

From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights

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ABSTRACT

The article explores the historical roots of the Latin American region's strong commitment to the idea of universal human rights, focusing on four key intellectual moments: the ethical response to the Spanish conquest; the rights ideology of the continent's liberal republican revolutions; the articulation of social and economic rights in the Mexican Constitution of 1917; and the Latin American contributions to the genesis of the Universal Declaration of Human Rights. Constructing a narrative from these examples, the article argues for the recognition of a distinct Latin American tradition within the global discourse of human rights.

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I. INTRODUCTION

Recently, a number of rich and thorough works have returned to the genesis of the Universal Declaration of Human Rights, retrieving for us the political, intellectual, and moral context of that foundational document of the international human rights movement.¹ One of the most interesting things that has been brought back to our attention as a result of this scholarship is the immensely important contribution that was made by Latin Americans. Through representing their individual countries as well as working together as a group, members of the Latin American delegations provided critical political and intellectual initiative to the birth of international human rights law. Latin American proposals formed the first models upon which the Universal Declaration of Human Rights was drafted, and many of the rights in it were inserted or modified in important ways through the intervention of Latin American delegates—ways that emphasized, for example, the universality of human rights, the equality of men and women, the centrality of family life and the importance of economic and social rights. Overall, both the depth of their commitment to the idea of human rights and the particular accent they gave to its expression were quite remarkable.

In the half century since then, however, the history of the human rights movement has largely obscured the role of Latin America. Cold War ideologies helped transform debates over human rights into conflicts between “liberal” political and civil liberties on the one hand and “socialist” economic, social, and cultural rights on the other. Decolonization and the struggle to end apartheid shifted the focus to Africa and to urgent questions of race discrimination. The rise of a relatively potent NGO movement organized, staffed, and financed largely out of the United States and Western Europe, helped ensure that those political societies exercised a dominant position in the creation and development of rights discourse internationally. Paradoxically, even a vigorous questioning of the universality of the language of human rights in recent years may have helped to diminish attention to Latin American approaches to human rights: the relativist challenge and response have often tended to suppose a monolithic “Western” understanding of rights talk, and have questioned its meaning and relevance primarily for Asian and African cultures.² Latin America, in that context, tends either to be lumped into other “Western” societies because of its colonial European history or else it is simply ignored.

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1. *E.g.*, MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001); JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* (1999).
 2. *See, e.g.*, *DEBATING HUMAN RIGHTS* (Peter Van Ness ed., 1999); *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 124* (Joanne R. Bauer & Daniel A. Bell eds., 1999). *See generally* EVA BREMS, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (2001).

As a result, even among human rights enthusiasts and activists, Latin America has long been regarded as the *object* of human rights concerns more than a *contributor* to human rights thinking. Or rather, its “contributions” have been perceived almost exclusively in negative terms. For example, the creativity of its repressive regimes in fashioning new forms of abuse, like the “disappearance,” provoked the governments and human rights organizations of Europe and North America to come up with new norms and institutions to address the problems.³ Or, more recently, the impunity with which its former dictators elect to travel in Europe has sparked a significant development of the principles of universal jurisdiction.⁴ But the affirmative dimensions of human rights in Latin America, instead, have much more often been seen to be tarnished and inferior copies of grand, rich European ideas.

My goal in this article is to begin to retrieve the Latin American contribution that was so critical to the Universal Declaration by returning to its roots and recasting that history in terms of the region’s own protagonists. Why were Latin American representatives so committed to the idea of human rights in 1948? Where did this rights tradition come from, and what has become of it? What gave the region its distinctive voice among the multiple dialects of human rights talk?

Obviously, five centuries of intellectual history provide a much more rich and complex answer to these questions than can be synthesized adequately in this brief discussion. My aim therefore is not to be exhaustive but rather selective, not providing a detailed, continuous chronology but more of a family history—skipping across events, generations and geography like a novel by Gabriel Garcia Marquez, in which a single anecdote evokes a richer collective memory. I first frame the inquiry with a brief overview of the role of Latin American delegates in the drafting and adoption of the Universal Declaration. From there, I reach backwards in time to focus attention especially on three historical antecedents of the generation of 1948—moments that I believe were critical watersheds in giving the Latin American human rights tradition its particular cast. The story begins with the ethical response to the injustices of the early Spanish conquest and colonialism, as embodied particularly in the life and works of Bartolomé de Las Casas, the 16th century missionary and later bishop of Chiapas. The tale then leaps forward to the late 18th century and the triumph of liberal revolutionary ideas, from the Latin American reception of

3. See, e.g., IAIN GUEST, *BEHIND THE DISAPPEARANCES: ARGENTINA’S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS* (1990).

4. See William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 *HARV. INT’L L.J.* 129, 160–70 (2000).

the French Declaration of the Rights and Duties of Man and the Citizen, through the thought of Simón Bolívar, to conceptions of human rights discernable in early republican constitutions. Finally, I take up the Mexican Constitution of 1917, one of the most immediately and widely influential constitutional documents in the history of the region. Although my main focus here ends with the birth of the Universal Declaration, I do in conclusion offer some examples and reflections of the continuing vitality and importance of the Latin American tradition in the international human rights movement.

II. LATIN AMERICA AND THE UNIVERSAL DECLARATION

The significant Latin American involvement in the genesis of the Universal Declaration has been recognized before; the details of the story are sprinkled throughout the memoirs of John Humphrey (the Director of the Division of Human Rights during the creation of the Universal Declaration and the author of the document's first draft),⁵ and more recently they have been recounted thoroughly in the works of Johannes Morsink and Mary Ann Glendon.⁶ My goal here is not to uncover a new and previously unknown history of the Universal Declaration, but simply to draw together in summary form scattered observations about Latin America, identify some of their common themes, and trace the ideas farther back in history.

At the San Francisco conference founding the United Nations in 1945, Latin American countries represented the largest single regional group, accounting for twenty-one of the fifty nations. Right from the start of the conference, several of the Latin American delegations—often working together with other smaller states⁷—made an effort to have human rights put on the conference agenda.⁸ In contrast to the great powers like the United States and the Soviet Union, the Latin American delegations were much more strongly committed to the inclusion of human rights in the new international order.⁹ Among their most acute concerns was racial discrimi-

5. See generally JOHN P. HUMPHREY, *HUMAN RIGHTS & THE UNITED NATIONS: A GREAT ADVENTURE* (1984).

6. See generally GLENDON, *supra* note 1; MORSINK, *supra* note 1. See also Mary Ann Glendon, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea* (April 30, 2001) (unpublished lecture on file with the author).

7. See generally Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, 23 *HUM. RTS. Q.* 44 (2001).

8. See GLENDON, *supra* note 1, at 13–18. The Latin American countries involved in the effort included, in particular, Brazil, Chile, Cuba, the Dominican Republic, Haiti, Mexico, Panama, Uruguay, and Venezuela.

9. See HUMPHREY, *supra* note 5, at 13.

nation, and they pressed for the conference to address the issue. Thanks to their campaign, the Charter included a number of significant references to human rights, including strong affirmations of equality and human rights in the Preamble as well as a statement counting the promotion and respect for human rights among the basic purposes of the organization.¹⁰ The Charter also instructed the UN Economic and Social Council to create a commission for the promotion of human rights, which would become the body charged with the task of preparing the Universal Declaration.¹¹

The Latin Americans' more ambitious goal, to have a declaration of rights included in the Charter, proved to be unsuccessful, but nevertheless it laid an important foundation for the later drafting of the Universal Declaration. At the first session of the General Assembly in 1946, Panama proposed that the draft bill of rights it had sought to introduce into the Charter now be adopted as a General Assembly resolution.¹² Again the Panamanians were defeated, but out of the debate the new Human Rights Commission emerged with a mandate to prepare an international bill of rights.¹³ Humphrey—who by his own description was “no Thomas Jefferson”¹⁴—fashioned the first draft of what would eventually become the Universal Declaration on the basis of various models that the UN Secretariat had collected. Among them were a model based on a Cuban-sponsored proposal at the San Francisco conference, a proposed first draft offered by the Chilean delegation, and the earlier Panamanian draft.¹⁵ Humphrey described the latter as “the best of the texts from which I worked.”¹⁶ Among the provisions that Humphrey drew from the Latin American models, those relating to economic and social rights stand out. As Morsink has shown with an article-by-article comparison, “Humphrey took much of the wording and almost all of the ideas for the social, economic and cultural rights of his first draft from . . . the bills submitted by Panama (ALI) and Chile (Inter).”¹⁷

When the Human Rights Commission began its work on Humphrey's first draft, the eight-member drafting committee had one Latin American representative, Hernán Santa Cruz of Chile. Santa Cruz, a lawyer, judge,

10. U.N. CHARTER, art. 1, para. 3.

11. *Id.* art. 68. See also HUMPHREY, *supra* note 5, at 13 (noting that “it was generally understood” that the new commission on human rights would draw up an international bill of rights).

