5

The Coming of States? The Nineteenth Century

5.1 Constitutions

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In 1856, the Peruvian liberal jurist José Silva Santisteban published a *Course on Constitutional Law*, motivated by the idea that Latin American youth needed to be educated with a locally written treatise instead of translated European manuals. By the time that he published its second edition in 1874, events in Europe had convinced him that that continent was not any longer the constitutional oracle it used to be during the first half of the century: it was time for Latin America to take over. He opened his manual with a sentence that neatly summarized the spirit of the century: "The destinies of humanity are largely entrusted to constitutional law."[1]

When considering the origins and subsequent evolution of constitutionalism in the new Latin American republics, we should bear this sentence in mind. As in other parts of the Western world, constitutions became one of the central axes of political life in nineteenth-century Latin America, and protagonists debated and fought over numerous issues – to be discussed later – ranging from the very meaning of emancipation to the scope of national sovereignty, the organization of the state, the latter's relationship with the Catholic Church, and the government of complex societies characterized by ethnic, gender, and class differences.

Constitutionalism in the Iberian world was conditioned by two circumstances: First, by earlier debates, especially during the late eighteenth century, on whether Catholic culture was able to assimilate the ideas of moral philosophy and political economy generated by European Enlightenment

1 J. Silva Santisteban, *Curso de Derecho Constitucional* (Lima: Centro de Estudios Constitucionales, 2015 [1856]), prologue. All translations are the author's unless otherwise stated.

thought; and second, by the specific historical contexts that produced the first constitutional texts in the Spanish and Portuguese realms. As in other Atlantic spaces, such as the British or French empires, the emergence of constitutions in the Iberian world was closely linked to imperial crises. As will be discussed later, these crises had unique characteristics that significantly shaped the earliest constitutions drafted in their territories (see Chapter 4). In the case of the Portuguese monarchy, this was the transfer of the imperial center to Brazil in 1807. In the Spanish empire, the coincidence of an imperial with a dynastic and a monarchic crisis (in the form of the conflict between King Carlos IV and his son and heir, Crown Prince Fernando), created highly complex scenarios both in the Peninsular kingdom and the various American colonies because of the novelty of the absence of the king (both father and son agreed to move to France, at Napoleon's behest) and the necessity of setting up new emergency institutions. A variety of constitutional projects emerged as attempts to resolve this critical situation.[2]

Section 5.1 will first consider the more distant origins of Iberian and Latin American constitutionalism by revisiting the most relevant aspects of Enlightenment thinking. The second part will focus on the "first constitutional moment" in Latin America, from the 1810s to the 1820s, and analyze how the crises of the Portuguese and Spanish monarchies resulted in the emergence of new political spaces with their own constitutional proposals. The third part is devoted to the "second constitutional moment," exploring the constitutional issues that the new, independent Latin American republics had to address and resolve from their foundations in the 1820s and 1830s until the end of the nineteenth century. While the third part focuses on Latin America, the discussion in the first two parts concerns both the European and the American territories of the Portuguese and Spanish empires, because the most decisive debates and historical processes took place within this larger context. The Spanish constitutions of 1808 (drafted by Napoleon) and the *Constitución política de la monarquía española* of 1812 (discussed and approved by an imperial parliament in Cádiz) were intended to be in force in all Spanish dominions around the world. Despite its official name, the Cádiz text should be taken not only as a Spanish but as a Hispano-American constitution for two reasons. First, together with smaller constitutional projects in Venezuela, Chile, and Nueva Granada (modern-day Colombia), it was one of the earliest

2 J. Viejo, *Amor propio y sociedad comercial en el siglo XVIII hispano* (Bilbao: Universidad del País Vasco, 2018); A. M. Hespanha and J. M. Portillo Valdés, "Portugal and Spain Under the Newly Established Liberal Regimes," in F. Bouza, P. Cardim, and A. Feros (eds.), *The Iberian World 1450–1820* (London: Routledge, 2020), 656–71.

constitutions in force in Latin America. Second, and more importantly, many American representatives who contributed to the preparation of the Cádiz constitution, went on to play important roles in the debates and drafting of the constitutions of the first independent republics in Latin America. Thus, the 1812 text can be viewed as one of the first links in the constitutional chain in the Iberian world, and arguably the most influential.[3]

The first Portuguese constitution of 1822 can similarly be seen as both a European and an American constitution. Like the Cádiz text, it took for granted that empire and nation coincided. However, after the proclamation of Brazilian independence by Dom Pedro I in Ipiranga (1821) and the definitive departure of Spanish troops from America after the Battle of Ayacucho (1824), the Latin American space was reorganized into new republics (in the formerly Spanish territories) and into a constitutional monarchy (in Brazil). Among other things, this meant the divergence of constitutional history in the Iberian worlds, with Portugal and Spain following their particular constitutional paths independently from their former American dominions. Section 5.1 ends when, following the intense debates on the separation of Church and state and on whether federalism or centralism represented the ideal form of state organization during the mid-nineteenth century, other conflicts emerged over the need to equip the new republics and the Brazilian monarchy with solid administrative structures (discussed in Sections 5.2, 5.3, and 6.1).

Constitutional Thought in the Iberian Enlightenment

The Iberian empires were anything but removed from the major philosophical and political debates that took place in Europe in the eighteenth century, particularly in the second half. Enlightenment thought was not only received in the Iberian monarchies; enlightened thinkers elsewhere were also interested in the developments and debates in the two largest European empires at the time.

With the term "Iberian monarchies," we describe two empires that exhibited similarities, but whose significant differences should also be borne in mind. Both had initiated a process of major territorial expansion at the end of the fifteenth century. In the case of the Portuguese monarchy, however,

3 For an English-language publication on this topic, see M. C. Mirow, *Latin American Constitutions: The Constitution of Cádiz and Its Legacy in Spanish America* (New York: Cambridge University Press, 2013). The relationships between Spanish and Portuguese first constitutions was analyzed by G. Paquette, "In the Shadow of Cádiz? Exogenous and Endogenous Factors in the Development of Portuguese Constitutionalism, c. 1780–1825," *Bulletin for Spanish and Portuguese Historical Studies* 37 (2012), https://doi.org/10.26431/0739-182X.1131 (last accessed Mar. 31, 2023).

this process, taking place during the fifteenth and sixteenth centuries, was more intermittent, and spread across different continents. The expansion of the Spanish monarchy, meanwhile, was a phenomenon that was principally – though not exclusively – American. In terms of the organization of government, the Portuguese monarchy combined the structured system of viceregal government, as in Brazil, with more flexible systems of military forts and agreements with local rulers, as practiced in various of its African and Asian territories. The vast Spanish dominions in America and Asia, meanwhile, were governed by a system of viceroyalties, *audiencias* (regional courts), and *capitanías generales* ("general captaincies," regional governments partially independent of the viceregal administration). Along with cities and, most notably, religious jurisdictions, these were the instruments of territorial control that enabled the Iberian monarchies to expand in such a dramatic fashion.

There were also differences between the two monarchies that could be described as constitutional, which became more visible after 1640, when Portugal separated from the Spanish monarchy (with which it had been linked since 1581). In contrast to Castile, the Portuguese kingdom – as represented by the *Cortes*, the meeting of the three estates: clergy, nobility, cities – acquired a political significance that became particularly visible in the crisis provoked by the removal of Alfonso VI from government in 1667, after the *Cortes* had declared him insane. In both 1640 and 1667, the Kingdom of Portugal, in the form of the *Cortes*, was an active political protagonist. In the second half of the seventeenth century, the *Cortes* also included representatives from overseas viceroyalties, such as Goa or Brazil. From the end of that century onwards, however, the Portuguese *Cortes* gradually lost its political significance, as had previously occurred in Castile. In Portugal, no meetings of the *Cortes* were convened during the whole of the eighteenth century. Instead, in both monarchies, there were other, far more effective forms of political representation of the different groups and units (cities, nobility, clergy, viceroyalties, provinces, merchants, etc.), which sent their agents to the court to take care of their own specific interests in direct and individual communication.[4]

The loss of the constitutional relevance of the Portuguese kingdom as represented by the *Cortes* resulted in the consolidation of the court, above all the monarch, as the true political center, which also facilitated the king's growing resemblance to a "chief," "architect," or "father" (as contemporary sources

4 P. Cardim, *Portugal unido y separado. Felipe II, la unión de territorios y el debate sobre la condición política del Reino de Portugal* (Valladolid: Ediciones Universidad de Valladolid, 2014); P. Fernández Albaladejo, *La crisis de la monarquía* (Madrid: Marcial Pons-Crítica, 2009).

described him) who oversaw a complex monarchy. The changed image of the king led theorists to debate whether politics should be considered the exclusive concern of the king and his government. The advocates of the affirmative position, such as Pascoal José de Melo in Portugal and Clemente Peñalosa in Spain, did not, however, renounce the benefits of modernity such as, above all, long-distance, high-intensity, and high-volume trade. Rather, they argued that political power exclusively controlled by the court was necessary to compete on the increasingly complicated European imperial stage.[5]

There were, however, also voices warning that the tendency to reinforce the king's *domestic* power actually constituted a threat to the monarchy. They made the case for reinstating the power of political bodies to assist the king, as the *Cortes* in Portugal had done after the restoration of the country's monarchy in the seventeenth century. Most such voices came from political counselors who regarded the concentration of political power within a small circle around the monarch, particularly the possibility of courtiers using the idea of the king-father to govern the monarchy without political mediation, as a dangerous political experiment incompatible with tradition.[6]

As shown in the sections devoted to colonial law (Sections 3.1–3.3), the Portuguese and Spanish monarchies were not based on a conception of law as the pure expression of monarchical will. Customs, natural law, religion, privileges, and specific statutes and constitutions imposed limits on monarchical governments and their production of norms. Understanding these characteristics of the legal and political system allows us to better evaluate the debates that took place in the eighteenth century. The supporters of a personal and arbitrary government were in fact promoting a less *constitutional* idea of the monarchy than those who advocated for reinforcing the intermediate powers and traditional counseling institutions such as the *Cortes*.

One sign of the elites' desire to assist in the governing of the realm was the proliferation of the so-called *Sociedades de Amigos del País* ("Societies of Friends of the Country") or *Sociedades Económicas* ("Economic Societies") from the 1760s onwards. The main aim of these associations of local notables was the promotion of commerce, industry, and agriculture in their own community and area. They perceived their activities as very different from politics, which was the sphere of the king alone; instead, these *Sociedades* reflected the educated classes' commitment to the management of the spaces where most

5 J. L. Gómez Urdáñez, *Víctimas del absolutismo. Paradojas del poder en la España del siglo XVIII* (Madrid: Punto de Vista, 2020).

6 G. Paquette, *Enlightenment, Governance, and Reform in Spain and Its Empire, 1759–1808* (New York: Palgrave Macmillan, 2008), 56–93.

of their social life unfolded: families and cities (and, in the later period, also provinces). The pioneering *Real Sociedad Bascongada de Amigos del País* (1765) sought to prepare the male members of the local elites to be good fathers and local "public figures," capable of the efficient running of municipal governments, on occasion advocating for the extension of the system of provincial governments typical of the Basque region (*diputaciones*) to the rest of the monarchy. Such *Sociedades* also emerged in the American dominions of the Spanish monarchy.[7]

In line with this growing interest of the elites to play a role in government, various Spanish Enlightenment thinkers proposed plans for the creation of institutions or mechanisms for the participation of local elites in local or even "national" governments during the final decades of the eighteenth century. In the 1790s, Victorián de Villava, a former law professor at the Universidad Sertoriana de Huesca and subsequently public prosecutor at the *Audiencia de Charcas* (now Bolivia), proposed the creation of a series of territorial councils (which in America would replace the *audiencias*) that would send representatives to a "Council of the Nation" advising the monarch. Villava was among those who had introduced the new science of political economy to Spain through his translations of the works of Antonio Genovesi, Gaetano Filangieri, and Gian Rinaldo Carli. Other late eighteenth-century thinkers, such as Melchor Gaspar de Jovellanos or León de Arroyal, also saw in political economy a way of introducing some of the essential principles of European Enlightenment moral philosophy into the Catholic monarchy. Valentín de Foronda, a Basque intellectual who was one of the first Spanish *liberales*, wrote a text in which he advised Charles IV on the occasion of his coronation in 1788 – coinciding with the early stages of the constitutional revolution in France – to rule at all times guided by the notion of the rights of his subjects, such as freedom, property, and equality. These rights were thus already replacing religion, privileges, and natural law as the recognized limits on government, even monarchic government.[8]

By the final decades of the eighteenth century, therefore, the language of modern constitutionalism was already circulating in the Spanish and Portuguese monarchies, coexisting with the more traditional language of statutes and

7 J. Astigarraga, *The Spanish Enlightenment Revisited* (Oxford: Voltaire Foundation, 2015).

8 V. de Foronda, "Carta sobre lo que debe hacer un Príncipe que tenga colonias a gran distancia (1800)," in I. Fernández Sarasola (ed.), *Valentín de Foronda. Escritos políticos y constitucionales* (Bilbao: Universidad del País Vasco, [1813] 2002), 245–60. Villava's discourse on the reform of the monarchy can be found in J. M. Portillo Valdés, *La vida atlántica de Victorián de Villava* (Madrid: Doce Calles-Mapfre, 2009); L. de Arroyal, *Cartas político-económicas al conde de Lerena (1789–1795)* (Oviedo: Instituto Feijoo, 1971).

privileges. Spanish and Portuguese political thinkers also adopted some of the arguments of modern moral philosophy based on the idea of commercial society or on the ideal of the legal rationality of codification. They included the Brazilian José da Silva Lisboa, author of the *Principios de economía política*. Like Clemente de Peñalosa in Spain, Silva Lisboa never supposed that the reforms he promoted would also entail political rights, but other authors did, such as Manuel de Aguirre in Spain, and Antonio Nariño in Nueva Granada. They argued that the commercial freedoms that promoted the wealth of nations should be accompanied by some form of political empowerment of the nation, that is, some kind of political representation.[9]

Simultaneous to the appearance of a constitutional language, a certain proximity between Catholic culture and the principles of what was known as "modern philosophy" can be observed. Some of the principles addressed by eighteenth-century European moral philosophy, such as the significance of individual interest and self-esteem for the progress of societies, allude to it. As part of these attempts to integrate Enlightenment philosophy and Catholic culture, authors criticized fanaticism as a manifestation of a vacuous and exaggerated piety and recommended new readings of the Gospels in search of messages assimilable to modernity, such as the essentiality of rights.[10]

As the *Sociedades de Amigos del País* exemplified, the – originally medieval – idea that local political issues were the concern of local elites and corporations remained alive. Certain areas, however, continued to lie outside the realms of popular involvement and public debate: Religious questions were the sole domain of the Catholic Church authorities, and discussions of the government of the monarchy the exclusive sphere of the king and his councils.

These principles can be detected in many publications from the late eighteenth century onwards, for example, in the brochure announcing the publication of the *Diario Literario de México* (1768), written by José de Alzate. It is also possible to see how several intellectuals started to defy them by promoting debates that undoubtedly affected the government of the monarchy. This was the case, for example, of Isidoro de Antillon's *Discurso sobre el origen de la esclavitud de los negros* ("A Discourse Concerning the Origins of the Slavery of the

9 J. da Silva Lisboa, *Principios de economia politica para servir de introducção a tentativa econômica do author dos principios do direito mercantil* (Lisbon: Impressão Regia, 1804); Manuel de Aguirre, *Cartas y discursos del militar ingenuo al Correo de los Ciegos de Madrid* (San Sebastián: Real Sociedad Bascongada de Amigos del País, 1978 [1785]). In 1794, Antonio Nariño translated the French revolutionary *Déclaration des Droits de l'Homme et du Citoyen* as *Declaración de Derechos del Hombre y del Ciudadano* and printed clandestine copies of it, for which he was arrested.

10 J. Viejo, "El caso Climent. ¿Ilustración católica o catolicismo ilustrado?," *Hispania* 269 (2021), 651–81.

Blacks"), initially delivered at the Academy of Jurisprudence in Madrid in 1802 and subsequently published in print in 1811. "Its content is of no less interest to religion than to humanity," Antillón noted upon publication of his text. For him, "individual freedom," the right to "self-sufficiency," to the fruits "of one's work," and to "exist politically," were tantamount to "dogmas" and "sacrosanct rights." His terminology shows the degree of maturity that the language of constitutionalism had attained on the eve of the Iberian monarchies' Atlantic crises.[11]

Early Hispanic liberalism also called for a new reading of classical Spanish political, juridical, and theological theories, such as those of the School of Salamanca (see Section 3.2). Given this interest, identifying rights with dogmas and assigning them a "sacrosanct" value was hardly coincidental. Distancing themselves from the French revolutionary thinkers' secularization of political theory, most of the early liberals in the Iberian world were convinced that the Holy Scriptures (and a correct interpretation of them) constituted the most reliable source of political philosophy.

Already in the years before the crises that shook the Portuguese and Spanish monarchies from 1807/8 onwards, various authors had begun to question the status of the American territories. The *Carta dirigida a los españoles americanos* (1799) by Juan Pablo Viscardo, one of the Jesuits expelled from the Spanish dominions in 1767, and Francisco Miranda's expeditions to free *Tierra Firme* from Spanish rule (1804–1806) are the most radical manifestations in this respect. However, while both Viscardo and Miranda already advocated for independence from Spain, most American elites still regarded this as undesirable. These same elites, however, were very interested in a reconsideration of their situation within the monarchy's system of honors and offices and evinced a growing desire to assume control of the administration of the complex Latin American societies themselves.[12]

The most significant questioning of the colonial order in America, however, came from the ranks of the commoners. The decades preceding the imperial crises of 1808–1810 witnessed numerous popular uprisings – both indigenous and *mestizo* – in Mexico, Guatemala, Nueva Granada, and Peru. Between 1780 and 1783, the rebellion led by Gabriel Tupac Amaru posed the most serious threat to the Spanish colonial order established in the former Incan territories. Like the majority of popular uprisings during this period, it was the consequence of oppressive taxation and forms of forced labor like

11 I. de Antillón, *Disertación sobre el origen de la esclavitud de los negros* (Valencia: Domingo y Mompié, 1820 [1811]), 11.

12 J. P. Viscardo, *Carta dirigida a los Españoles Americanos* (Mexico City: Fondo de Cultura Económica, 2004).

the *mita*. It was, however, also a political revolution, and prefigured some of the political arguments used during the Creoles' revolutions of independence some decades later. Tupac Amaru and his followers sought to reformulate the relationship between the ruling Inca (who, following an Andean tradition, could perfectly well be the king of Spain) and his subjects in America, seeking more political autonomy, control over local resources, and to prevent the over-exploitation of local laborers.[13]

Imperial Crises, Constitutional Crises

As David Armitage has convincingly explained, the origin of constitutionalism in the West is closely linked to the crises of the European Atlantic empires.[14] The constitutional revolutions in the British and French empires had obvious consequences for their respective imperial orders. In the case of the British world, constitutional change both originated in, and was restricted to, its North American colonial dominions, whereas in France, the revolution began in the metropole but soon transcended it, leading to a complete revolution of the colonial order in Haiti that culminated in the creation of the first republic under Afro-American rule in 1804.

As explained in Chapter 4, the imperial crises of the Iberian monarchies at the start of the nineteenth century, though also forming part of the process initiated in North America in the 1770s, exhibited interesting unique features. Napoleon Bonaparte's taking control of Portugal forced the Portuguese court to adopt the unprecedented decision to transfer to the colonies. Its move to Rio de Janeiro in October 1807 proved decisive in facilitating Brazil's later monarchic transfer to independence (1822) and a new constitutional order (1824), as will be discussed in the following section. The Spanish crisis, meanwhile, was considerably more complex. Since the signing of the Peace of Basel with the French Republic in 1795, the Spanish monarchy had shown increasing dependence upon France. The Treaty of Subsidies (1803), according to which Carlos IV agreed to a monthly payment of a substantial sum (six million Spanish *reales*) in return for not getting involved in the war against England, did not prevent a confrontation with England, and finally led to the defeat of the Spanish Armada, under French command, at Trafalgar in 1805.

13 S. Serulnikov, *Conflictos sociales e insurrección en el mundo colonial andino. El norte de Potosí en el siglo XVIII* (Buenos Aires: Fondo de Cultura Económica, 2006); E. Tandéter, *Coacción y mercado. La minería de la plata en el Potosí colonial 1692–1826* (Buenos Aires: Siglo XXI, 2002); C. Walker, *The Tupac Amaru Rebellion* (Cambridge: Harvard University Press, 2014).

14 D. Armitage, "The First Atlantic Crisis: The American Revolution," in P. D. Morgan and M. A. Warsh (eds.), *Early North America in Global Perspective* (London: Routledge, 2014), 309–36.

The Spanish empire's defenselessness, with its silver and ships in the service of another empire, resulted in English attempts to take control of Montevideo and Buenos Aires, and encouraged Francisco de Miranda to undertake his failed endeavor to gain independence for Venezuela. This imperial crisis coincided with the culmination of a power struggle in the royal court involving Carlos IV, Queen María Luisa de Parma, her favorite, Manuel de Godoy, and a faction formed around Crown Prince Fernando. An initial conspiracy in 1807 failed, but in March 1808, the crown prince's party finally achieved its objective of forcing Carlos IV to abdicate in favor of the prince. The person who ultimately took advantage of this internal instability, however, was Napoleon Bonaparte, to whom Carlos IV illegally transferred all his dynastic rights in order to escape from his son's supporters, settling in France under the French emperor's protection. In April 1808, Crown Prince Fernando also gave in to French pressure and left Spain, ceding control of the Spanish monarchy to Napoleon. Just over a month later, the latter had approved a constitution for Spain and transferred the dynastic rights to his brother Joseph, until then king of Naples, who became José I of Spain.

If the transfer of the Portuguese Court to its colonial domains had enabled it to overcome the crisis, the Spanish royal family's move to France added a dynastic crisis to the imperial one. This led to the gathering of the first congresses and the drafting of the first constitutional projects in the Spanish monarchy's territories. Indeed, it was the rejection of Napoleon's dynastic interference in the Spanish monarchy that produced the first reflections about the nature of the crisis that transcended its imperial and dynastic characteristics and explored its repercussions in terms of sovereignty and governance.

Both in the Peninsula and in the overseas territories, the first reaction to the transfer of the dynastic rights to Napoleon, considered illegal by the majority of Spanish local and territorial elites, consisted in the formation of extraordinary institutions to maintain government in the absence of a legitimate monarch. Municipal actors formed local committees, known as *juntas*, which acted as sovereign entities. However, even though the *juntas*, as emergency representative institutions of the *pueblos*, exercised all the attributes of sovereignty and led the resistance to the French during the first phase of the Peninsular war, their aims were not revolutionary; on the contrary, they were created to safeguard monarchic sovereignty, not to disrupt it, by acting as temporary guardians of the state entrusted to them.[15]

15 M. Chust (ed.), 1808. *La eclosión juntera en el mundo hispano* (Mexico City: Fondo de Cultura Económica, 2007).

The need to coordinate the different *juntas* soon became apparent, and various forms of federation were created, both in the Peninsula and in America. The *Junta Suprema Central Gubernativa del Reino*, initially formed in September 1808 in Aranjuez, near Madrid, and later transferred to Seville and then Cádiz, sought to govern the entire Spanish empire.[16] While the legitimacy of the *juntas* formed in America was never recognized by Peninsular authorities, in 1809 the *Junta Central* decided to invite American representatives to join it. This invitation, however, differed from that sent to the European provinces of the monarchy. American dominions were granted representation by only one deputy for each colonial viceroyalty and general captaincy and not, like in Peninsular Spain, two for each provincial *junta*. American Creole elites immediately noted and denounced this unequal treatment.

The intensification of the crisis, caused by the royal family's transfer to France, the almost complete occupation of European Spain by the Napoleonic troops, and the chaotic nature of the *Junta Central*'s government, led public opinion to conclude that the crisis should be interpreted as a constitutional crisis, and that it was necessary to act accordingly. In April 1809, the *Junta Central* therefore decided to convene a truly singular session of the *Cortes*, in which the entire empire was called to participate. Again, however, colonial representation was to be significantly inferior in both quality and quantity to that of the European provinces, as the American Spaniards once again observed. In this *Cortes*, Peninsular representation was of various types, and included the local election of provincial representatives. The representatives of the American territories, by contrast, were to be nominated by the municipal councils of provincial capitals and subsequently determined by drawing of lots.[17]

By the time this extraordinary imperial congress assembled in Cádiz in September 1810, other representative assemblies were already in operation in America. The most active was in Caracas, which not only declared the independence of Venezuela (July 5, 1811) but also drafted the first federal constitution for the "Provinces of Venezuela" (December 21, 1811). Although the objectives of the constitutional congresses of Cádiz and Caracas were obviously very different (Venezuela's constitution considering it independent,

16 A brief summary of events in English can be found in J. E. Rodríguez, "The Process of Spanish American Independence," in T. H. Holloway (ed.), *A Companion to Latin American History* (Malden and Oxford: Blackwell Publishing, 2008), 195–214, at 196–200.

17 American representatives to the Spanish *Cortes* were perfectly aware of the differences between Peninsular and American representations and denounced these repeatedly: B. Rojas, *Documentos para el estudio de la cultura política de la transición. Juras, poderes e instrucciones. Nueva España y Capitanía General de Guatemala 1808–1820* (Mexico City: Instituto Mora, 2005).

while the Cádiz text still included Venezuela as part of the Spanish nation), they were both premised on the view, prevalent among the governing elites all across the Spanish empire, that the *juntas* were no longer suitable instruments of governance. The issue was no longer the need to safeguard sovereignty in the absence of a rightful king, but to control it in order to design a new political order. The legitimacy to proceed to debate and approve a constitution was based on the Cortes' assumption of national sovereignty.[18]

A New Political Order: The First Constitutions

1. From *Pueblos* to *Pueblo*: Sovereignty and Emancipation

The bourgeoning of Spanish constitutionalism during the imperial crises was striking. It contrasted with the Portuguese-Brazilian situation, where the establishment of the royal court in Rio de Janeiro and the British protectorate in the European part of the empire blocked similar experiments. This difference was partly also a consequence of the aforementioned differentiated colonial structure of Portuguese America, where provincial elites, even if they argued for autonomy, mostly accepted that the whole territory of the Portuguese dominion should become a single independent entity.[19] From that comparative perspective, the singularity of the Spanish crisis was the result of the unique coincidence of a monarchic-dynastic with an imperial crisis, which resulted in the *pueblos* taking the initiative from 1808 onwards.[20] With the gathering of the *Cortes* in 1810 and its decision to assume national sovereignty, the crisis turned constitutional, centering on the question of which political bodies were entitled to exercise sovereignty. On the basis of traditional Spanish political thought, the *pueblos* assumed that it was they who were entitled to do so, but soon new political actors claiming this capacity appeared on the scene: *la Nacion Española* (considered as comprising the inhabitants of both the Peninsula and the overseas territories), and the *pueblo* in the singular, a term denoting a new political community made up of all the *pueblos*.

Considered from the point of view of traditional jurisprudence, it was not surprising that the *pueblos* had assumed that it was they who were entitled to hold sovereignty in the event of major constitutional crisis. Already Jerónimo

18 R. Breña (ed.), *En el umbral de las revoluciones hispánicas 1810–1812* (Mexico City: El Colegio de México, 2010).

19 L. M. Bastos Pereira das Neves, "Estado e politíca na independência," in K. Grinberg and R. Salles (eds.), *O Brasil Imperial (1808–1831)*, vol. I (Rio de Janeiro: Civilização Brasileira, 2009), 95–136.

20 The Spanish word *pueblo* refers not only to the settlement (village, town) but also, and above all, to the locally organized and incorporated political community.

Castillo de Bobadilla in the sixteenth century and Lorenzo Santayana y Bustillo in the eighteenth had argued that the core part of the "constitution" of the Spanish monarchy were the organized local communities called *pueblos*. Alongside the king, they were the only "essential" part of the monarchy (see Chapter 4). Despite their utmost relevance for the practical government of the monarchy, judicial and administrative institutions like councils, *audiencias*, *chancillerías,* and *corregimientos* were not conceptualized as fundamental building blocks of the empire. The *pueblos* were entitled to self-government and, above all, to have their own treasury and the tutelage of their own communities. Despite the fact that, during the eighteenth century, the tendency to represent the king as a "general father" of his subjects had eroded the idea of the *pueblos* as having governmental responsibility for themselves and their members, the consciousness of their essential constitutional role was very present in 1808, when the crisis of the monarchy demanded extraordinary – though still legal – responses. This is clear from the arguments for setting up *juntas* put forward by Spanish *pueblos* in 1808, and also in the debates during the meetings called by Viceroy José de Iturrigaray in Mexico City in 1810, in which the principal communities and institutions of Mexico City – the city council, royal *audiencia*, military, Church, and Indian *pueblos* – were attempting to formulate solutions to the monarchic crisis for New Spain.[21]

Let us now consider how political actors at the time concluded that sovereignty could reside in the nation and not in the king. As in the earlier constitutional debates in the United States and in Haiti, the attribution of sovereignty in the early nineteenth-century Iberian world stemmed from a reinterpretation of an old civil law concept known as "emancipation." This was an instrument that modern law had already reformulated in relation to its Roman original, but it continued to describe an act that accorded with the term's etymology: *ex manu capere*, the release of a person's hand from that of their tutor, typically the *pater familias* (see Section 3.3). In early modern European law, emancipation took place only in the family context. In 1783, the dictionary of the *Real Academia de la Lengua* defined it as the act of "the father releasing his children from his control, no longer holding their hands, and setting them free, so they might act alone, direct, and govern their affairs."[22]

21 For the idea of self-government of the *pueblos*, see B. Clavero, "Tutela administrativa o diálogos con Tocqueville," *Quaderni fiorentini per la Storia del Pensiero Giuridico Moderno* 24 (1995), 419–68. A contemporary formulation of this principle can be seen in the first chapter of Lorenzo Santayana Bustillo, *Gobierno político de los pueblos de España, y el corregidor, alcalde, y juez en ellos* (Zaragoza: Moreno, 1742).

22 Real Academia Española, *Diccionario de la lengua española* (Madrid: Ibarra, 1783).

An important role in the transformation of the concept of emancipation in the late eighteenth and early nineteenth centuries was played by the Swiss jurist Emmerich de Vattel's influential work on the law of nations – one of the books most frequently read by the delegates at the First Continental Congress in Philadelphia in 1774, when it began to consider the independence of the thirteen British colonies. De Vattel proposed transforming the concept of emancipation into an attribute not only of free and independent persons but also of nations. On both sides of the Atlantic, the phrase "free and independent" – formerly used by civil law to refer to familial emancipation, but now applying to new polities –appears in the first constitutional experiments.[23] This was the case both in the Spanish sphere and in Brazil from the 1820s onwards. The transition from *juntas* – intended to act as custodians of royal sovereignty – to *congresos* – which assumed national sovereignty – was marked by the adoption of the language of emancipation, now applied to a liberation from the power and sovereignty of the king, who, as we already have seen, was presented as the father of his *pueblos* by traditional juridical and political literature. Applied to the Spanish monarchy, Vattel's arguments implied that it should logically be the *pueblos,* as the natural authorities of their own communities, that carry out this self-emancipatory act.

2. The Appearance of the Nation as Body Politic

In contrast to the sovereignty of *pueblos* based on established political thought, the appearance of the nation as a political subject was an innovation. Previously, the term had been employed to refer to a particular community (the Spanish nation, but also the indian nation, for example), but never in a political sense that attributed political capacity or rights to that community. This key innovation in how the political community was conceptualized was usually expressed in the very first sentences of the new constitutions of the Ibero-American world. The nation already appeared in the earliest Spanish American constitutions, those of Caracas (1811) and Cádiz (1812). In 1824, when the first constitution of newly independent Brazil was drafted, its first article defined Brazil's empire as a political association of Brazilian citizens that "make up a free and independent nation, which

23 Emmerich de Vattel, *Le Droit de Gens ou Principes de la Loi Naturelle, Appliqués à la Conduite et aux Affaires des Nations et des Souveraines*, 2 vols. (London: s.n., 1758). The influence of Vattel's book on the American Congress is detailed in S. Pincus, *The Heart of the Declaration: The Founders' Case for an Activist Government* (New Haven: Yale University Press, 2016). I have explored the relevance of the idea of emancipation for the constitutional solution to the Spanish crisis in J. M. Portillo Valdés, *Una historia atlántica de los orígenes de la nación y el Estado. España y las Españas en el siglo XIX* (Madrid: Alianza Editorial, 2022).

does not maintain any kind of union or federation opposed to its independence with any other nation or federation." In the same year as the Brazilian constitution, Mexico's first federal constitution also stated in its first article: "The Mexican nation is forever free and independent of the Spanish government and of any other power."

