer. Rather each recognizes the other’s face as like one’s own and would be recognized as “real” in return. This is nature smiling on people having an inalienable right to occupancy.

This was the California that Tac represented in Rome and important people believed that was actually happening. Tac was like Bede’s Caedmon. The Romans did not convert the neophyte. The neophyte converted the Romans. If the Diocese of California was the “sheer boldness” of Kevin Starr’s estimate, or “premature” as Msgr. Francis Weber has written, then the financially sound successor California dioceses must be ignoring the wonder worked by a clever youth who was easy and mirthful about the “reality” of their future.



Pechanga tribal leaders wrote (2015) to protest the canonization of Junipero Serra<sup>7</sup>. Reciting a history of abuses the tribes suffered in the Missions, they conceived of their people having been tied to the land by labor and travail. This is worthy of complaint. But are the tribes not still tied to the land despite their new wealth? The United States can revoke their sovereignty. It has in the past. Life in the Missions as portrayed by the tribal leaders was certainly harsh. Is it better now for many other citizens? Perceived as having some advantage to offer, the Padres were admitted to California by an inalienable act of sovereignty *jus soli*. Later, schools were proposed for the new diocese (anticipating the rents from the Pious Fund) in which the “Californians” were supposed to regard the land being open to newcomers while remaining the native people’s own to occupy. This was the picture of the post-Mission period anticipated in Rome when Pablo Tac was alive. Those schools built on Mission foundations materialized only once and not too long ago.

The best illustration of *jus soli* not being a choice comes from one’s own experience of “reality”. The first Catholic bishop of San Diego began building the Pala Mission school on early 19<sup>th</sup> century foundations in 1958. I was acquainted with some of those who were making the new adobe bricks. At the time, the bishop was a beneficiary of the Pious Fund having in hand a judgement against Mexico from the World Court. (I was told then that he used to do confirmations in Tijuana being driven over the border in very splendid regalia flaunting Mexican laws proscribing clerical garb. Apparently, no one dared stop him lest it provoke an international incident.) I found myself the Mission school’s principal years later. The idea of preparing tribal and other local children to make things of their own charmed the school’s builders and financial supporters for nearly forty years. After all, the students were natural princes and princesses of a land of their own. The supporters knew what the Indians did: that to hear a Mission bell was to belong. Then the agents of a successor bishop entered a transaction with a sovereign Tribe to fund the school. When payment was due,

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7 <http://walkfortheancestors.org/wp-content/uploads/2015/10/pechanga-letter-to-pope-francis.pdf>

the Tribe demurred. A Mission is not a choice just as *jus soli* is not transactional.

*Jus soli* is not useful or valuable. Nor are Mission schools where an image that a child makes of the place where she lives is taken for her “right to have rights”. One sometimes finds cartoon-like legends on ancient maps like those of California shown as an island. Tac too measured a space that was his people’s own no matter the time and place and no matter its value. One abides its “reality” by disposing of binary choices with calm and mirth so people stay oriented to who they are. What is written that is difficult to say can still turn earth into a heaven of novelty free from the smoldering hell of false choices.

## 2.0. Conclusion

Natural birth citizenship springs from the “reality” of a people’s image of itself as suddenly born full-grown out of work in tension with labor. Distinct claims to occupancy and to ownership can be shown to be consistent with one another in principle on this basis. Environmental protection and capital growth are therefore positive and productive together. The inevitable tension appears often as a crisis, even in the extreme. But it can always be resolved; “... be he ne’re so vile, this day shall gentle his condition” (*Henry V*, IV, iii). On the other hand, to be “most powerful man [nation] in the universe” is highly motivating. *Jus sanguinis* citizenship belabored the Indians before when their right to occupancy was ignored. Ignorance of their own birthright belabors people generally. That it survives in California is something for the world to consider and discuss. For the inalienable American citizenship that Marcelo found in the name “*Rey*” is as true today as yesterday. What is pictured small on paper or a chip can indeed become big in reality. And Pope Francis seems to know it.

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KARL A. KOTTMAN, JR <sup>8</sup>

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<sup>8</sup> [KARL A. KOTTMAN, JR., educated as an historian of philosophy (Ph.D., UCSD), works independently on positioning California's history in the context of Hispanic thought. His most recent book is *Antônio Vieira's Preliminary Book to the History of the Future: Original Reading* (LULU: 2018). He lives in Temecula, California.]