12. HUMPHREY, *supra* note 5, at 14.

13. *Id.* at 17.

14. *Id.* at 31.

15. *Id.* at 31–32; MORSINK, *supra* note 1, at 30.

16. HUMPHREY, *supra* note 5, at 32. Although the draft was sponsored by Panama, it was originally prepared under the auspices of the American Law Institute “by a distinguished group representing many cultures, one of whom was Alfredo Alfaro, the Panamanian foreign minister.” *Id.* See also GLENDON, *supra* note 1, at 57.

17. MORSINK, *supra* note 1, at 131.

professor, and military man, frequently served as a spokesman for the Latin American nations collectively.¹⁸ Throughout his long involvement with the drafting and adoption of the Universal Declaration, he was the most vocal and consistent advocate of the Declaration's social and economic rights.¹⁹ The Latin American delegates in general became the "guardians" of the social and economic provisions of the draft declaration, with Santa Cruz the foremost among them.²⁰ At this stage, René Cassin of France, the head of the drafting committee, called for the Declaration's social welfare provisions to provide special recognition of the family, mothers, and children. His additions were sponsored by none other than Santa Cruz, and they found support in both the original Chilean draft declaration as well as Latin American constitutional traditions more generally.²¹

The final phase of Latin American influence on the Declaration came when the completed Human Rights Commission draft was considered by the General Assembly's Committee of Social, Cultural and Humanitarian Questions (or "Third Committee"). With a representative from each of the member states of the United Nations at the time, the Third Committee had twenty out of fifty-nine delegates from Latin America,²² and they tended to vote as a bloc. At this stage, another Latin American text had an influential role to play as well: the American Declaration of the Rights and Duties of Man (also known as the Bogotá Declaration), adopted by the Organization of American States earlier in the same year as the Universal Declaration.²³ Some of the Latin American representatives—especially the Cuban delegate—wanted to send the draft declaration back to committee for a detailed comparison with the Bogotá Declaration,²⁴ but Santa Cruz used his influence with the Latin Americans to persuade them that this universal document should not be expected to resemble the American one in every detail.²⁵ The region's representatives settled, then, for more limited, but

18. *Id.* at 89.

19. *See, e.g., id.* at 30, 89–90.

20. *See id.* at 131.

21. *See id.* at 253.

22. HUMPHREY, *supra* note 5, at 65.

23. The timing of the two documents (the Bogotá Declaration was adopted in April 1948, the Universal Declaration in December of that year) ensured that the influence of the former upon the latter was not direct. Nevertheless, as Morsink points out, "in 1948 the Latin American nations were engaged in drafting two bills of rights, the Bogotá one for their own region and the other for the United Nations. Almost all of the Latin American countries sent delegates to both events and no doubt many of these did double duty." MORSINK, *supra* note 1, at 132.

24. Because of the delay that this would have involved, and thus the risk that the whole effort might fail, Humphrey referred to this Latin American effort as "the Bogotá menace." HUMPHREY, *supra* note 5, at 65–66.

25. *See id.* at 65; GLENDON, *supra* note 1 at 140–41.

nonetheless important, amendments to the draft Declaration, based largely on the influence of the Bogotá Declaration. For instance, the representative of the Dominican Republic successfully proposed making special mention of the equal rights of men and women in the document's preamble.²⁶ The Declaration's right to an adequate standard of living contains a reference to the needs of families thanks to the Cuban delegate. And, in one of the best known Latin American contributions to the Declaration, at this late stage Mexico proposed adding an article based on its institution of *amparo*—the legal right to an effective remedy in national tribunals for violations of fundamental rights.²⁷ With the strong support of Uruguay, Chile, Cuba, and Venezuela, the Mexican amendment was accepted and led to Article 8 of the Universal Declaration.²⁸ Mexico also moved successfully to include the words "without any limitation due to race, nationality or religion" in the Declaration's statement of the right to marry.²⁹ On other occasions, Latin American delegates pressed for greater recognition of the duties correlative to rights,³⁰ they offered language strengthening the parity of the civil and political rights with the social, economic, and cultural ones,³¹ and several Latin American countries were the only non-Soviet-bloc delegations to support a failed proposal to include in the right to life a prohibition of capital punishment.³²

This is obviously only a very compressed summary of the Latin American impact on the Universal Declaration, but it is sufficient to allow us to see that there was in fact a very strong and distinctive Latin American commitment to the idea of human rights in 1948. First, the region exhibited a dedication to international human rights generally at a time when the idea was still viewed with reluctance or even hostility by most other states. The Latin American voices resounded with a firm belief in the universality of rights and, especially, the equality of rights among all races and both sexes. Their understanding of rights consistently emphasized the social dimensions of the human person, from the family to the social and economic structures in which she realizes her dignity. And even while championing rights, they consistently sought to balance them with the language of duties, too. Mary Ann Glendon has described the importance of this regional accent in the Universal Declaration's language of rights very concisely:

26. See GLENDON, *supra* note 1, at 162.

27. See Hector Fix Zamudio, *The Writ of Amparo in Latin America*, 13 LAW. AM. 361 (1981) for a general explanation of the meanings and uses of *amparo*.

28. See GLENDON, *supra* note 1, at 162; DAVID WEISSBRODT, *THE RIGHT TO A FAIR TRIAL* 29–33 (2001).

29. See GLENDON, *supra* note 1, at 153.

30. See *id.* at 141.

31. See *id.* at 157, 162.

32. See *id.* at 151–52 (the countries were Cuba, the Dominican Republic and Mexico).

The Latin American contribution was one of the major factors that kept the document from falling into the traps of either an excessive individualism or excessive collectivism. Neither a US-style nor a Soviet-style document could have commanded a consensus from a UN that included representatives from so many different cultures.³³

Such a strong, rich, and distinctive approach to human rights could not have sprung up overnight in the middle of the 20th century, and in fact it did not. Where did that Latin American rights tradition come from, then, and what were the factors that accounted for its characteristic expression? Morsink, focusing almost entirely on the Latin American origins of the Universal Declaration's economic and social provisions, summarily asserts that it was the "tradition of Latin American socialism" at work.³⁴ At best, though, this is only part of the truth, and a very small part at that. To begin with, very few of the Latin American countries represented could be said to have socialist constitutional structures or economic systems at the time (with the notable exception of Mexico, and as we will see later the Mexican example is also a much more complex case).³⁵ Moreover, the region's history demonstrates that sophisticated expressions of a Latin American rights tradition precede socialism by several centuries. In fact, stepping back

33. Glendon, *supra* note 6, at 9.

34. MORSINK, *supra* note 1, at 89, 131. Glendon, in contrast, clearly recognizes that there is a longer and more complex story to the Latin American rights tradition, but also makes clear that it is beyond the scope of her inquiry. Glendon, *supra* note 6, at 2.

Morsink appears to have based his conclusion almost entirely on his observation that Santa Cruz, the principal spokesman for the Latin American bloc, was, like his friend Humphrey, a "socialist." MORSINK, *supra* note 1, at 30. It is true that Santa Cruz was a childhood friend of Salvador Allende and a member of the politically left Popular Front in Chile. GLENDON, *supra* note 1, at 44. But especially in the case of Santa Cruz, such a simple label can be deceiving: he was also from the Chilean upper-class (GLENDON, *supra* note 1, at 185); he had no sympathy for the Soviet delegates and proposals and sometimes clashed with them very directly (see, e.g., HUMPHREY, *supra* note 5, at 57); he was Jesuit-educated and active in the Chilean Academy of Christian Humanism (see Curriculum Vitae of Hernán Santa Cruz Barceló, on file with the author). Although best known for his tenacious defense of economic and social rights, it is worth noting that he also fought unsuccessfully to have the Universal Declaration's right to life protect also "unborn children and incurables, mentally defectives and lunatics." See GLENDON, *supra* note 1, at 92, 282. In short, if Santa Cruz embodies "the Latin American socialist tradition" then it is a rather unique brand of socialism, which itself begs the question of its historical antecedents.