The collective emancipation as *pueblo* (in the singular) or nation was not, however, a simple operation. As mentioned earlier, in the Spanish empire the *pueblos* had been the protagonists of the first reaction to the imperial crisis in 1808 and, unlike the nation, did have a past as political bodies. The concept of the political community as a free and independent nation was generally accepted by the first constituent congresses, who then faced the question of how to reconcile the sovereignty of the nation with that of the *pueblos*. The constitution most widely applied in Spanish America, that of Cádiz of 1812, implemented a system of provincial autonomy that generalized a form of territorial government modeled – as the commission that drafted the text explicitly stated – on the Basque-Navarran autonomous territories. It featured provincial councils whose members, like those of the representatives in the *Cortes*, were elected by the *vecinos*, that is, the emancipated residents (heads of families in the towns of the province). These provincial councils, presided over by a representative of the central government (*jefe político*) and a treasury supervisor (*intendente de hacienda*), were responsible for what was termed "interior administration," that is, the administration of provincial interests (markets, roads, the distribution of taxes, creation of new town councils, education, charity programs and, in America, "the conversion of the pagan indians").[24]

While this was the solution adopted at Cádiz, the first American constitutions tended to construct the relationship between nation and *pueblos* in terms of a federal structure. The earliest constitutional experiment produced in the Iberian American territories, that of Venezuela in 1811, followed the model of the (North American) Articles of the Confederation of 1781 by defining provinces as bodies endowed with "freedom and independence," but only "in the part of their sovereignty reserved to them" (art. 134). The same principle was established in 1824 upon the creation of the Central American Republic (which included Guatemala, Honduras, El Salvador, Costa Rica, Nicaragua, and eventually Chiapas, too): "Each of the states that form [the Central American Republic] is free and independent in its government and internal

24 For the category of *vecino* and its electoral relevance in a number of the earliest constitutions of the Hispanic world, see T. Herzog, *Vecinos y extranjeros. Hacerse español en la Edad Moderna* (Madrid: Alianza Editorial, 2006).

administration, and to [the states] appropriately belongs all the power that is not attributed by the constitution to the federal powers" (art. 10).

There were also territories in which the idea of the nation as a collective political body did not prosper, and where instead the *pueblos* became "free and independent" on their own (see Chapter 4). In 1821, after the failure of a general constitutional project for Río de la Plata, the province of Córdoba adopted a provisional constitution that stated that the province was "free and independent" so that "sovereignty resides essentially in it, and to it belongs the right to establish its fundamental laws by means of permanent constitutions" (art. 2).[25] Similar developments took place in Nueva Granada and Río de la Plata. *Villas* (autonomous villages), cities, or provinces proceeded to invoke the attribute of sovereignty to establish themselves as independent of both imperial and regional authorities. These free and independent *pueblos* formed temporary local unions and federations. An example of such a union were the Confederated Cities of the Valle del Cauca (1811–1815) in the former province of Popayán in Nueva Granada, which functioned according to the law of nations. Both this case and similar federations in the south of the continent should not be seen as examples of sovereignty having disintegrated, as these areas had never been united in a single nation or been considered to constitute a single *pueblo* in the first place. Instead, in these cases, sovereignty remained where traditionally it was meant to lie: with the *pueblos*.[26]

3. Citizenship

The first constitutions in the Iberian world also embraced the idea of the modern *ius gentium* that stated that free and independent nations were formed by equally free and independent – in other words, emancipated – citizens. This proved decisive in establishing an initial difference between *natural* and "citizen" (*ciudadano*). The former category could include "all," as established by most of the first Hispanic American constitutions (such as art. 8 of the 1824 Constitution of Central America Republic), or "all free men," as stated in the constitutions of Cádiz (1812) or of Peru (1823). Those "born in the territory" of a nation (a typical formulation), however, did not necessarily also fall into the category

25 Note that the word *provincia* in Río de la Plata had (and still has in Argentina today) the meaning of "state." In other parts of Spanish America, *estado* finally became the preferred term. See A. Agüero, "¿Provincias o Estados? El concepto de provincia y el primer constitucionalismo provincial rioplatense. Un enfoque ius-histórico," *Revista de Historia Americana y Argentina* 54(1) (2019), 137–75.

26 D. Gutiérrez Ardila, *Un nuevo Reino. Geografía política, pactismo y diplomacia durante el interregno en Nueva Granada (1808–1816)* (Bogotá: Universidad del Externado, 2010); Agüero, "¿Provincias o Estados?".

of citizen, because the latter required emancipation. "[B]eing married or older than twenty," "able to read and write," and "having some employment or trade, or professing some science or art, without subjection to any other person in the capacity of menial servant," were the attributes of citizens required by the first Bolivian Constitution of 1826 (art. 14). The key to accessing citizenship lay in independence – the essential condition, along with freedom, of the emancipated. This is why women and domestic employees, though *naturales*, could under no circumstances be citizens. The concept of a *ciudadana* (female citizen) was incompatible with early constitutional culture because, while women could be free, they were never independent of (emancipated from) their male family members. Citizenship in general terms was considered an attribute of a *vecino*, that is, the autonomous father and head of family. For example, the constitution of the Free State of Neiva (Nueva Granada) in 1815 listed as necessary qualities "being a free man, resident, father or head of family, or having a household and living of private income or working independently of others" (Tit. VII, art. 1).

The status of *vecino*, in turn, invoked a Catholic culture that was clearly reflected in the first Latin American constitutions.[27] The *vecino* was invariably a parishioner, that is, someone who participated in the rites and discipline of the Catholic Church. For this reason, the parish generally served as the basic electoral district, the census was taken from parish registers, and priests took part at the local electoral committees. In the earliest constitutional texts in the Hispanic world, Catholic rites were also present in other forms, particularly in the form of the oath as a mechanism of security and trust, as well as in the role of the Catholic mass and Te Deum in ceremonies of taking office. Furthermore, one element repeated in all the early constitutional texts in the Iberian world is the overlap between the body of the nation and the mystical body of the Church. Article 12 of the Constitution of Cádiz stated: "The religion of the Spanish nation is, and ever shall be, the Catholic Apostolic Roman and only true faith; the nation shall, by wise and just laws, protect it and prevent the exercise of any other." Similar formulations can be found in numerous other Ibero-American constitutions.[28]

27 The link between traditional culture and early constitutionalism is discussed by B. Clavero, *Constitucionalismo colonial. Oeconomía de Europa, Constitución de Cádiz y más acá* (Madrid: Universidad Autónoma de Madrid, 2016). A case study of the political relevance of *oeconomia* in early constitutionalism is R. Zamora, *Casa poblada y buen gobierno. Oeconomía católica y servicio personal en San Miguel de Tucumán, siglo XVIII* (Buenos Aires: Prometeo, 2017). See also Section 3.3 in this volume.

28 See, for example, the constitutions of Bolivia, 1826 art. 6 and of Peru, 1823 arts. 8 and 9. The Colombian constitution of 1821, though it contained no prescriptions regarding religion, nevertheless included a declaration of the Congress to the Colombian people stating that legislation should be always produced in accordance with Catholic dogma.

With respect to religion, Brazil was different. Its first constitution in 1824 adopted what in the 1820s was understood as the French model of the constitutional treatment of the religious question: establishing a state religion but permitting private worship of other faiths.[29] In the Spanish world, however, the norm was constitutional intolerance, which would subsequently become one of the most controversially debated issues on the continent.

4. The Judicial System and the Separation of Powers

It was also very common for the first constitutional texts to express the advisability of the existence of codes for civil and criminal litigations (on codification, see Section 5.2). In its article 179, guaranteeing the inviolability of the civil and political rights of citizens, the Brazilian empire's 1824 constitution instructed that "civil and criminal codes founded on the solid bases of justice and equity" were to be drawn up as soon as possible. However, though abolishing most privileges, the same article included an exception for cases that "by nature" required private trials. Hispanic constitutions, too, advocated the generalized implementation of a universal law, on the one hand, while continuing to recognize certain special *fueros* (charters) granted to particular groups or persons, on the other. The first constitution of the province of Córdoba in Río de la Plata established in 1821 that "in common causes, civil and criminal, there shall be but one form of trial, for all classes of persons." However, it also stated that "the clergy shall benefit from their state's charter in the terms provided for by law, and the military shall also enjoy theirs in the terms set out in the ordinance" (arts. 3 and 4).

The constitutions also attempted to create more organized and hierarchical judicial systems. A high court (*corte* or *tribunal supremo*) was usually established with both jurisdictional and disciplinary powers. It handled so-called state cases (involving senior dignitaries, ambassadors, or ministers), settled disputes between courts, and called upon the legislature to clarify the meaning of laws. It also acted as a kind of judicial council, since it had disciplinary authority over all lower courts. Usually, there were also appeal courts, like *tribunales superiores* or *audiencias* for more important cases, and, at a lower level, district or provincial courts.

Finally, many of these early constitutions maintained a form of community justice to provide arbitration and conciliation for the numerous minor local conflicts that occurred. Some constitutions, like Brazil's of 1824, established conciliation as an obligatory first step: "No suit whatever shall be begun without it being shown that a reconciliation has been attempted" (art. 161). It was

29 In the constitutional project aborted by the monarchical reaction in November 1823, freedom of religion was registered as one of the "Individual Rights of the Brazilians" (art. 7 III).

not necessary to have a law degree in order to act as a judge or participate in a jury in municipal courts (the formal judicial level closest to local communities that dealt with a large number of civil cases); common sense was deemed more important than juridical knowledge. However, as juries, though provided for in many of the first Latin American constitutions, were alien to the local cultures, a transitional period was included in most countries during which the institution was to be introduced and its use subsequently extended. For instance, article 175 of the Colombian constitution of 1821 stated: "One of Congress's first tasks will be to introduce trial by jury under certain circumstances, until, once the benefits of this institution are known to all, it is extended to all the criminal and civil cases in which it is habitually applied in other nations, with all the measures appropriate to this procedure."

The architects of the first Ibero-American constitutions created a distribution of powers that, as a rule, reflected a distrust of executive power. The latter was most closely associated with monarchic power – whether it actually took the form of a monarchy or not. The earlier constitutional texts thus placed special emphasis on limiting the executive power by transferring many of the competences that had previously been the monarch's to other powers and institutions. Significantly, this even included matters of state (foreign relations) that had previously clearly been the responsibility of the government. Matters such as declarations of war, or the conclusion of peace treaties or trade agreements, now passed through the filter of one of the parliamentary chambers. For example, article 101 of the 1811 Federal Constitution of Venezuela expressly prohibited the executive authority from waging war overseas without parliamentary consent. This provision, subsequently repeated in almost all the texts produced in the Hispano-American region, should be considered alongside other limitations of the executive power. These extended to issues relating to the security of citizens and their property, including fiscal matters, legal dispensations, the granting of privileges, and the cession of territory. Presidents, members of *directorios* (collective executives), or monarchs (where they existed) were charged with running the government and, above all, with the administration of the state and the implementation of laws, for which they could "issue decrees and orders," that is, use their regulatory powers. With the separation of powers, however, these took on a different meaning.

5. Education, Taxation, and National Defense

Early constitutions in the Iberian World also considered aspects of social life. The 1824 Central American constitution that federated Guatemala, Costa

Rica, Honduras, Nicaragua, and El Salvador declared education one of the competences of the federal Congress, and the Guatemalan state constitution, promulgated a year later, provided that "any citizen can establish private educational institutions" under the supervision of the government. Education was generally considered a national issue in early Latin American constitutions. In some texts, like the first Peruvian constitution of 1823 or the Chilean one of 1828, an entire title was devoted to "public education" as a citizen's right. Like legal codes or the tax system, education was considered to require some uniformity and to ideally encompass the whole of society. All three issues were closely linked to the idea of the equality of all citizens. The importance given to education as a distinctive marker of the citizen is visible in several constitutions' inclusion of literacy as a precondition for having the vote.

There was also an obvious link between equality, citizenship, and taxation. A shared principle of these early constitutions was summarized by the first Venezuelan constitution after the dissolution of Gran Colombia in 1830: "Taxes will be levied proportionally and will be effective without exemptions on the basis of *fuero* or privilege." Along with proportionality, many constitutions also stated that tax should be paid as a single contribution (*única contribución*). Enlightenment thinkers had repeatedly promoted this idea, which aimed at replacing the existing dense web of taxes with a single general tax assessed in proportion to the wealth of each citizen.

The principle of the equality of all citizens also underlay the constitutional provision for national defense as a citizen's obligation. Regular and standing armies were complemented by a national militia system in which citizens were locally organized for the defense of the republic and the constitution. In later years, however, conservatives tended to oppose these militias, considering them to pose a permanent risk of insurrection.[30]

A Second Constitutional Moment: Constitutions after Independence

After the representatives of New Spain left the *Cortes* of Madrid in 1821 for a Mexico that was being born as an independent nation, the presence of the Spanish monarchy in continental America faded rapidly. The *Cortes* of the "Liberal Triennium" (1820–1823) rejected the final attempt to maintain

30 R. Moreno Gutiérrez, *La trigarancia. Fuerzas armadas en la consumación de la independencia. Nueva España, 1820–1821* (Mexico City: Universidad Nacional Autónoma de México, 2016) showed how the conflicting ideas about citizenship, militias, and the regular army originated during the process of independence. The same was true in the area of fiscal ideas: E. Sánchez Santiró, *La imperiosa necesidad. Crisis y colapso del erario de la Nueva España (1808–1821)* (Mexico City: Instituto Mora, 2016).

a common body politic uniting Spain and Spanish America by means of a commonwealth. In Portugal, by contrast, one of the aims of the liberal revolution that began in Oporto in 1820 was to form a single nation in the "United Kingdom of Portugal, Brazil, and the Algarves." This vast kingdom, created in 1815 when the royal court resided first in Rio de Janeiro and then in Bahía, also incorporated the numerous Portuguese possessions in Africa and Asia. As was the case in Spain, the closer identification of the *Reino Unido* with a "Portuguese nation" in the constitution of 1822 marked the beginning of the separation of Brazil as an independent monarchy.

The American dominions of the two Iberian monarchies achieved independence as a result of very different developments (see also Chapter 4). The Portuguese court had been located in Brazil since 1807, and when João VI returned to Portugal in 1822 at the request of the revolutionary *Cortes*, he left his son Dom Pedro in charge of the government. Pedro subsequently declared Brazilian independence, and the new state came into being with barely any conflict with those who wanted to maintain unity with Portugal. In the territories of the Spanish monarchy, by contrast, the birth of the new republics occurred after more than a decade of both colonial and civil wars.[31] Even after independence, war did not disappear from the continent, but rather was transformed in the ensuing decades into internal conflicts within the different republics and, to a lesser extent, among them. In most of these civil conflicts, the constitution was the principal cause of dispute. From the mid-1820s onwards, both in Brazil and in Hispanic America (upon the termination of the conflict with the Spanish *madre patria*, the "motherland"), the essential question was how to shape and structure the new republics. It was one thing to achieve emancipation, but another, very different thing to decide how to use it, and the accompanying sovereignty, to create new political bodies.

The complex post-independence constitutional processes took place in contexts that had changed substantially in the fifteen years since the crises of the monarchy in 1808–1810. One effect of the long period of civil strife was what historiography has termed a "ruralization" of politics, consisting in the shift of the decision-making centers from important cities (capitals or major towns and cities) to smaller settlements, where a local leader and ruling group could launch a constitutional alternative to the government. This was very visible in the names of the different constitutional texts (*planes*) proposed

31 T. Pérez Vejo, *Elegía criolla. Una reinterpretación de las guerras de independencia hispanoamericanas* (Mexico City: Tusquets, 2010); J. P. Pimenta, *La independencia de Brasil y la experiencia hispanoamericana (1808–1822)* (Santiago de Chile: Dirección de Bibliotecas, Archivos y Museos, 2017).

by Mexican insurrectionists throughout the nineteenth century: the Plans of Casa Mata (1823), Ayutla (1854), Tacubaya (1857), and so forth. These developments involved a dispersion of constituent power that, to a degree, harked back to the idea that had re-emerged during the 1808–1810 crisis, namely, that each *pueblo* could be regarded as capable of assuming sovereignty. Unlike what happened then, however, in the decades after independence, the idea in various Spanish American territories was no longer to endow a *pueblo* with a constitution, but to locally initiate a process of constitutional change for the entire nation – which, in reality, often took the form of constitutions being replaced, as we shall see later.

In the following pages, I will discuss a number of key issues faced by those drafting – and subsequently revising – the independent polities' constitutions. Apart from the form of government (monarchy or republic) and of state structure (unitary or federal), they also had to decide questions that touched on the main ideological dividing lines between liberals and conservatives,[32] including, as Sol Serrano put it, the questions of what to do with God in the republic, and how to end *fueros* and privileges.[33]

The new republics inherited a complex internal social order. Whereas some features disappeared (such as distinctions of nobility), others, such as very clear ethnic dividing lines as well as distinctions awarded to specific sectors such as the clergy, the military, or merchants, were maintained. One of the disputes defining conflicting ideologies in the decades of republican consolidation centered on the government of society, with positions depending on whether society was conceptualized as a unitary whole or as formed by different bodies. This debate had considerable political importance in legitimizing the inclusion or exclusion of certain types of people from the political space.

It was also necessary to address the advisability of continuing to conflate – as the first constitutions had done – the political body of the nation with the mystical body of the Catholic Church. Whereas liberals saw this identification as limiting the process of civic emancipation and thought it should be revised, conservatives argued that it should be kept as a constitutive characteristic of Hispanic societies.

32 A note on the terminology: In nineteenth-century Latin America, the terms "liberals" and "conservatives" both denoted factions of liberalism, with the "liberals" adhering to progressive and the "conservatives" to moderate liberalism.

33 The "ruralization" of politics was first theorized by Antonio Annino in an essay now available as A. Annino, "Soberanías en lucha," in A. Annino, *Silencios y disputas en la historia de Hispanoamérica* (Bogotá: Universidad Externado-Taurus, 2014), 215–64. See also S. Serrano, *¿Qué hacer con Dios en la República? Política y secularización en Chile (1845–1885)* (Santiago de Chile: Fondo de Cultura Económica, 2008).

The Latin American constitutionalism of the 1820s–1860s also included a debate over the relative political weight of the various powers. As we saw earlier, the first texts were deeply suspicious of the executive power and leaned towards forms of government dependent upon parliament. In the 1830s, many actors – not only from the conservative wing, as one might expect, but also from the liberal side – began to voice criticism of this system.

Monarchy or Republic

Nearly all the new Latin American nations achieved their formal and actual independence after the enactment of the first constitutional texts. As in the United States or Haiti, declarations of independence were not directed at the former "motherland" but to "advise foreign powers of the determination to achieve independence" (Haiti, 1804). In the case Spain, its recognition of the new American republics was spread over a long period, lasting from 1836 (Mexico) to 1894 (Honduras). This contrasts significantly with Portugal, which by 1825 had already recognized Brazil's independence, and where the presence of the royal court and dynastic continuity had facilitated the transition towards an independent monarchy. Also implicit within declarations of independence was a complete separation (*independencia absoluta*) from the motherland, addressed to the new nations' own populations.

The declarations were issued surrounded by ceremonial that sought to transmit the solemnity of the announcement: a new nation was operative from then on in the context of the law of nations (*ius gentium*). These ceremonial acts were intended to demonstrate the different social bodies' support for independence. In 1904, the Peruvian artist Juan Lepiani recreated the ceremony held on July 28, 1821 in Lima's Plaza Mayor in a painting. Significantly, he depicted all the important corporations of the capital as having been present, as they would have been for royal proclamations or the entrances of viceroys: the town council and representatives of the clergy, university, commerce, army, and *pueblo*. We know that in advance of the ceremony, General San Martín had asked the city council, composed of local notables, to issue a statement about the advisability of independence. At no time was this statement expected to oppose independence; rather, it was meant to express the unity of the political body, as did the subsequent ceremony in the Plaza Mayor. In contrast to earlier proclamations of independence, the intention in Lima in 1821 was that the assembled political body would symbolize social continuity in the process of constituting the new republic: There was no social transformation, nor any territorial changes disrupting the continuity from viceroyalty to republic. Article 1 of the first Peruvian constitution

of November 1823 proclaimed that united front: "All the provinces of Perú, assembled in one single body, form the Peruvian nation."[34]

Despite claims of continuity, however, the actual process of the formation of the new political bodies in Iberian America was very dynamic. In fact, today's Latin American political map could have ended up looking very different: When it declared independence, Mexico occupied a large area of what is now the United States of America and extended as far south as the former Chiapaneca region of the district of Guatemala; there was a Central American Republic (uniting present-day Guatemala, Honduras, El Salvador, Nicaragua, and Costa Rica); the entire island of Santo Domingo was under Haitian control until 1844; the United Provinces of Nueva Granada extended from Panamá to Ecuador (and included present-day Colombia and Venezuela); and Uruguay was a province of Brazil until 1830. Paraguay broke away from the former viceroyalty of Río de la Plata in 1811, followed in 1825 by Upper Peru, which was then renamed Bolivia. In the rest of the former domain of the viceroyalty, a system of provincial sovereignties was established to present a (precariously) united front to outsiders. Only Chile and Brazil became independent with borders largely similar to their current appearance, although they, too, underwent territorial changes throughout the nineteenth century.

The first urgent constitutional decisions that the new polities had to take concerned their form of government. Brazil was the only context favorable to a lasting monarchic solution, though even there, the monarchic option did not remain unchallenged. In fact, Brazil's first emperor, Dom Pedro I, was forced to abdicate in 1831, following an armed conflict with the Provinces of Río de la Plata that resulted in the loss of the province of Cisplatina (Uruguay). His handling of the conflict, combined with the dire consequences of the war, reopened a debate over the monarch's powers. These had been defined very broadly in the 1824 constitution, which Dom Pedro I had, in a demonstration of strength, imposed against those intending to delimit his scope of action more strictly in line with the Portuguese constitution of 1822. Uniquely, the 1824 constitution, following the theories of French political thinker Benjamin Constant, created a fourth state power in addition to the legislative, executive, and judiciary, called the "moderating power" (*poder moderador*). This was attributed to the king in order that he might "constantly assure the

34 For this process in Peru, see N. Sobrevilla Perea, "Entre proclamas, actas y una capitulación: la independencia peruana vista en sus actos de fundación," in A. Ávila, J. Dym and E. Pani (eds.), *Las declaraciones de independencia. Los textos fundamentales de las independencias americanas* (Mexico City: El Colegio de México, 2010), 241–74. This book also analyzes other cases of Latin American territories achieving independence.

independence, balance, and harmony of the other political powers" (art. 98), but in fact, translated into a broad royal prerogative to intervene in government and legislation. Along with this, the Council of State, appointed by the king at will for life, strengthened the executive pillar of the system, which as a whole centered on the monarch. Both the "moderating power" and the Council of State were suspended during the regency that governed on behalf of Dom Pedro II (in 1832 and 1834, respectively), in order to avoid the regents making use of powers solely belonging to the king. After Pedro had been elevated to the age of majority at the instigation of the liberals in 1841, when he was only fourteen years old, an ordinary law recreated the Council of State. However, since this was not a constitutional act, the emperor could exercise his "moderating power" freely, consulting the Council only when he deemed it necessary.[35] Upon the consolidation of the rule of Dom Pedro II, the conservative and liberal factions reached a common point of reference based upon the constitution of 1824. The revitalization of the essential instrument of the "moderating power" enabled the Brazilian empire and its successive governments during the second half of the nineteenth century to deal with some of the main political issues of the time. Among them were avoiding the separatist aspirations of some provinces and supporting the continuation of an economy linked to the maintenance of slavery in the face of the British blockade of the Atlantic slave trade. The consolidation of the system owed much to the agreement between the two main liberal factions for alternating in power without resorting to a coup d'état (as was the case in other Latin American countries).

Brazil was the only successful Latin American monarchy. The other attempt at establishing a monarchy right after independence, the Mexican first empire (1821–1823), failed, and the plans of Carlota Joaquina (the Portuguese queen consort and sister of Fernando VII of Spain) to create a great South American monarchy were never realized.[36]

Republic and Territory I: Federalism

One of the first objectives of the constitutions promulgated following independence was making the nation, as the new sovereign, and the republic, as

35 M. Duarte Dantas, "Constituição, poderes e cidadania na formação do Estado-Nacional brasileiro," in M. das Graças de Souza (ed.), *Rumos da cidadania. A crise da representação e a perda do espaço publico* (São Paulo: Instituto Prometheus, 2010), 19–58.

36 For monarchical attempts in Spanish America, see M. Ternavasio, *Candidata a la corona. La infanta Carlota Joaquina en el laberinto de las revoluciones hispanoamericanas* (Buenos Aires: Siglo XXI, 2015).

the new body politic, coincide. As already indicated in the previous section, this involved not only declaring independence from the former sovereign but also integrating a heterogeneous set of *pueblos*, which initially considered themselves perfectly entitled to exercise sovereignty. This was one of the causes for the changing political geography of many Latin American states in the first years following their independence. Boundaries, however, largely stabilized towards the middle of the nineteenth century, when the republics formed a map approximating the present one. For this to happen, Latin American constitutionalism had to impose a conception of "territory" that abandoned its identification with *iurisdictio* and instead assimilated it to *administratio*. Under Spanish rule, the political geography had not been conceived as a map of territories but of jurisdictional domains, but the new states needed to treat the territory as an administrative space, stripped of jurisdiction as an attribute of the territory.[37] It was only when this process was already consolidated that the representatives of the republics of Bolivia, Chile, Ecuador, Nueva Granada, and Peru at the American Congress of Lima (1847) proposed using *uti possidetis iuris* as a principle to determine the frontiers between republics. This principle consisted in a subrogation of the old colonial jurisdictions by the new nations. Identification of the "national" space with that of the preceding colonial territorial units was a notion that had appeared in early constitutions, such as that of Colombia in 1821, or those of Mexico and Central America in 1824. However, these texts established a double standard: On the one hand, they applied towards the exterior a principle of "national" territorial delimitation based on the old colonial jurisdictional districts. For example, the 1843 constitution of Ecuador stated: "The territory of the Republic of Ecuador … includes all the provinces of the ancient kingdom and presidency of Quito." On the other hand, they did not apply the same principle of replicating the former jurisdictions inside the republic, as can also be seen in the Colombian text of 1821 (art. 8): "The territory of the Republic shall be divided into Departments, the Departments into Provinces, the Provinces into *Cantones* [districts], and the *Cantones* into *Parroquias* [parishes]."

The new republics also faced another major dilemma when it came to connecting territory and state. It was one thing to make republic and nation

37 M. Llorente Sariñena, "Uti possidetis, ita domini eritis. International Law and the Historiography of the Territory," in M. Meccarelli and M. J. Solla Sastre (eds.), *Spatial and Temporal Dimensions for Legal History: Research Experiences and Itineraries* (Global Perspectives in Legal History 6) (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2016), 131–72.

coincide, another to organize the state within that space once it had been delineated. Whether or not the new polities should be subdivided internally into territories with autonomous political powers was a question that until the final decades of the nineteenth century often divided the American republics to the point of civil conflict.

For reasons perhaps of spatial and temporal proximity, it is usually taken for granted that opting for a federal solution in Latin America was an imitation of the successful revolution in the Anglo-American North. Undoubtedly, a system like the United States' was of interest to the leaders of the post-independence Latin American republics. However, Latin American constitutional drafters also demonstrated a considerable capacity to innovate in this respect, and generated a different type of federalism that became very characteristic of this region. Unlike its North American counterpart, Latin American federalism blended national emancipation and sovereignty with the freedom and sovereignty of the individual federal states. When the drafters of the Mexican constitution opted for federalism in 1823 and 1824, they did so from a different premise to their northern neighbors: What was freeing itself from Spain was the "Mexican nation," whereas the term "nation" did not even appear in the constitution of the United States. The search for a similar expression in North American constitutionalism is fruitless because it was not "the United States" that emancipated themselves from the colonial power but the individual states, which subsequently formed the Union. By contrast, in Mexico, the emancipated nation was constituted first, and it then created the states, to the extent that they were specifically named in the Constitutive Act and in the 1824 constitution.[38] In other words, the states of the Mexican federation were born dependent upon the nation, and not, as in the United States, independent entities that subsequently formed the nation. This is why, as we have already seen, the Mexican nation was characterized in its constitution as a "free and independent" (i.e., emancipated) subject. According to article 6 of the 1824 *Acta Constitutiva* of Mexico, its federal states enjoyed the same status, but "exclusively in relation to their administration and internal government, as is detailed in this act and in the general constitution."

38 J. M. Portillo Valdés, "¿Un super omnia mexicano? Acerca de la soberanía nacional y el federalismo en la constitución de 1824," in B. Rojas (ed.), *Procesos constitucionales mexicanos. La constitución de 1824 y la antigua constitución* (Mexico City: Instituto Mora, 2017), 19–34. For the preception of equality among the federal states and the recognition of the superiority of the Mexican nation, see J. E. Rodríguez O., "'Ningún pueblo es superior a otro': Oaxaca and Mexican federalism," in J. E. Rodríguez O. (ed.), *The Divine Charter: Constitutionalism and Liberalism in Nineteenth-Century Mexico* (Lanham: Rowman and Littlefield, 2005), 65–108.

It was thus no coincidence that many federal states in Latin America included in their constitutions the expression "free and sovereign" rather than "free and independent" (which was the nation's particular condition), or specified, as in the case of the Central American Republic, that they were free and independent "in their internal government" (art. 10). The constitutions of the federal states were drafted immediately after the nation's federal constitution and in accordance with the latter. The Honduran constitution of 1825, adopted a year after the federal one of the Central American Republic (of which Honduras was part), reflected this logic when declaring the State of Honduras to be "free and independent in its internal administration and government" (art. 3). This internal administration and government involved the replication of national institutions (government, congress, and courts) at state level, and the states' autonomous capacity to produce their own civil, criminal, and commercial codes.

The distinction between the national and the "internal" government was fundamental to Latin American federalism, and in some cases did eventually lead to a federal system more similar to the United States of America. Between the 1850s and 1880s, one of the most radical federal experiments in Latin America took place in Colombia. The principle underlying the 1863 constitution that gave birth to the United States of Colombia was that an original sovereignty of the states was partly delegated to a "general government." It was the latter that the constitution sought to delimit, proceeding from the understanding that what was not general government remained a competence of the government of the states (art. 16). The Colombian text of 1863 contained provisions regarding the rights of states and of individuals, the separation of Church and state, and the relations between federal states and the institutions of central government. The individual states' constitutions were established on the basis of the federal constitution's principles, thus permitting the formation of a common republic.[39]

The 1850s also witnessed the creation of two other federal systems that, unlike the Colombian one, have endured to this day: in Argentina (1853–1860) and in Mexico (1857). For decades after the effective independence of Río de la Plata (1810), a constitutional union between Buenos Aires and the other

39 Federalism is not usually associated with Colombia, but its experience was significant in the nineteenth century, as described in D. Gutiérrez Ardila, "La nación federal," in M. Garrido, F. Hensel, and F. Ortega (eds.), *Historia de lo político* (Bogotá: Universidad Nacional-Universidad del Rosario, 2023), forthcoming; S. Kalmanovitz and E. López Rivera, "Las finanzas públicas de la Confederación Granadina y los Estados Unidos de Colombia (1850–1886)," in S. Kalmanovitz and E. López Rivera (eds.), *Las cuentas del federalismo colombiano* (Bogotá: Universidad Externado, 2022), 31–66.

provinces that had belonged to the viceroyalty had been prevented by a dispute over the former colonial capital's role within a new state. After the failure of Bernardino Rivadavia's centralist constitution of 1826, which precipitated a civil war, the various provinces remained effectively independent from each other. However, in 1853, following the proposals of the jurist Juan Bautista Alberdi, all provinces except Buenos Aires agreed to a common constitution. Buenos Aires joined the Argentine union in 1860 only after pushing through certain revisions to the original text. These reforms mainly concerned strengthening the provincial powers *vis-à-vis* the federal government, preventing, for example, control over the provincial constitutions by congress or the takeover of provincial institutions by central government. Buenos Aires also insisted on additional guarantees for individual liberties and claimed control over the customs office, which had been one of the main causes of dispute with the Argentine Confederation. The reformed constitution provided for a constitutional delay in relation to the status of Buenos Aires, initiating a long period of dispute over the government of the capital city between the national government and the province of Buenos Aires. In 1880, a law separated the province from the city of Buenos Aires, which was put under federal control, ending the long dispute over the place of the port city within the Argentine political body. Seventy years after the effective independence of Río de la Plata, federal and provincial powers found their respective ways of implementation and interaction leading to a versatile – rather than uniform – relationship between local and national.[40]

Republic and Territory II: Centralism

The previous section has shown that there was a strong tendency towards federalism in many of the constitutions of the independent Latin American republics, ultimately derived from the traditional concept of *pueblos* as communities governed autonomously by their councils. As we saw previously, the prominence of *pueblos* during the monarchic crisis of the early nineteenth century had catapulted them to the forefront of politics (see also Chapter 4). There was, however, also an opposing current in Latin American political thought which contributed to the design of constitutional systems described at the time as "centralist" and "unitary," in which the remnants of the political power of the *pueblos* were made to disappear. This tendency can already be perceived in the first constitutions of the Iberian world, but it was developed

40 See the works collected in P. Alonso and B. Bragoni (eds.), *El sistema federal argentino. Debates y coyunturas (1860–1910)* (Buenos Aires: Edhasa, 2015).

far more effectively in the middle decades of the nineteenth century. As discussed earlier, the first constitutions in Latin America projected towards the exterior a nation that coincided with previous colonial borders, while towards its interior that nation held regulatory control over what during the imperial period had been a multitude of territorial jurisdictions. This capacity of the national legislature to alter the internal territorial structure had already been expressed in article 11 of the Constitution of Cádiz: "A more convenient division of the Spanish territory shall be made as soon as the political circumstances of the nation permit."