35. It is also interesting to note that a comprehensive survey of the philosophy of law throughout all of Latin America in the 1940's reveals no significant socialist legal thought in any of the countries of the region. See Josef L. Kunz, *Latin-American Philosophy of Law in the Twentieth Century*, 24 N.Y.U.L.Q.R. 283 (1949); Josef L. Kunz, *Latin-American Philosophy of Law in the Twentieth Century (Continued)*, 24 N.Y.U.L.Q.R. 473 (1949) (noting also that "[c]ontemporary Spanish-American general philosophy is dominated by a reaction against positivism." at 477); Josef L. Kunz, *Latin-American Philosophy of Law in the Twentieth Century (Continued)*, 24 N.Y.U.L.Q.R. 801 (1949).

about 450 years from 1948, we can see that the Latin American language of human rights is as old as the continent's experience of European conquest.

III. BARTOLOMÉ DE LAS CASAS, THE MIDWIFE OF MODERN HUMAN RIGHTS TALK

The modern idea of human rights had a period of gestation lasting millennia.³⁶ But it would be fair to say—even if it is not commonly recognized—that its birth was in the encounter between sixteenth century Spanish neoscholasticism and the New World.³⁷ If that encounter were embodied in a single person, it would be Bartolomé de Las Casas.³⁸ Las Casas had first come to the Indies from Spain in 1502, at age 18, and after returning to Spain four years later to continue his studies, he was ordained to the priesthood. He spent two years after his ordination studying canon law, which would prove to be extremely important for his contribution to the incipient language of human rights later in his life. In 1509 he again sailed to the New World, where he served as a chaplain on the Spanish conquest of Cuba and took up residence on Hispaniola. Like many other Spaniards in the West Indies, including clerics, he lived off the toil of the Indians of his *encomienda*—the system by which Spanish colonists were given tracts of land and the rights to the forced labor of the native people in return for a promise to instruct them in the faith.

At the time, the foremost critics of Spanish brutality in the Indies were the friars of the Order of Preachers (also known as Dominicans, after their

36. See, e.g., *THE HUMAN RIGHTS READER: MAJOR POLITICAL ESSAYS, SPEECHES, AND DOCUMENTS FROM THE BIBLE TO THE PRESENT* (Micheline R. Ishay ed., 1997).

37. The entire current of thought represented by the "School of Salamanca" in this era was defined largely by the scholars' efforts to respond to the ethical imperatives that arose out of that encounter. See Martin van Gelderen, *Vitoria, Grotius and Human Rights: The Early Experience of Colonialism in Spanish and Dutch Political Thought*, in *HUMAN RIGHTS AND CULTURAL DIVERSITY* 215 (Wolfgang Schmale ed., 1993). Regarding generally the revival of Thomism of which the School of Salamanca was a part, see 2 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 135–73 (1978).

38. Studies of Las Casas are plentiful, and the biographical details in the following section are drawn from the following works: *INDIAN FREEDOM: THE CAUSE OF BARTOLOMÉ DE LAS CASAS, 1484–1566: A READER* 1–10 (Francis Patrick Sullivan, S.J. ed. & trans., 1995); MAURICIO BEUCHOT, *LOS FUNDAMENTOS DE LOS DERECHOS HUMANOS EN BARTOLOMÉ DE LAS CASAS* 17–27 (1994); GUSTAVO GUTIÉRREZ, *LAS CASAS* (Robert R. Barr trans., 1993); MANUEL GIMÉNEZ FERNÁNDEZ, *1 BARTOLOMÉ DE LAS CASAS* (1953, reissue 1984); MANUEL GIMÉNEZ FERNÁNDEZ, *2 BARTOLOMÉ DE LAS CASAS* (1960, reissue 1984); *WITNESS: WRITINGS OF BARTOLOMÉ DE LAS CASAS* 1–19 (George Sanderlin ed., 1971); HENRY RAUP WAGNER, *THE LIFE AND WRITINGS OF BARTOLOMÉ DE LAS CASAS* (1967); LEWIS HANKE, *ARISTOTLE AND THE AMERICAN INDIANS* (1959). English translations of Las Casas' writings are somewhat harder to come by, but edited collections of excerpts from various of his voluminous works can be found in *INDIAN FREEDOM*, *supra*, and in *WITNESS*, *supra*.

founder St. Dominic). They were already condemning the Cuban “pacification”³⁹ while Las Casas participated in it, but he remained unpersuaded then, even after one Dominican refused to hear Las Casas’ confession because he owned slaves. But after a profound conversion of conscience in 1514, Las Casas arranged to free his slaves and began instead a lifelong, passionate devotion to the cause of just and humane treatment of the Indians.

After an early experiment in founding a model community of peaceful farmers and traders turned out to be a spectacular failure, Las Casas entered the Order of Preachers and turned toward the more characteristically Dominican habits of study and reflection. He spent most of the next decade and a half serving the cause of the Indians by producing a flood of treatises, memorials and testimonies before emerging from this self-described “slumber” to become active again as the “Protector of the Indians,” the official state office to which he was appointed by the crown. He crisscrossed Spanish America, from Peru to Guatemala, campaigning against conquest, and traveled on many occasions to Europe to plead his case before the court. Las Casas’ arguments against the *encomienda* system and the sensational accounts of the cruelty and neofeudalism of the *conquistadores* in his *History of the Indies* persuaded Charles V to promulgate the New Laws of 1542.⁴⁰ These were supposed to ensure that no more Indians would be enslaved, and were intended to deprive officials of their *encomiendas*, although the implementation and enforcement of the New Laws proved to be next to impossible from the start.

After a brief, troubled tenure as Bishop of Chiapas, Las Casas became ever more enmeshed in scandal and controversy. He had his *Confesionario*—the rules for confessors that he had composed—confiscated because it insisted that every penitent be required to free his Indian slaves and make full restitution of all the Spaniards’ unjustly acquired wealth in the New World.⁴¹ This seemed to call into question the very legitimacy of Spain’s claim to rule the Indies, and Las Casas was accused of treason. Everything came to a head when in 1550 the emperor halted all conquests and instructed a panel of theologians and jurists to hear both Las Casas and his principal intellectual enemy, Juan Ginès de Sepúlveda, debate the justice

39. For a concise description of the conquest of Cuba (euphemistically referred to as the island’s “pacification”), see JOSÉ M. PÉREZ CABRERA, *Conquista de Cuba*, in 1 HISTORIA DE LA NACIÓN CUBANA 55–73 (Ramiro Guerra y Sánchez et al. eds., 1952) (noting also the strength and authority of Las Casas’ eyewitness account).

40. For selected excerpts of the New Laws of 1542, see INDIAN FREEDOM, *supra* note 38, at 248–52.

41. See the excerpts of Las Casas’ *Rules for Confessors* in INDIAN FREEDOM, *supra* note 38, at 281–88 and in WITNESS, *supra* note 38, at 159–61.

and lawfulness of the Spanish occupation of the Americas. These famous debates in Valladolid in 1550 and 1551, were in a sense the climax of Las Casas' advocacy, even though ultimately inconclusive in their outcome.⁴² After that, he remained in Spain actively writing, exhorting, proclaiming, and beseeching with all the fervor of the prophet Jeremiah, until his death.

Perhaps in no other time or place has a single man's life and work so deeply embodied the cry for justice of a whole continent. That is not to say that Las Casas was a solitary, isolated figure in this struggle; he did have many allies in what was collectively an active minority struggling to defend the native populations.⁴³ But as Gustavo Gutiérrez has emphasized, Las Casas was the first among equals, "the one who drilled the deepest into what was occurring in the Indies and best articulated a theological reflection on the basis of those events."⁴⁴ It is appropriate, then, to regard him as the paradigmatic voice of the historical moment. From that perspective, what is most interesting for our purposes here is the way that Las Casas succeeded in articulating and advocating a set of ideas that in many senses represents the first clear announcement of the modern language of human rights. Even among those familiar with Las Casas and his contemporaries, this may at first seem implausible, or at least exaggerated. Las Casas has sometimes been regarded as somewhat of a second-rate thinker, whose understandings of philosophy and theology were not up to the standard of his senior Dominican brother in the School of Salamanca, Francisco de Vitoria.⁴⁵ While the latter is universally regarded as a brilliant light of his era, Las Casas has often been relegated to Vitoria's shadows.⁴⁶ The criticisms have sometimes been quite harsh: he was too polemical in rhetoric, too unsystematic and undisciplined in thought, a demagogue in practice—he has even been accused of paranoia and dementia.⁴⁷ Why begin with the lesser disciple, then, instead of the master? What distinguishes Las Casas from his contemporaries is his combination of speculation and experience, his engagement in practice with the struggle for justice. He never set out to

42. A full study of the disputation between Las Casas and Ginès de Sepúlveda can be found in LEWIS HANKE, *ALL MANKIND IS ONE* (1974). Although both Las Casas and Ginès de Sepúlveda privately claimed victory, according to Hanke, "The judges at Valladolid, probably exhausted and confused by the sights and sounds of this mighty conflict, fell into argument with one another and reached no collective decision . . . The judges went home after their final meeting, and for many years afterward the Council of the Indies struggled to get their opinions in writing." *Id.* at 113–14. Hanke also presents the larger intellectual and political context of the debates in HANKE, *supra* note 38.