This centralist tendency was reflected, for example, in the first constitution of the "State of Ecuador" in 1830, drawn up after the dissolution of the republic of Gran Colombia that had united Ecuador, Colombia, and Venezuela. The "State of Ecuador" was formed out of the merger of three provinces (Azuay, Guayas, and Quito) and, according to its constitution, occupied "the former Kingdom of Quito." In other words, it claimed for the new nation a territory that it attributed to a previous polity, which in this case was particularly confusing, as the Kingdom of Quito had been dependent on the viceroy of Peru.[41] Within the State of Ecuador, however, there was no recognition of the permanence of older jurisdictions or territorial structures. Instead, the entire space was considered at the disposal of the nation, which organized it as follows (art. 53): "The territory of the state is divided into departments, provinces, *cantones*, and *parroquias*. Political government of each department is vested in a Prefect, who is the direct agent of the Executive Power. Government of each province is vested in a Governor; each *canton* or group of *cantones*, if so decided by the government, shall be governed by a *corregidor* [local governor]; and the parishes by deputies."

A few years later, the 1833 Chilean constitution applied the principle laid down in Ecuador more successfully, as it remained in force until 1925. It defined the exterior borders of "the territory of Chile" using natural features (mountain ranges, deserts, oceans). Inside these borders, the country was subjected to a hierarchic administrative structure formed by provinces (headed by an *intendente*), departments (with a governor who reported to the *intendente*), sub-delegations (with sub-delegates subordinate to governors),

41 F. Morelli, *Territorio o nación. Reforma y disolución del espacio imperial en Ecuador, 1765–1830* (Madrid: Centro de Estudios Políticos y Constitucionales, 2005); M.-D. Demélas, *La invención de la política. Bolivia, Ecuador, Perú en el siglo XIX* (Lima: Instituto de Estudios Peruanos, 2003). More recently, A. I. Deidán de la Torre has reexamined the relationship between *pueblos* and sovereignty in Ecuador: A. I. Deidán de la Torre, *Pueblos y soberanía. Continuidades y rupturas conceptuales durante la insurgencia en el reino de Quito 1809–1813* (Quito: Instituto Ecuatoriano de Cultura Hispánica, 2016).

districts (with inspectors under the sub-delegates' command) and municipalities. Only on this last level was there citizen participation in the appointment of mayors and aldermen who, however, reported to the sub-delegates (or, in the case of a department's capital city, to the governor). The law that regulated local governments in 1854 (art. 25) defined municipalities as *cuerpos administrativos de los intereses locales*, administrative bodies that managed local interests.

The idea of the whole interior structure of a state being at the disposal of the central government to arrange as it saw fit was greatly influenced by conservative political thought. By mid-century, some of the principles of the so-called *Ciencia de la Administración* had reached the educated national elites in several Latin American countries. A number of legal treatises written around the middle of the century advocated for a more centralized state, as did the lectures delivered by Teodosio Lares in Mexico. Lares clearly positioned himself as following the Spanish scholars who had translated and disseminated the French theory of the administration as the "musculature" of the state, which should replace the nation as the main political subject. The ideal of the "administrative state" (see Section 6.1) imagined a system in which the "administrative power" (*poder administrativo*) regulated the government of society. According to Lares and other enthusiasts of the administrative state, it included a new kind of jurisdiction that put the judicial resolution of cases concerning administrative authorities (*contencioso administrativo*) under its control. Paulino Soares de Souza, viscount of Uruguai, promoted these ideas in Brazil, arguing for the extension of the central administration's competences and leaving to local governments only those aspects that were impossible for the central government to manage. Soares de Souza was the instigator of the law of December 3, 1841, which reinforced the executive power and restricted representative institutions both in the administrative and judicial systems.[42]

Latin American conservative political thought, then, tended to favor constitutional and legal systems in which the society's participation in political institutions was strictly limited. What we historians usually label as centralism was, in fact, a complex proposal based on the conception of society as an object of politics rather than as a political subject. Elective authorities at

42 T. Lares, *Lecciones de derecho administrativo dadas en el Ateneo mexicano* (Mexico City: Ignacio Cumplido, 1852); Visconde de Uruguai [P. Soares de Souza], *Ensaio sobre o direito administrativo* (Rio de Janeiro: Tipografia Nacional, 1862); M. Duarte Dantas, "O Codigo do Processo Criminal e a Reforma de 1841. Dois modelos de organização dos poderes," *História do Direito* 1(1) (2020), 96–121.

different administrative levels or the citizens' participation in the judiciary (by serving on juries) were seen as impediments to the effective deployment of state institutions over the entire territory of the republic.

Society, Economy, and Constitution

In the mid-nineteenth century, at the height of the final battle to establish a constitutional system of national scope in Río de la Plata (present-day Argentina), the political theorist and diplomat Juan Bautista Alberdi published an influential work with a view to guiding the efforts of the constitutional assembly. He argued that it was time to start a new phase of Spanish American constitutionalism. Up to his day, he argued, constitutionalism had been related to the struggle for independence, and constitutional texts thus solely concerned with establishing the new republics. This had led to the neglect of certain aspects of importance to modern societies: "During that period, in which democracy and independence were the sole ingredients of the constitutional proposal, wealth, material progress, commerce, the population, industry – in a nutshell, all economic interests – were accessories, secondary benefits, second-class interests, little known and little studied, and, needless to say, even less taken care of."[43]

Alberdi clearly intended to redirect constitutional thought towards aspects that had more to do with the relationship between society (and economy) and the state than with the nation. Once the latter was stabilized, it was time for Latin American liberalism to lay the constitutional foundations of the social order and to establish the principles that would allow for it to be governed and protected by the state. Once again, however, these were neither simple nor uncontroversial questions; on the contrary, they would continue to generate differing ideological positions that were frequently resolved only after civic hostilities that in many cases lasted into the first decades of the twentieth century.[44]

In the historiography, it is usual to refer to each nineteenth-century Latin American polity as having a single society (Mexican society, Argentine society, etc.). However, the existence of one national society was a controversial subject in the first Hispanic constitutions. On the one hand, these constitutions all aspired to generate the same law "for every type of person," as the Constitution

43 J. B. Alberdi, "Bases y Puntos de Partida para la Organización de la Confederación Argentina," in J. B. Alberdi, *Organización de la Confederación Argentina* (Bezanzon: José Joaquín, 1858), 3–4.

44 J. M. Portillo Valdés, *Historia mínima del constitucionalismo en América Latina* (Mexico City: El Colegio de México, 2015), 111–207.

of Cádiz had already declared in 1812. On the other hand, it, and other constitutions in the Iberian world, included significant exceptions for the clergy, the military, and public officials. Furthermore, the political geography of the republics that emerged from the monarchic collapse contained a plethora of political bodies created in towns and provinces. These bodies were no longer in possession of "their own law," that is, a charter per se, but many of them were conceived of as corporations endowed with their own political capacity. As can be more specifically explored in the section devoted to civil codification (Section 5.2), one of the explanations for the delay in effectively constituting civil society in the Latin American republics via the enactment of civil codes rested in the fact that the existence of a homogeneous civil society had not yet been effectively established. It was one thing to constitute the government (with a *constitución política*) and a different one to constitute society (with a *código civil*).

In the 1830s, post-independence political thinkers with such contrasting ideological beliefs as the conservative Mexican Lucas Alamán and the liberal José María Luis Mora arrived at similar conclusions when they identified *espíritu de cuerpo* or the "absolutism of corporations" as one of the republic's main shortcomings.[45] Andrés Bello, the influential Chilean intellectual who participated in various constitutional projects in the new South American republics, predicted in 1836 that these would eventually bring back together two elements whose connection had been severed in the first phase after independence: emancipation and the consolidation of a legal order as the basis of personal freedom. The first constitutions had concerned themselves with the former but, halfway into the century, the time had come to concentrate on the latter. To this end, Bello argued, it was necessary for constitutional drafting to take into account both political philosophy and social reality.[46]

Bello was also the main author of the Chilean Civil Code (1855), which exemplified his blend of philosophy and sociology (i.e., of theory and reality) and became very influential both in Spanish America and in Spain (see Section 5.2). Bello himself acknowledged that his approach resulted in legal products that could not reflect the liberal paradigm in all respects but argued that something similar was happening in the famous North American republic, too, where progress and slavery walked hand in hand. For Bello,

45 C. A. Hale, *El liberalismo mexicano en la época de Mora* (Madrid: Siglo XXI, 1985). *Espíritu de cuerpo* in Spanish had a negative connotation as related to selfishness and lack of the opposite, *espíritu público*.

46 A. Bello, "Las repúblicas Hispanoamericanas," in A. Bello, *Las repúblicas Hispano-Americanas. Autonomía cultural* (Cuadernos de Cultura Latinoamericana 11) (Mexico City: UNAM, 1978).

once national emancipation had been achieved, what really counted from a constitutional point of view was not the implementation of a philosophical ideal but the constitution's adaptation to social reality. Due to their ethnic and class differences, the Hispanic American societies had peculiarities that demanded special legal and constitutional treatment.

The type of constitutional thought demanded by Alberdi, Bello, and others thus had to include considerations of social order and economic development – in their words, the "progress" of the republics. The social order they envisioned required agreement that all inhabitants of the nation together constituted a single society and were subject to the same laws, thus these thinkers' insistence on suppressing any kind of particular law. However, Bello's, Alberdi's, and other mid-century authors' analysis of social reality convinced them that a homogenous society was more wishful thinking than fact. Slavery was, perhaps, the most obvious obstacle to imagining a society that was composed of different socio-economic classes but homogeneous according to the law.

The treatment of slavery provides an excellent vantage point for viewing the issue of how constitutions were able to accommodate the social and political order. Many of the first constitutions assumed a social order in which slavery continued to be commonplace and consequently established the condition of freedom as a prerequisite for forming part of the national community. The development of republican constitutionalism since the 1830s contained two potentially conflicting principles. On the one hand, many constitutions (as, e.g., the Uruguayan constitution of 1830, art. 131) established that everybody born in the republic was free and that human trafficking was forbidden within its borders. The policy of "free wombs" (i.e., that a child born of an enslaved woman is free) was part of this constitutional provision. These measures, implemented in most of the South American republics during the 1820s and 1830s, were understood as a correlate of the principle of equality, because they attempted to lay the foundations of a homogenous social sphere. On the other hand, however, the republics' liberal social order demanded scrupulous respect for property rights, which owners of enslaved people continued to enjoy. The Uruguayan example shows that the development of constitutional provisions was directed towards integrating the enslaved population into the nation via very similar mechanisms to the expropriation of land and other assets in the public interest, that is, by reimbursing owners the supposed "value" of the enslaved person from public funds.[47]

47 A. Borucki, *Abolicionismo y tráfico de esclavos en Montevideo tras la fundación republicana (1829–1853)* (Montevideo: Biblioteca Nacional, 2009).

There were also countries, such as Brazil or Cuba, where economic progress was based upon the intense use of the labor of enslaved persons. In these cases, the constitutions provided for the possibility of continuing this type of labor exploitation with different formulae, even beyond what was already contained in international agreements or in internal legislative or administrative provisions. The Spanish constitution of 1837 (which replaced the 1812 Cádiz constitution) introduced an additional provision that placed Cuba and Puerto Rico (as well as the Philippines) outside the constitutional space. The provision, which remained in force until 1869 and was repeated in the constitution of 1876, merely stated that "special laws" would be provided for the "overseas provinces." However, these never materialized, facilitating arbitrariness in the legal treatment of the trafficking and exploitation of enslaved persons in these areas until the prohibition of slavery in 1880.[48]

The Brazilian constitution of 1824, in force until the end of the reign of Dom Pedro II (1889), dealt with the tension between equality and the existence of enslaved persons in a singular fashion. It avoided the usual practice of establishing a distinction between nationality and citizenship. Instead, it defined the latter as the condition of "[t]hose who are born in Brazil and are *ingenuos* or freedmen" (art. 6, I). *Ingenuo* at the time had the legal meaning of having been born free and not having subsequently been enslaved. This definition of citizenship – which was the individual's sole form of constitutional existence – excluded enslaved persons, whose numbers were growing at the time. The mass production of coffee, which began during the reign of Dom Pedro II, was made possible by the large-scale trafficking of enslaved people from overseas, which continued until 1850. Subsequently, the trade of enslaved people became internal to Brazil, to be abolished only in the 1880s.

Another element of constitutional attempts to render the social space more uniform was the struggle to suppress local charters (*fueros*). While the intention to end these exceptions was already announced in the earliest constitutional texts, they persisted in accordance with special laws. These contradictions continued for decades after the formation of the independent republics. Article 13 of the Mexican constitution of 1857 is a good example of the legal suppression of *fueros*: "In the Mexican Republic, nobody can be judged according to exclusive laws, or by special courts. No person or corporation may have charters or enjoy emoluments that are not paid in compensation for a public service and fixed by law." Nevertheless, Tlaxcala, which

48 J. M. Fradera, *The Imperial Nation* (Princeton: Princeton University Press, 2018); J. A. Piqueras, *Negreros. Españoles en el tráfico y en los capitales escalvistas* (Madrid: Catarata, 2021).

had been upgraded from "territory" to "free and sovereign state" by the constituent assembly in 1856, had defended its "independence" with a call for the conservation of "its ancient *fueros*."[49]

The drafters of the 1857 Mexican constitution were expressly intent on abolishing the ecclesiastical *fuero* and whatever remained of the former status of indigenous *pueblos*. A series of complementary laws, known as the Reform Laws, were added to the constitution both before and after its promulgation. The first of these, called the Lerdo Law (after the minister who promoted it, Miguel Lerdo de Tejada), led to the dismantling of the corporatism of Mexican society by eliminating the patrimonial basis of peasant communities. Such measures were part of a more general abolition of any form of corporate ownership, which the Lerdo Law identified very precisely: "Under the name of corporations are included all religious communities of both sexes, fraternities and confraternities, congregations, brotherhoods, parishes, town halls, schools and, in general, any establishment or foundation of a perpetual or indefinite nature." Suppressing such long-standing forms of corporate social life was justified with reference to the idea that private property was a precondition for progress and social development.

The constitutionalism of the later nineteenth century intensified this imposition of the logic of private ownership. The Costa Rican constitution of 1871, among others, included an explicit ban on creating entailed estates: "The Republic does not recognize hereditary titles or *empleos venales* [bought offices that were often also inherited] or permit the creation of entailed estates" (art. 23). At stake was the reduction of all ownership to private ownership, and, therefore, bringing property under the owner's complete control. However, there were also constitutions that established the continuity of non-individual ownership of real estate, albeit subject to the logic of individual ownership: "The Church's real estate and the property belonging to educational or charitable establishments, to municipalities, or religious communities and corporations, will benefit from the same guarantees as those of individuals" (Bolivia, 1878 art. 17).

The prevailing liberal constitutional culture was thus based on (private) ownership. This radically conflicted with the indigenous communities' cultural values and concepts of property. Liberals saw this as evidence of the indigenous populations' inferior level of civilization which necessitated their

49 B. Hamnett, "El liberalismo en la Reforma mexicana, 1855–1876: Características y consecuencias," in R. Blancarte (ed.), *Las Leyes de Reforma y el Estado laico: importancia histórica y validez contemporánea* (Mexico City: El Colegio de México, 2013), 67–95. On Tlaxcala, see J. M. Portillo Valdés, *Fuero Indio. Tlaxcala y la identidad territorial entre la monarquía imperial y la república nacional 1787–1824* (Mexico City: El Colegio de México, 2014).

"cultural conversion" to progress and modern civic life. The most progressive Latin American constitution of the century, the Columbian Constitution of Rionegro (1863), expressed this idea very clearly (art. 173): "A special law shall govern sparsely populated Territories, or those occupied by indigenous tribes, which the State or States to which they belong agree to cede to the central government with the objective of fostering colonization and implementing material improvements." Note that "indigenous tribes" were not described as "populating" or "inhabiting" but merely "occupying" a territory, which the federal states and the general government should administer in order to civilize it. This was the same principle that Juan Bautista Alberdi formulated in an expression destined to become famous: "To govern is to populate" – but to populate with a very specific, supposedly more "civilized," type of human being.

The idea of a single, homogenous national society formed of just one legal kind of person raised the question of the breadth of suffrage. If originally the majority of the Latin American constitutions included an extensive franchise, considerably broader than what was usual at the time in the Western hemisphere, this was subsequently qualified in several ways.[50] It is important to bear in mind that the independent Latin American republics retained much of the colonial social order, modified only at the higher levels with the abolition of titled nobility.

The most effective constitutional mechanism in order to align the political with the social order was the definition of the citizen as an autonomous individual (free and independent, i.e., emancipated) discussed previously, which *de facto* excluded large sectors of society. Until the twentieth century, it prevented women's entry into the public space of representation. (Their presence in the public debate increased via other channels, such as through literature or by engaging in discussions of public affairs in private gatherings, but these were restricted, of course, to women from the upper echelons of society.) A supposed absence of autonomy also closed the doors to citizenship for the mainly *mestizo* or indigenous members of the lower social classes. Expressions like "domestic service," "lazy," or "lacking an honest way of living," employed by various constitutions as grounds for the suspension of citizenship, could result in interpretations that also excluded salaried workers

50 H. Sabato, *Republics of the New World: The Revolutionary Political Experiment in Nineteenth-Century Latin America* (Princeton: Princeton University Press, 2018); R. Warren, "Los tránsitos de la representación política en México, 1821–1857," in J. A. Aguilar Rivera (ed.), *Las elecciones y el gobierno representativo en México (1810–1910)* (Mexico City: Fondo de Cultura Económica, 2010), 55–94.

and others subject to different forms of supervision and control by employers, such as several kinds of *hacienda* workers (*gañanes, conchabados*). There were also complementary forms of excluding members of lower social and/or economic status, such as requiring citizens to be literate or to fulfill certain moral criteria, derived from contemporary anthropological assumptions, that penalized practices such as transhumance or nudity.[51] Other circumstances that precluded citizenship also belonged to the sphere of moral values: Article 40 of the Peruvian constitution of 1860 stated that one could be excluded from citizenship "[f]or being flagrantly idle, a gambler, inebriate, or for being the culpable party in a divorce."

Nineteenth-century Latin American constitutions worked in concert with other equally effective instruments to ensure that the Creole elite would continue to dominate political representation. These included differentiated electoral systems with varying requirements for suffrage depending on whether elections were local, provincial, or national. Indirect electoral systems on various levels further restricted access to the higher strata of representation, which was limited, with very few exceptions, to those who already belonged to the economic and intellectual elites.

Progressive and conservative liberals argued at length over the relations between the social and the political order. The liberals, especially at the more radical end of the spectrum, aspired to the extension of citizenship to all married or even all adult males. The more moderate sectors preferred to keep eligibility for citizenship conditional on the fulfillment of certain cultural or moral criteria. What all agreed upon was that the social order should correspond to Creole cultural values and that this should be reflected in the constitution.[52]

By the 1870s, constitutions had established themselves in Latin America in the sense referred to by the Peruvian jurist José Silva Santisteban in the work quoted at the beginning of Section 5.1: They were the most important instrument of government. With the consolidation of the constitution as a basic political tenet, the political debate moved on to focus on the state's administration. To put it in metaphorical terms, the skeleton of the new political bodies – that is, the constitutions – that had emerged from the crisis of the

51 Exclusion from citizenship due to "moral or physical incapacity" could affect many indigenous communities categorized as "uncivilized": see Duarte Dantas, "Constituição, poderes e cidadania," 36.

52 The limits of this shared belief have been explored by J. E. Sanders, *The Vanguard of the Atlantic World: Creating Modernity, Nation, and Democracy in Nineteenth-Century Latin America* (Durham: Duke University Press, 2016); and T. H. Schaefer, *Liberalism as Utopia: The Rise and Fall of Legal Rule in PostColonial Mexico, 1820–1900* (Cambridge: Cambridge University Press, 2017).

Iberian empires was already consolidated by the 1870s. What Silva, Bello, or Alberdi deemed necessary then was to add musculature – that is, the administration – as Sections 5.2 and 6.1 will show.

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5.2 Codifications

AGUSTÍN PARISE*

Codification was a global movement that aimed to shape the way in which the law was presented, studied, and applied. Though its origins lie in the eighteenth century, it developed significantly during the nineteenth century, mainly in the civil law world. Codifiers advocated for a new presentation and form of law that would replace the multitude of existing provisions. In its original conception, codification pursued the utopian goal of organizing all areas of the law in an organic, systematic, clear, accurate, and comprehensive way.[53] This global movement continued to evolve during the twentieth and twenty-first centuries, when it mainly experienced processes of revision,

* Part of the research and writing used for this chapter was previously presented in other forums: A. Parise, "The Place of the Louisiana Civil Code in the Hispanic Civil Codifications: Inclusion in the Comments to the Spanish Civil Code Project of 1851," *Louisiana Law Review* 68 (2008), 823–929; A. Parise, "Legal Transplants and Codification: Exploring the North American Sources of the Civil Code of Argentina (1871)," in J. A. Sánchez Cordero (ed.), *Legal Culture and Legal Transplants. La culture juridique et l'acculturation du droit* (Mexico City: UNAM, 2012), vol. I, 71–121; A. Parise, "Libraries of Civil Codes as Mirrors of Normative Transfers from Europe to the Americas: The Experiences of Lorimier in Quebec (1871–1890) and Varela in Argentina (1873–1875)," in T. Duve (ed), *Entanglements in Legal History: Conceptual Approaches, Global Perspectives on Legal History* (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2015), 315–384; A. Parise, "Harmonization of Private Law in Latin America and the Emergence of Third-Generation Codes," in S. Vogenauer and R. Momberg (eds.), *The Future of Contract Law in Latin America: The Principles of Latin American Contract Law* (Oxford: Hart Publishing, 2017), 29–55; A. Parise, *Ownership Paradigms in American Civil Law Jurisdictions: Manifestations of the Shifts in the Legislation of Louisiana, Chile, and Argentina (16th–20th Centuries)* (Leiden: Brill Nijhof, 2017); A. Parise, "Sources of Law and Legal History," in U. Basset (ed.), *Introduction to the Law of Argentina* (Alphen aan den Rijn: Wolters Kluwer, 2018), 1–24; and A. Parise, "Using Metaphors to Explain the Construction of Societal *Buildings*: A look into the Codification of Civil Law in Latin America," in A. Parise and L. van Vliet (eds)., *Re- De- Co-dification? New Insights on the Codification of Private Law* (The Hague: Eleven International Publishing, 2018), 101–133.

53 L. Díez-Picazo and A. Gullón, *Sistema de Derecho Civil*, 4th ed. (Madrid: Tecnos, 1982), vol. I, 51; A. Alessandri Rodríguez and M. Somarriva Undurraga, *Curso de Derecho Civil, basado en las Explicaciones de los Profesores de la Universidad de Chile*, 2nd ed. (Santiago: Editorial Nascimento, 1945), vol. I, 49; and G. R. Carrió, "Judge Made Law under a Civil Code," *Louisiana Law Review* 41 (1981), 993–1005, at 993.

de-codification, and re-codification, but these lie outside the period covered in this section, which will focus on the nineteenth century.[54]

Constitutions and codes were seen as symbols of change and as constitutive elements of the different territories in nineteenth-century Latin America (on constitutions, see Section 5.1). At a time of prevailing liberalism, these *corpora* were part of a process that aimed to attain uniformity of laws while at the same time pursuing a juridical centralism that would help overcome the multiplicity of norms within a specific territory.[55] As tools for centralization[56] and symbols or juridical monuments of nation building, they ultimately helped to eliminate divisions and pluralism.[57] Despite these aims, drafters drew on an international, indeed global, pool of legal sources, as will be discussed in detail later. In the words of Thomas Duve, these constitutions and codes "have been part of a complex process of communication that, in some respects, possessed a global dimension. Constitutions and codes from different parts of the world circulated and were translated, literally and culturally, to a greater or lesser degree, into each nation's realities."[58] Looking at codes, it can be argued that there was a "contagion" of codification efforts across Latin America.[59] In addition, a number of local constitutions called for the adoption of codes (see Section 5.1).[60] This development offered proof of the "veneration" of these *corpora*, and it was accompanied by the emergence of specialized literature and the revision of the curricula at law schools, amongst other changes. That enthusiasm was succeeded by a conception that allowed the perception of the law "in action."[61] The decades that followed the enactments of the different codes however showed that the codes were not able to realize the utopian task they had been originally envisioned to achieve.[62]

This section will address the codification movement in nineteenth-century Latin America. It will focus on civil law codification as a means to narrow the scope of study, though it should be noted that at the time codification tended

54 See, amongst the copious literature, more recently: A. Parise and L. van Vliet (eds.), *Re- De- Co-dification? New Insights on the Codification of Private Law* (The Hague: Eleven International Publishing, 2018).

55 A. L. Fernández Álvarez, "Constitucionalismo y codificación civil. El proceso de centralización jurídica en el siglo diecinueve," *Direito em Movimento* 18(3) (2020), 39–76, at 41.

56 See Section 6.1 in this volume.

57 T. Duve, "What is Global Legal History?," *Comparative Legal History* 8(2) (2020), 73–115, at 92; and Fernández Álvarez, "Constitucionalismo y codificación civil," 65.

58 Duve, "What is Global Legal History?," 92.

59 See generally O. Moréteau and A. Parise, "Recodification in Louisiana and Latin America," *Tulane Law Review* 83 (2009), 1103–62.

60 See, for example, section 64, paragraph 11 of the Argentine Constitution of 1853.

61 M. R. Pugliese la Valle, "La 'idea de jurisprudencia' a través de los primeros años de la 'Revista de Jurisprudencia Argentina'," *Revista de Historia del Derecho* 22 (1994), 241–77, at 277.

62 R. Lesaffer, *European Legal History: A Cultural and Political Perspective* (Cambridge: Cambridge University Press, 2011), 510–11.

to cover five areas of law (civil, commercial, and criminal law, as well as civil and criminal procedure). Indeed, the different codification experiences – across areas of law and jurisdictions – merit attention beyond this section.

The late Carlos Ramos Núñez stated that codification as a legal paradigm had an impact in Latin America.[63] In order to understand this impact, it also needs to be placed within a pan-American context, and indeed understood as part of a global movement. This section will therefore look at codification within three dimensions, but always from a Latin American perspective. The first dimension introduces the codification movement by focusing on the endeavors in Europe. While codification soon spread across the globe, it also kept evolving in Europe throughout the period covered in this section, running parallel to the developments in the Americas.

The second dimension jumps across the Atlantic to focus exclusively on the development of codification in Latin America, discussing a selection of actors, events, and influences, and tracing some of the main codification efforts. The third dimension continues to focus on the Americas, but looks beyond Latin America to its northern neighbors, and explores two case studies, the civil codes of Louisiana (1825) and Quebec (1866), to trace the pan-American circulation of legal ideas. All three dimensions will also offer examples of failed codification endeavors, since the history of codification should not be written as a story of linear progress. A new paradigm does not become consensual overnight and can run along parallel paths in different parts of the globe. Accordingly, this section aims to offer insights into the traits that help explain the paradigmatic shift brought by codification in Latin America as part of a larger process around the globe.

Ramos Núñez, as already mentioned, argued that codification could be seen as a legal paradigm,[64] an overarching set of legal concepts, which was also combined with the prevailing ideologies in a certain society.[65] The late Peruvian jurist defined a "paradigm shift" as the generation of a new consensual model that changes the previous, long-established perspective of a certain scientific community.[66] A shift or scientific revolution will break

63 C. Ramos Núñez, *Codificación, Tecnología y Postmodernidad* (Lima: Ara Editores, 1996), 23.

64 Ramos Núñez, *Codificación*, 23.

65 E. P. Haba, "Ciencias del derecho, La controversia de paradigmas en la Teoría del Derecho contemporánea," in M. Ossorio y Florit et al. (eds.), *Enciclopedia Jurídica Omeba* (Buenos Aires: Driskill, 1996), vol. VII, 107–45, at 122.

66 Ramos Núñez, *Codificación*, 23; drawing on T. S. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed. (Chicago: The University of Chicago Press, 1970). See also Haba, "Ciencias del derecho," 122. Some scholars have argued that the Kuhnian model should not be applied to the legal sciences; see, for example, U. de Vries, "Kuhn and Legal Research: A Reflexive Paradigmatic View on Legal Research," *Recht en Methode in onderzoek en onderwijs* 3(1) (2013), 7–25, at 11.

with a previous paradigm and set in place a new one that will be likewise accepted.[67]

The development of codification can be divided into four periods or stages from the time of its emergence until the present.[68] The first period is that of foundation. In this period, the enactment of a seminal code (or small number of codes) can be considered as sparking a codification movement in particular spaces, hence triggering a "contagion" of codes. Such a seminal text – like the Chilean civil code of 1857 – often served as a blueprint or model for future codification endeavors. The second period is that of expansion, which sees an accelerated growth in the number of codes enacted, many of which share common traits and build on existing models. The third period is that of differentiation. In this period, codifiers worked within societies that sought to distinguish their own national legal culture. They were able to use developments in their own court judgments, legislation, and doctrine as a means of differentiating their codes from previous products. The fourth period is that of globalization. In this period, drafters of codes sought to harmonize internal private law with that of other jurisdictions, trying to find an equilibrium between what is good for the individual and what is good for society, even beyond borders.[69] This section will only address the periods that took place during the nineteenth century – foundation and expansion – and will look at them within the global, Latin American, and pan-American dimensions. Periodization is an analytical tool; the various developmental stages described should not be understood as chronologically entirely distinct but could overlap.

Global Dimensions

The global spread of codification began on the European continent, where it can be traced back to the eighteenth century. Changes to the understanding of law had started with the Enlightenment and the humanist movement and continued in rationalistic natural law theorizing that led the way to codification.[70]

67 Ramos Núñez, *Codificación*, 23.

68 In previous studies, when looking at Latin America, the author of this chapter referred to "generations" of codes. For more information on generations of codes, see A. Parise, "Civil Law Codification in Latin America: Understanding First and Second Generation Codes," in J. M. Milo, J. H. A. Lokin, and J. M. Smits (eds.), *Tradition, Codification and Unification: Comparative-Historical Essays on Developments in Civil Law* (Cambridge: Intersentia, 2014), 183–93.

69 On this equilibrium, see A. A. Alterini, "Tendencias en la contratación moderna," in C. López Fernández, A. Caumont, and G. Caffera (eds.), *Estudios de Derecho Civil en Homenaje al Profesor Jorge Gamarra* (Montevideo: Fundación de Cultura Universitaria, 2001), 13–24.

70 A. Levaggi, *Manual de Historia del Derecho Argentino (Castellano-Indiano/Nacional)*, 2nd ed. (Buenos Aires: Depalma, 1996), vol. I, 185.

The new European political, intellectual, and legal environment offered a fertile ground for a movement that aimed to challenge previously uncontested dogmas.[71] Through the new European context, these ideas, including legal ideas, circulated around the globe and linked codification movements across and within continents. However, different political and social conditions provided different contexts for codification. Thus, while there were common legal bases and temporal parallels between different jurisdictions, each merits its own study.[72]

The enthusiasm for codification gained strength with the development of comparative legislation around the 1850s, for example, through concordances listing different jurisdictions' rules on various topics side-by-side.[73] Latin American legal thought was particularly influenced by the works of French and Spanish authors in this field.[74] One of these was Fortuné Anthoine de Saint-Joseph, who in 1840 produced the first edition of his concordance of civil codes that went on to circulate widely in Europe and the Americas.[75] The work provided a synoptic table that aided the comparison of the texts of the French civil code (1804) (later called *Code Napoléon*) with the texts of several other nineteenth-century codes.[76] In Spain, Florencio García Goyena directed readers through the text of the Spanish civil code project of 1851 and included a scholarly commentary on each of its articles.[77] Drafters of civil codes regarded these works as useful repositories of a multiplicity of provisions. Again in Spain, but at the start of the 1860s, Juan Antonio Seoane also published a work that provided formal sources, in this case, translations and transcriptions of both Spanish and foreign provisions

71 G. A. Weiss, "The Enchantment of Codification in the Common-Law World," *Yale Journal of International Law* 25 (2000), 435–532, at 453.

72 V. Tau Anzoátegui, *La Codificación en la Argentina (1810–1870). Mentalidad Social e Ideas Jurídicas*, 2nd rev. ed. (Buenos Aires: Librería Histórica – Emilio J. Perrot, 2008), 16.

73 V. Tau Anzoátegui, *Las Ideas Jurídicas en la Argentina (Siglos XIX–XX)* (Buenos Aires: Editorial Perrot, 1977), 79.

74 See generally A. Parise, "Las Concordancias Legislativas Decimonónicas: Instrumentos de Difusión del Derecho Continental Europeo en América," *Cuadernos de Historia del Derecho* 17 (2010), 171–206.

75 A. de Saint-Joseph, *Concordance entre les codes civils étrangers et le Code Napoléon* (Paris: Charles Hingray, 1840). The text was also translated into Italian and Japanese, further extending its readership. See G.-R. de Groot and A. Parise, "Anthoine de Saint-Joseph: A Nineteenth-Century Paladin for the Development of Comparative Legislation," in B. van Hofstraeten, J. van Rensch, T. Gehlen, G. de Groot, and C. H. van Rhee (eds.), *Ten definitieve recht doende … Louis Berkvens Amicorum* (Maastricht: Limburgs Geschieden Oudheidkundig Genootschap, 2018), 70–93.

76 See generally de Saint-Joseph, *Concordance*.

77 F. García Goyena, *Concordancias, Motivos y Comentarios del Código Civil Español* (Madrid: Sociedad Tipográfico-Editorial, 1852), vols. I–IV.

that aimed to fill the *lacunae* that existed in the legislation of Spain and the Americas.[78]

In Europe, codification went through three of the four periods of its development during the nineteenth century: foundation, expansion, and differentiation. The foundation period was marked by the *Code Napoléon*,[79] and the French Exegetical School of jurists that developed following its adoption.[80] Apart from being in force in the French empire, its colonies, and the polities established in the wake of Napoleonic victories,[81] after the end of the Napoleonic Wars, the *Code Napoléon* was also adopted voluntarily in a number of territories, either by simply translating it or with considerable modifications.[82] It thus reached all continents. The Exegetical School occupied a paramount position in providing the intellectual context in which future codification projects developed. Its proponents, both scholars, and judges, interpreted the code's provisions by closely following their language (literal meaning) and by drawing on a body of prior works, such as those of Robert-Joseph Pothier and Jean Domat.[83] This exegesis was a way both of presenting and of teaching law,[84] and Charles Demolombe, the "prince of exegesis," advocated for the supremacy of written codified law, as did other representatives of the school.[85] The works of the

78 J. A. Seoane, *Jurisprudencia Civil vigente Española y Estranjera, según las sentencias del Tribunal Supremo desde el establecimiento de su jurisprudencia en 1838 hasta la fecha* (Madrid: Bailly-Bailliere, 1861), vii.

79 Foundation is not necessarily linked to the enactment of a first code, since earlier codes were enacted in Europe before the *Code Napoléon*.

80 The literature in English on the influence of that seminal French text is copious; see, for example, C. S. Lobingier, "Napoleon and His Code," *Harvard Law Review* 32 (1919), 114–34; J.-L. Halpérin, *The Civil Code*, trans. D. W. Gruning (Baton Rouge: Center of Civil Law Studies, 2000); and M. C. Mirow, "The Code Napoléon: Buried but Ruling in Latin America," *Denver Journal of International Law & Policy* 33 (2005), 179–94.

81 C. Seruzier, *Historical Summary of the French Codes with French and Foreign Bibliographical Annotations Concerning the General Principles of the Codes Followed by a Dissertation on Codification,* trans. D. A. Combe and M. S. Gruning (Littleton: Fred B. Rothman, 1979), 197; A. N. Yiannopoulos, *Louisiana Civil Law System: Course Outlines* (Baton Rouge: Claitor's Publishing Division, 1971), vol. I, 45.

82 Yiannopoulos, *Louisiana Civil Law*, vol. I, 45.

83 M. U. Salerno, "Un Retorno a las Fuentes del Código Civil Argentino: La Doctrina Francesa," in A. Levaggi (ed.), *Fuentes Ideológicas y Normativas de la Codificación Latinoamericana* (Buenos Aires: Universidad del Museo Social Argentino, 1992), 219–40, at 228; and A. N. Yiannopoulos, *Louisiana Civil Law System: Course Book* (Baton Rouge: Claitor's Publishing Division, 1977), part 1, 58.

84 C. Petit, "Lambert en la Tour Eiffel, o el derecho comparado de la Belle Époque," in A. Padoa-Schioppa (ed.), *La comparazione giuridica tra Otto e Novecento: In Memoria di Mario Rotondi* (Milan: Istituto Lombardo di scienze e lettere, 2001), 53–98, at 69.

85 A. Levaggi, "La Interpretación del Derecho en la Argentina en el Siglo XIX," *Revista de Historia del Derecho* 7 (1979), 23–121, at 29.

exponents of the Exegetical School were read together with the *Code Napoléon*, even leading to translations into other languages.[86]

At this point, a closer look into a specific provision can illustrate the impact of codes in substantive law. The *Code Napoléon*, especially in the area of property, was deemed a symbol of modernity and liberalism.[87] Property law occupied a central place in the French text.[88] Article 544 of the *Code Napoléon* was present in many codes that followed its model, sometimes taken over *verbatim*, in other cases substantively adapted. It read (in English translation): "[O]wnership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by law or by regulations." This definition followed the proposals included in the drafts by Jean-Jacques-Régis de Cambacérès[89] of 1793, 1794, and 1796,[90] but also found a precedent in the *Projet de code civil* of 1800, and thus offers an example of how the "genetic" history of provisions can be traced.[91] The conceptualization provided by article 544 was the result of long-standing efforts to eradicate many of the feudalistic limitations on property.[92] This work reached its clearest expression in the writings of Pothier, who should perhaps be seen as the last of the "old" writers rather than the first of the "new."[93] Immediately after the enactment of the *Code Napoléon*, jurists claimed that the French article was related to parts of the *Corpus Iuris Civilis*.[94] This connection should not be overemphasized, however, as – even though many scholars claim that ownership was an absolute and indivisible right in Roman law – the

86 J. M. Díaz Couselo, "Francisco Gény en la Cultura Jurídica Argentina," *Revista de Historia del Derecho* 38 (2009), 1–18, at 17–18; and A. Aragoneses, *Un Jurista del Modernismo: Raymond Saleilles y los Orígenes del Derecho Comparado* (Madrid: Editorial Dykinson, 2009), 80.

87 J.-L. Halpérin, *Histoire du droit des biens* (Paris: Économica, 2008), 266.

88 Halpérin, *The Civil Code*, 37.

89 Halpérin, *Histoire du droit des biens*, 192.

90 See the wording of the different drafts in P. A. Fenet, *Recueil complet des travaux préparatoires du code civil, suivi d'une édition de ce code, [à] laquelle sont ajoutés les lois, décrets et ordonnances formant le complément de la législation civile de la France, et ou se trouvent indiqués, sous chaque article séparément, tous les passages du recueil qui s'y rattachent* (Paris: Au dépôt, rue Saint-André-des-Arcs, 1827), vol. I, nos. 51, 39, 116, and 243.

91 See the wording of the relevant article in *Projet de code civil, présenté par la commission nommée par le gouvernement* (Paris: De l'imprimerie de la République, 1801), 166.

92 P. Lira Urquieta, *El Código Civil y el Nuevo Derecho* (Santiago: Imprenta Nascimento, 1944), 166.

93 J.-L. Halpérin, *Histoire du droit privé français depuis 1804* (Paris: Presses Universitaires de France, 1996), 25; and C. Álvarez Alonso, *Lecciones de Historia del Constitucionalismo* (Madrid and Barcelona: Marcial Pons, 1999), 57–59.

94 For example, in 1805, Henri-Jean-Baptiste Dard stated the relevance of *Leg. 21, Cod. Mandate. Leg. I, § 4 et 13, ff. de aqua et aquae pluviae arcendae*. See H.-J.-B. Dard, *Code civil des Français, avec des notes indicatives des lois romaines, coutumes, ordonnances, édits et déclarations, qui ont rapport [à] chaque article; ou Conférence du Code civil avec les lois anciennes* (Paris: J.-A. Commaille, 1805), 104.

nineteenth-century ideas of liberalism were foreign to Roman law.[95] Article 544's definition did echo concepts of the French Revolution that related to ownership, however.[96] This might explain why Jean-Étienne-Marie Portalis wrote in the *exposé des motifs* that ownership was the fundamental right on which all social institutions rested.[97]

Bartolus of Sassoferrato deserves special attention due to his role in shaping the understanding of ownership, not only during the Middle Ages but also in the modern period, on both sides of the Atlantic. His celebrated understanding of ownership as *ius perfecte disponendi de re corporali nisi lege prohibeatur*[98] was highly regarded by future scholars, and influenced property law, ever since its conception in the fourteenth century.[99] For example, Gregorio López, when undertaking his seminal gloss of the *Siete Partidas*, likewise followed the criteria of commentators such as Bartolus, according to whom ownership meant the right to dispose of or to sell a corporeal thing when facing no prohibition by law.[100] That gloss showed the interaction of the text of the *Siete Partidas* with that of the renowned commentator.[101] Spanish Scholasticism (e.g., Luis de Molina) returned – with some nuances – to the definition of Bartolus.[102] That understanding of Bartolus was replicated almost *verbatim* by the architects of the *Code Napoléon*[103] and from there spread across the globe.

The expansion period of the codification paradigm was marked by the enactment of numerous codes across Europe within one century. Many of these built on the *Code Napoléon*, but some also benefited from local codes, pointing to a certain degree of cross-pollination. Examples of the expansion

95 F. Tomás y Valiente, "Manual de Historia del Derecho Español," in F. Tomás y Valiente, *Obras Completas* (Madrid: Centro de Estudios Políticos y Constitucionales, 1997), vol. II, 916–1577, at 1414; and T. Rüfner, "The Roman Concept of Ownership and the Medieval Doctrine of Dominium Utile," in J. W. Cairns and P. J. du Plessis (eds.), *The Creation of the Ius Commune: From Casus to Regula* (Edinburgh: Edinburgh University Press, 2010), 127–42, at 128.

96 A. Tunc, "The Grand Outlines of the Code Napoleon," *Tulane Law Review* 29 (1955), 431–52, at 448.

97 Fenet, *Recueil complet des travaux préparatoires du code civil*, vol. XI, 132.

98 This expression was coined in a comment of Bartolus to Digest 41, 2, 17, I, n. 4. See P. Grossi, "La proprietà nel sistema privatistico della Seconda Scolastica," in P. Grossi, *Il dominio e le cose: percezioni medievali e moderne dei diritti reali* (Milan: Giuffrè, 1992), 281–383, at 368.

99 See J. L. de los Mozos, *El Derecho de Propiedad: Crisis y Retorno a la Tradición Jurídica* (Madrid: Editorial Revista de Derecho Privado, 1993), 36; and Rüfner, "The Roman Concept of Ownership," 127.

100 I. Sánchez Bella, A. de la Hera, and C. Díaz Rementería, *Historia del Derecho Indiano* (Madrid: Editorial MAPFRE, 1992), 343.

101 A. Guzmán Brito, *La Codificación Civil en Iberoamérica. Siglos XIX y XX* (Santiago: Editorial Jurídica de Chile, 2000), 160.

102 De los Mozos, *El Derecho de Propiedad*, 36–38.

103 Rüfner, "The Roman Concept of Ownership," 127.

of codification are the civil codes of Austria (1811), the Netherlands (1838), and Italy (1865), to name but a few of the codes that also crossed continents and reached Latin America.[104] At the same time, the spread of codification was also fueled by the earlier-mentioned works of legislative concordances, in which drafters of codes could find "consolidated libraries" of previous examples.

The period of differentiation started at the end of the nineteenth century. It was marked by the drafting and adoption of the German civil code that took effect in 1900. The latter was a product of nineteenth-century German legal science and inspired the drafting of several twentieth-century codes, both in Europe and beyond.[105] This German product was able to distinguish itself, both in form and substance, from the antecedents that had been adopted across Europe. In Germany, the Historical School, and later Scientific Positivism, advocated for customs and traditions to be considered in potential codification efforts and for the objective interpretation of the law, respectively.[106]

Already during its European foundation period, the paradigm of codification began to spread across the globe. Jurists were interested in knowing the state of the art regarding civil law legislation in a succinct and comprehensive way, while examining ideas that existed in the codes of other states.[107] Another of the many existing examples of codification is found in Asia, when Japan promulgated a civil code in 1890, during the Meiji period.[108] Examples are also found in Africa, when David Santillana led the work on a draft civil and commercial code for Tunisia at the end of the nineteenth century.[109] The new century brought many new codification endeavors, such as the 1926 civil code in the Republic of Turkey, which aimed to modernize and secularize the law at the time of Mustafa Kemal Atatürk,[110] and the 1949 Egyptian civil code, led by Abd el-Razzâq el-Sanhourî, which shows an interplay of sources from Islamic law, local court decisions, and modern codes.[111] As Julio C. Rivera

104 See A. Parise, *Historia de la Codificación Civil del Estado de Luisiana y su Influencia en el Código Civil Argentino* (Buenos Aires: Eudeba, 2013), 184–354.

105 See generally M. Reimann, "Nineteenth Century German Legal Science," *Boston College Law Review* 31 (1990), 837–97.

106 C. Ramos Núñez, *El Código Napoleónico y su Recepción en América Latina* (Lima: Pontificia Universidad Católica del Perú, 1997), 237.

107 F. Stone, "A Primer on Codification," *Tulane Law Review* 29 (1955), 303–10, at 307.

108 A. Ortolani, "The Japanese Civil Code: Its First 120 Years," in Parise and van Vliet, *Re- De- Co-dification?*, 219–46, at 221.

109 See generally D. E. Stigall, *The Santillana Codes: The Civil Codes of Tunisia, Morocco, and Mauritania* (Lanham: Lexington Books, 2017).

110 See generally E. Özsunay, "The Scope and Structure of Civil Codes: The Turkish Experience," in J. C. Rivera (ed.), *The Scope and Structure of Civil Codes* (Dordrecht: Springer, 2013), 387–407.

111 See the brief note by G. M. Badr, "The New Egyptian Civil Code and the Unification of the Laws of Arab Countries," *Tulane Law Review* 30 (1956), 299–304.

stated, the nineteenth century was "the codification century of civil law,"[112] a time when private law tended to revolve around the new codes.

The Latin American Dimension

Ideas circulated across the Atlantic Ocean, and the paradigm of codification arrived in Latin America within the first decades after the adoption of the *Code Napoléon*. Codification occurred in a particular way in Latin America. It developed mainly during the second half of the nineteenth century and was shaped by the interaction of both European and local products. This comparatively late development allowed for the percolation of positivistic ideas, including those of the exegetical approach, and enabled the adaptation of models that had proven successful in other jurisdictions. The interaction of European and local products was specific to the region. The shared heritage (see Section 3.1) and language also facilitated the circulation and reception of local elaborations across the continent.

Codification in Latin America experienced two of the four periods during the nineteenth century: foundation and expansion. While a number of Latin American jurisdictions promulgated codes in the first half of the nineteenth century,[113] the foundation period can only be deemed to have properly started with the adoption of the civil code of Chile of 1857. This text, largely written by the Venezuelan Andrés Bello, had a massive impact in the region, and quickly led to other codification efforts. Bello had been working privately on his draft of a civil code for Chile for some years, and by 1835 had accomplished one-third of his project.[114] The years that followed were marked by Bello working together with special commissions.[115] From 1847, however, Bello once again undertook the drafting autonomously.[116] In 1853, the project was published, and subjected to review by a special commission.[117] Finally, it was sent to the Chilean National Congress, which approved the text in 1855.[118] In his work, Bello had taken inspiration from a multiplicity of sources. He

112 J. C. Rivera, "The Scope and Structure of Civil Codes: Relations with Commercial Law, Family Law, Consumer Law and Private International Law: A Comparative Approach," in J. C. Rivera (ed.), *The Scope and Structure of Civil Codes* (Dordrecht: Springer, 2013), 3–39, at 7.

113 Other codes followed in the region, before the enactment of the Chilean Code: Haiti (1826), Bolivia (1831), Peru (1836), Costa Rica (1841), and the Dominican Republic (1844).

114 Alessandri Rodríguez and Somarriva Undurraga, *Curso de Derecho Civil*, vol. I, 59.

115 A. Guzmán Brito, *Andrés Bello Codificador. Historia de la Fijación y Codificación del Derecho Civil en Chile* (Santiago: Ediciones de la Universidad de Chile, 1982), vol. I, 306–36.

116 Guzmán Brito, *Andrés Bello Codificador*, vol. I, 337–43.

117 Alessandri Rodríguez and Somarriva Undurraga, *Curso de Derecho Civil*, vol. I, 63. See the detailed study in Guzmán Brito, *Andrés Bello Codificador*, vol. I, 366–82.

118 Alessandri Rodríguez and Somarriva Undurraga, *Curso de Derecho Civil*, vol. I, 63.

benefited from, amongst others, the *Code Napoléon* and its commentators,[119] the works of Saint-Joseph and García Goyena,[120] the Louisiana Civil Code of 1825 (Louisiana Code),[121] as well as other nineteenth-century civil codes.[122] The work of Bello was grounded in the previous law, but this was restated according to modern codification techniques. It included the tenets of liberalism, while following the Roman and Spanish provisions. Bello, who was also known as a distinguished linguist, was able to maintain a perfect harmony between precision and succinctness for each article of his code, making his work not only an example of law drafting but also of linguistics.[123]

After the promulgation of the Chilean code, the expansion period of codification in Latin America was marked by the quick succession of enactments across the region. Codes were adopted in El Salvador (1860), Panama (1860), Ecuador (1861), Venezuela (1862), Uruguay (1868), Argentina (1871), Mexico (1871), Nicaragua (1871), Colombia (1873), Guatemala (1877), Paraguay (1877), Honduras (1880), Cuba (1889), and Puerto Rico (1889).[124] Enactments during that period were fueled by the already mentioned legislative concordances, particularly those of García Goyena and Saint-Joseph (which was also available in Spanish translation),[125] and by the model offered by the Chilean code. While these concordances mostly, though not exclusively, focused on European legislation,[126] the work of Bello became the Latin American blueprint for many codes.[127]

Latin American jurisdictions made use of the Chilean code in three different ways. A first group adopted it in its entirety with only minor changes to make it operational in their own jurisdictions. A second group created a new code, but one that was closely linked to and dependent on that of Chile.

119 For additional information regarding the use of the *Code Napoléon*, see M. C. Mirow, "Borrowing Private Law in Latin America: Andres Bello's Use of the Code Napoleon in Drafting the Chilean Civil Code," *Louisiana Law Review* 61 (2001), 291–329.

120 See also R. Knütel, "Influences of the Louisiana Civil Code in Latin America," *Tulane Law Review* 70 (1996), 1452–459.

121 Guzmán Brito, *Andrés Bello Codificador*, vol. I, 422.

122 V. Pescio Vargas, *Manual de Derecho Civil*, 2nd ed. (Santiago: Editorial Jurídica de Chile, 1978), vol. I, 115.

123 A. Guzmán Brito, *La Codificación Civil en Iberoamérica. Siglos XIX y XX* (Santiago: Editorial Jurídica de Chile, 2000), 373.

124 Codification took place in Brazil in 1917.

125 See generally Parise, *Historia de la Codificación*; A. Parise, "The Concordancias of Saint-Joseph: A Nineteenth-Century Spanish Translation of the Louisiana Civil Code," *Journal of Civil Law Studies* 9 (2016), 287–328.

126 For example, these works also examined the Louisiana Code of 1825 (discussed in the following section).

127 A. Guzmán Brito, *Vida y Obra de Andrés Bello especialmente considerado como Jurista* (Cizur Menor: Thomson-Aranzadi, 2008), 100; and M. C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (Austin: University of Texas Press, 2004), 137.

A third group used the Chilean code merely for inspiration, borrowing only isolated elements from it.[128] Three factors may explain the widespread influence of the Chilean code in Latin America: the shared historical background, the existing geographical similarities, and the uniformity of the Romance languages.[129] The specific Latin American interaction of works of concordances with the Chilean blueprint helps explain the speed with which codification spread across the region from the late 1850s onwards.

The dissemination of the Chilean code can be demonstrated by looking at one of its specific provisions. The law of property, once more, offers an example of the circulation of ideas. Bello adopted the liberal doctrine of the *Code Napoléon*, believing it to provide an essential building block for progress.[130] Article 582 of the Chilean code, therefore, read in its first paragraph: "[O]wnership (also called property) is the real right in a corporeal thing to enjoy and dispose thereof *as the owner wishes*, provided that it is not contrary to the law or the rights of a third party."[131] This article echoed the subjective right to enjoy and dispose arbitrarily of a thing as stated in article 544 of the *Code Napoléon*, discussed earlier.[132] The Chilean code's article 582, defining ownership as an absolute right, was in turn replicated throughout the continent. Several jurisdictions adopted the Chilean wording almost *verbatim* in their codes, such as El Salvador (1860), Panama (1860), Ecuador (1861), Venezuela (1862), Nicaragua (1871), Colombia (1873), and Honduras (1880).[133]

The development of codification in Latin America was not limited to enactments that closely replicated the Chilean text, however. The 1871 Argentine code by Dalmacio Vélez Sarsfield offers an illustration of an enactment that relied less on Bello's work and more on other sources. It also serves as proof that periods are not watertight compartments, since the Argentine text could also be placed within an early phase of the differentiation period. The Argentine code included notes for many of its articles, which were not part

128 B. Bravo Lira, "La difusión del código civil de Bello en los países de derecho castellano y portugués," *Revista de Estudios Histórico-Jurídicos* 7 (1982), 71–106, at 93–94.

129 Moréteau and Parise, "Recodification," 1123. The authors in that paper provided that understanding beyond the scope of the Chilean code.

130 P. Lira Urquieta, "Introducción al Código Civil de Andrés Bello," in R. Caldera (ed.), *Obras Completas de Andrés Bello*, 2nd ed. (Caracas: Fundación La Casa de Bello, 1981), vol. XIV, xiii–lxii, at xxxi.

131 As translated by J. Romanach, *Civil Code of Chile 2008: Translated into English with an Introduction and Index* (Baton Rouge: Lawrence Publishing, 2008), 94.

132 Guzmán Brito, *Andrés Bello Codificador*, vol. I, 455.

133 See article 608 of the code of El Salvador; article 732 of the code of Panama; article 571 of the code of Ecuador; article 1, law 1, Title 2, Book 2 of the code of Venezuela; article 582 of the code of Nicaragua; article 669 of the code of Colombia; and article 661 of the code of Honduras.

of the law but intended to inform the reader about Vélez Sarsfield's underlying reasoning.[134] Like a legislative history or *exposé des motifs*, they provided an additional element for the provisions' interpretation and served as guides when studying articles.[135] In 1865, Vélez Sarsfield wrote about the notes:

> I indicated the concordances between the articles of each title and the current laws and the codes of Europe and America, for an easier and more illustrated discussion of the draft.
>
> On occasion I had to include long notes in articles that solved archaic and serious matters which had been debated by jurists or when it was necessary to legislate in areas of law that needed to be moved from doctrine and turned into [positive] law.[136]

Having an eclectic approach to law,[137] Vélez Sarsfield incorporated into his work materials from many sources, including legislative acts, drafts of codes, codes, and doctrine.[138] As with other drafters, he used the ideas and codes that existed at the time.[139] Like Bello in Chile, he was especially interested in the jurists and works that theorized on modern law while building upon Roman law principles.[140] Finally, Vélez Sarsfield added local customs to these materials.[141] While the Argentinean codifier was well acquainted with Roman law and Castilian legislation, the archaic nature of those texts encouraged him to look for direct, modern models that reproduced those ideas: Augusto Teixeira de Freitas' draft of a civil code for Brazil, the *Code Napoléon*, the concordance of García Goyena, the Chilean code by Bello,[142] and the Louisiana Code. For example, Rolf Knütel has shown that Vélez Sarsfield used the Louisiana text because its regulations in the area of real rights were extracted mainly from the

134 L. Moisset de Espanés, "Reflexiones sobre las notas del código civil argentino," in *Studi sassaresi. V, Diritto romano, codificazioni e unità del sistema giuridico latinoamericano* (Milan: Giuffrè, 1981), 448–76, at 448.

135 A. Levaggi, *Dalmacio Vélez Sarsfield, Jurisconsulto* (Córdoba: Ciencia, Derecho y Sociedad, 2005), 209; M. O. Cobas and J. A. Zago, "La influencia de las 'notas' del código civil en la ciencia del derecho argentino y latinoamericano," in S. Schipani (ed.), *Dalmacio Vélez Sarsfield e il diritto latinoamericano* (Padua: CEDAM, 1991), 141–48, at 146–47; and R. Rivarola, *Instituciones del Derecho Civil Argentino: Programa de una Nueva Exposición del Derecho Civil* (Buenos Aires: Imprenta de Peuser, 1901), vol. I, 12.

136 D. Vélez Sarsfield, *Proyecto de Código Civil para la República Argentina, Libro Primero* (Buenos Aires: Imprenta de la Nación Argentina, 1865), v. See also Levaggi, *Dalmacio Vélez Sarsfield,* 204 and 310.

137 Guzmán Brito, *La Codificación Civil*, 453.

138 R. M. Salvat, "El Código Civil Argentino (Estudio General). Historia, Plan o Método y Fuentes," *Revista Argentina de Ciencias Políticas* 7 (1913), 420–37, at 436.

139 Levaggi, *Dalmacio Vélez Sarsfield*, 180.

140 Levaggi, *Dalmacio Vélez Sarsfield*, 180.

141 R. M. Salvat, *Tratado de Derecho Civil Argentino. Parte General*, 9th ed. (Buenos Aires: Tipográfica Ed. Argentina, 1950), vol. I, 132.

142 R. Zorraquín Becú, "La recepción de los derechos extranjeros en la Argentina durante el siglo XIX," *Revista de Historia del Derecho* 4 (1976), 325–59, at 350.

Projet of 1800, which followed the casuistry of Roman law. According to him, "the majority of the concepts which found their way into the Argentine civil code through the Louisiana codification are ideas developed in Roman law, ideas 'garbed in modern linguistic dresses.'"[143] Amongst many other sources, Vélez Sarsfield explicitly mentioned in his code the *Corpus Iuris Civilis*, the *Siete Partidas*, principles of canon law, the project of a civil code for the State of New York (1865), the codes of numerous jurisdictions (including Austria and Haiti), and many doctrinal works (such as William Blackstone, Domat, James Kent, Pothier, and Friedrich Carl von Savigny).[144] Even though French authors and the codes that followed the wording of the *Code Napoléon* predominated in his notes, Vélez Sarsfield did not limit himself to one particular school of thought, and his very diverse sources helped him to produce an eclectic code.

Not all Latin American jurisdictions adopted civil codes during the nineteenth century. Brazil, for example, waited until 1917,[145] although a criminal code was adopted as early as 1830.[146] Nevertheless, Brazil's Teixeira de Freitas deserves to be counted as one of the great Latin American civil law codifiers, the equal of Bello and Vélez Sarsfield. As early as 1824, the Imperial Constitution of Brazil recognized the need for criminal and civil codes.[147] In 1859, Teixeira de Freitas was appointed to draft a civil code; however, the result of his efforts was ultimately not adopted.[148] He had previously drafted his *Consolidação das Leis Civis*, which was intended to be an official work classifying and systematizing the laws of Brazil. In 1872, the Brazilian government terminated the contract

143 Knütel, "Influences of the Louisiana Civil Code," 1466–467.

144 See the notes to articles 2913 (*Corpus Iuris Civilis*), 455 (*Siete Partitas*), 14 (canon law), 2538 (New York), 19 (Austria), 325 (Haiti), 167 (Blackstone), 1198 (Domat), 3136 (Kent), 1650 (Pothier), and 3283 (Savigny).

145 For insights on the process towards the 1917 code, see S. Meira, "Gênese e elaboração do Código Civil brasileiro de 1917," in A. Levaggi (ed.), *Fuentes Ideológicas y Normativas de la Codificación Latinoamericana* (Buenos Aires: Universidad del Museo Social Argentino, 1992), 313–79; and M. Neves, "Ideas in Another Place? Liberal Constitution and the Codification of Private Law at the Turn of the 19th Century in Brazil," in M. R. Polotto, T. Keiser, and T. Duve (eds.), *Derecho Privado y Modernización. América Latina y Europa en la Primera Mitad del Siglo XX* (Frankfurt am Main: Max-Planck-Institut für Europäische Rechtsgeschichte, 2015), 47–81. On the codification of private law beyond the period covered in this chapter, and with special attention to the current state of slavery as a potential failure of codification, see B. Clavero, "Esclavitud y Codificación en Brasil, 1888–2017: Por una Historia Descolonizada del Derecho Latinoamericano," *Revista de Historia del Derecho* 55 (2018), 27–89.

146 See generally I. M. Poveda Velasco and E. Tomasevicius Filho, "The 1830 Criminal Code of the Brazilian Empire and Its Originality," in A. Masferrer (ed.), *The Western Codification of Criminal Law: A Revision of the Myth of its Predominant French Influence* (Cham: Springer, 2018), 341–68.

147 S. de Salvo Venosa, *Direito Civil* (São Paulo: Editora Atlas, 1987), vol. I, 107.

148 A. Wald, *Curso de Direito Civil Brasileiro*, 4th rev. ed. (São Paulo: Sugestões Literárias, 1975), 83.

with Teixeira de Freitas because he had changed his plan of work. However, he had already published part of it in the shape of a sketch (*Esboço*) from 1860 onwards, and this proved highly influential on the civil codification works of other countries, including in Argentina through the work of Vélez Sarsfield, as mentioned earlier.[149] Teixeira de Freitas' work offers a paramount example of the local circulation of ideas specific to Latin American codification.

There were a number of overarching motivations for governments and lawyers to undertake codification efforts in nineteenth-century Latin America. One was the intention to break with the past and with the Spanish, Portuguese, or French presence, respectively. The recently independent jurisdictions sought to end the normative subjugation that had existed during the previous period. A second motivation may be found in seeing the codes as constitutive elements of the new republics and states (see Chapter 4). As already mentioned, new territories included the need to promulgate codes within their legislative agendas, some even including references to codification in their constitutions (see also Section 5.1). Nineteenth-century codes in Latin America were part of projecting a sense of differentiation between Europe and the Americas, between former dependent territory and metropole.

A "culture" of the code developed in the Latin American jurisdictions soon after the enactment of these bodies of the law.[150] This development was similar to what had occurred at a global level, for example, in France after the adoption of the *Code Napoléon*. A look at Argentina offers an illustration. The Argentine code triggered positivistic, mainly exegetical approaches to the law, which were present in the works of scholars and judges during the second half of the nineteenth century and continued, though at a slower pace, well into the next century.[151] These scholars sought to identify the intention of the codifier and promoted the study of the letter of the law and of the code's sources.[152] Scholarly writings and judicial interpretations turned the code into a repository

149 Wald, *Curso de Direito*, 83.

150 On the "culture" of the code, see V. Tau Anzoátegui, "La 'Cultura del Código:' Un Debate Virtual entre Segovia y Sáez," *Revista de Historia del Derecho* 26 (1998), 539–64, at 543–44.