43. GUTIÉRREZ, *supra* note 38, at 5.

44. *Id.*

45. *See id.* at 5–6 & n. 12, 13.

46. *See id.* at 332.

47. *See HANKE, ALL MANKIND IS ONE, supra* note 42, at 140–44.

reason in the abstract about the duties and rights associated with the Spanish presence in the Indies, but instead formed his understanding of the requirements of justice in the crucible of action and in the face of a lived necessity;⁴⁸ in this way he also foreshadowed the typical dynamic of how human rights thinking developed in the 20th century. In doing so, he contributed to the idea of human rights in a way that was unique and not simply derivative of Spanish thought. He became the first notable American proponent of the idea of human rights.

Admittedly, the way he meshed theory and practice can make it a little difficult to synthesize Las Casas' views. These views are not set out with the patient and systematic rigor of a philosopher, but with a litigator's focus on the practical results sought in the dispute at hand. He therefore grabs arguments to serve his cause wherever he can find them and is eclectic in choosing his sources. Nevertheless, there are a few core ideas that persist throughout his work, and to which he is doggedly faithful.

First, Las Casas consistently framed the requirements of justice in terms of the *rights* of the Indians.⁴⁹ We should not undervalue the importance and novelty of this simply because that way of talking is so familiar to us moderns. While Las Casas' thought is clearly in the same Thomist tradition as his Dominican brothers of Salamanca,⁵⁰ he uses a language of subjective natural rights that was not found in Aquinas' work itself.⁵¹ Brian Tierney's careful study of the origins of the idea of natural rights shows us that Las Casas' "essential achievement, on a theoretical level, was to graft, quite consciously, a juridical doctrine of natural rights onto Aquinas' teaching on natural law."⁵² This may have been a reflection of Las Casas' early studies in canon law, and was almost certainly related to the style of advocacy alluded to earlier: Las Casas drew broadly from law, philosophy, theology, and his direct experience, and one finds his arguments strewn with juridical sources and language, in a manner more overt and persistent than even Vitoria and

48. Cf. BEUCHOT, *supra* note 38, at 43; GUTIÉRREZ, *supra* note 38, at 6 ("A continuous interaction takes place, in Las Casas' work, between reflection and concrete commitment—theory and practice. His is a thinking that not only *refers* to practice, but is developed by someone *engaged* in practice.").

49. See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW, 1150–1625* 275 (1997) (noting that "one can open a work of Las Casas . . . almost anywhere at random and, reading on for a few pages, come across specific references to the rights of the Indians").

50. See Philippe André-Vincent, *La concrétisation de la notion classique de droit naturel à travers l'oeuvre de Las Casas*, in *LAS CASAS ET LA POLITIQUE DES DROITS DE L'HOMME* 203 (l'Institute d'études politiques eds., 1974).

51. There is a considerable disagreement among scholars of natural law over whether the idea of natural rights should be regarded as a continuation of or a break with the thought of Aquinas. See generally TIERNEY, *supra* note 48; Jean Porter, *From Natural Law to Human Rights: Or, Why Rights Talk Matters*, 14 *J.L. & REL.* 77 (1999–2000).

52. TIERNEY, *supra* note 49, at 276.

other contemporaries.⁵³ The result, Tierney argues, was a language of natural rights that was certainly not found in Aquinas, but that could be said to be a recognizable and natural extension of the Thomistic tradition.⁵⁴ Las Casas in this way was both innovative and at the same time in deep continuity with the intellectual and moral tradition in which he was formed. This allowed him to make the theoretical doctrines of natural rights that were being developed in the abstract elsewhere applicable to concrete historical situations, to the most practical and pressing moral problems of his day. The pragmatic interplay between law and philosophy that his work exemplified decisively influenced the development of subsequent natural rights theories.⁵⁵

As for his understanding of the foundations of the rights of the Indians, many of Las Casas' voluminous polemics on behalf of the Indians can be contained in one of his most famous statements:

All the races of the world are men, and of all men and of each individual there is but one definition, and this is that they are rational. All have understanding and will and free choice, as all are made in the image and likeness of God . . . Thus the entire human race is one.⁵⁶

Even more concise is the phrase he used to conclude his rebuttal of Sepúlveda in the Valladolid debates with eloquent simplicity. While his rival argued that the Indians were beast-like "natural slaves," Las Casas affirmed "They are our brothers, and Christ gave His life for them."⁵⁷ In sum, his case for the rights of the native peoples were based always on the first principles of the unity of human nature and the unity of the human family.⁵⁸

Put another way, the rights that he sought for the native peoples were due to them simply in virtue of their humanity, a humanity common to all of God's children. This had several consequences. First of all, Las Casas was deeply committed to affirming *equality* among all human beings, "one of the themes dearest to his heart."⁵⁹ Second, it also puts his notion of rights on a decidedly *universal* plane, vindicating the equal rights not only of Europeans but of indigenous peoples as well.⁶⁰ As a result, Las Casas perceived and condemned the evil of slavery, for instance, long before

53. *Id.* at 272–87.

54. *Id.* at 286.

55. *Id.* at 286–87.

56. BARTOLOMÉ DE LAS CASAS, *APOLOGETIC HISTORY*, 3 OBRAS ESCOGIDAS 165–66, excerpted in WITNESS, *supra* note 38, at 174–75.

57. See TIERNEY, *supra* note 49, at 272–73.

58. See BEUCHOT, *supra* note 38, at 32–36.

59. GUTIÉRREZ, *supra* note 38, at 356.

60. Cf. Mauricio Beuchot, *Bartolomé de Las Casas, el humanismo indígena y los derechos humanos*, 6 ANUARIO MEXICANO DE HISTORIA DEL DERECHO 37, 37–39 (1994) (emphasizing the universality of rights in Las Casas' thought).

Enlightenment theories of rights emerged and also much more unambiguously than the later liberal rights theories of the early United States.⁶¹

Another consequence of Las Casas' premises can be seen in his emphasis on the idea that the Indians' fundamental humanity meant that they were created with *freedom*.⁶² His early treatise entitled *On the Only Way of Attracting All Peoples to the True Religion*,⁶³ which was dedicated to condemning forcible Christianization of the Indians by military means, is an extended appeal to the liberty of the indigenous peoples. He understands freedom to be more than just a reflection of an individual's external, social conditions; it is, for Las Casas, constitutive of human nature and realized in the exercise of human understanding and will.⁶⁴ Coercion in matters of conscience therefore does violence to the basic humanity of the native people of the Americas; they needed to be persuaded to accept truth, he argued, only by the peaceful methods of reason, love, and the living example of practiced virtue.⁶⁵ Las Casas took this position so seriously that he went as far as to defend some of the native populations' practice of human sacrifice.⁶⁶ Of course, he didn't defend human sacrifice as such, but instead insisted that the indigenous peoples needed to be educated through peaceful persuasion and that even their use of human sacrifice could not justify military conquest and forcible submission.

This conception of freedom is, implicitly, more than just an individualistic liberty. Las Casas begins with an Aristotelian-Thomist understanding of the natural sociability of human persons,⁶⁷ and thus for him individual freedom is rooted in and expressed through the beliefs, practices and authority of the community. This allows Las Casas to have a conception of human rights that integrates the recognition of individual rights with social or collective ones, and to perceive the Indians both as individuals and also

61. See BEUCHOT, *supra* note 38, at 79–89. For Las Casas' discussion of slavery, see Bartolomé de Las Casas, 1 TRATADOS 559–95 (1965), excerpted in INDIAN FREEDOM, *supra* note 38, at 255–77.

62. See, e.g., BARTOLOMÉ DE LAS CASAS, 2 TRATADOS 741–59, in INDIAN FREEDOM, *supra* note 38, at 240–47 (presenting Las Casas' understanding of freedom as the ninth of twenty arguments he made against the *encomienda* system).

63. BARTOLOMÉ DE LAS CASAS, THE ONLY WAY (Helen Rand Parish ed., Francis Patrick Sullivan, S.J. trans., 1992). Excerpts can be found in INDIAN FREEDOM, *supra* note 38, at 200–221; WITNESS, *supra* note 38, at 137–42.