151 D. F. Esborraz, "La Individualización del Subsistema Jurídico Latinoamericano como Desarrollo Interno Propio del Sistema Jurídico Romanista: (II) La Contribución de la Ciencia Jurídica Argentina en la Primera Mitad del Siglo XX," *Roma e America Diritto Romano Comune* 24 (2007), 33–84, at 34–35; and Ramos Núñez, *El Código Napoleónico*, 200; and M. I. Seoane, *La Enseñanza del Derecho en la Argentina: Desde sus Orígenes hasta la Primera Década del Siglo XX* (Buenos Aires: Editorial Perrot, 1981), 68.

152 R. J. Vernengo, *La Interpretación Jurídica* (Mexico City: Universidad Nacional Autónoma de México, 1977), 77; and V. Tau Anzoátegui, "La Jurisprudencia Civil en la Cultura Jurídica Argentina (s. XIX–XX)," *Quaderni fiorentini per la storia del pensiero giuridico moderno* 40 (2011), 53–110, at 72.

of legal science with absolute value: The law was what the code stated.[153] The code was also the central focus of law teaching, together with the work of exegetical scholars.[154] Civil law teaching closely followed the structure of the code until 1910.[155] Scholars and judges looked for the legislator's intention in the notes, and turned to comparative legislation to trace the different sources used.[156] Other positivistic approaches, such as the ideas of Savigny and Scientific Positivism, were also popular in Argentine law schools, and these theories aided to the development of an eclectic legal thought.[157] The new century brought criticisms to extreme positivistic approaches,[158] and the social sciences liberated law from the narrow exegetical approach.[159] New approaches, presented in, for example, the seminal work of François Gény, still placed the code in the paramount position, but when interpreting its provisions also used doctrine, court decisions, comparative legislation, customs, and other social elements.[160] Codification as a paradigm was affected by this new context, which was not unique to Argentina, as the following section will show.

Pan-American Dimensions

The codification paradigm had a significant pan-American dimension during the nineteenth century. A look beyond Latin America to the North shows

153 V. Tau Anzoátegui, "Peculiaridad del Pensamiento Jurídico Argentino," in V. Tau Anzoátegui (ed.), *Antología del Pensamiento Jurídico Argentino (1901–1945)* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 2007), vol. I, 11–35, at 19–20; and Tau Anzoátegui, "La 'Cultura del Código,'" 543–44.

154 E. Martínez Paz, *Dalmacio Vélez Sarsfield y el Código Civil Argentino* (Córdoba: Academia Nacional de Derecho y Ciencias Sociales de Córdoba, 2000 [1916]), 350; M. U. Salerno, "El Código de Vélez Sársfield," in J. H. Alterini et al. (eds.), *La Codificación: Raíces y Prospectiva II La Codificación en América* (Buenos Aires: EDUCA, 2004), 143–58, at 149; Tau Anzoátegui, *Las Ideas*, 113; M. U. Salerno, "Argentine," in Association Henri Capitant, *La Circulation du Modèle Juridique Français* (Paris: Litec, 1993), 121–24, at 123; and Tau Anzoátegui, "Peculiaridad del Pensamiento," 162.

155 M. U. Salerno, "Aporte de Héctor Lafaille a la Enseñanza del Derecho Civil," *Revista de Historia del Derecho* 2 (1974), 199–224, at 205; Tau Anzoátegui, "Peculiaridad del Pensamiento," 162; and A. Cháneton, *Historia de Vélez Sársfield* (Buenos Aires: Editorial "La Facultad", 1937), vol. II, 344.

156 Cháneton, *Historia de Vélez*, vol. II, 344; Levaggi, *Dalmacio Vélez Sarsfield*, 247; and Salerno, "Aporte de Héctor Lafaille," 207.

157 Levaggi, "La Interpretación," 78, 84–85; V. Tau Anzoátegui, "La Influencia Alemana en el Derecho Argentino: Un Programa para su Estudio Histórico," *Jahrbuch für Geschichte Lateinamerikas* 25 (1988), 607–34, at 623; and Tau Anzoátegui, *La Codificación*, 277–78 and 282; Tau Anzoátegui, *Las Ideas*, 114–15.

158 V. Tau Anzoátegui, "Los Juristas Argentinos de la Generación de 1910," *Revista de Historia del Derecho* 2 (1974), 225–83, at 241.

159 Tau Anzoátegui, "Peculiaridad del Pensamiento," 20; Tau Anzoátegui, *La Codificación*, 21; and Tau Anzoátegui, "La Jurisprudencia," 99.

160 Tau Anzoátegui, *Las Ideas*, 141; Levaggi, "La Interpretación," 120; Levaggi, *Dalmacio Vélez Sarsfield*, 249; and Díaz Couselo, "Francisco Gény," 1–2.

that codification was a global movement that invited dialogue across jurisdictions and legal systems, and that this was not limited to exchanges with Europe. Efforts towards the adoption of civil codes were undertaken in civil law and common law systems alike, as well as in mixed jurisdictions, such as the Canadian province of Quebec and the State of Louisiana. Codes produced in the Americas (also those produced beyond Latin America) were considered valuable sources by nineteenth-century drafters of civil codes across the globe.

The paradigm of codification in the Americas experienced two of the four periods during the nineteenth century: foundation and expansion. Louisiana offers a representative example of codification in the foundation period. In the early nineteenth century, the legal culture of Louisiana was an isolated "Civil Law island" surrounded by a "sea of Common Law," a status that had to be safeguarded to survive.[161] The French and Spanish occupation resulted in the introduction and subsequent preservation of the civil law system in that part of North America.[162] In 1769, the then governor of Louisiana, Alejandro O'Reilly, implemented the *Indiano* system[163] of government to replace the French laws (e.g., *Coutume de Paris*) in Louisiana.[164] The Spanish judicial records confirm that *Indiano* legal precepts applied in Louisiana.[165] Courts in that southern space continued to rely on Spanish legal sources even after the 1803 Louisiana Purchase, mainly during the first decades of the nineteenth century.[166]

In June 1806, James Brown and Louis Casimir Elisabeth Moreau-Lislet were appointed by the Legislature of the Territory of Orleans to draft a project of a civil code.[167] According to the resolution, the "two jurisconsults shall make the civil law by which this territory is now governed, the ground

161 A. Parise, "Non-Pecuniary Damages in the Louisiana Civil Code Article 1928: Originality in the Early Nineteenth Century and Its Projected Use in Further Codification Endeavors," unpublished LL.M. thesis, Louisiana State University (2006), 14.

162 See A. Parise, "Legal History," in A. A. Levasseur, J. R. Trahan, and D. Gruning (eds.), *The Legal System of Louisiana* (Durham: Carolina Academic Press, 2019), 1–8; and A. Parise, *Historia de la Codificación*, 29–55.

163 That is, the system of law that applied in American territories that belonged to the Spanish crown.

164 See the analysis in R. Batiza, "The Unity of Private Law in Louisiana under the Spanish Rule," *Inter-American Law Review* 4 (1962), 139–56, at 139.

165 J. W. Cairns, *Codification, Transplants and History: Law Reform in Louisiana (1808) and Quebec (1866)* (Clark: Talbot Publishing, 2015), 52. On the different special laws enacted for Louisiana, see K. Wallach, *Research in Louisiana Law*, 2nd ed. (Baton Rouge: Louisiana State University Press, 1960), 209–12.

166 See generally R. J. Rabalais, "The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762–1828," *Louisiana Law Review* 42 (1982), 1485–1508, at 1485.

167 "A Resolution Relative to the Formation of a Civil Code," in *Acts Passed at the First Session of the First Legislature of the Territory of Orleans* (New Orleans: Bradford & Anderson, 1807), 214.

work of said code."[168] In March 1808, the Legislature promulgated Brown and Moreau-Lislet's work as the *Digest of the Civil Laws Now in Force in the Territory of Orleans* (Digest of 1808).[169] While it did not include an *exposé des motifs* explaining its sources,[170] a number of copies contain interleaves with manuscript notes dictated – or, in some cases, even written – by Moreau-Lislet.[171] One of these manuscripts, the de la Vergne volume, includes references to Roman and Spanish materials linked to the Digest's provisions,[172] as well as to French texts grounded in Roman law, such as the works of Pothier and Domat. In his analysis of the de la Vergne volume in 1971, Rodolfo Batiza identified the textual origins of 2,081 articles.[173] He concluded that approximately 85 percent of the articles' text had been extracted from French texts (such as the *Code Napoléon*, the *Projet* of 1800, and French commentators).[174] The following year, Robert A. Pascal published a reply claiming that French law, composed after elements of Roman, Romanized Frankish, Burgundian, and Visigothic origin, often resembled the Spanish law that derived from Roman or Roman-Visigothic origins.[175] He thus argued that, while the *Code Napoléon* provided a mine of texts written in French, the drafters had used French texts that in substance contained, or could be modified to contain, the Spanish-Roman law then in force in Louisiana.[176] Despite their disagreement, both Batiza's and Pascal's research made clear that the Digest's provisions were mainly taken from the civil law system, irrespective of whether their origins lay in French, Spanish, or Roman law. The Digest of 1808 was not a mere copy either of the *Code Napoléon* or of any other single text.[177]

There was a tendency in the Louisiana legal community to de-emphasize the importance of the Digest of 1808 after its enactment.[178] A remarkable and

168 "A Resolution," 214.
169 *A Digest of the Civil Laws Now in Force in the Territory of Orleans, With Alterations and Amendments Adapted to Its Present System of Government* (New Orleans: Bradford & Anderson, 1808).
170 J. Dainow, "Moreau Lislet's Notes On Sources of Louisiana Civil Code of 1808," *Louisiana Law Review* 19 (1958), 43–51, at 43.
171 J. W. Cairns, "The De la Vergne Volume and the Digest of 1808," *Tulane European and Civil Law Forum* 24 (2009), 31–81, at 74.
172 Cairns, "The De la Vergne Volume," 76–77.
173 R. Batiza, "The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance," *Tulane Law Review* 46 (1971), 4–165, at 11.
174 Batiza, "The Louisiana Civil Code," 12.
175 R. A. Pascal, "Sources of the Digest of 1808: A Reply to Professor Batiza," *Tulane Law Review* 46 (1972), 603–27, at 605.
176 Pascal, "Sources of the Digest," 605–6.
177 S. Herman, *The Louisiana Civil Code: A European Legacy for the United States* (New Orleans: Louisiana Bar Foundation, 1993), 32.
178 R. H. Kilbourne, *A History of the Louisiana Civil Code: The Formative Years, 1803–1839* (Baton Rouge: LSU Law Center Publications Institute, 1987), 62.

comprehensive codification movement started around the same time, with Edward Livingston as its central figure, a New York jurist who had moved to New Orleans in 1804. In March 1822, the Louisiana Legislature resolved that three jurists should be appointed to revise the Digest of 1808: Pierre Derbigny, Edward Livingston, and Moreau-Lislet.[179] The three submitted a preliminary report to the Louisiana Senate in February 1823, in which they stated that they would

> keep a reverent eye on those principles, which have received the sanction of time, and on the labors of the great Legislators, who have preceded us. The Laws of the *Partidas*, and other Statutes of Spain, the existing digest [of 1808] of our own Laws, the abundant stores of the English Jurisprudence, the comprehensive Codes of France, are so many rich mines from which we can draw treasures of Legislation.[180]

The Louisiana Legislature then ordered that the revision of the Digest of 1808 be printed and distributed, and ultimately the Louisiana Code took effect in 1825.[181] It went on to influence many codification endeavors across the globe due to its inclusion in the legislative concordances of Saint-Joseph and García Goyena and because copies were circulated to other jurisdictions.[182] The Louisiana Code offers an example of a codification endeavor that had an impact on the provisions of subsequent civil codes and linked the three dimensions: global, Latin American, and pan-American.

The expansion period of codification in North America was exemplified by the enactment of the 1866 civil code of Lower Canada (Quebec Code). Codification came as a natural and logical development in Quebec due to the latter's legal heritage and the success that the codification paradigm had had in France.[183] The ordered presentation of private law in the Quebec Code put an end to the "legal Babel"[184] that had previously existed, whilst aiming to

179 "Resolutions," in *Acts Passed at the Second Session of the Fifth Legislature of the State of Louisiana* (New Orleans: J. C. de St. Romes, 1822), 108.

180 E. Livingston, W. H. Byrnes, L. Moreau Lislet, P. Derbigny, and J. H. Tucker Jr., "Preliminary Report of the Code Commissioners: Dated February 13, 1823," in Louisiana Legal Archives, vol. I–II (New Orleans: Thos. J. Moran's Sons, 1937), lxxxv–xcv, at lxxxix.

181 "An Act Directing the Revision of the Civil Code and the Projected Codes of Commerce and of Procedure to Be Printed," in *Acts Passed at the First Session of the Sixth Legislature of the State of Louisiana* (s.l.: s.n., 1823), 68–71, at 68.

182 See generally Parise, *Historia de la Codificación*.

183 J. E. C. Brierley, "Reception of English Law in the Canadian Province of Quebec," in M. Doucet and J. Vanderlinden (eds.), *La réception des systèmes juridiques. Implantation et destin* (Brussels: Bruylant, 1994), 103–37, at 116.

184 D. Howes, "La domestication de la pensée juridique québécoise," *Anthropologie et Sociétés* 13(1) (1989), 103–25, at 109.

determine the private laws of Quebec.[185] It blended long-lasting civil law principles that could be traced back centuries with those shaped by rationalistic and liberal values derived from the Enlightenment,[186] and included elements of canon, English, French, and Roman laws as well as local provisions.[187] The codifying commission was composed of judges, who took leave during the drafting period. Chaired by René-Edouard Caron, it also included Augustin-Norbert Morin and Charles Dewey Day.[188] The commissioners undertook a critical examination of local and foreign laws, and they valued tradition, jurisprudential theory, and their own intuitive understanding of optimal provisions.[189] The sources of the Quebec Code were many, and the text reflected the law that had applied in the territory until its enactment.[190] The reports drafted by the commissioners referred to more than 350 different authorities and offer a convenient way of determining the sources of each provision.[191] Together with an internal memorandum by Caron, they show that the commissioners worked with an array of local and foreign sources (e.g., English law, Roman law, Scots law, US law), but drew above all on French materials.[192] The Louisiana Code played a prominent role, but as a model for form and language rather than substance.[193] The commissioners also looked into decisions adopted by local courts, and did not limit themselves to a single source for their normative transfers.[194] In their first report, they wrote

185 J. E. C. Brierley and R. A. Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Montgomery, 1993), 24; D. Howes, "La domestication," 109; and J. E. C. Brierley, "Quebec's Civil Law Codification: Viewed and Reviewed," *McGill Law Journal* 14 (1968), 521–89, at 542.

186 Brierley and Macdonald, *Quebec Civil Law*, 35.

187 E. Arroyo i Amayuelas, "From the Code Civil du Bas Canada (1866) to the Code Civil Quebecois (1991), or from the Consolidation to the Reform of the Law: A Reflection for Catalonia," in H. L. MacQueen, A. Vaquer, and S. Espiau Espiau (eds.), *Regional Private Laws and Codification in Europe* (Cambridge: Cambridge University Press, 2003), 267–87, at 272.

188 Brierley and Macdonald, *Quebec Civil Law*, 27.

189 J. W. Cairns, "Employment in the Civil Code of Lower Canada: Tradition and Political Economy in Legal Classification and Reform," *McGill Law Journal* 32 (1987), 673–710, at 709.

190 P. Mignault, "Le Code Civil de la Province de Quebec et son Interpretation," *The University of Toronto Law Journal* 1 (1935), 104–36, at 108; J. Richert and S. Richert, "The Impact of the Civil Code of Louisiana upon the Civil Code of Quebec of 1866," *Revue juridique Thémis de l'Université de Montréal* 8 (1973), 501–20, at 506.

191 Brierley, "Quebec's Civil Law," 552; and F. H. Lawson, *A Common Lawyer Looks at the Civil Law* (Ann Arbor: University of Michigan Law School, 1955), 50.

192 See the breakdown of sources in Brierley and Macdonald, *Quebec Civil Law*, 28, n. 96. See generally Cairns, *Codification, Transplants and History*. See also Brierley, "Quebec's Civil Law," 552.

193 Richert and Richert, "The Impact of the Civil Code," 518.

194 M. Karpacz, "La Cour d'appel et la rédaction du Code Civil," *Revue juridique Thémis de l'Université de Montréal* 6 (1971), 513–34, at 534. On the sources of the Quebec Code in general, see Cairns, *Codification, Transplants and History*.

> [we] have tried to avoid [acknowledged faults], and have sought for the means of doing so in the original sources of legislation on the subject, in the writings of the great jurists of France as well under the modern as the ancient system of her law, and in the careful comparison of these with the innovations which have been introduced by our local legislation and jurisprudence, or have silently grown up from the condition and circumstances of our population.[195]

The earlier statement of the commissioners reaffirms the broad approach they had to sources when writing their code for Quebec. In addition, it makes evident that commissioners were drafting a set of laws for a specific society at a specific time, hence they considered the particularities of their inhabitants and context.

Codification should not be deemed solely a success story, however, as already mentioned earlier. When focusing on the pan-American dimension, the efforts of David Dudley Field offer an example of codification endeavors that were not adopted in their place of conception. Field, influenced by the works of Jeremy Bentham, was the preeminent advocate for codification in the United States of America during the mid-nineteenth century.[196] After drafting a project of a civil code and four other code projects for the State of New York in the period 1847–1865, Field became one of the greatest proponents of codification in North America.[197] Many consider him the father of codification in the US and deem his *Project of a Civil Code for the State of New York* (the Project) of great importance for codification at that time.[198] The Project was presented by Field and Alex W. Bradford before the New York Legislature in February 1865. It had notes for two-thirds of its sections (articles), including references to, amongst others, related court decisions, revised statutes, the *Code Napoléon*, and the Louisiana Code.[199] Even though the Project never

195 *Civil Code of Lower Canada: First, Second and Third Reports* (Quebec: George E. Desbarats, 1865), 6.

196 S. Herman, "The Fate and the Future of Codification in America," *American Journal of Legal History* 40 (1996), 407–37, at 422. See generally R. Batiza, "Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code," *Tulane Law Review* 60 (1986), 799–819.

197 Herman, "The Fate," 422; and C. M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Westport: Greenwood Press, 1981), 187.

198 Cook, *The American Codification Movement*, 187.

199 See *The Civil Code of the State of New York. Reported Complete by the Commissioners of the Code* (Albany: Weed, Parsons & Co., 1865), ix. See also Batiza, "Sources of the Field Civil Code," 803. For example, the note to Chapter 2, Title 3, Part 4, Division 2 stated: "The provisions of this chapter, except § 455, are similar to those of the Code Napoleon and the Code of Louisiana." *The Civil Code of the State of New York*, 136. See also Herman, "The Fate," 423.

became law in New York (it was vetoed twice by the governor), its eight drafts and eighteen partial corrections were very influential.[200] For example, its provisions about the law of contracts were adopted by California, North Dakota, South Dakota, Georgia, Idaho, and Montana.[201] Moreover, during the early 1870s, the Californian code commissioners provided annotations in their work that significantly replicated the glosses by Field.[202] Field's Project also offers an example of the pan-American circulation of legal ideas: It served as a source for the codification works of, among others, Vélez Sarsfield, who had a copy of the Project in his private library.[203]

Closing Remarks

Codification as a legal paradigm developed during the nineteenth century in three dimensions: global, Latin American, and pan-American. It developed in different ways in different territories, combining with the prevailing ideologies in specific societies. Section 5.2 has shown that codification was shared by a legal community at a certain time and place but was also seen as part of scholarly debates that extended across continents and indeed around the globe. As pointed out by Ramos Núñez, codification triggered a scientific revolution that resulted in the generation of a consensual model that modified the historical perspective of the juridical community in Latin America and beyond. Accordingly, it can be claimed that codification broke with a previous consensual understanding in the law and as a result became a new paradigm.

The global dimension of codification was primarily traced to Europe in Section 5.2. There, an early and favorable environment existed for the development of this new legal paradigm. Codification experienced three periods in Europe during the nineteenth century. The first period, of foundation, was marked by the enactment of the French *Code* and the Exegetical School that emerged around that seminal corpus of private law. The impact of that code found very few barriers across the globe. The second period, of expansion, saw the proliferation of numerous codes, many building on the French

200 H. M. Field, *The Life of David Dudley Field* (New York: Charles Scribner's Sons, 1898), 88; and Anonymous, *Extracts from Notices of David Dudley Field* (New York: s.n., 1894), 39.

201 Herman, "The Fate," 425.

202 R. Parma, "The History of the Adoption of the Codes of California," *Law Library Journal* 22 (1929), 8–21, at 19.

203 See R. D. Rabinovich, "Alrededor del muy mencionado y poco conocido proyecto de código civil para el estado de Nueva York," *Revista de Historia del Derecho* 22 (1994), 279–87, at 279; Levaggi, *Dalmacio Vélez Sarsfield*, 196; and *Catálogo de la Donación de Vélez Sarsfield* (Córdoba: Biblioteca Mayor, 1980), 83.

antecedent. A "veneration" of codes had developed by that time and was likewise fueled by the studies on comparative legislation. The expansion period allowed for codes to be considered synonyms of state law. The third period, of differentiation, was closely related to the promulgation of the German Civil Code, which was able to distinguish itself, both in form and substance, from previous codes. It is worth noting that the global dimension of the codification paradigm extended beyond the nineteenth century. Future studies that extend their scope to the following centuries should look at the recurrent revision, de-codification, and re-codification experiences that took (and continue to take) place across the globe.

The Latin American dimension of codification showed the "veneration" of these *corpora* of private law during the nineteenth century. Two factors characterized the specific development of codification in the region: It developed mainly during the second half of the nineteenth century, and it was shaped by the interaction of European and local products. The history of codification in Latin America can be better understood by placing the enactments of codes within two periods. The first period, of foundation, started with the adoption of the Chilean code, even though previous codes had been enacted in the region. The influence of the Chilean text in Latin America can be compared only to that of the French code. In contrast to the latter, however, the Chilean code did not need to travel by means of translations. It, therefore, became a blueprint that facilitated the rapid expansion of codification in Latin America during the second half of the century.

For the second period, of expansion, Section 5.2 looked at the Argentine code, which showed once more that codes in the region benefited from both European and American sources. Abortive efforts are also part of the story of codification. A Latin American example of this was the codification work by Teixeira de Freitas for Brazil. However, even though it failed in its country of conception, his work was of paramount importance for other codification efforts that were able to benefit from its provisions. There was an overarching motivation for codes in Latin America with the intention to project a sense of differentiation between Europe and the Americas, between former dependent territory and metropole. Finally, this dimension engaged with the "culture" of the code that developed in Latin American jurisdictions. By that time, codes had come to be considered repositories of legal science and had gained a place of preeminence in, amongst other forums, the writings of scholars and the curricula of law schools.

Exploring the pan-American dimension showed that codification as a legal paradigm was not restricted to a specific space, to specific actors, or to specific

legal systems. Concerning the latter, two codification case studies in mixed jurisdictions were explored. A key enactment during the foundation period was the civil code of Louisiana. Though it was initially conceived as a means to preserve that state's distinctive legal heritage, it also had a pan-American impact. The Louisiana Code reached Latin America not only due to the common Spanish past but also as a consequence of its inclusion in Saint-Joseph's and García Goyena's legislative concordances. The 1866 code of Quebec, another mixed jurisdiction, served as an exemplary case study for the expansion period. The use of sources was eclectic there, too, hence replicating the entanglements that were observed in Section 5.2 both for the Latin American and the global dimensions.

Codification, too, should not be considered a fairy tale moving toward a happy ending. The efforts of Field, one of the paramount champions of codification in the US, failed in his home state of New York. Like the drafts of Teixeira de Freitas, however, they proved to be successful in other states, both in the US and beyond, demonstrating once more that the shared paradigm of codification encouraged the circulation of legal ideas across continents. A look at the personal papers and private libraries of individual codifiers can help trace the circulation of legal ideas and the development of the codification paradigm during the nineteenth century.[204]

It is tempting to speak of an "enchantment" of nineteenth-century codification.[205] Section 5.2 pointed to a "veneration," to a "contagion," and to a "culture" of the codes. All these expressions aim to characterize a period in which the codification paradigm extended across Latin America, while at the same time being part of a global movement nurtured by the circulation of legal ideas. There were indeed three dimensions for codification, and they were all interconnected. This section also pointed to the fact that paradigmatic shifts do not occur overnight, and events that shape a paradigm can run in parallel in different parts of the globe. The insights presented in this section showed some of the traits that explain the paradigmatic shift brought by codification in Latin America and beyond. It was part of a larger process: a process that took place across the globe, building on ideas that were deemed universal at that time, and enabling the adaptation of the law to the needs of specific societies at specific periods.

. . .

204 See, for example, A. Parise, "A Translator's Toolbox: The Law, Moreau-Lislet's Library, and the Presence of Multilingual Dictionaries in Nineteenth-Century Louisiana," *Louisiana Law Review* 76 (2016), 1163–184.

205 See, for example, Weiss, "The Enchantment of Codification."

5.3 Contestations and Exclusions

MONICA DANTAS AND ROBERTO SABA

By the mid-1820s, all continental Spanish and Portuguese American colonies had achieved independence. Most had to endure long and bloody wars, and none got there without a fight. A few decades later, seventeen countries occupied the former colonial territories of Spain and Portugal, only two with frontiers similar to those they had at the beginning of the century, Chile and Brazil. Even in these two cases, the outcome of the independence process cannot be taken as the culminating point of state formation, not least because one must consider that constructing a state meant asserting its sovereignty over people as well as territory. No longer *los pueblos* or *os povos* (the peoples, in plural form) of colonial times, members of natural sovereign communities and corporations, but an abstract people, a nation composed of autonomous – and hopefully self-reliant – individuals. These new polities would ideally be composed of individuals equal before a man-made law who consented to being governed by nationally chosen authorities, which in turn were elected by all men qualified to vote. They would form a homogeneous nation made up of equal and free citizens (see also Chapter 4 and Sections 5.1 and 6.1).

For several reasons, all the above was easier said than done in Latin America. To begin with, unlike their European counterparts, all new Latin American states had to assert their sovereignty over pluri-ethnic populations. In some areas, indigenous people comprised over half of the population. Elsewhere, indigenous groups for all purposes ruled their own communities. Additionally, if theoretically freedom and equality were at the heart of these new nation-states, many countries still held large, enslaved populations, African-born or of African descent. Their "masters" thought they could do as they wished with their (human) property, states tried to regulate such relations, and enslaved persons constantly fought back, asserting their humanity at every turn. To further complicate things for nation builders, centuries of colonialism created an enormous population of free but for the most part destitute people. These were men and women who were neither enslaved nor indigenous but very often had African and Amerindian ancestry. They were variously called *mestizos*, *cholos*, *zambos*, *mulatos*, or *pardos*. Often landless and unskilled, they were for the most part not attached to any corporate body that had previously shaped Latin America. Even those who inhabited the cities and towns of Latin America and sometimes enjoyed corporate privileges suffered major setbacks when governments implemented new

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policies devised to develop a market economy and build a national society of (so-called) equals.

The fledgling nation-states of nineteenth-century Latin America were caught between the principles of equality and freedom, on the one hand, and the necessity to maintain order, on the other. Political elites forged laws and institutions designed to be homogeneously applied to all free persons, regardless of race or class, but they very often failed to do so. Different sectors experienced laws and institutions differently. And, in general, this new top-down order ended up harming indigenous, enslaved, and free poor communities. Homogenizing and individualizing forces threatened community values and survival strategies, they upended family and kinship ties, and often detached disadvantaged people from their homes and their lands. Therefore, nineteenth-century Latin America witnessed the outbreak of a myriad of contestations – more or less organized (and more or less violent) popular movements that pushed back against liberal ideals and policies.

Attempts to homogenize the nation and create a polity of individuals often backfired as disadvantaged communities recovered older (colonial) customs and manipulated newer (national) laws to assert their own agendas. Throughout the nineteenth century forces from below unsettled elite projects of state-building. They organized, petitioned, sued, marched, conspired, and (not infrequently) rioted. Sometimes these fierce struggles to protect their ways of life or create alternative ones lasted for decades. Yet towards the end of the century, they were defeated. Modernizing political elites coalesced with the transnational forces of industrial capitalism. Overwhelmed by the productive and destructive machinery at the service of the state, the poor and people of color were transformed into second-class citizens, excluded from the body politic, and made available for exploitation by capital and manipulation by political elites.

Indigenous America and the National Order

After the demographic collapse of the early colonial period, the indigenous population of Latin America grew during the eighteenth century and continued to do so in the nineteenth century, reaching over thirty million by the 1850s. In some countries, like Bolivia and Guatemala, indigenous people made up over 50 percent of the population, whereas in others they were less than 10 percent. Indigenous ways of life varied greatly according to political, social, cultural, economic, and environmental factors. Some were part of small groups who mixed agriculture with foraging and tried to steer clear from outsiders. A great number lived in settled peasant communities.

Although they cherished self-sufficiency, they could – and did – engage in exchanges with *criollos* and *mestizos*. Yet other indigenous peoples formed horse-riding and cattle-raising communities with expansive trading networks that controlled vast territories.

A renewed process of imperial expansion took place in the nineteenth century. Eager to acquire territories and markets and afraid of falling behind in the imperial race, European powers brutalized indigenous peoples in Africa, Asia, and Oceania. Although Latin America was freeing itself from European colonialism, indigenous people bore the brunt of the process of nation building there. No matter how and where indigenous communities lived, they posed a problem for the political elites who were trying to build nation-states in Latin America: How to integrate them into the new polities that professed equality before the law and sought to create a homogenous body of citizens? In colonial times, indigenous communities had inhabited a distinct political space, which the Spanish called *república de indios*. Imbued with liberal ideas, postcolonial leaders sought to unify the *res publica*. But for decades they saw most of their efforts frustrated. Indigenous people manipulated the new laws to maintain cohesive and independent communities. Not until the last quarter of the nineteenth century, when global economic forces reconfigured social and political arrangements in Latin America, did political elites succeed in breaking the back of resistant indigenous communities.

Land and Power

The revolutionary leaders of nineteenth-century Latin America envisioned nations in which all adult males (except enslaved persons), regardless of ethnicity, would be equal before the law. Indigenous men should be able to work and save money as individuals, become property owners, and exercise their rights as citizens. The new countries abolished the caste system and the special courts which had dealt separately with indigenous issues in colonial times. As the historian David J. Weber explains, these measures "represented the momentary triumph of classical liberalism, an ideology that sought to limit the power of the state and promote the liberty of the individual." As abusive as it had been, however, colonial rule had provided indigenous communities with a certain degree of stability and autonomy, exempting them from conscription, the Inquisition, and tithes. By revoking corporate institutions, the new nation-states created new forms of inequality and oppression. "In practice, these liberal measures left Indian communities vulnerable to rapacious non-Indian neighbors," Weber clarifies. "Stripped of their special

legal status, Indians gradually lost control of their communal governments and communal resources, including mission lands."[206]

While some political leaders proposed – and sometimes carried out – the extermination of whole indigenous communities, most adopted an assimilationist approach. In their reformist drive, however, politicians of the independence era sought to erase indigenous cultures, absorbing these populations into the body of a homogeneous nation.[207] An exponent of Latin American liberalism, the Brazilian statesman José Bonifácio de Andrada, wrote in 1823 that the Brazilian government should work on introducing in indigenous villages "whites and mulattos already adapted in order to mix the races, connect reciprocal interests with our people, and make them all into one single body with the nation, stronger, instructed, and entrepreneurial."[208]

Although property requirements existed in most countries, many indigenous men could now vote for their representatives, and some were eligible to hold office. Following through with their liberal project, the new governments simultaneously removed restrictions preventing *mestizos* and *criollos* from inhabiting indigenous villages and participating in local politics. Progressively, outsiders came to dominate municipal governments. In the former Spanish colonies, the new *ayuntamientos* (town council) absorbed the colonial *pueblos de indios* – which had provided indigenous communities with autonomy to manage resources and decide collective matters. In Brazil, until 1875 the *câmaras municipais* (municipal councils) had no jurisdiction over indigenous territories (the *aldeamentos* created by the Portuguese Crown); yet they often disregarded the boundaries of such lands and distributed them to settlers in *emphyteusis*.[209]

Concomitantly, the constitutional governments abolished the tribute which the metropoles had extracted from indigenous communities in the colonial period. This was the fundamental step, they calculated, towards making former vassals of European monarchs into members of the new nations. Analyzing the actions of José de San Martín in Peru, the historian

206 D. J. Weber, *Bárbaros: Spaniards and Their Savages in the Age of Enlightenment* (New Haven: Yale University Press, 2005), 264.

207 A. Escobar Ohmstede, "Del dualismo étnico colonial a los intentos de homogeneidad en los primeros años del siglo XIX latinoamericano," *Alteridades* 28 (2004) 21–36.

208 J. B. de Andrada e Silva, "Apontamentos para a civilização dos índios bravos do Império do Brasil," in M. Dolhnikoff (ed.), *Projetos para o Brasil* (São Paulo: Companhia das Letras, 1998). Unless otherwise mentioned, all translations are by the authors.

209 For recent comparative approaches to the political history of indigenous communities in Latin America, see I. de Jong and A. Escobar Ohmstede (eds.), *Las Poblaciones Indígenas en la Conformación de las Naciones y los Estados en la América Latina Decimonónica* (Mexico City: El Colegio de México, 2016).

Nils Jacobsen notes: "If the state relinquished interest in the community as a source of revenue, then in the future it would have no reason to protect and guarantee its internal social and agrarian order. Abolition of tribute was thus a prerequisite for disestablishing common usufruct of land in the *ayllus*."[210] Simón Bolívar, Vicente Guerrero, and other revolutionary leaders thought the same way.

The emergence of industrial capitalism in the North Atlantic region and the consequent expansion of market relations triggered relentless pressures to privatize land and other natural resources in the nineteenth century. Latin American political elites, who actively participated in this global movement, came to see communal lands held by indigenous peoples as unproductive wastelands, bastions of backwardness in a rapidly developing global commercial order. Consequently, they sought to break these lands up into individual plots. Some imagined that indigenous men would become smallholders, owning land in fee simple, cultivating their plots with the help of family members (and perhaps some hired hands), and paying property taxes. Others were interested in the full commodification of land and the emergence of a free (and cheap) labor market, which would give birth to dynamic export economies. Communal lands would be auctioned off to the highest bidders – anyone who had the capital to improve them. The reformers reckoned that land privatization would not only foster commercial agriculture throughout Latin America but also make indigenous men into self-reliant and independent citizens, free from the tutelage of tribal or religious leaders.[211]

In the nineteenth century, a myriad of grassroots movements took shape in response to the expansion of imperialism and capitalism. From Australia to China, from South Africa to the American West, indigenous peoples resisted new laws that threatened their ways of life. Such movements were not pre-political uprisings of ignorant folk guided by messianic leaders. On the contrary, they were strategic actions carried out by people who had been trying to shape the modern world in the best way they could, using any tools available to them. In Latin America, when confronted with the expansion

210 N. Jacobsen, "Liberalism and Indian Communities in Peru, 1821–1920," in R. H. Jackson (ed.), *Liberals, the Church, and Indian Peasants: Corporate Lands and the Challenge of Reform in Nineteenth-Century Spanish America* (Albuquerque: University of New Mexico Press, 1997), 128.

211 M. T. Ducey, "Liberal Theory and Peasant Practice: Land and Power in Northern Veracruz, Mexico, 1826–1900," in R. H. Jackson (ed.), *Liberals, the Church, and Indian Peasants: Corporate Lands and the Challenge of Reform in Nineteenth-Century Spanish America* (Albuquerque: University of New Mexico Press, 1997); D. Marino, "Reformas estatales y estructuras indígenas. Los derechos de propiedad en México Central, norte de Argentina y sur de Bolivia, 1810–1910," *Boletín Americanista* 79 (2019), 151–72.

of liberal, modernizing nation-states, indigenous groups neither rejected the new legislations outright nor embraced them blindly. They acted according to local circumstances and adjusted their responses to the political reality of the fledgling Latin American countries. When facing encroachment by *criollos* or *mestizos*, indigenous communities could either manipulate the discourse of equal rights that the new regimes promoted or reframe the corporate privileges that colonial governments had granted them. Usually, the two approaches went hand in hand. Throughout the continent, indigenous people employed an array of strategies to preserve their way of life, from sabotage to petitioning, from judicial battles to armed rebellion. Although the law put state authorities in charge of communal resources, for decades indigenous communities resisted takeover – fiercely when necessary – retaining traditional forms of land management and resource distribution.[212]

In places where they made up a large section of the population, indigenous people relied on local authorities such as *prefectos*, *jueces auxiliaries*, and *jefes políticos* to advance their interests. Some indigenous men – usually those who held traditional posts of authority within their community – got elected to *ayuntamientos*. Historians have also found evidence of parallel indigenous councils that emerged alongside the *ayuntamientos* and performed a dual function: taking care of the internal affairs of the community and mediating the relations between indigenous people and government officials.[213] In many parts of Latin America, indigenous communities could elect *apoderados* to represent their interests in court and before the government. These legal representatives, usually well-articulated and well-connected indigenous men, oversaw issues that affected their communities, such as land leases and debts. Many *apoderados* soon transcended their legal roles and became political leaders capable of establishing alliances with other – indigenous, *mestizo*, or *criollo* – leaders.[214]

212 See, among others, T. Schaefer, *Liberalism as Utopia: The Rise and Fall of Legal Rule in PostColonial Mexico, 1820–1900* (New York: Cambridge University Press, 2017); B. Larson, *Trials of Nation Making: Liberalism, Race, and Ethnicity in the Andes, 1810–1910* (Cambridge: Cambridge University Press, 2004).

213 J. A. Fernández Molina, "De tenues lazos a pesadas cadenas. Los cabildos coloniales de El Salvador como arena de conflicto político," in S. Herrera Gómez and M. Gómez (eds.), *Mestizaje, poder y Sociedad: Ensayos de historia colonial de las provincias de San Salvador y Sonsonate* (San Salvador: Flacso, 2003), 73–96.

214 P. Mendieta Parada, "Caminantes entre dos mundos: los apoderados indígenas en Bolivia (siglo XIX)," *Revista de Indias* 46(28) (2006), 761–82; L. B. Rodríguez, "El sistema de representación de indígenas en la transición a la república: los apoderados de la comunidad de Colalao y Tolombón en perspectiva comparative," in I. de Jong and A. Escobar Ohmstede (eds.), *Las Poblaciones Indígenas en la Conformación de las Naciones y los Estados en la América Latina Decimonónica* (Mexico City: El Colegio de México, 2016); A. Guerrero, "La coutume et l'État: Curagas et lieutenants politiques à Otavalo (Équateur) au XIXe siècle," *Annales: Économies, Sociétés, Civilisations* 47(2) (1992).

Holding on to their communal values, indigenous communities often manipulated the very laws that had been designed to privatize their lands. Community leaders or organized groups pulled resources to buy land. In theory, these landholdings became private property, but in practice, they continued to belong to the community. Indigenous people continued to treat rivers, lakes, swamps, and forests as inalienable commons. Further complicating things for reform-minded elites for decades after independence, in many parts of Latin America local authorities lacked the resources (such as police forces, census data, and land surveys) to enforce laws privatizing communal lands.[215]

Indigenous leaders were also able to establish alliances with *caudillos*, powerful political and military leaders who ruled much of Latin America during the nineteenth century. They favored *criollos* who would not interfere with their customs and offered them gifts (like cattle and manufactured goods), which indigenous communities considered tributes that the settlers owed them. Many fought side by side with their *caudillo* allies, helping them expand their power and territory. The Argentine liberal reformer Domingo Faustino Sarmiento was horrified to see the rancher Juan Manuel de Rosas ally himself with indigenous warriors to expand his power over the South American grasslands. "To intimidate the countryside," Sarmiento claimed, Rosas had "brought into the southern forts some savage tribes whose caciques were under his command."[216] Leaders like Rosa thrived in the first half of the nineteenth century because they managed to preserve the corporate logic of colonial times. As Sarmiento's bitter testimony made clear, this world was very distant from the national order that reform-minded leaders had devised at the time of independence.[217] Yet, contrary to what liberals like Sarmiento sought to argue, Latin America was no exception in the nineteenth century. The process of state building was not a straightforward process. Armed groups like the samurai in Tokugawa Japan, the Cossacks in Tsarist Russia, and the frontiersmen in the western United States challenged attempts of political centralization. Attempts to subject these groups to a national or an imperial order extended for decades.

War and Peace

In their struggle to establish legitimacy and pacify their (claimed) territories, the national governments shaped and bent and sometimes ignored or

215 J. Gutiérrez Ramos, "Comunidades indígenas, liberalismo y estados nacionales en los andes en el siglo XIX," *Anuario de Historia Regional y de las Fronteras* 4(1) (1998), 295–317.

216 D. F. Sarmiento, *Facundo: Civilization and Barbarism* (Berkeley: University of California Press, 2003 [1845]), 223.

217 On Rosas's policies, see J. Lynch, *Argentine Dictator: Juan Manuel de Rosas, 1829–1852* (Oxford: Clarendon, 1981).

even annulled their own laws in response to the actions of indigenous people. Often it was in the best interest of the nation-state to preserve the independence of indigenous communities. In some areas, like the dense forests of the Amazon Valley, the indigenous population lived too far away from any settler community to trouble the powers that be. In the Andes, where indigenous communities were the majority and elites faced devastating and costly wars, *criollo* and indigenous leaders struck a bargain. Driven by their need for funds, national authorities re-established the tribute that had been abolished by the founders. In exchange, tribute-paying indigenous communities received guarantees that secured their autonomy. To collect any tributes, Latin American states often had to rely on indigenous leaders themselves. Short on options, local authorities reached agreements with indigenous communities that resembled the privileges and exemptions of colonial times.[218]

In other regions, for example, the arid lands of northern Mexico or southern Chile and Argentina, indigenous groups such as the Comanches and the Mapuches had been expanding their territory, and in general behaving like land-based empires, since colonial times. In addition to indigenous weapons and military strategies, they relied on tools introduced by European colonizers and their descendants – like the horse and firearms – to mount formidable armies and defend their sovereignty. Especially in frontier areas, independent groups conducted raids on farms, ranches, and villages, and denied state officials access to their territories.[219] Indigenous peoples such as the Tobas and Wichí, who lived in the Chaco region between Bolivia and Argentina, manipulated state borders to their own advantage.[220] In some instances, indigenous groups took advantage of the presence of other (stronger) powers in order to resist struggling Latin American nation-states. Relying on trade and diplomatic relations with British Honduras, the Mayas of lowland Yucatán ruled the republic of Chan Santa Cruz from the 1840s to the 1890s and waged outright war against Mexico.[221] Latin America was not the only region to experience the phenomenon of indigenous peoples forming their own states and keeping intruders under control: the Sokoto Califate in West Africa and the

218 E. D. Langer, "Indigenous Independence in Spanish South America," in J. Tutino (ed.), *New Countries: Capitalism, Revolutions, and Nations in the Americas, 1750–1870* (Durham: Duke University Press, 2017), 361.

219 J. Bengoa, *Historia del Pueblo Mapuche. Siglos XIX y XX* (Santiago: Lom, 2000); P. Hämäläinen, *The Comanche Empire* (New Haven: Yale University Press, 2008).

220 E. D. Langer, "The Eastern Andean Frontier (Bolivia and Argentina) and Latin American Frontiers: Comparative Contexts (19th and 20th Centuries)," *The Americas* 59(1) (2002), 33–63.

221 N. A. Reed, *The Caste War of Yucatán*, rev. ed. (Stanford: Stanford University Press, 2001).

Kingdom of Hawaii in the Pacific are two among many examples. In time, colonizers would employ brutal tactics alongside outright fraud to dispossess indigenous communities. Yet the process was not foreordained, and for decades indigenous powers demonstrated that they were able to take control of their own political destinies.

At a loss on how to pacify independent indigenous groups, some Latin American political leaders resorted to treaties, which amounted to recognizing that the indigenous peoples formed their own autonomous nations within the territories claimed by constitutional governments. Carrying on a tradition from colonial times, the political elites of the Pampas and Araucanía engaged in *parlamentos* with indigenous powers, which culminated in peace treaties and the recognition of indigenous sovereignty over sprawling territories. Following legal principles common to both parties, indigenous and *criollo* leaders promised to *honrar la palabra dada* (honor the given word). Indigenous powers maintained embassies in the capital cities of Chilean and Argentine provinces. Indigenous leaders such as Juan Calfucurá – a Huilliche *cacique* who led his people to migrate from Araucanía to the Pampas – rose to prominent positions, being recognized by Chilean and Argentine authorities alike.[222]

Mexican authorities also did what they could to negotiate with, rather than fight against, independent indigenous groups. In 1822, the Comanche Capitán Guonique attended the coronation of Agustín de Iturbe in Mexico City and signed the *Tratado entre el Imperio Mexicano y la Nación Comanche*. In this treaty, Mexico granted the Comanches duty-free trade, recognized their right to capture wild horses near Mexican settlements, invited Comanche youths to study in Mexico City, and asked Comanche leaders to return Mexican prisoners (excepting those who wished to stay – whatever this meant). Article 4 in particular elucidated Mexico's (fragile) reliance on Comanche power on the northern borderlands: the Comanche Nation "will not allow any nation" – indigenous, American, or European – "to penetrate Mexico through its territory, resisting it with arms and warning the [Mexican] Emperor." National as well as local republican leaders who assumed control after the fall of Emperor Iturbide continued to negotiate with the Comanches.[223]

Diplomatic arrangements, however, only brought temporary truce. For decades indigenous powers demanded the continuation of the Spanish policy of gift-giving. Bolivia's federal government paid yearly duties to Chiriguano

222 On Mapuche diplomacy, see P. M. Herr, *Contested Nation: The Mapuche, Bandits, and State Formation in Nineteenth-Century Chile* (Albuquerque: University of New Mexico Press, 2019).

223 Hämäläinen, *Comanche Empire*, 191.

leaders from the 1830s through the 1860s. In certain areas, ranchers paid grazing fees known as *yerbaje* to indigenous groups.[224] Yet more often than not the new republics lacked the means to satisfy indigenous demands. Indigenous sovereigns switched alliances when governments failed to pay and did not hesitate to attack former allies. Mexico, which was struggling to keep internal conflicts under control in the 1830s, had no funds to spend on pacifying its vast northern territories. Comanche and Lipan Apache bands attacked *criollos*, *mestizos*, and sedentary indigenous communities. US Democrats led by President James K. Polk pointed to the Mexican inability to curb indigenous raids to justify the annexation of Texas and wage war on Mexico in the 1840s.[225]

At a loss on how to control the borderlands, leaders of the still young republics looked to the recent past, emulating the Spanish colonizer they had fought only recently. Aware that the central government did not have enough resources to impose its will on the Llanos of Venezuela and eastern Colombia, Simón Bolívar encouraged the establishment of Catholic missions there.[226] Similarly, President Antonio López de Santa Anna invited Jesuits (who had been expelled in 1767) to return to Mexico in 1843 and establish missions among Comanches and Apaches.[227] However, these efforts failed to pacify independent indigenous nations. As they had done in colonial borderlands, indigenous peoples took whatever advantages missionaries had to offer and used them to carry on with their resistance against settler encroachment.

Not all indigenous groups, however, had the power to protect themselves the way the Mapuches did against Chile and the Comanches against Mexico. And whenever settlers and state officials could bypass (their own) national laws in order to brutalize indigenous peoples, they did so without hesitation. Given the opportunity, military leaders such as José Gaspar Rodríguez de Francia of Paraguay would readily wage genocidal assaults against indigenous villages. Two Swiss naturalists who visited the Río de la Plata basin in the 1820s were astonished by what they saw: "These savages are now treated as ferocious beasts: war without quarter is made on them: they are relentlessly killed, whether they appear as friends or enemies."[228] In Brazil, a law passed in 1831 banned the colonial practice of abducting and enslaving

224 E. D. Langer, *Expecting Pears from an Elm Tree: Franciscan Missions on the Chiriguano Frontier in the Heart of South America, 1830–1949* (Durham: Duke University Press, 2009), 33.

225 B. DeLay, "Independent Indians and the U.S.-Mexican War," *American Historical Review* 112 (2007), 35–36.

226 Weber, *Bárbaros*, 268.

227 D. J. Weber, *The Mexican Frontier, 1821–1846: The American Southwest Under Mexico* (Albuquerque: University of New Mexico Press, 1982), 50.

228 J. R. Rengger and M. Longchamps, *The Reign of Doctor Joseph Gaspard Roderick de Francia in Paraguay* (London: T. Hurst, E. Chance, 1827), 52–53.

"hostile Indians". Yet indigenous slavery endured for decades thereafter, even close to the capital city. In the late 1840s, a British traveler noted that "Indians appear to be enslaved as much almost as negroes, and are bought and sold like them. In Rio a large number are made merchandise of."[229] The enslavement of indigenous people extended beyond Latin America. As the historian Andrés Reséndez demonstrates, Anglo-American settlers enslaved thousands of indigenous North Americans in the Trans-Mississippi West before the Civil War. The California Gold Rush brought this kind of exploitation to its cruelest.[230]

Violence against indigenous communities intensified by the middle of the nineteenth century, when Latin American nation-states tried once again to implement the anti-corporate vision of the independence period and passed a series of laws designed to convert communal tenancy into private property and transform indigenous peasants into a mobile workforce for commercial agriculture and mining. Some reformers thought that such a process of privatization would attract European immigrants to Latin American countries, advancing a process of *blanqueamiento* (whitening). Again, indigenous people resisted through legal and extra-legal means, and in any case, local officials rarely had the means to implement such legislation. Reformers and legislators in the national capitals felt frustrated with the lack effectiveness of such measures. Yet the new laws set the stage for a profound transformation that would soon materialize.[231]

The Second Conquest

In the last third of the nineteenth century, Latin America went through what historians call a "second conquest." Fueled by transformations in the centers of industrial capitalism, exports boomed. Commodity production expanded and intensified in Latin America as countries like Great Britain, the United States, and Germany demanded coffee, sugar, cacao, henequen, banana, wheat, beef, rubber, guano, nitrate, copper, tin, and other raw materials.

229 T. Ewbank, *Life in Brazil: Or, a Journal of a Visit to the Land of the Cocoa and the Palm* (New York: Harper & Brothers, 1856), 323. See also, Y. Miki, *Frontiers of Citizenship: A Black and Indigenous History of Postcolonial Brazil* (Cambridge: Cambridge University Press, 2019).

230 A. Reséndez, *The Other Slavery: The Uncovered Story of Indian Enslavement in America* (Boston: Houghton Mifflin Harcourt, 2016).

231 I. Figueroa, "Legislación marginal, desposesión indígena, civilización en proceso: Ecuador y Colombia," *Nómadas* 45 (2016), 43–57; C. A. Murgueitio Manrique, "El proceso de desamortización de las tierras indígenas durante las repúblicas liberales de México y Colombia, 1853–1876," *Anuario de Historia Regional y de las Fronteras* 20 (2015), 73–95.

Investments flowed from urban centers (within and without the continent) into rural areas. Railroads and steam navigation expanded rapidly from the coastal regions to the interior. The process of land privatization sped up and the demand for labor exploded. Local and foreign entrepreneurs found it unacceptable that indigenous communities continued to dedicate themselves to their own subsistence lifestyle rather than commercial activities. In response, legislators passed laws, codes, and regulations coercing indigenous peoples to provide workers for private enterprises.[232]

Albeit reliant on wage labor in the most developed economies, the global hegemony of industrial capitalism created a boom in unfree labor relations in peripheral economies. In El Salvador until the late 1870s, indigenous communities owned over one quarter of all lands, much of which was ideal for coffee cultivation. Under the modernizing reign of President Rafael Zaldívar, anybody could take over uncultivated lands provided that he planted at least one-quarter of it with coffee. Subsequently, new laws abolished *ejidos* (communal lands) and forced indigenous peasants into serving as *colonos*, or resident laborers, on the lands now appropriated by major planters.[233] A similar process took place in Guatemala. The *jefes políticos* came to play a central role, mediating between the coffee planters, who informed them of their labor needs, and the indigenous communities. Often, these state authorities were staffed by members of planter families who thus profited greatly from this system of exploitation. Debt peonage and the infamous *enganche* – a form of debt bondage – re-emerged in Guatemala and other parts of Latin America. Vagrancy laws and convict labor also became a means to force indigenous people to work for agricultural, construction, and mining entrepreneurs.[234] Similar to El Salvador and Guatemala, other parts of the Global South experienced a resurgence of indentured labor in the last decades of the nineteenth century. The kidnapping and enslavement practice of "blackbirding" in the South Pacific, for example, brutalized South Sea Islanders and helped develop sugar plantations in British Australia.

232 S. Topik and A. Wells (eds.), *The Second Conquest of Latin America: Coffee, Henequen, and Oil during the Export Boom, 1850–1930* (Austin: University of Texas Press, 1998).

233 A. Lauria-Santiago, *An Agrarian Republic: Commercial Agriculture and the Politics of Peasant Communities in El Salvador, 1823–1914* (Pittsburgh: University of Pittsburgh Press, 1999).

234 R. Falcón, "'No tenemos voluntad de ir al trabajo forzado…': una comparación de los nexos entre indígenas y jefaturas políticas en México y Guatemala (segunda mitad del siglo XIX)," in I. de Jong and A. Escobar Ohmstede (eds.), *Las Poblaciones Indígenas en la Conformación de las Naciones y los Estados en la América Latina Decimonónica* (Mexico City: El Colegio de México, 2016).

Wars of extermination, which had been devastating indigenous peoples the world over since the early modern era, came to a head in the second half of the nineteenth century. The Lakotas in the United States, the Zulus in South Africa, and the Boxers in China are just a few examples of local groups that were annihilated by the new industrial weapons of western powers. Armed intervention brought longstanding indigenous struggles to bloody endings in Latin America as well. In 1878, President Nicolás Avellaneda spoke to the Argentine Congress promising "the conquest, sooner rather than later, by reason or by force, of a handful of savages that destroy our principal wealth and impede us from definitively occupying, in the name of the law, of progress, and of our own security, the richest and most fertile territories of the Republic."[235] Between 1879 and 1884 the Argentine army waged total war against the Mapuches and other indigenous groups in the so-called Conquest of the Desert. The few survivors were subjected to programs of "regeneration," which consisted in dissolving their tribal governments, prohibiting them from speaking their native languages, and forcing them to perform hard labor. Following the model of the US Homestead Act of 1862, the Argentine government took indigenous lands and distributed them to ranchers and farmers.

Chile followed a similar path beginning in the mid-1880s, as soon as the War of the Pacific ended. Reduced to living in reservations, the descendants of the indigenous groups who had ruled southern Chile for centuries became an oppressed caste in the 1900s. Meanwhile, *criollo* settlers – reinforced by a large immigration wave from Europe – increased their domains and promoted the idea of an all-white Chile.[236] Although Bolivia had lost the War of the Pacific and faced a major political crisis, the Bolivian government also waged war against independent indigenous communities. The army established forts and colonies all over the Chaco region in the 1880s, whence soldiers hunted down Chiriguanos, Tobas, and Wichí, who were allegedly stealing cattle. In 1892 an uprising led by Apiaguaiki Tumpa broke out among the Chiriguanos and faced brutal retaliation. Thousands of Chiriguano men were murdered and thousands of Chiriguano women and children were sold into slavery in Sucre and Santa Cruz.[237]

235 N. Avellaneda cited in C. R. Larson, "The Conquest of the Desert: The Official Story," in C. R. Larson (ed.), *The Conquest of the Desert: Argentina's Indigenous Peoples and the Battle for History* (Albuquerque: University of New Mexico Press, 2020), 21.

236 J. Bengoa, "Chile Mestizo; Chile Indígena," in D. Maybury-Lewis, T. Macdonald, B. Maybury-Lewis, (eds.), *Manifest Destinies and Indigenous Peoples* (Cambridge: Harvard University Press, 2009), 133.

237 Langer, "Eastern Andean Frontier," 51.

By the turn of the century, industrial capitalism spread its destructive tentacles even into the heart of the Amazon. Fueled by the demands of manufacturers of shoes and tires, the rubber economy took over the Brazilian, Ecuadoran, Bolivian, and Peruvian Amazon. Traveling these regions in 1904–1905, the Brazilian journalist Euclides da Cunha described the violent campaigns to capture indigenous workers for rubber extraction: "This wilderness has seen an incalculable number of small battles in which tiny but well-armed groups have overthrown entire tribes, abruptly sacrificed because of the primitiveness of their arms and by their own valor in mounting head-on attacks against the repeating fire of carbines."[238] Terrorized into working in rubber extraction, indigenous laborers lived in abject conditions. They were forced to acquire overpriced food and supplies from the extractive companies and consequently soon fell into debt. And debt transformed them into peons. Ravaged by famine, disease, and torture, whole Amazonian indigenous communities succumbed. Rubber extraction also wreaked havoc elsewhere around the turn of the century. The indigenous inhabitants of the Congo Basin suffered similar forms of enslavement, torture, and genocide under the rule of the Belgian king as did the indigenous peoples of the Amazon Valley.

Perhaps more than any of his contemporaries, the modernizing dictator of Mexico Porfirio Díaz succeeded in defeating independent indigenous groups and attracting foreign investment. Beginning in 1882, Mexican authorities collaborated with US agencies to attack the Apaches and Comanches, seeking to restrict them to reservations. Long neglected, the northern Mexican states opened their doors for North American corporations interested in investing in railroads, agriculture, ranching, and mining.[239] The modernizing policies of the Porfiriato also brought suffering to indigenous people in the southern regions. After decades of war against the Mayas, Mexico was able to crush the Chan Santa Cruz movement, and Mexican settlers established profitable plantations in Yucatán. Two visitors to the state described the slave-like condition of the Mayas who labored in henequen fields: "Yucatan is governed by a group of millionaire monopolists whose interests are identical, banded together to deny all justice to the Indians, who, if need be, are treated in a way an Englishman would blush to treat his dog."[240]

238 E. da Cunha, "The Caucheros," in L. Sá, *The Amazon: Land without History* (New York: Oxford University Press, 2006), 56–57.

239 S. Truett, *Fugitive Landscapes: The Forgotten History of the U.S.–Mexico Borderlands* (New Haven: Yale University Press, 2006).

240 C. Arnold and F. J. T. Frost, *The American Egypt: A Record of Travel in Yucatan* (New York: Doubleday, Page & Company, 1909), 329.

Autonomous indigenous communities lost access to resources all over Latin America during the second conquest. The combined forces of the nation-state and (transnational) capital broke the back of communities that had long resisted the intrusion of alien interests in their territories. Often subjected to violence and assaulted by exploitative economic practices, they lost the capacity to rule their own destinies. While a few groups were able to retreat to isolated or unwelcoming regions, most became people without a country in their own ancestral lands.

Slavery in the Age of Freedom

By the middle of the nineteenth century, some four million enslaved Africans and enslaved people of African descent lived in Latin America. Most of them worked on sugar and coffee plantations, but enslaved workers were also essential for many other economic activities, including mining, ranching, logging, domestic work, construction, transportation, and all sorts of urban trades. The influx of enslaved Africans persisted in Latin America – especially in Brazil and Cuba – until the 1850s. Moreover, throughout the nineteenth century, enslaved men and women were transported from declining economic regions to new economic frontiers in Latin America.

Slavery presented a blatant contradiction to the claims of political elites that they were building nations based on ideals of freedom and equality. Enslaved persons' political actions made the contradiction all the more evident. Authorities encountered difficulties in regulating the master-slave relationship; slaveholders clearly showed their dissatisfaction at attempts by the state to improve the situation for the enslaved persons. Furthermore, European powers – with Great Britain at the forefront – were growing hostile to the institution and using the abolitionist cause to intervene in other countries' affairs. As enslaved men and women continued to fight against bondage, economic transformations and the emergence of new classes with new sensibilities spread an attitude of antislavery to different sectors of Latin American societies. Antislavery forces used legal and extra-legal means to confront the institution. It was a long struggle, but by the end of the nineteenth century, slavery had vanished in the hemisphere.

Gradualism and Regulation

As the wars of independence dragged on, "El Libertador" Simón Bolívar freed his enslaved workers and lamented the attitude of some of his fellow-revolutionaries: "It seems to me madness that a revolution for freedom

expects to maintain slavery."[241] Slaveholding interests notwithstanding, war needs would shake the foundations of slavery in Latin America. Military commanders, lacking manpower and resources to pay free men, resorted to recruiting enslaved men. Often these recruits had no choice, being press-ganged by revolutionary armies. Yet the wars presented positive incentives as well. The perspective of attaining freedom lured enslaved men to join the revolutionary forces. Moreover, the independence struggle provided them opportunities to retaliate for past abuses, demonstrate loyalty to a leader or a homeland, assert their humanity and masculinity, make money, attain social influence, and even establish a career in the military.[242]

Yet despite the vital contribution of enslaved men to the cause of Latin American independence, only Chile, Mexico, and the United Provinces of Central America abolished slavery in the first years of independence. The Haitian occupying forces liberated enslaved persons in the Dominican Republic in 1822. Under Bolívar's rule, Gran Colombia passed a free womb law liberating all children of enslaved mothers born from July 1821 onward, but only after they reached the age of eighteen. The government also set up a manumission fund based on an inheritance tax. In the 1830s, however, the successor states of Colombia, Ecuador, and Venezuela slowed down the process of emancipation. Among other things, they imposed apprenticeship periods on the children of enslaved persons, which could extend until the age of twenty-six. A similar pattern emerged in Peru and Bolivia. Slaveholders often circumvented the laws, manumission funds dried up, and slavery thrived in plantation and mining areas. Only in the 1850s would these countries end slavery. Slavery persisted in Paraguay and Puerto Rico until the 1870s and in Cuba and Brazil until the 1880s.[243]

While Latin American masters insisted on their right to do as they wished with enslaved men and women, torturing them at will, the nineteenth-century Latin American state – imbued with enlightened ideas – sought to regulate these relations. More so than in the antebellum United States, where the doctrine of states' rights guaranteed that proslavery interests would avoid regulation from the central government, in Latin America the nation-state would directly intervene in master-slave relations. Brazil's 1830 Criminal Code sought to place the state in charge of punishing crimes committed by enslaved

241 S. Bolívar in P. Blanchard, "The Language of Liberation: Slave Voices in the Wars of Independence," *Hispanic American Historical Review* 82(3) (2002), 514.

242 P. Blanchard, "The Slave Soldiers of Spanish South America: From Independence to Abolition," in C. L. Brown and P. D. Morgan (eds.), *Arming Slaves: From Classical Times to the Modern Age* (New Haven: Yale University Press, 2006), 257–58.

243 H. S. Klein and B. Vinson III, *African Slavery in Latin America and the Caribbean* (Oxford: Oxford University Press, 2007).

persons, for example, by making judges responsible for determining the number of lashes – not exceeding fifty per day – that could be dealt. The state nonetheless made clear that its interventions were designed to protect public order and the lives of free persons. The same code determined the punishment for enslaved persons involved in insurrections: "Penalties – to the leaders – of death for the maximum degree; of perpetual *galés* [forced labor] for the medium; and of fifteen years for the minimum; – to all others – flogging."[244]

Brazilian masters also had the option of sending their enslaved workers to be punished in state-funded prisons. James Cooley Fletcher, an American missionary who lived in Brazil in the 1850s, observed that "[o]ne department of the *Casa da Correcao* is appropriated to the flogging of slaves, who are sent thither to be chastised for disobedience or for common misdemeanors." No matter how much the state tried to provide the means of controlling the enslaved population, however, Brazilian – and other Latin American – slaveholders did not give up their private punishments. "There are private floggings; and some of the most common expiations are the tin mask, the iron collar, and the log and chain," Fletcher continued.[245]

Although slavery persisted, all former Spanish colonies moved to abolish the transatlantic slave trade. Political elites saw in this act a means to gain British favor and recognition. The countries that remained under Spanish rule adopted a different path. In 1817, Spain had signed a treaty with Great Britain abolishing the slave trade to the colonies. The treaty was supposed to take effect in 1820, but the number of enslaved Africans entering Cuba and Puerto Rico only increased thereafter. In 1835, recognizing that the first treaty was ineffectual, the two empires signed a new one. Nevertheless, the slave trade continued to increase. Anglo-Americans – from the northern as well as the southern states – played a central role in this illegal trade. US authorities not only behaved leniently towards US nationals trafficking human beings to Cuba but got directly involved in the slave business. US consuls in Havana made lots of money providing sea letters (a kind of license for vessels and cargo) to traffickers, and the senator for Rhode Island James DeWolf made a fortune through the trade.[246]

244 V. Chieregati Costa, "A punição pela morte no Código Criminal do Império do Brasil: debates parlamentares e concepções jurídico-políticas na positivação das leis penais" in M. Duarte Dantas (ed.), *Da Corte ao Confronto. Capítulos de História do Brasil Oitocentista* (Belo Horizonte: Fino Traço, 2020).