64. See BEUCHOT, *supra* note 38, at 35; Jesús Angel Barreda O.P., *Diritto naturale e pedagogia della fede in Bartolomé de las Casas*, in I DIRITTI DELL'UOMO E LA PACE NEL PENSIERO DI FRANCISCO DE VITORIA E BARTOLOMÉ DE LAS CASAS 191, 196–98 (Pontificia Studiorum Universitas a Sancto Thoma Aquinate in Urbe eds., 1988).

65. See THE ONLY WAY, *supra* note 63, at 68.

66. See BARTOLOMÉ DE LAS CASAS, 1 TRATADOS 395–415, in INDIAN FREEDOM, *supra* note 38, at 293–94. See also WITNESS, *supra* note 38, at 162–67.

67. See BEUCHOT, *supra* note 38, at 35, 55. Regarding the centrality of this idea in 16th century scholasticism generally, see SKINNER, *supra* note 37, at 157–58.

as peoples, as communities.⁶⁸ It is striking to see, for instance, how much attention Las Casas paid to questions of collective health care and labor rights in his proposals for alternatives to the *encomienda* system.⁶⁹

In large part, Las Casas nourished his insights about the integral relationship between dignity, freedom, and community with detailed and deeply appreciative study of the customs and practices of the native populations he encountered in his life. His is "a mighty effort to understand from within the behavior and the values of the native people."⁷⁰ Using the criteria Aristotle proposed as measures of civilization, Las Casas sympathetically compares the Inca and Aztec cultures in detail to those of ancient Greece and Rome. The work has been described as one of the earliest examples of comparative ethnology.⁷¹ From the perspective of the modern language of human rights, Las Casas' defense of the freedom of the Indians based on an internal appreciation of their values and beliefs has strong elements of what today we would regard as a defense of their cultural integrity and self-determination.⁷²

Such an observation may seem anachronistic, taking the categories of thought of individuals and societies with dramatically different circumstances and contexts than our contemporary world and extracting from them ideas that they themselves would probably not have used, at least not in the way that we understand them today when we speak of "human rights."⁷³ But there are two reasons why it may not be inappropriate to do so. First, we should not overstate the rupture between "primitive" thinkers like Las Casas and the founders of "modern" international law; as David Kennedy has shown, there is a deeper doctrinal continuity between the two

68. See BEUCHOT, *supra* note 60, at 272.

69. See BARTOLOMÉ DE LAS CASAS, *Memorial Concerning Remedies for the Indies, excerpted in WITNESS*, *supra* note 38, at 132–36.

70. GUTIÉRREZ, *supra* note 38, at 191. In fact, at times Las Casas is so intent on gaining that internal perspective and so adamant in condemning Spanish violation of the respect that the indigenous culture and religion demand, that he indulges in rather cartoonish stereotypes of the native populations as the most gentle, kind and humble imaginable, while Spaniards are given "almost diabolical character . . . described impersonally as 'ravaging wolves' or 'tigers and savage lions who have not eaten meat for days.'" Fernando Cervantes, "The defender of the Indians": Bartolomé de las Casas in Context, 38 *THE WAY* 271, 276 (1998).

71. See ANTHONY PAGDEN, *THE FALL OF NATURAL MAN: THE AMERICAN INDIAN AND THE ORIGINS OF COMPARATIVE ETHNOLOGY* 119–45 (1982). See also BEUCHOT, *supra* note 38, at 37.

72. For a similar comparison, see Joseph Joblin, S.J., *Las Casas et les perspectives présentes du droit international*, in *I DIRITTI DELL'UOMO E LA PACE NEL PENSIERO DI FRANCISCO DE VITORIA E BARTOLOMÉ DE LAS CASAS* 409, 512–13 (1988).

73. It would not be the first time that an ahistorical reading of Las Casas, for instance, has resulted in subordinating the integrity of his thought to the agenda of a modern ideological position. See G.C. Marks, *Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolomé de las Casas*, 13 *AUSTRALIAN Y.B. INT'L L.* 1 (1992).

eras than we have commonly recognized in mainstream international legal scholarship.⁷⁴ Second, and more importantly, if the basic premise of this article is correct—that the evidence of 1948 suggests the existence of a distinctive Latin American tradition of human rights—then we should be able to observe that tradition as an historically extended effort to identify, to retrieve, and to appropriate the past into the present.⁷⁵ And in fact Las Casas is a paradigmatic example of this dynamic: he is not simply a historical figure but has been since his death part of a continuous narrative of the idea of human dignity, rights, and freedom in Latin America. Other historical periods have gone back to him to claim ancestry and inspiration from his example. Today, biographies of Las Casas offer his life as a witness of how Latin America should confront its “unresolved problems and wounds not yet healed.”⁷⁶ In the years just before the drafting and adoption of the Universal Declaration, there was a scholarly and political revival of appreciation for Las Casas as representative of the conscience of America.⁷⁷ And the ideals of Las Casas were certainly present a century and a half before that, during the struggles for independence of the new Latin American republics. Simón Bolívar, the Liberator, referred to Las Casas as the “Apostle of the Americas,” and “a humane hero,” and suggested naming the new capital city of his proposed Pan-American Union “Las Casas.”⁷⁸

IV. REVOLUTION, RIGHTS, ROUSSEAU

Bolívar himself, of course, lies at the epicenter of the continental upheavals associated with the next historical “moment” to be explored: the birth of the first constitutional republics in Latin America. Bolívar’s life, words, and works tower over the era. But before getting to those, it is helpful to understand at least a little bit about the context in which he must be placed.

Most conventional histories of the idea of human rights in Latin America, including by Latin Americans themselves, tend to identify the intellectual and political roots of the continent’s commitment to rights

74. See generally David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT’L L.J. 1 (1986).

75. Cf. ALASDAIR MACINTYRE, *AFTER VIRTUE* 222 (2nd ed. 1984) (“A living tradition . . . is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition.”).

76. GUTIÉRREZ, *supra* note 38, at 457. Gutiérrez explains eloquently the broader point about tradition and history, as well: “The present acquires density and substance when it is nourished by the memory of a journey. . . . The historical view gains effect and luminosity when maintained from the present.” *Id.*

77. See LEWIS HANKE, *THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA* 177 (1965).

78. SIMÓN BOLÍVAR, *THE JAMAICA LETTER* (September 6, 1815), reprinted in SIMÓN BOLÍVAR: HIS BASIC THOUGHTS 51–86, 81 (Manuel Pérez Vila ed., 1980).

language with the importation of European Enlightenment ideologies and the inspirations of the revolutionary movements of France and North America.⁷⁹ This is not unreasonable. The intellectual and political elites of the Spanish colonies did provide a ready audience for the ideas of Rousseau, Voltaire, Montesquieu, Smith, Paine, and others. They commonly held intellectual salons, or *tertulias*, to share these perspectives. Political pamphlets entered the colonies from abroad, including the enormously influential French Declaration of the Rights and Duties of Man. The Declaration of Independence and the Constitution of the United States were disseminated by the North American naval officers visiting South American ports. European scientists like von Humboldt on expeditions to America were the sources of inflammatory political ideas.⁸⁰

Still, it is too simple to just see this traffic as a one-way transplantation of ideas that remained the same in the greenhouse of Latin America as they were in their original gardens. That view really begs two questions. Staying with this metaphor, first, how was the soil in which the shoots were received different, and second, how did the new environment affect the subsequent growth of the transplants? In both cases, there is good reason to understand the seed of European and North American rights talk to have produced a distinctive fruit in the Latin American experience.

Take, for instance, the role of the French Declaration of the Rights and Duties of Man. In 1794 Antonio Nariño translated the French Declaration and circulated it in New Granada—for which he was rewarded, by the way, with imprisonment, exile, and the confiscation of his property.⁸¹ A few years later, one band of conspirators sought to oust the *capitán general* of Venezuela with a force of 500 men who were carrying arms and distributing copies of the Declaration.⁸² Other examples show that the knowledge of and commitment to the principles of the French Declaration were tremendous—to the point that one Venezuelan author described it as “a yearning,

79. See, e.g., Hector Gros Espiell, *La Declaración Americana: Raíces Conceptuales y Políticas en la Historia, la Filosofía y el Derecho Americano*, REVISTA DEL INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 41, 42–43 (Número Especial, May 1989).