245 D. P. Kidder and J. C. Fletcher, *Brazil and the Brazilians, Portrayed in Historical and Descriptive Sketches* (Philadelphia: Childs & Peterson, 1857), 131.

246 A. F. Corwin, *Spain and the Abolition of Slavery in Cuba, 1817–1886* (Austin: University of Texas Press, 1968); Leonardo Marques, *The United States and the Transatlantic Slave Trade to the Americas, 1776–1867* (New Haven: Yale University Press, 2016).

Despite the Law of November 7, 1831, stating that "all the slaves who enter the territory or ports of Brazil, coming from abroad, are free," Brazil imported over one million enslaved Africans from the time of independence to the early 1850s. The 1831 law became known as the *lei para inglês ver* (law for the British to see) – both a cruel joke and an act of defiance. Henry A. Wise, a major slaveholder from Virginia who served as the US Minister to Brazil in the 1840s, was appalled to see how powerful the traffickers had become in Rio de Janeiro. "It is not to be disguised nor palliated," he wrote to the US Secretary of State in 1845, "that this Court as well as this whole country is deeply inculpated in that trade.... Thus, the Govt itself is in fact a slave trading Govt against its own laws and treaties."[247] Only in 1850, after several diplomatic tensions unsettled Anglo-Brazilian relations, did Brazil terminate the transatlantic slave trade.[248]

Resistance and Rebellion

The British were not the only ones fighting slavery in Latin America. Enslaved persons themselves were the fiercest enemies of the institution. Wherever slavery persisted, enslaved men and women continued to use tactics inherited from colonial times in order to resist: slowing down work, appropriating goods, forming family and kinship ties, preserving and reinventing religious practices, absconding, building and protecting so-called maroon communities of formerly enslaved Africans and their descendants, accumulating resources to buy their freedom, organizing strikes and other demonstrations, and using violence against masters, overseers, or other abusers. As national and provincial capitals grew, enslaved persons found more opportunities to escape farms and plantations and hide among the anonymous masses. Moreover, as the judicial apparatus developed in postcolonial Latin America, numerous enslaved men and women went to court to sue their masters for negligence or brutalization. They incorporated the new language of national interests and citizenship rights into their pleas. Although an uprising like the Haitian Revolution never materialized in Latin America, generations of enslaved persons built a culture of resistance that undermined the system.

Enslaved persons and their allies insisted on using the laws that Latin American slaveholders tried to circumvent. Colombia, for example, established

247 H. A. Wise to J. Buchanan, Rio de Janeiro, December 9, 1846, in W. R. Manning (ed.), *Diplomatic Correspondence of the United States, Inter-American Affairs, 1831–1860* (Washington: Carnegie Endowment for International Peace, 1932), vol. II, 370.

248 L. Bethell, *The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question, 1807–1869* (Cambridge: Cambridge University Press, 1970).

manumission *juntas* in charge of liberating "honorable and industrious" slaves. Yet, as the historian Yesenia Barragan demonstrates for the northern parts of the Pacific lowlands of Colombia, publicly funded manumissions were scarce. Between 1821 and 1846, the *juntas* freed only seventeen persons in the region. In response to this poor outcome, enslaved persons pulled resources together and negotiated with masters and government officials to purchase their own freedom. "The acquisition of freedom papers was a public act," Barragan explains. "Enslaved lowlanders faced the notary, their master or masters, any family member or individual who paid for their freedom, two or three witnesses, and, in more contentious cases, the *procurador municipal* (municipal attorney)."[249]

Similarly, after seceding from Gran Colombia, Ecuadoran legislators cut the taxes that contributed to the manumission fund and made the process of self-purchase more difficult. But enslaved persons fought back. Soon the port city of Guayaquil, the key location of the Ecuadoran cacao trade, became a hub of antislavery activism. Runaways from the countryside as well as from the city found hiding places among friends, family, and others allies. Flight was dangerous, however, often leading to persecution and other unpredictable harm. Many enslaved Ecuadorans therefore used legal means to liberate themselves. They petitioned the *junta*, manipulating the language of citizenship rights to request more effective action from the authorities. They further protested that the manumission funds were depleted, and the manumission *junta* was nonoperational.[250]

If, on the one hand, enslaved persons made use of the law when they saw it could help them, on the other, they chose to flaunt regulations that hurt their interests. Slave mobility in Puerto Rico is a case in point. A legal instrument designed to protect slaveholding interests, the 1826 Slave Code comprised provisions ordering the arrest and jailing of any enslaved person who left the plantation without their master's permission. The code nonetheless legalized the customary right of enslaved persons engaging in productive activities in their free time and accumulating *peculio* (any amount of money), which could eventually be used for *coartación* (buying their freedom). Enslaved Puerto Ricans tended to their gardens and livestock, marketing their surplus outside their master's plantations. Others engaged in odd jobs for employers other than their masters. Enslaved men and women in Puerto Rico took

249 Y. Barragan, *Freedom's Captives: Slavery and Gradual Emancipation on the Colombian Black Pacific* (Cambridge: Cambridge University Press, 2021), 207.

250 C. Townsend, "In Search of Liberty: The Efforts of the Enslaved to Attain Abolition in Ecuador, 1822–1852," in D. J. Davis (ed.), *Beyond Slavery: The Multilayered Legacy of Africans in Latin America and the Caribbean* (Lanham: Rowan & Littlefield, 2007), 56.

advantage of the 1826 code when it came to their right to save money but often disregarded it when moving around to make such money.[251]

In some instances, enslaved persons strove to make unwritten customs into rights, and at times they succeeded. In Cuba, the uncodified practices of *coartación* and *pedir papel* (request paper to seek a new owner) endured in the nineteenth century. Enslaved men and women used such customary rights in cases the slaveholders failed to provide for their well-being or abused them. Yet, since these practices were only customary, their effectiveness depended on the views and whims of the slaveholders, who usually considered them an attack on their interests. Enslaved persons were not afraid to litigate, however, and judges were forced to consider what entitlements masters and their enslaved workers had under Spanish legal customs (see Section 1.4). In 1842, largely thanks to enslaved persons' persistence, the new Spanish *Reglamento de Esclavos* made these customary rights into law. Hence, the state acquired the power to decide whether enslaved people could purchase their freedom or find new masters.[252]

Enslaved persons also acted in ways reminiscent of indigenous groups, manipulating national borders to their own advantage. In southern Brazil, they took advantage of political tensions that were brewing in the neighboring country. The *Guerra Grande* in Uruguay (1839–1851) brought about military incursions, raiding campaigns, and intensive military recruitment – including that of enslaved men. The Colorado government of Montevideo, in desperate need for troops, abolished slavery in 1842. Four years later the Colorados' enemies, the Blancos, also proclaimed abolition to attract new recruits. Brazilian authorities calculated that some 900 runaways were living across the border in 1850. Soon slave catchers from Rio Grande do Sul began crossing the border and recapturing fugitives on Uruguayan soil. Some of these returnees, however, went to court to reclaim their freedom, arguing that the law of 1831 had made it illegal to introduce enslaved persons in Brazil.[253]

The court was just one of the arenas in which enslaved men and women fought for freedom. Inspired by a mass social movement in the English metropole and the activism of enslaved persons in the West Indian colonies, the British Empire abolished slavery in 1833. Soon abolitionism spread to other countries, and the United States – the largest and richest slave society in the

251 L. A. Figueroa, *Sugar, Slavery, and Freedom in Nineteenth-Century Puerto Rico* (Durham: University of North Carolina Press, 2005).

252 A. de la Fuente and A. J. Gross, *Becoming Free, Becoming Black: Race, Freedom, and Law in Cuba, Virginia, and Louisiana* (New York: Cambridge University Press, 2020), 173.

253 K. Grinberg, "Slavery, Manumission and the Law in Nineteenth-Century Brazil: Reflections on the Law of 1831 and the 'Principle of Liberty' on the Southern Frontier of the Brazilian Empire," *European Review of History* 16(3) (2009), 402.

world – found itself engulfed in a divisive debate over the expansion of slavery. Inspired by these major fissures in the Atlantic slave system, some enslaved communities in Latin America moved to overthrow the governments that kept them in chains. One of the most radical antislavery movements of the era took shape in northeastern Brazil. Enslaved Muslims in Salvador, Bahia, embraced the Islamic concept of Jihad (struggle or effort) to try to free themselves. In January 1835, during the Ramadan, some 600 Hausas and Yorubas organized an armed rebellion. They planned to establish an Islamic Califate and impose Sharia law in South American territory. The National Guard crushed the uprising and dozens of rebels were executed. Masters and other sectors of the free population panicked, and authorities redoubled their vigilance. In June 1835, parliament passed a law determining that enslaved persons who killed their masters, overseers, or their families would receive the death penalty. Article 2 clarified that insurrection would also be punished by death.[254]

The fear of a possible slave rebellion also rocked Cuba. After small and large uprisings took place in Matanzas and Cárdenas in 1843, authorities found out about a conspiracy planned for Christmas day. In blatant disregard of legal procedures, authorities tortured thousands of men and women who might have taken part in or known about the conspiracy. Writing for the *Knickerbocker* magazine in 1845, an American observer explained how the conspiracy got its name, "La Escalera": The rebels were taken to a room in which "stood a bloody ladder, where the accused were tied, with their heads downward, and whether free or slave, if they would not avow what the fiscal officer insinuated, were whipped to death by two stout mulattoes selected for this purpose."[255] State terror spread, affecting free as well as enslaved persons of color. Some three thousand persons were executed or died due to mistreatment. Slaveholders blamed the 1842 *Reglamento de Esclavos*, arguing that it had subverted the institution of slavery by making customs into laws and interfering in private master-slave relations.[256]

254 J. J. Reis, *Slave Rebellion in Brazil: The Muslim Uprising of 1835 in Bahia* (Baltimore: Johns Hopkins University Press, 1993); M. Barcia, "An Islamic Atlantic Revolution: Dan Fodio's Jihād and Slave Rebellion in Bahia and Cuba, 1804–1844," *Journal of African Diaspora Archaeology and Heritage* 2(1) (2013). Although Yorubas were responsible for one of the most dramatic slave insurrections in Brazil, many other smaller – but by no means less radical – movements drew on Bantu religious practices. See, for example, F. dos Santos Gomes, *Histórias de quilombolas. Mocambos e comunidades de senzalas no Rio de Janeiro, século XIX* (São Paulo: Companhia das Letras, 2006) and R. Figueiredo Pirola, *Senzala insurgente. Malungos, parentes e rebeldes nas fazendas de Campinas, 1832* (Campinas: UNICAMP, 2011).

255 "Letters from Cuba," *The Knickerbocker: Or, New-York Monthly Magazine*, July 1845.

256 A. Ferrer, *Cuba: An American History* (New York: Simon & Schuster, 2021), 104.

Many other conspiracies took place in Latin America. Although most ended up like La Escalera, crushed before even begun, they pushed authorities into regulating slavery more closely. And, as scholars have recently shown, the enactment of new codes, laws, and regulations created political opportunities for enslaved persons and other antislavery forces to organize.[257] Afraid of "other Haitis" and willing to do anything to preserve their wealth and power, slaveholders and authorities ramped up punitive measures. Yet in the second half of the nineteenth century, a liberal wave originating in the 1848 European movements for democracy and the Union triumph in the American Civil War swept Latin America. Enslaved persons increasingly gained support from sectors of the working and middle classes, and the agitation to end slavery could no longer be contained.

Abolition

By the 1850s, emancipation laws and enslaved persons' own efforts had gradually chipped away at the institution of slavery in most countries of Latin America. Whereas in Colombia, there had been some 54,000 unfree people at the end of the colonial period, that number shrank to 16,000 in 1851. Venezuela's enslaved population had dropped to almost half, from 64,000 in 1810 to 33,000 in 1854. Peru, where 89,000 human beings were held in chains in 1821, counted some 25,000 enslaved persons in 1854. The debate became not whether slavery should be ended but how to bring this about. Not surprisingly since they were champions of private property rights, the reformist governments of mid-century promised to compensate slaveholders but rarely had the means to do so.[258]

In the 1860s, a destructive civil war shattered the institution of slavery in the United States. War, a major force for legal changes throughout history, would also set the stage for the end of slavery in Latin America. When Brazil declared war on Paraguay, the government began to pay masters for slave recruits. Some enslaved men seized the opportunity, requesting that masters "sell" them to the government. Nearly 7,000 enslaved men served in the Brazilian Army during the Paraguayan War.[259] Dependent on the support of slaveholders, however, the Brazilian government did not pass any comprehensive act of emancipation during the war.[260]

257 A. Alonso, *The Last Abolition: The Brazilian Antislavery Movement, 1868–1888* (Cambridge: Cambridge University Press, 2021).

258 Klein and Vinson, *African Slavery*, 232.

259 H. Kraay, "Arming Slaves in Brazil from the Seventeenth Century to the Nineteenth Century," in C. L. Brown and P. D. Morgan (eds.), *Arming Slaves: From Classical Times to the Modern Age* (New Haven: Yale University Press, 2006), 169.

260 W. Peres Costa, *A Espada de Dâmocles: O Exército, a Guerra do Paraguai e a Crise do Império* (São Paulo: Hucitec, 1996).

However, the frustrating campaign against the Paraguayan dictator Francisco Solano López, which lasted much longer and was much bloodier than Brazilian elites had expected, rekindled political discussions about slavery and its effects on Brazilian society. When, scarcely one year after the end of the war, Prime Minister José Maria da Silva Paranhos, the Viscount of Rio Branco, proposed a free womb law to parliament, he stated that "I found myself [in Paraguay] … amongst no less than 50,000 Brazilians, who were in touch with neighboring peoples, and I know for myself and through the confession of the most intelligent of them how many times the permanence of this odious institution in Brazil shamed and humiliated us before the foreigners."[261] On September 28, 1871, the so-called Rio Branco Law was ratified. It did not differ much from other free womb laws that had been implemented earlier in Latin America.

Spain's free womb law of 1870 was also a response to military conflict. As the Ten Year's War (1868–1878) unfolded across Cuba, enslaved persons in the eastern parts of the country – a region distant from the major plantation centers – ran away from their masters to join the rebel forces. Desperate for manpower, rebel leaders – some of whom were slaveholders – decided to end slavery in the regions they controlled. Soon the anticolonial cause and the antislavery causes became intertwined in Cuba.[262] Two years into the war, Segismundo Moret y Prendergast, Spain's minister of overseas provinces, reckoned that gradual emancipation legislation would show that the reform process could be controlled from above. However, this approach backfired. The Spanish Abolitionist Society and many rebellious Cubans thought the so-called Moret Law did not go far enough and asked for more.[263] Moreover, enslaved men and especially women proved themselves eager to use the law to seek freedom through the courts for themselves and their family and kin.[264]

Taking advantage of the conflict in the Spanish Antilles, Puerto Rican captives escaped en masse, and Spanish abolitionists concentrated their attacks on the island's labor system. In 1873, Spain ended slavery in Puerto Rico but stipulated that freedpeople would work for their former masters for an

261 J. M. da Silva Paranhos, speech at the Chamber of Deputies, July 14, 1871, in *Annaes do Parlamento Brazileiro. Câmara dos Srs. Deputados, Terceiro Anno da Décima Quarta Legislatura, Sessão de 1871,* (Rio de Janeiro: Typographia Imperial e Constitucional de J. Villeneuve, 1871), vol. III, 146.

262 A. Ferrer, "Armed Slaves and Anticolonial Insurgency in Late Nineteenth-Century Cuba," 310.

263 C. Schmidt-Nowara, *Slavery, Freedom, and Abolition in Latin America and the Atlantic World* (Albuquerque: University of New Mexico Press, 2011), 148.

264 C. Cowling, *Conceiving Freedom: Women of Color, Gender, and the Abolition of Slavery in Havana and Rio de Janeiro* (Chapel Hill: University of North Carolina Press, 2013), 61.

additional three years as compensation. Five years later, the Ten Years' War came to an end in Cuba. During the peace negotiations, Spanish commanders recognized that enslaved men who had joined the rebels in eastern Cuba were now free. Still, slavery remained entrenched in the sugar-producing western and central regions of the island.[265]

In 1880, pressured by the abolitionists' success in Puerto Rico and afraid of new rebellions in Cuba, Spain passed a law that made slaveholders into *patronos* and enslaved workers into *patrocinados*. Although labor relations changed little, the law established oversight *juntas*, gave *patrocinados* over the age of eighteen the right to receive "stipends" for their labor, protected enslaved families from separation, facilitated self-purchase, and – most significantly – established 1888 as the definitive date for total emancipation. But the abolitionists kept asking for more, and those workers that were still unfree took action. Some 11 percent of the *patrocinados* bought their own freedom, and about 7 percent were able to prove to the *juntas* that their *patronos* had disregarded the law and so attained their freedom. Two years before the date it had set, the government in Madrid yielded to the pressure and abolished slavery in Cuba.[266]

Brazil also faced great popular unrest around the question of slavery after the free womb law passed. Enslaved persons could now sue their masters for failure of registering them in a nationwide inventory or refusing to accept the registered value. The historian Celso Thomas Castilho observes that as the legal battles multiplied, they fundamentally undermined the authority of the slaveholders: "These lawsuits publicly exposed their owner's illegal maneuvers to evade the law; they injured their honor before their peers, and damaged their credibility before other slaves."[267] Enslaved persons' public actions made it into newspapers, inspired manumission ceremonies, strengthened abolitionist associations, and encouraged even more freedom suits.

In response to the general agitation, in 1884, Prime Minister Manoel Pinto de Souza Dantas of the Liberal Party presented a bill that would, among other things, free all captives who reached the age of sixty without compensation for their masters, fix slave prices, and expand the manumission fund. Accused of pandering to agitators, Dantas fell. The pragmatic Liberal Senator José Antonio Saraiva took his place to revise the bill. The new project made enslaved persons who reached the age of sixty work three more years to

265 Schmidt-Nowara, *Slavery, Freedom, and Abolition*, 149.
266 Schmidt-Nowara, *Slavery, Freedom, and Abolition*, 149–50.
267 C. T. Castilho, *Slave Emancipation and Transformations in Brazilian Political Citizenship* (Pittsburgh: University of Pittsburgh Press, 2016), 57.

compensate their masters and set slave prices above market values. Seeking to re-establish order, the revised bill determined that those who aided fugitives would be subjected to imprisonment.[268] The infamous "Law of the Sexagenarians," passed in September 1885, led the abolitionists to radicalize even further and adopt extra-legal means. Enslaved men and women took their destinies into their own hands. Violent clashes took place on plantations and in towns large and small. On May 13, 1888, Princess Isabel signed the so-called "Golden Law." Slavery was dead in the Americas.[269]

The struggle against slavery had been more than a fight against human bondage: it had also been a struggle for land, community, and the right to keep the fruits of one's labor. Like in Jamaica, where freedpeople sought to turn sugar plantations into food-producing farms controlled by the workers themselves, and in the United States, where they asked for "forty acres and a mule" during the Reconstruction period that followed the Civil War, freedpeople in Latin America envisioned a post-emancipation order in which they would enjoy community autonomy and personal safety. Yet as soon as they achieved formal freedom, the formerly enslaved suffered from the heavy hand of a state that sought to make them into a cheap source of labor. The black engineer and abolitionist André Rebouças related some dramatic events that took place in southeastern Brazil one year after emancipation. In Boituva, a town near the coffee-producing region of São Paulo, freedpeople settled on an abandoned farm, where they built shelter and began producing food for their subsistence. Coffee planters complained, and the police immediately attacked with utmost brutality. Two freedmen died and three were badly injured. The policemen burned their shacks, destroyed provisions, and evicted the survivors. Five days later, the police killed eight freedpeople twenty miles from there, in the town Tatuí. Rebouças was outraged: "It has been reported that on arrival they killed a couple of blacks and shot many others who, later, were found dead. Among the victims, there are two children who were burned inside a barn!!!"[270]

As slavery unraveled, Latin American elites – with varying degrees of success – sought to attract European immigrants. The newcomers not only expanded the workforce in rural areas but also were manipulated by Latin American governments seeking to whiten the population. Influenced by pseudo-scientific ideas about human races, Latin American political elites

268 R. E. Conrad, *The Destruction of Brazilian Slavery, 1850–1888* (Berkeley: University of California Press, 1972).
269 Alonso, *Last Abolition*.
270 A. Pinto Rebouças, "Imposto Territorial," *Revista de Engenharia* (1889).

were invested in diluting African blood. In addition to subjecting freedpeople and their descendants to eugenicist projects, Latin American elites would use racial ideas to deny them equality before the law. Even when legislation pretended to be colorblind, all over the hemisphere freedpeople and their descendants came to be treated as second-class citizens.

The Free Poor

In the aftermath of independence, Latin America was home to an extremely heterogeneous population. In some countries, indigenous peoples made up half of the population. In others, they had been decimated. In some, slavery had been abolished. In others, enslaved men and women amounted to one third of the population. But, in spite of these differences, all countries shared one feature: They contained an ever-growing number of free persons of various and mixed descents. And, in most parts, the vast majority of this free population was destitute.

For free men and women in Latin America, the post-independence reality promised a better future as national elites championed the establishment of constitutional governments supposed to rule over a body of citizens equal before the law. The process of state-building, however, left many promises and expectations unfulfilled. Not only was the rhetoric of equality and rights meant only for those considered capable of integrating the body politic – men of means, education, and preferably of European descent – but, as the majority painstakingly discovered, that same rhetoric eventually jeopardized their autonomy and livelihood.

As countries strove to ascertain control over boundaries and territories, and competing factions battled each other, the burdens of war fell harshly on the free poor. As governments and elites tried to make the most of expanding international markets, men and women were not only ousted from their lands but also forced into working for others under the most abhorrent conditions. Discourses of equality and elites' interests in profiting from a world market economy went hand in hand, and consequently, artisans and the urban free poor confronted a new reality in which former corporate privileges and many colonial policies that had guaranteed a moral economy no longer had a place. All over Latin America, the free poor tried to resist such changes, sometimes taking up arms. But even while they fiercely resisted change, governments fought back with even harsher laws in a process that eventually led to the criminalization of poverty.

Soldiers, Militiamen, and Guardsmen

In most of the Spanish American colonies, independence was achieved only after long wars, as is shown in Chapter 4. And even in Brazil, political

separation came alongside violence. In most countries, independence did not put an end to armed conflicts – quite the contrary. For decades, men kept on fighting as different groups tried to seize control of the newly established states. Territorial disputes, not only among Latin American countries, but also against invading European or Anglo-American armies, also called for armed mobilization. And fighting wars – internal or external – meant gathering troops, more often than not engaging thousands of men. Such long-lasting belligerence had unforeseen consequences, not only for governments in the making but especially for those called to bear arms.

Professional armies recruited thousands of men, but citizen's guards (usually called civic or national guards or citizen's militias) also absorbed vast numbers of recruits. In Latin America, this type of militia only became a reality in the nineteenth century, but in parts of continental Europe – above all France – they dated back to the last decade of the previous century, when they were praised as the most appropriate force for free and equal men. In the 1780s, the Marquis of Condorcet did not mince his words with regard to standing armies. Such regular troops, he claimed, were incompatible with a "popular constitution." Praising the experience of the United States, he advocated that the citizens themselves should be the ones to bear arms, not professional soldiers. On the one hand, standing armies presented a threat to the sovereignty of the people and, on the other, having the citizens themselves fight for their homeland had the advantage of both "elevating the people's souls" and fostering their fondness for their country.[271] Condorcet did not live long enough to bear witness to such an experiment in his homeland. As for the United States, he was either unaware of or unwilling to acknowledge George Washington's troubles leading the so-called Continental Army.

In nineteenth-century Latin America, as previously in the United States and Revolutionary France, citizen's militias were supposed to include those with citizenship rights or, better, those who had the right to vote. All other men who did not fit the criteria were potential recruits for the professional army. Most were press-ganged and forced to serve for long periods of time. While these soldiers could and would be sent to different parts of a country, sometimes hundreds of miles away from their families, militiamen tended to be restricted to a relatively limited geographical area. Supposedly, this

271 Jean-Antoine-Nicolas de Condorcet, *Lettres d'un bourgeois de New-Haven à un citoyen de Virginie* (Paris: A. Condorcet O'Connor et M. F. Arago, 1847 [1787]), 72; Jean-Antoine-Nicolas de Condorcet, *Essai sur la Constitution et les fonctions des Assemblées provinciales, où l'on trouve un Plan pour la Constitution & l'Administration de la France* (1788), vol. I, 249–50.

restriction should make it possible for them to maintain their day-to-day activities. Furthermore, professional soldiers were subjected to corporal punishments, while militiamen should not be subject to such abuses. Chains of command also differed, as soldiers had to obey a clear hierarchical military structure imposed from the top, but militias generally could elect their officers – at least the lower ranks. Finally, whereas political rights were a necessary condition for becoming a militiaman, soldiers (unless granted a patent) were usually not allowed to vote.[272]

However, although in theory – and depending on place and time – these differences were clear-cut, in practice they tended to be blurred, and this was not a Latin American exception. According to the historian Hilda Sabato, "under special circumstances" militias could be "moved to more distant locations and assume extra duties that were not too different from those of the standing army."[273] Usually, that happened whenever the numbers in the professional armies were too low, or when governments were fighting a larger enemy contingent. But shortage of army personnel also led to the unlawful conscription of men not usually obligated to serve in the army, be it because they fulfilled the criteria for participating in the militia or because they were exempted due to their responsibility as upstanding breadwinners.

Some (often cruel) realities were shared by all who were called to serve. First, the threat of death, maiming, or permanent disability was always present. As stressed by the historian Juan-Carlos Garavaglia, from a handful of deceased in the so-called Battle of Ochomogo, in Costa Rica, to the hundreds of thousands who died during the Paraguayan War, "Hispanic-American wars left a trail of corpses."[274] However, serving presented yet other challenges beyond the bloody battles. Soldiers (and militiamen when fighting alongside the army) were supposed to receive pay for their services, even if a meager one. But financial constraints on governments, a widespread occurrence after the wars of independence and subsequent internal and external battles, led to continuous and long delays in payment. Furthermore, uniforms, guns, and ammunition were more often than not provided irregularly. As Chilean guardsmen in 1850 complained, this paucity of resources left them between a rock and a hard place. Failing to show up properly dressed was cause for punishment, but paying for their own uniforms could seriously harm their ability

272 H. Sabato, *Republics of the New World. The Revolutionary Political Experiment in 19th–Century Latin America* (Princeton & Oxford: Princeton University Press 2018), 92–97.

273 H. Sabato, *Republics of the New World*, 103.

274 J. C. Garavaglia, "Prólogo," in J. C. Garavaglia, J. Pro Ruiz, and E. Zimmermann (eds.), *Las Fuerzas de la Guerra en la construcción del Estado. América Latina, siglo XIX* (Rosário: Prósitoria Ediciones, 2012), 11.

to provide for their families.[275] To make things worse, even food provisions fell short. Recognizing this chaotic situation, a Mexican law from 1838 stipulated that whenever a soldier deserted because he had not been provided payment, barracks, food, or clothes, he should receive only mild punishment.[276]

Families were also deeply impacted by military service. Although breadwinners were not supposed to be drafted, many were. When that happened, petitions flooded the authorities, be they in charge of local, provincial, or central posts. Poor and often illiterate wives, mothers, and children – with the help of someone able to write – begged for their loved ones to be released, arguing that otherwise starvation and even death would be the family's fate. As families faced hardship, and authorities were usually deaf to their cries, many women and children chose to follow men to the battlefield. According to Garavaglia, some regiments in the pampa frontier in the mid-nineteenth century had as many soldiers as women and children.[277] In 1871, Alfredo d'Escragnolle Taunay, a Brazilian engineer who had served in the Paraguayan War, published an account of the 1867 Battle of Laguna in which he registered the impressive presence of soldiers' wives and widows. They marched behind the troops, on foot, carrying babies and toddlers, all marked by the "stigma of suffering and ultimate misery."[278] And although many states provided pensions, they were usually granted only to officers' families, despite the fact that foot soldiers and unpatented militiamen made up the vast majority of casualties.

Desertion plagued armed forces all over the western world. This was a lesson that Washington had already learned during the War of Independence, especially regarding the militias. It was a lesson that another Anglo-American general – Andrew Jackson – had to learn over and over again some decades later. French authorities were also plagued by this problem, beginning in the seventeenth century and extending into the next two centuries.[279] Latin America was no exception. The historian Claudia Ceja Andrade, writing

275 J. A. Wood, "Building a Society of Equals: the Popular Republican Movement in Santiago de Chile, 1818–1851," Ph.D. thesis, University of North Carolina (2000), 346.

276 A. Cacho Torres, "Entre la utilidad y la coerción. Los desertores: una compleja realidad del México independiente (1820–1842)," *Estudios de Historia Moderna y Contemporanea de México* 45 (2013), 48.

277 Garavaglia, "Prologo," 10.

278 A. d'Escragnolle Taunay, *A Retirada de Laguna*, trans. B. T. Ramiz Galvão, 3rd ed. (Brasília: Edições do Senado Federal, 2011 [1871]), vol. 149, 115.

279 C. E. Skeen, *Citizen Soldiers in the War of 1812* (Lexington: University Press of Kentucky, 1999); A. Forrest, *Conscripts and Deserters: The Army and French Society During the Revolution and Empire* (New York and Oxford: Oxford University Press, 1989); T. Hippler, *Citizens, Soldiers, and National Armies: Military Service in France and Germany, 1789–1830* (London and New York: Routledge, 2006).

about Mexico City from 1824 to 1859, points out that desertion was a pervasive reality for both the army and the militias. If most simply ran away, not once or twice but many times over the years, others, faced with future perils and the certainty of condemning their families to hopeless poverty, resorted to extreme measures. In order to be considered unfit for service – and being unable to present a doctor's affidavit stating a previous, debilitating condition (as those with better means were able to produce) – some of the poor chose to deliberately maim themselves. In 1842, a recruit used a machete to cut off four fingers on his right hand, an injury that led to his death after twenty days. Forty years later, a medical doctor registered that, among conscripted men, one common practice was to put a hand over a rifle and pull the trigger.[280]

As the historian Marisa Davio remarks in an article about Tucuman in the first half of the nineteenth century, the recurring legislation on desertion – common not only in Latin America but also in North America and Europe – must be understood as definitive proof of men's resistance to serving, whether in the army, militias, or guards. Depending on time and place, such regulations prescribed an array of different punishments, from corporal ones – such as lashes or even death – to property expropriation, further menacing the subsistence of one's family.[281]

Resistance to conscription sometimes led to full-fledged rebellion. On May 13, 1846, Juan Galán, commander of the "volunteers" of Tamaulipeco, Mexico, wrote a letter to Cirineo Monjarás of Sierra Gorda. Galán warned Monjarás that the Mexican government was trying to rally troops to fight the Texans. Among his reasons to advocate for general desertion, he referred to the slaughtering of Mexican troops in battle, specifically mentioning how officers behaved in such occasions: "As we bleed they [high-ranking officers] will be sleeping on their mattresses, and while they drink chocolate we'll be gunned down, dying in order for them to live."[282] The rebels of Sierra Gorda fought the government for over three years. Two decades later, in Argentina, when the national government declared war on Paraguay and ordered the provinces to recruit men to be sent to battle, an obscure peon of La Rioja,

280 C. Ceja Andrade, "Amanecer Paisano y dormir soldado … Resistencias frente al reclutamiento y el servicio militar em la ciudad de México (1824–1858)," *Estudios de Historia Moderna e Contemporánea de México* 55 (2018), 57–58.

281 M. Davio, "Vagos, traidores o desmotivados? Deserciones militares de sectores populares em Tucumán durante la primeira metade del siglo XIX," *Dimensión Antropológica*, 54 (2012), 29–49.

282 U. Ramírez Casas, "'Mientras los generales duermen.' Desobediencia militar y rebelión en Sierra Gorda durante el conflicto bélico entre México y los Estados Unidos, 1846–1849," *Estudios de Historia Moderna e Contemporánea de México* 60 (2020), 23.

in the words of the historian Ariel de La Fuente, "attacked the contingent destined for the Paraguayan front, liberated the draftees, and gathered a *montonera* [a paramilitary group] of around 500 gauchos."[283] Although not necessarily always involving that many people, attacks on those responsible for conscription were quite common in Latin America. Time and again, for most of the nineteenth century, local Brazilian authorities justified their inability to send recruits to war with the fact that local men – usually helped by family members and acquaintances – escaped local prisons or were forcefully taken from the custody of the armed forces.