80. Examples are taken from JOHN J. JOHNSON, SIMÓN BOLÍVAR AND SPANISH AMERICAN INDEPENDENCE: 1783–1830 27–28 (1968); R.A. HUMPHREYS & JOHN LYNCH, *Introduction*, in THE ORIGINS OF THE LATIN AMERICAN REVOLUTIONS, 1808–1826 3, 10–14 (R.A. Humphreys & John Lynch eds., 1966); BENJAMIN KEEN & MARK WASSERMAN, A SHORT HISTORY OF LATIN AMERICA 145–47 (1980). See also David S. Clark, *Judicial Protection of the Constitution in America*, 2 HASTINGS CONST. L.Q. 405, 414 (1975) (noting influence of European social contract theories and French and North American revolutionary thought on educated elite of the Americas).

81. See ALBERTO RAMOS GARBIRAS AND HÉCTOR ALONSO MORENO PARRA, BOLÍVAR Y EL CONSTITUCIONALISMO 59 (1999); ALEJANDRO SOTO CÁRDENAS, INFLUENCIA DE LA INDEPENDENCIA DE LOS ESTADOS UNIDOS EN LA CONSTITUCIÓN DE LAS NACIONES LATINOAMERICANAS 120 (1979).

82. RAMOS & MORENO, *supra* note 81, at 60.

one could almost say an obsession" to make the French Declaration into "the gospel of the new era that humanity was beginning to live."⁸³

At the same time, the ideology with which the French and North American revolutionary creeds were received and redeployed in Latin America differed significantly from that of their original contexts. To begin with, despite the rhetoric of "popular sovereignty," "it is clear that the revolutions on which the modern states of Spanish America were founded were not 'popular' movements, except in a very restricted sense. They were the work of the few, not of the many."⁸⁴ The Enlightenment was not a uniform phenomenon, and the current of its waters that reached Latin America through Spain was a somewhat more conservative one, appealing to the more socially and politically conservative Creoles, whose nationalism was the driving ideological force of independence.⁸⁵ And in any event, even the more radical strains of revolutionary ideology in the era were filtered through the educated minority, which did not accept them uncritically.⁸⁶

Among other things, this meant that the French Declaration in Latin America generally was not understood to have the same strongly anticlerical orientation that it did in France.⁸⁷ Many of the same revolutionaries who carried the banner of the Declaration considered it fundamental to their constitutional ideas that the state would be a confessional one, with the recognition and protection of the Roman Catholic faith firmly at its core—indeed that was one of the few constants of the region's constitutional thinking in this period.⁸⁸ More generally, one of the remarkable features of the diffusion of the Declaration was that its principles typically do not seem to have been regarded as expressing a fundamental rupture with the Latin Americans' prevailing precepts of political ethics as taught in the great colonial universities, preached from the pulpits and published in books.⁸⁹

83. JESÚS M. YEPES, *La Evolución del Pensamiento Constitucional de la América Latina (1810–1830)*, in 3 *EL PENSAMIENTO CONSTITUCIONAL DE LATINOAMÉRICA, 1810–1830* 95, 99 (Academia Nacional de la Historia, 1962).

84. HUMPHREYS & LYNCH, *supra* note 80, at 5.

85. *Id.* at 10. See also KEEN & WASSERMAN, *supra* note 81, at 144–49.

86. Humphreys & Lynch, *supra* note 80, at 10.

87. YEPES, *supra* note 83, at 98.

88. *Id.* See also BERNARDINO BRAVO LIRA, *EL ESTADO CONSTITUCIONAL EN HISPANOAMÉRICA, 1811–1991* 22–23 (1992); Carlos Restrepo Piedrahita, *Las primeras constituciones políticas de Colombia y Venezuela*, in *EL PRIMER CONSTITUCIONALISMO IBEROAMERICANO* 75, 107–08 (José Luis Soberanes Fernández ed., 1992). At the same time, not surprisingly, religious freedom was among the French and North American principles most often missing from the early Latin American constitutions. See SOTO, *supra* note 81, at 121.

89. See YEPES, *supra* note 83, at 111 ("en efecto esta 'Declaración' era en el fondo una síntesis feliz de la enseñanza impartida en las universidades coloniales"); SOTO CÁRDENAS, *supra* note 81, at 119; FERNANDO MURILLO RUBIERA, *AMÉRICA Y LA DIGNIDAD DEL HOMBRE* 215 (1992) (noting influence of traditional Jesuit education on the reception of Enlightenment ideas in Latin America).

Working from Aquinas, Suarez and Vitoria, Juan de Mariana and Luis Molina, and others primarily in the scholastic tradition, it was commonplace to teach doctrines such as the priority of natural law over written law, the legitimacy of resistance to tyranny and unjust laws, and the existence of certain imprescriptible rights and guarantees due to every man by virtue of his humanity.⁹⁰ It was not by accident that the Spanish crown, in the years leading up to the American revolts, tried to abolish all professorships of public law, natural law and the *jus gentium* in the colonial universities and seminaries, and to ban all teaching of doctrines of popular sovereignty.⁹¹ Equally telling, we know that Antonio Nariño, after he was arrested for having translated and disseminated the Declaration, defended himself by arguing that the most important articles of the Declaration were merely reflections of the doctrines of Thomas Aquinas that were being taught in the universities.⁹²

In short, the rights talk of the French Declaration had a unique ground in which to grow in Latin America, one that explicitly drew nourishment from, rather than rejecting, the continent's inherited traditions of thought. As the Mexican scholar Silvio Zavala points out, it is important to stress those precedents that made Latin Americans receptive to liberal ideals of freedom and equality,

so as to correct the mistaken idea that we owe our independence and our liberalism solely to an ingenuous and chance imitation of foreign models suddenly put before the dazzled eyes of our forefathers. Nowadays we realize that their aspirations (at the end of the eighteenth century and the beginning of the nineteenth) were in accord with a state of mind that long existed—an enduring desire for justice and freedom which led them to venerate, among others, the fighting figure of Las Casas.⁹³

When it came time to fashion constitutions for the nascent American republics, the French Declaration uniformly did serve as the principal source for individual rights and guarantees in virtually every early Latin American constitution.⁹⁴ But in light of the history just described we may reasonably see it as a document with a somewhat different meaning—in the context of Latin America, it represents more of a synthesis of the

90. See YEPES, *supra* note 83, at 104–05, 109; SOTO, *supra* note 81, at 119.

91. See YEPES, *supra* note 83, at 112–13; JOHNSON, *supra* note 80, at 22–23.

92. YEPES, *supra* note 83, at 98. Such a blending of traditional Catholic teachings with the critical, rationalist ideas of the Enlightenment was especially typical of the Jesuits in Latin America both prior to their expulsion from Spanish America in 1767 and afterwards, from exile. See KEEN & WASSERMAN, *supra* note 80, at 122.

93. SILVIO ZAVALA, *THE DEFENCE OF HUMAN RIGHTS IN LATIN AMERICA (SIXTEENTH TO EIGHTEENTH CENTURIES)* 63 (1964).

94. See SOTO, *supra* note 81, at 120. For specific examples, see also YEPES, *supra* note 83, at 125–28.

Enlightenment's liberal, secularized version of natural law and the Thomist natural law tradition that had preceded it.

The new constitutions and their statements of rights also represent a different sort of convergence of traditions, the knitting together of two separate strands of Western legal thought. Even though the French Declaration did exert such a strong influence on the rights talk of the revolutionary moment, the United States discourse of rights was also well known, from Thomas Paine to the Declaration of Rights of the Constitution of Virginia and the constitutive documents of the U.S. federation. In drafting their constitutions, the new Latin American republics adopted structures that overall strongly reflected the models of their neighbors to the North. Ever since, one of the most notable characteristics of Latin American legal systems has been their fusion of North American concepts of public law onto a base that is fundamentally a part of the Romano-Germanic legal tradition of Continental Europe. As summarized by the leading U.S. textbook to cover the Latin American legal tradition:

In the idea of the nature and function of a constitution, in the approach to review of the legality of legislative, administrative and judicial action, Latin America was strongly affected by the United States model. . . . In the structure and content of the civil, commercial and procedural codes, in the roles assigned to legislator, scholar and judge in the legal process, in the pattern of legal education and the legal professions, in the style of legal scholarship, Latin American legal systems are more orthodox—sometimes more European than the Europeans themselves.⁹⁵

In terms of human rights, this dynamic created a unique confluence of ideas.