The constant need for recruits – the "blood tribute" or "blood contingent," as it has been described in different countries on both sides of the Atlantic – not only threatened the daily lives of those who could be drafted but also the general economy. As early as 1824, the Buenos Aires press began publishing letters complaining of the disastrous impacts of a generalized state of war. One *labrador* (farmer) held the government responsible for the fact that crop yields were shrinking year after year. As more and more armed men were needed, and the best time for recruiters to find them was during the workday, many realized that regular occupations posed a threat to their well-being. Whenever workers heard rumors about conscription, they fled, hiding for days or weeks.[284] Such a practice extended across national borders and over decades. Yet brutal forms of recruitment persisted as wealthier men – planters, farmers, and cattle ranchers – had much to benefit from this ever-recurring menace to the poor.

Land and Labor

Amidst major social and political transformations, independence brought direct access to world markets for the young Latin American countries. The newly achieved commercial freedom impacted all new polities, although the timing and profitability differed from one region to another. Those less troubled by continuous warfare benefited earlier from the northern hemisphere's hunger for Latin American commodities. Yet even countries that faced, for decades, the negative impacts of war – which halted or severely diminished production, made investments more difficult, and often blocked access to fertile land – eventually found a place in the world market economy.

283 A. de la Fuente, *Children of Facundo: Caudillo and Gaucho Insurgency during the Argentine State-Formation Process (La Rioja, 1853–1870)* (Durham & London: Duke University Press, 2000), 12.

284 J. C. Garavaglia, "Ejército y milícia: los campesinos bonaerenses y el peso de las exigencias militares, 1810–1860," *Anuário IEHS* 18 (2003), 170.

As far as access to land was concerned, elite Latin Americans came up with effective strategies, from laws devised to abolish corporate communal property to outright expulsion (or even extermination) of indigenous peoples or the expulsion of squatters unable to produce proof of their landholdings. Although privatization (*desamortización*) of communal indigenous property had different impacts from region to region (as mentioned earlier), for the free poor in general privatization of Church or municipal property along with policies devised to sell public lands – the *baldios*, as they were called in Spanish America, or *terras devolutas* in Brazil – had dreadful consequences.

The privatization of Church property impacted different groups in different ways. First, as many poor tenants lived and labored on lands owned by secular clergy and, especially, regular orders, the process of privatization forced vast numbers of people out of their homes and from the land they tilled. Those who decided (or were forced) to stay faced harsher conditions imposed by the new, profit-driven proprietors. Despite the rhetoric of state responsibility for the welfare of its citizens, after these privatizations, the poor had to go without the many services and assistance once provided by the Church, such as hospitals, charitable facilities, and even schools. For a number of reasons, from lack of funds to lack of interest, governments failed to provide these. No wonder, then, that time and again the free poor in Latin America sided with the Church against the various government modernization efforts.[285]

The privatization of municipal communal property, on the other hand, not only impacted men and women who depended on this property to make a living, but also those who envisioned new municipalities as a means to be free from private landowners' control over their lives. According to the historian Maria Fernanda Barcos, in the province of Buenos Aires, legislation aimed at fostering the privatization of *ejidos* (municipal property) ultimately led many older occupants, mostly poor, to lose their right over the land.[286] In Mexico, the 1856 Lerdo Law and the privatization measures of the 1857 Constitution also took their toll on those who were not yet *vecinos* of a municipality (see Sections 3.3 and 5.1).[287] The historian Juan Carlos Sanchez Montiel points out

285 R. H. Jackson (ed.), *Liberals, the Church and Indian Peasants. Corporate Lands and the Challenge of Reform in Nineteenth-Century Spanish America* (Albuquerque: University of New Mexico, 1997).

286 M. F. Barcos, "Los ejidos de los pueblos a la luz del proceso de construcción del Estado, Guardia de Luján (Mercedes), 1810–1870," in J. C. Garavaglia and P. Gateau (eds.), *Mensurar la tierra, controlar el territorio. América Latina, siglos XVIII–XIX* (Rosario: Prohistoria Ediciones, 2011).

287 On *vecino* and *vecinidad*, T. Herzog, *Defining Nations: Immigrants and Citizens in Early Modern Spain and Spanish America* (New Haven: Yale University Press, 2003).

that many poor families who lived in *pueblos de hacienda* (small communities established on private lands) expected to be granted municipal status in order to escape the demands of private patrons while being guaranteed access to corporate lands that they could use as they saw fit (see Chapter 4). Privatization policies, though, meant that *pueblos de hacienda* converted into municipalities could no longer rely on corporate lands either to finance their new jurisdictional duties or provide for the livelihood of their inhabitants. The poor, unable to make ends meet, were forced to return to the status quo, despite their constant pleas to government authorities to be granted *ejidos*. In the end, their dependence on the landowners only got worse.[288]

In Brazil, prior to independence, most forests were deemed crown property. This custom remained in place after 1822. Since these woods could only be cut down by governmental order, usually to fulfill the demands of the naval industry, sugar planters, and other private entrepreneurs were kept at bay. The seventeenth-century introduction of Cayenne cane, whose bagasse could be used as fuel, mitigated the planters' problem. The free poor, on the other hand, relied heavily on crown forests. They not only foraged for food and fuel but also cleared small patches to grow manioc and other foodstuffs without attracting the authorities' prying eyes. But by the 1830s, when the liberals gained power and were able to further policies that weakened crown and corporate property, crown forests lost government protection and (as any other *terra devoluta*) could now be privatized. Forests located in land coveted for sugarcane expansion were the first to go. From 1832 to 1835, however, a major popular rebellion – which gathered together the free poor, indigenous peoples, and enslaved persons – shook the provinces of Alagoas and Pernambuco. One major grievance on the rebels' list was the slate of new liberal policies interfering with protected forests.[289]

Decades earlier, English authorities had faced similar widespread protests against policies regulating rights to the commons. Rural and urban folk fought for their customary rights to water, passages, grazing, gleaning, hunting small game, wood-gathering, and so on. Such rights, which had already been questioned in the previous century, came to the fore forcefully in the seventeenth century, both as targets of parliamentary enclosure acts and of new ideas regarding ownership. According to the influential historian E. P. Thompson,

288 J. C. Sanchez Montiel, "De poblados de hacienda a municípios en el Altiplano de San Luis Potosí," *Estudios de Historia Moderna e Contemporánea de México* 31 (2006), 57–81.

289 M. J. Maciel de Carvalho, "Um exército de índios, quilombolas e senhores de engenho contra os 'jacubinos': a Cabanada, 1832–1835," in M. Duarte Dantas (ed.), *Revoltas, motins, revoluções. Homens livres pobres e libertos no Brasil do século XIX*, 2nd ed. (São Paulo: Editora Alameda, 2018), 193.

from the time of Edward Coke to that of William Blackstone, England experienced "a hardening and concretion of the notion of property in land, and a reification of usages into properties which could be rented, sold or willed." In time such process would spread to other parts of the British Empire and beyond, much to the joy of the likes of Adam Smith, for whom "property was either 'perfect' and absolute or it was meaningless."[290] In order for perfect property to be ascertained, communal or corporate ownership had to cease to exist. In France, common rights were dealt a huge blow shortly after the Revolution; however, its death sentence came a few years later, when the 1804 Civil Code was approved (see Section 5.2).

But elites needed more than just land to profit from the international market. Without labor, land meant nothing. As stated earlier, wars – external and internal – had deep impacts on the labor market, as many were forced to abandon their daily activities in order to serve, and not only the free poor but also enslaved men were conscripted. In parts of Latin America, the process of independence disrupted slavery permanently, eventually leading to its demise. Other polities, either independent states or colonies, were able to stall antislavery forces. But even in these countries the end of the transatlantic slave trade and, afterward, policies such as free womb laws posed a threat to planters' ability to maintain and expand production. Whether they depended on an enslaved workforce or not, most Latin America elites approached labor shortage with a similar tool: the adoption of policies devised to criminalize poverty.

In 1878, sugar planters from five Brazilian provinces gathered in Recife to discuss and demand new policies to foster economic development. Besides the lack of credit, labor was their main concern. According to one of these planters, legislation reform was paramount as "existing laws only guarantee vagabondage and laziness under the pompous name of citizen's liberties." Those who attended or sent filled-out surveys agreed that a large portion of the country population was made of idle people whose habits of "indolence, dissipation, immorality, and anarchy" not only aggravated economic conditions but also threatened public safety, as they drove the masses to a life of crime. To face such a menace – especially troublesome due to the rising prices of enslaved workers – the government should criminalize any behavior that remotely resembled idleness. In other words, free people's resistance to work long hours for meager pay, if any pay at all, should be punished by the state. The planters gathered in Recife reminisced of years gone by, when war forced

290 E. P. Thompson, "Custom, Law and Common Right," in E. P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (New York: The New Press, 1993), 122 and 143.

the free poor to work in the fields in order to escape conscription, and migrants starving from year-long droughts accepted jobs in exchange for food only.[291]

Brazilian planters would have been thrilled at the prospect of adopting regulations like the ones that had been enforced in Argentina two decades earlier. In 1855, in Rosario, a new rural regulation determined that men who had a "known profession, trade, or occupation" should carry an official paper proving such employment, being obligated to present it upon request to those responsible for safeguarding public order. In addition to the police and other state authorities, Rosario landowners had the right to oversee the enforcement of this regulation. People who could not provide such papers could be forced to serve in the National Guard or toil in public works. Whereas some questioned the lawfulness of such measures (as they might infringe individual rights), most considered that "miserable families who have absolutely nothing, who do not work, do not farm, and do not even bother to keep straw on the roofs of theirs shacks," who surely abused the properties of others, had either to submit to work discipline, leave the province, or face punishment. Constitutions and rights should not get in the way of "improving the primitive conditions of these forgotten people, providing them with work, prosperity, education, well-being, that is, happiness…"[292]

Such processes of criminalization of poverty were also effective in the Spanish colony of Puerto Rico. In 1849, Governor Juan de la Pazuela passed a law regarding *jornaleros* (wage laborers). Henceforth all landless people had to carry a *libreta* (a paper booklet) containing information about their place of work along with any observations their employers deemed important. Authorities would review the *libretas*, searching for inconsistencies regarding current employment and any negative comments from employers. And the law had further implications. It also forbade the continuance of labor by *agregados* or *moradores* (tenants and dwellers). From then on, all people were forced to be either wage laborers or renters. Those unable to guarantee one or the other type of employment had to move to cities or face prison sentences. Most of the former tenants chose to become renters in order to avoid wage labor and maintain a somewhat independent lifestyle. But soon enough they found out that, despite some similarities with tenancy, becoming a renter

291 M. Duarte Dantas and V. Chieregati Costa, "O 'pomposo nome de liberdade do cidadão': tentativas de arregimentação e coerção da mão-de-obra livre no Império do Brasil," *Estudos Avançados* 87 (2016), 29–48.

292 M. Bonaudo, E. Sonzogni, and A. Klatt, "To Populate and to Discipline: Labor Market Construction in the Province of Santa Fe, Argentina, 1850–1890," *Latin American Perspectives* 26(1) (1999), 65–91.

put them in harm's way. Besides preventing renters from working on other farms, the new contracts had provisions compelling them to be employed on "land improvement, fence construction, and labor at harvest time" for their landlords. Falling short of one's contract obligations – or trying to evade them – entailed a set of punishments, from fines to imprisonment. No wonder such regulations resulted in an armed rebellion in 1868.[293]

Latin American governments and landed elites were, for the most part, following a trend already in place in many European countries. Back in 1797, Jeremy Bentham had written an essay proposing radical changes to England's Poor Laws. Basically, he championed the establishment of "industry houses" where "all persons, able-bodied or otherwise, having neither visible or assignable property, nor honest and sufficient means of livelihood" were to be forcefully committed.[294] Two years after his death, Bentham's ideas came to life as an 1834 law provided for the creation of workhouses in every parish of the country: Jail-like establishments where workmates – either men, women, or children – lived under extremely harsh conditions (as Charles Dickens famously portrayed in *Oliver Twist*) designed to curb their supposed laziness and encourage them to accept whatever job they could find. Similarly, in France of the 1840s, the unemployed poor were considered dangerous enemies of society and therefore had to be dealt with accordingly.[295]

By the end of the nineteenth century, most Latin American countries had passed laws criminalizing poverty. At the same time, responding to expanding international markets and nurturing hopes of peopling the new countries with men and women of "better habits and cultural backgrounds," landowners and government authorities turned to foreign immigrants. Reality, though, did not always live up to expectations for either those who arrived or the ones in need of laborers. Many immigrants who dared resist the abuse from Latin American elites, were subjected to similar criminalization as the local poor. Uncountable immigrants either organized to contest labor conditions, eventually setting up rebellions, or fled rural estates to pursue a better future in urban areas. But, just like rural inhabitants paid a dear price in the

293 F. Picó, *Historia general de Puerto Rico*, 4th ed. (San Juan: Ediciones Huracán, 2008), 190–91; L. Bergard, "Coffee and Rural Proletarization in Puerto Rico, 1840–1898," *Journal of Latin American Studies* 15(1) (1983), 83–100; L. Bergard, "Toward Puerto Rico's Grito de Lares: Coffee, Social Stratification, and Class Conflicts, 1828–1868," *The Hispanic American Historical Review* 60(4) (1980), 617–42.

294 J. Bentham, "Outline of a Work Entitled Pauper Management Improved," in J. Bowring (ed.), *The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring* (Edinburgh: William Tait, 1843), vol. VIII, 370.

295 H.-A. Frégier, *Des classes dangereuses de la population dans les grandes villes, et des moyens de les rendre meilleures* (Paris: Chez J. B. Baillière, 1840).

process of state formation and commercial expansion, the urban poor were not much better off.

Deregulation and the Urban Poor

Like in Europe, in Latin America, the battle for equal rights meant dissolving corporate rights typical of *Ancien régime* societies, such as the privileges granted to artisan guilds and similar *corporae*. In England guilds had already lost importance by the eighteenth century; across the channel in France, where they had been abolished in 1791, Restoration provided a brief comeback for the guilds in the 1830s. In other parts of Europe, for example, in some Italian and German states, such corporate bodies were able to resist a while longer. Nonetheless, considering the continent as a whole, the nineteenth century came to be the era of their demise.[296] Even if such bodies were never as widespread and strong in the New World as they had been in the Old World, they undeniably played an important role in many Latin American cities. And in both Spanish and Portuguese America corporate privileges had been under scrutiny since the Bourbonic and Pombaline reforms.

Workers affiliated with guilds and similar bodies came to face major challenges in the aftermath of the wars for Independence. Reformers attacked the guilds' control over pricing as an impediment to the development of urban economies in Latin America. They also demonized the labor regulations imposed by the guilds. According to new liberal creeds, such privileged bodies should perish so that the doctrine of equal rights (incompatible with corporate privileges) could thrive, and local economies could more easily integrate a free world market. If a country were to benefit from growing international connections, they preached, its manufactured goods and food staples should be produced and exchanged according to market constraints – and not artisans' whims.

In colonial Latin America (as in some European countries), artisans had traditionally organized themselves in guilds or other institutions that played a similar role. In Brazil, for instance, artisans' brotherhoods (*irmandades* as they were called in Portuguese, or *cofradias* in Spanish) enjoyed many privileges granted to lay artisans' corporations.[297] In guilds, labor was usually organized according to craft. There were corporations of carpenters, masons, blacksmiths, goldsmiths, tailors, cobblers, millers, and bakers, among many others.

296 I. Katznelson and A. Zolberg, *Working-Class Formation: Nineteenth-Century Patterns in Western Europe and the United States* (Princeton: Princeton University Press, 1986); E. Hobsbawm, *The Age of Revolution, 1789–1848* (New York: Vintage Books, 1996).

297 Regarding confraternities in colonial Latin America, see Section 3.2.

A young man interested in working on a specific craft had to become apprentice in a master's workshop. If accepted, the apprentice would work in exchange for food, shelter, and training. After a number of years – depending on the master's evaluation – the apprentice would undergo an examination. If he passed, he would become an officer and be entitled to payment, even though he would continue to work in someone else's workshop. Later on, the officer could take another test to become a master. Only then he would be authorized to establish a workshop for himself and have others working for him. Municipal regulations guaranteed that no one could work as an artisan unless he was endorsed by such corporations. Hence, the guilds controlled learning and training in their crafts while tightly managing the labor market. Furthermore, they were entitled to verify the quality of the manufactured products.

Even before Latin American colonies became independent nations, some cities had been adopting legislation to ban guilds or similar bodies. Such was the case of Buenos Aires, where the municipality outlawed artisans' corporations in 1799. In other Spanish American cities, guilds faced challenges as provisions from the Cádiz constitution were adopted. Elsewhere they were dissolved by the early national constitutions, as occurred in Brazil in 1824. In other places, though, as was the case in Peru, guilds were not abolished until the second half of the nineteenth century.[298] In Mexico, although the first law suppressing guilds was passed in 1814, they remained active for decades thereafter. In 1834, the *Tribunal de Vagos* established that "masters are responsible for their apprentices' and officers' behavior, as they work in their shops." In 1843, Mexican authorities approved the establishment of the *Junta de Fomento de Artesanos*, determining that guilds' funds would now be transferred to this newly created institution. According to the historian Sonia Pérez Toledo, such regulations amounted to official recognition that such corporate bodies not only still existed but also continued to exert control over the artisans' labor and promote their interests.[299]

The artisans' ability to resist the laws that national elites devised to weaken or abolish their corporate privileges varied greatly. First, resistance was stronger

298 G. Di Meglio, T. Guzman, and M. Katz, "Artesanos hispano-americanos del siglo XIX: identidades, organizaciones y acción política," *Almanack* 23 (2019), 288–89; R. Bezerra de Freitas Barbosa, "O processo de extinção das corporações de oficio no Brasil: organização e resistência de um grupo de trabalhadores do recife (1787–1824)," in M. Duarte Dantas (ed.), *Da corte ao confronto. Capítulos de história do Brasil oitocentista* (Belo Horizonte: Editora Fino Traço, 2020), 89; I. García-Bryce Weinstein, *República con ciudadanos: los artesanos de Lima, 1821–1879* (Lima: IEP, 2008), 109.

299 S. Pérez Toledo, *Los hijos del trabajo. Los artesanos de la ciudad de México, 1780–1853* (Mexico City: El Colégio de México, Universidad Autónoma Metropolitana Iztapalapa, 1996), 150 and 198.

wherever artisans lived in large numbers. Since guilds and brotherhoods usually organized themselves by craft, some were more capable to resist than others. Second, economic constraints played a major role. In Peru, for instance, the country's tardiness in fully entering the world market economy – this only happened once guano became a major export commodity – largely accounts for the endurance of the guilds. Finally, political circumstances were usually a significant factor. According to the historian James Wood, the strength of a "popular republican movement" in Santiago, Chile, in the decades following independence, turned artisans into strong political players: They were entitled to vote and competing elite factions turned to them for support.[300] Artisans in Latin America were able to hold on to some of their privileges when facing challenges such as declining numbers or local price fluctuations. But when they encountered major disruptions – such as weakening political representation, the inexorable forces of the world market, and elite indifference or distrust – they either took up arms or tried to reinvent themselves, or both.

Artisans were behind many of the so-called protectionist rebellions occurring in urban areas of Latin America. Depending on each individual policy adopted by various governments, different craftsmen took up arms. Most revolted against the lowering or lifting of tariffs on imported goods that competed with the products they manufactured, claiming that cheap imports would drive them into poverty. Others demanded that raw materials be imported at the lowest cost possible in order to keep the price of their manufactured goods competitive. Yet others, facing inflation and depressed production due to wars and other contingencies, demanded food imports be free of taxes. Regardless of the reason, and despite political interests in promoting such movements to favor certain factions, armed protest meant a desperate effort on the part of artisans to maintain their livelihoods. And such rebellions shook many Latin American countries for decades.

Some craftsmen chose more peaceful strategies to counter elite distrust, liberal reforms, and everyday challenges. Creating mutual aid societies was one of them. Guilds and brotherhoods, in addition to all their activities mentioned earlier, collected funds to provide for those who fell ill, pay for funerals, and help widows and orphans when the head of the household was gone. As the nineteenth century progressed, however, there was not much else they could

300 Di Meglio, Guzman, and Katz, "Artesanos hispano-americanos del siglo XIX"; P. Gootenberg, "The Social Origins of Protectionism and Free Trade in Nineteenth-Century Lima," *Journal of Latin American Studies* 14(2) (1982), 329–58; P. Gootenberg, *Imagining Development: Economic Ideas in Peru's "Fictitious Prosperity" of Guano, 1840–1880* (Berkeley, Los Angeles, and Oxford: University of California Press, 1993); J. A. Wood, "Building a Society of Equals."

do. In contrast to colonial-era guilds and brotherhoods, they lost their ability to exert control over workforce training, labor regulations, and the quality and price of manufactured goods.

Not long after the Brazilian constitution of 1824 strictly forbade guilds and similar corporations, a group of carpenters, masons, and coopers created a mutual aid society in Recife. Gathering most of those who belonged to their artisans' brotherhood, the new society provided for their members in need and managed to ensure government support for night classes. For years, masters offered lessons for those interested in learning one of the crafts. But despite the services provided, they no longer had any say on who could or could not perform the different trades in Recife. And this loss had dire consequences. Barely any member of the society was now able to enter into contracts with the city. As earlier, the masters valued their workmanship, employing men trained in their craft and using quality materials. Recife authorities, however, were mainly interested in cutting costs. And manufacturers with money and no regard to the trade, who cut costs both in supplies and labor, employing unskilled hands, offered better prices.[301]

If deregulation of labor affected artisans' ability to earn a living, it also had other effects, which were perhaps less visible but surely as critical. Although since colonial times manual labor had been devalued as unbecoming for those with means in Latin America, craftsmen considered themselves – and were thus generally viewed by others – as situated above unskilled workers. Artisanal occupations enjoyed a special status as they entailed honor, knowledge, and independence. Craftsmen (at least the masters) were their own bosses, had years-long training, and were proud of their workmanship. Guilds and brotherhoods, besides controlling the labor market, assured their members a special place in local society – which was clearly reflected in their positions in religious processions and other public festivities.[302] Their demise, hence, had pernicious impacts. Artisans were to become just like any other worker. This would seem bad enough in an era of new clock-time work discipline and of laws criminalizing poverty, but it was worse yet in places where work was identified with slavery and other forms of bondage.[303]

301 M. Mac Cord, *Artífices da Cidadania. Mutualismo, educação e trabalho no Recife oitocentista* (Campinas: Editora UNICAMP, 2012), 304–7.

302 R. Di Stefano, H. Sabato, L. A. Romero, and J. L. Moreno, *De las cofradias a las organizaciones de la sociedad civil. Historia de la iniciativa associativa en Argentina, 1776–1990* (Buenos Aires: Edilab Editora, 2002).

303 E. P. Thompson, *The Making of the English Working Class* (London and New York: Penguin Books, 1968); T. C. Holt, *The Problem of Freedom: Race, Labor, and Politics in Jamaica and Britain, 1833–1938* (Baltimore and London: The Johns Hopkins University

Policies against both corporate privileges and protectionist policies ended up also affecting urban dwellers other than the artisans themselves. In colonial times, many regions in Latin America enjoyed some type of policy regulating the price of food staples. Although not all cities and towns had public granaries or grain exchange facilities, municipal authorities often found ways to lower food prices.[304] They did so because, as stated in 1747 by the crown attorney of the *Audiencia* (or royal court) of Guadalajara, "although anyone may do as he likes with his own property, in the things necessary for the sustenance of life, sellers should not be at liberty to set and raise prices freely."[305]

From the eighteenth century onward, however, even before Adam Smith published his *Wealth of Nations*, governments and other interested parties started questioning the validity of such regulations. Slowly but surely a moral economy, as defined by E. P. Thompson, gave way to free markets and free trade policies. A new economic model championing that a market "was never better regulated than when it was left to regulate itself" came to prevail. State interference and "popular prejudice" were set aside in favor of impersonal market rules.[306] As the historian Thomas C. Wright explains, after independence Latin America came under the banner of economic liberalism, witnessing a "radical change in the philosophy and institutions of urban provisioning" and awarding the urban poor "full responsibility for their own well-being."[307]

But, as it occurred in England and continental Europe, some authorities and especially the urban masses – born and raised under the sign of a moral economy – proved unwilling to bow down before the new economic credo. In 1858, residents of São Salvador da Bahia, in Brazil, protested the provincial president's autocratic resolution to close the city's public granary. Municipal councilors, who were almost all in favor of maintaining the facility, claimed that the provincial authority, under the spell of Adam Smith, had failed to

Press, 1992); H. M. Mattos, *Das cores do silêncio: os significados da liberdade no Sudeste escravista (Brasil, século XIX)*, 3rd rev. ed. (Campinas: Ed. UNICAMP, 2013).

304 J. C. Garavaglia and J. D. Gelman, "Rural History of the Rio de la Plata, 1600–1850: Results of a Historiographical Renaissance," *Latin American Research Review* 30(3) (1995), 84.

305 E. Van Young, *Hacienda and Market in Eighteenth-Century Mexico: The Rural Economy of the Guadalajara Region, 1675–1820* (Berkeley: University of California Press, 1981), 43.

306 E. P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," in E. P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (New York: The New Press, 1993), 182–83.

307 T. C. Wright, "The Politics of Urban Provisioning in Latin American History," in J. C. Super and T. C. Wright (eds.), *Food, Politics and Society in Latin America* (Lincoln: University of Nebraska Press, 1985), 26.

acknowledge that the people did not live off theories.[308] That same year, urban workers in Lima, Peru, protested against food policies – or the lack thereof – that threatened their well-being. They did so again for years to come. In 1867, for instance, they threw stones at shops and closed bakeries.[309] Similarly, bakers in Mexico City had been enduring decades of protest as prices rose far beyond what was considered fair, at least according to old customs and expectations.[310] Throughout Latin America, urban dwellers protested through peaceful as well as violent means, always favoring protectionist measures regulating food prices, making clear that such measures had a direct impact on their ability to survive. Oftentimes, when their demands converged with other interests, especially those of more influential groups, they were able to secure favorable conditions. As the years went by, however, the people's demands increasingly fell on deaf ears and the cold logic of the free market prevailed.

By the end of the nineteenth century, guilds were altogether extinct and the old moral economy policies were completely abandoned in Latin America. Adding insult to injury, the ever-growing production of export commodities brought about encroachment on lands previously devoted to food cultivation, thus contributing to high prices and frequent food shortages in urban areas. Such problems were made all the more devastating by the privatization of urban commons. As the urban poor lost their battles in Latin America, as market constraints spread to all areas of the economy, as specialized crafts were replaced by unskilled labor, the criminalization of poverty became the law of the land, terrorizing the poor in urban areas as well as the countryside.

Conclusion

In 1897, a group of soldiers returned to their hometown of Rio de Janeiro after months in the battlefield. Poor, unemployed, and lacking any kind of government assistance, they settled in one of the city's poorest areas, then called "Morro da Providência" (Providence Hill). Not long after, due to the overwhelming presence of those destitute soldiers who fought for the Republican

308 J. J. Reis and M. G. de Aguiar, "'Carne sem osso e farinha sem caroço': o motim de 1858 contra a carestia na Bahia," *Revista de História* 135 (1996); R. Graham, *Alimentar a cidade. Das vendedoras de rua à reforma liberal (Salvador, 1780–1860)* (São Paulo: Companhia das Letras, 2013).

309 V. C. Peloso, "Succulence and Sustenance: Region, Class, and Diet in Nineteenth-Century Peru," in J. C. Super and T. C. Wright (eds.), *Food, Politics and Society in Latin America* (Lincoln: University of Nebraska Press, 1985), 57–58.

310 R. Weis, *Bakers and Basques: A Social History of Bread in Mexico* (Albuquerque: University of New Mexico Press, 2012), 46–49.

Army, the area lost this name and earned a new epithet. Years later its name became a worldwide synonym for disenfranchised urban communities, which it retains until today: Morro da Favela (Favela Hill).[311] *Favela* or *faveleira* is a plant common to Brazil's semiarid regions. Its existence became nationally known as thousands of army personnel – together with cannons, machine guns, and other industrial weaponry – were sent to fight and destroy a backland town in Bahia between 1896 and 1897. Surrounded by these *favela* plants, the town of Canudos was the stage for one of the bloodiest episodes in Latin American history, which historians reckon left some thirty thousand dead.[312]

At the end of the war, newspapers celebrated the progressive forces of the Republic for ridding the country of an unwelcome community of thousands of backland free poor, indigenous people, and the so-called "May 13th" (a derogatory term for formerly enslaved persons who had become free when Brazil passed the emancipation law on May 13, 1888). However, unable to explain how the rebels were able to put up a formidable fight against the country's official army, many – from contemporaries such as the journalist Euclides da Cunha to twentieth-century academic historians – chose to explain the rebels' endurance and brave resistance as the effect of a messianic movement. Ignorant and gullible – so the story goes – the poor inhabitants of Bahia's backlands had become blind followers of a charismatic leader, Antonio Conselheiro, who supposedly had promised them heaven on earth.[313] Such a simplistic explanation, though, not only fails to account for the hazardous impacts of decades-long liberal policies – from land encroachment to criminalizing laws – but also for poor peoples' ability to understand and resist them. Unwilling to conform, the Canudos rebels were labeled as fanatics and denied a place in modern society. Exclusion in this case, as in many others throughout Latin American history, literally meant demise.[314]

The violence of the War of Canudos extended beyond the slaughtering of Bahia's rebel poor. The very soldiers who committed this massacre returned home to encounter nothing but poverty and exclusion: They became the inhabitants of the Morro da Favela. As it happened so many times in

311 L. do Prado Valladares, *A invenção da favela. Do mito de origem à favela.com* (Rio de Janeiro: Editora UFGV, 2005).

312 R. M. Levine, *Vale of Tears: Revisiting the Canudos Massacre in Northeastern Brazil, 1893–1897* (Berkeley: University of California Press, 1992).

313 For an interpretation of popular resistance as messianic or millenarian movements, which places religious fanaticism as the only possible avenue for the poor to speak out, see M. I. Pereira de Queiroz, O *Messianismo. No Brasil e no mundo* (São Paulo: Dominus, EDUSP, 1965).

314 M. Duarte Dantas, *Fronteiras movediças. A comarca de Itapicuru e a formação do arraial de Canudos (relações sociais na Bahia do século XIX)* (São Paulo: Hucitec, 2007).

nineteenth-century Latin America, the poor killed one another to further the projects of visionaries who could not care less about the welfare of ordinary men and women. Those who survived the wars the elite had created encountered poverty and exclusion at every turn. But the elites were more than satisfied: Another obstacle – another alternative way of life – had been removed from the path to political and economic "progress."

The story of Canudos and the Morro da Favela is one among many examples of how the combined forces of the state and capital oppressed the masses in nineteenth-century Latin America. Anti-corporate legislation began to be implemented during the process of independence and continued to be pushed by modernizing elites throughout the century. Resistance came primarily from those living at the margins of the new order, from indigenous and enslaved persons to the rural and urban impoverished workers. Resistance proved effective at times, but ultimately the new order envisioned by liberal elites triumphed. In the name of freedom and equality, the rulers of the new Latin American nations effectively destroyed institutions based on a corporate logic. Their efforts undeniably emancipated people who had lived under the yoke of slaveholders, priests, tribal rulers, and master craftsmen, among others, since colonial times. Yet such emancipation was accompanied by a brutal process of expropriation. Reformers made sure that the Latin American masses were to have no means to live outside nation-states and a capitalist system connected to global – overwhelming – forces.

Internal and external wars, land privatization, the extinction of corporate privileges, the expansion of production for export, and the imposition of wage-labor relations – to name some of the most important processes spreading throughout Latin America in the nineteenth century – combined to turn indigenous people, freedpeople and their descendants, and the rural and urban poor into a formally free but materially destitute workforce. As Section 5.3 has sought to show, these processes were protracted and contested, the victims were not passive observers but put up a brave resistance, and the perpetrators were not all-powerful or all-seeing. Yet as competing visions of society clashed in Latin America, alternatives to a national and capitalist order were brutally crushed. Relying on global networks and industrial tools, modernizing liberal elites managed to impose their interests – their ideals of order and progress – onto a whole continent.