The dominant genes of the idea of human rights in the early Latin American republics were undoubtedly inherited from Continental Europe, and specifically Rousseau. Rights discourse in that tradition, when compared to its North American cousin of the same generation, exhibits more concern for equality and fraternity, and less exclusive emphasis on liberty; it highlights the positive role of law as a pedagogical instrument for the cultivation of virtue and therefore is more willing to stress the duties that are correlative to individual rights.⁹⁶ For all those reasons, the Rousseauian accent on rights tends to view government intervention much more

95. JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA* 463 (1994).

96. For a study of the contemporary differences of these two different "dialects" of rights discourse, see *generally* MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). Glendon ties the more "dignitarian" European language in part to the greater influence of Rousseau and Kant, over Hobbes and Locke. See *id.* at 13.

favorably—it is not just a threat to liberty, but in many cases is essential to the securing of rights together with responsibilities.

This is where we can return to the person of Simón Bolívar, who most clearly embodies the political consciousness of the time. He was a military leader who liberated five nations from Spanish tutelage, a statesman and author of constitutions, a clear-eyed realist who clairvoyantly predicted much of the bleak future of the continent and yet a romantic dreamer of international unity. He had “devoured” Montesquieu, Voltaire, Locke, Hobbes, Spinoza and other thinkers from whom he acquired a commitment to republicanism,⁹⁷ but before all these he was a disciple of Rousseau. Bolívar’s longtime tutor and companion, the eccentric Simón Rodríguez, was utterly consumed by Rousseau.⁹⁸ Rodríguez was not content with just teaching the philosopher’s ideas to Bolívar; he practically made his student a living subject of Rousseau’s pedagogical principles⁹⁹—a true *Émile*, as it were—and years later Bolívar would write to his former tutor, “You cannot imagine how deeply the books you gave me are engraved on my heart. I have not been able to omit even a single comma from these great theses which you presented to me. They have ever been before my mental eye, and I have followed them as I would an infallible leader.”¹⁰⁰

It is not surprising then that no other figure is more frequently invoked by Bolívar in his speeches and writing than Rousseau, nor that Simón’s language of rights might just as well be that of Jean-Jacques.¹⁰¹ Bolívar was firmly committed to the constitutional recognition of basic individual *liberty*; he reserved a special abhorrence toward slavery, regarding it as a “shameless violation of human dignity” and any law perpetuating it to be a “sacrilege.”¹⁰² He also referred to *equality* as “that law of laws” without which all other rights and safeguards would vanish;¹⁰³ and he vigorously defended rights to material *security* such as the recognition and protection of private property.¹⁰⁴ But at their core all of these rights, for Bolívar, depended on two more fundamental things. First was the natural liberty of man as a creature of the Divine: “If there were no divine Protector of Innocence and freedom,” he proclaimed, “I should prefer the life of a great-hearted lion, lording it in the wilderness and the forests . . . But no! God has

97. See GERHARD MASUR, *SIMÓN BOLÍVAR* 49–50 (1948).

98. See *id.* at 34–35.

99. See *id.* at 35, 57–58.

100. *Id.* at 57.

101. Cf. RAMOS & MORENO, *supra* note 81, at 70, 73 (emphasizing Rousseauian character of Bolívar’s commitment to human rights).

102. SIMÓN BOLÍVAR, *Message to the Congress of Bolivia (Lima, May 25, 1826)*, reprinted in *SIMÓN BOLÍVAR: HIS BASIC THOUGHTS* 133–52, 147–48 (Manuel Pérez Vila ed., 1980).

103. *Id.* at 147.

104. *Id.* at 145, 147.

willed freedom to man, who protects it in order to exercise the divine faculty of *free will*.¹⁰⁵ The second foundation, though, puts that divinely-ordained liberty firmly within a Rousseauian understanding of political life. Bolívar believed that one arrives at freedom by means of society and law, and therefore that liberty is the result of an assiduous education of character that is obtained through appropriate legislation and a virtuous government.¹⁰⁶ Thus, he concluded, “the moral development of man is the legislator’s first concern.”¹⁰⁷

Still, as previously argued, Rousseau’s understandings were not the only tradition of thought at work in the new constitutions of Latin America. The North American examples had their say, too. To begin with, the basic concept of individual constitutional rights, especially in a judicially enforceable form, by itself reflected something of a North American twist. Then the rights were placed in the context of constitutional structures that implicitly drew to some degree from the U.S. example of limited government, separation of powers and more negative understandings of liberty. The end result of this commingling of constitutional traditions was that the early Latin American nations provided strong examples of constitutionalized individual rights long before the countries of Europe, but did so with a substantive understanding of the content of the rights that was rather different from the more Lockean, libertarian, property-based notions dominant in most of the United States (especially at the federal level).¹⁰⁸

A typical example is the constitution of the Republic of Colombia, from 1812.¹⁰⁹ Its essential similarity with the US constitutive documents is in the affirmation that human individuals, *qua* human, have certain inalienable rights prior to and above the state, and that the state is obliged to respect those rights. But looking more particularly at the text, we can immediately see serious divergences in understanding. Chapter XII is entitled, “On the Rights of Man and the Citizen,” not only adopting the French title but also closely following the content of its French predecessor. Article 1 begins by declaring that, “The rights of man in society are legal equality and liberty, security and property.” But then Article 2 continues, “Freedom has been granted to man not in order to do good or evil without distinction, but in order to choose to do good.” Even more striking is that the next Chapter,

105. BOLÍVAR, *supra* note 102, at 148.

106. RAMOS & MORENO, *supra* note 81, at 65–66.

107. BOLÍVAR, *supra* note 102, at 150.

108. Thus, Soto notes that none of the political leaders of Latin America who exercised power during the early period of independence failed to include a declaration of rights in the constitutions they created, and attributes significant influence to the North American model on this point, while still recognizing that the substantive model of rights was predominantly the French one. SOTO, *supra* note 81, at 119, 122.

109. *Reprinted in* YEPES, *supra* note 83, at 131–36.

XIII, is entitled, "On the Duties of the Citizen."¹¹⁰ It starts by emphasizing that, "The first obligation of the citizen aims at the preservation of society and thus requires that those who constitute it know and fulfill their respective duties." That is followed by such provisions as Article 4, which specifies that, "No one is a good citizen who is not a good son, a good father, a good brother, a good friend, a good husband." Both the inclusion of duties and even the specific language of Article 4 are also borrowed from France,¹¹¹ and to say the least, they are not of the same strain of rights talk as that of the United States Bill of Rights, with its few, restrained and terse injunctions like, "Congress shall make no law . . . abridging the freedom of speech."¹¹²

Other constitutions of the era were comparable to that Colombian constitution in their understandings of rights and duties, liberty, and equality.¹¹³ That model prevailed for the next century of Latin American history, which would see the adoption of almost 150 constitutions in Spanish-speaking Latin America alone.¹¹⁴ Only with the Mexican Revolution of 1910, and the adoption of the Mexican Constitution of 1917 at the constitutional congress of Querétaro did Latin America begin its second "major epoch" of constitutional history as a region.¹¹⁵

V. THE CONSTITUTION OF "SOCIAL LIBERALISM"

What was so uniquely important about the Mexican Constitution of 1917? Part of the answer lies simply in its timing. It was crafted at a time of global upheaval and was the first constitution to begin to take into account a world being reshaped by World War I, Russian unrest, significant economic globalization, and the growing power of Latin America's northern neighbor. That period was followed by an intense political ferment during which

110. Cf. SOTO, *supra* note 81, at 121 (considering the articulation of duties together with rights to be one of the most consistent and significant differences between early Latin American constitutionalism and its North American counterpart).

111. See FRENCH CONSTITUTION OF 1795, *available at* <http://www.conseil-constitutionnel.fr/constitution/c1795.htm> (last viewed 9 Feb. 2003).

112. U.S. CONST. amend. I.

113. For thorough discussions of other constitutions of the period, see EL PRIMER CONSTITUCIONALISMO IBEROAMERICANO (José Luis Soberanes Fernández ed., 1992); Eduardo ROZO ACUÑA, BOLÍVAR Y LA ORGANIZACIÓN DE LOS PODERES PÚBLICOS 69–117 (1988); EL PENSAMIENTO CONSTITUCIONAL DE LATINOAMÉRICA, 1810–1830 (5 Volumes, Academia Nacional de la Historia, 1962).

114. See BRAVO, *supra* note 88, at apps. I–II.

115. Clark, *supra* note 80, at 415. Cf. Russell Fitzgibbon, *Constitutional Development in Latin America: A Synthesis*, 39 AM. POL. SCI. R. 511, 518–19 (1945) (describing 1917 as "the most significant date in the whole panorama of Latin American constitutionalism" and its "coming of age").

fourteen other Latin American countries rewrote their constitutive documents over a mere quarter century,¹¹⁶ making the Mexican one the eldest sibling among a new family of twentieth century constitutions.

But the importance of the Mexican Constitution of 1917 is due even more to its content, and specifically to its incorporation of extensive social and economic guarantees and protections. It preserves almost unchanged the traditional complement of classical civil and political liberties of the previous constitution of 1857, but adds to them detailed provisions on labor, agrarian reform, and the social dimensions of property rights.¹¹⁷ Articles 27 and 123 of the 1917 Constitution are its most famous. The former provides, among other things, that, "The Nation shall have at all times the right to impose on private property such limitations as the public interest may demand" and gives the government the power to, "take necessary measures to divide large landed estates." It recognizes the right to hold property privately, but subordinates that right to the public interest. Much of the Article reflects a severe economic nationalism, restricting control over natural resources and property ownership by foreign interests generally.¹¹⁸ In contrast, Article 123 runs to several pages with statutory-like detail on labor rights and working conditions, including regulation of maximum working hours, child labor, laborers' health and safety, the right to organize and to strike, and the establishment of pension, unemployment, and accident insurance—it is the only article that occupies a whole chapter of the Constitution on its own, entitled, "Of Labor and Social Welfare."¹¹⁹

These social and economic provisions were the first of their kind in any constitutional document, not just in Latin America but in all the world. The principles of the 1917 Constitution were borrowed or imitated in varying degree by virtually every Latin American constitution thereafter, and made themselves felt in the next wave of European constitutionalism, too.¹²⁰

116. See BRAVO, *supra* note 88, at app. III.

117. For the original text of the 1917 Constitution in English, as well as a side-by side comparison of it and the 1857 Constitutions, see *The Mexican Constitution of 1917 Compared With The Constitution of 1957*, 71 ANNALS AM. ACAD. POL. SOC. SCI. (H.N. Branch trans., 1917) [hereinafter 1917 CONSTITUTION].

118. 1917 CONSTITUTION, *id.* art. 27.

119. *Id.* art. 123.

120. See ANTONIO COLOMER VIADEL, INTRODUCCIÓN AL CONSTITUCIONALISMO IBEROAMERICANO 105 (1990); Fernando Yllanes Ramos, *The Social Rights Enshrined in the Mexican Constitution of 1917*, 96 INT'L LAB. R. 590, 591 (1967); Fitzgibbon, *supra* note 115, at 519. This is not to say that the 1917 Constitution directly influenced European constitutions of the post-World War I era, but it did anticipate chronologically their recognition of social and economic rights. See, e.g., Constitution of the German Reich of August 11, 1919, Arts. 151–65, in THE NEW CONSTITUTIONS OF EUROPE 176, 205–09 (Howard Lee McBain & Lindsay Rogers eds., 1922); Constitution [of 1921] of the Kingdom of the Serbs, Croats and Slovians (Jugoslavia), Arts. 22–44, in *id.* at 348–56.

The 1917 Constitution is sometimes regarded today as a “socialist” document. Such a view could not be derived merely from the Constitution’s social protections or the social “mortgage” on private property rights—these have been standard constitutional features in most Western free market democracies, and central goals of Christian Democratic political programs in many countries since the Second World War. The socialist label undoubtedly arises in part because of the document’s authorization of expropriation and redistribution of land and state control of certain economic sectors, especially natural resources. The characterization is reinforced by subsequent political developments in Mexico. The consolidation of the dominant power of the National Revolutionary Party (later called the Institutional Revolutionary Party) in the 1930s constituted a decisively radical political turn not arising from the 1917 Constitution itself,¹²¹ and the presidency of Lázaro Cárdenas from 1934–40 marked a high point of left revolutionary ideology, including a Marxist-Leninist accent to the term “socialism.”¹²²

Nevertheless, it is a misleadingly simplistic reduction to see the 1917 Constitution as socialist in its original orientation. Neither the history of the Constitutional Congress nor the resulting text itself support such a view, and in fact it obscures the uniqueness of the Mexican developments, reinforcing again an implicit perception that Latin American developments are merely derivative of European creativity. With respect to the Congress, the delegates, although united in their support for the Revolution, came from many different social, economic, and professional backgrounds.¹²³ They showed little inclination to conceive of the Revolution in terms of grand, abstract ideologies, and in fact it is widely agreed that the debates of the constitutional assembly are notable for the nearly complete absence of any single or systematic set of economic or social theories.¹²⁴ This is confirmed by the text

121. See BRAVO, *supra* note 88, at 35–37.

122. See KEEN & WASSERMAN, *supra* note 80, at 281–94; HÉCTOR GONZÁLEZ URIBE, *HOMBRE Y ESTADO* 194 (1988).

123. See EBERHARDT VICTOR NIEMEYER, JR., *REVOLUTION AT QUERÉTARO: THE MEXICAN CONSTITUTIONAL CONVENTION OF 1916–1917* 39–40 (1974).

124. See COLOMER, *supra* note 120, at 105; JOSÉ GUTIÉRREZ CASILLAS, S.J., *HISTORIA DE LA IGLESIA EN MÉXICO* 403, 413 (2nd ed.1984); NIEMEYER, *supra* note 123, at 231; ROBERT E. QUIRK, *THE MEXICAN REVOLUTION AND THE CATHOLIC CHURCH, 1910–1929* 85–86 (1973); ALFONSO NORIEGA CANTÚ, *LA NATURALEZA DE LAS GARANTÍAS INDIVIDUALES EN LA CONSTITUCIÓN DE 1917* 9–10, 95 (1967); Ward M. Morton, *The Mexican Constitutional Congress of 1916–1917*, 33 *Sw. Soc. Sci. Q.* 7, 26 (1952). As one delegate put it during the debate on individual rights, “I can say, and many of my fellow delegates will agree with me, that not only do we lack that preparation in economics but neither do we have it in constitutional law nor in any other field of law; therefore . . . we decide these highly important matters after hearing the pros and cons because when we vote, it is our revolutionary instinct that guides us rather than our understanding.” *Quoted in* NIEMEYER, *supra* note 123, at 43.

of the Constitution itself, which as a whole does not reveal any consistent ideological stance; it is more of a hodgepodge of ideas, many of them even contradictory. Félix Palavicini, one of the principal protagonists of the constitutional process and the author of the first history of the Constitutional Convention, concluded simply that, "The Constitution was not a socialist charter, certainly, but neither did it remain within a strictly individualistic system."¹²⁵

Practically the only philosophical-judicial theme that has been plausibly proposed as a consistent underlying idea of the 1917 Constitution at the time when it was drafted is "the conviction that the human being, as a human person, has rights prior to the state."¹²⁶ It can reasonably be seen as a document about a certain vision of rights, one that encompasses social, economic, and cultural spheres as well as political and civil ones. The Constitution begins with its first chapter entitled, "Of Individual Guarantees," and the first article declares that, "In the United Mexican States every individual shall enjoy the guarantees granted by this constitution."¹²⁷ When this provision was opened for debate at the Constitutional Convention, according to Palavicini,

The sense of the delegates was unanimous that it was desirable to maintain individual guarantees, the established rights of man. The Mexican revolutionaries could not forget the history of their country. Arbitrariness and abuse had been almost constantly the authorities' norm, and in the Convention no one supported the elimination of individual guarantees, the citizens' supreme protection. The only communist of the assembly, professor Monzón, was not opposed.¹²⁸

The Constitution, in other words, did not reject the basic liberal rights of the previous 1857 constitution, but instead added to them a solicitude for certain social concerns, especially labor, that sought to make constitutional rights more reflective of the reality of human life in all its factors.¹²⁹ As one

125. FÉLIX F. PALAVICINI, 1 *HISTORIA DE LA CONSTITUCIÓN DE 1917* Prólogo (1938). Moreover, Palavicini wrote these words more than 20 years later, in the midst of Mexico's most ardently socialist period.

126. See generally NORIEGA, *supra* note 124, at 9–10.

127. 1917 CONSTITUTION, *supra* note 117, art. 1. The language of Article 1 suggesting that the rights are "granted" by the state could indicate a more positivist understanding of rights, rather than one recognizing that the individual rights in question precede the state, but as Alfonso Noriega has shown, that was not the understanding of the Constitution at the time of its adoption or in the discussions of the delegates, but rather an understanding that emerged later with the predominance of Kelsenian legal philosophy in Mexico. See generally NORIEGA, *supra* note 124, at 125.

128. PALAVICINI, *supra* note 125, at 217.

129. See 1917 CONSTITUTION, *supra* note 117; GONZÁLEZ, *supra* note 122, at 185. This also reflected the broader view among most of the revolutionaries that the contents of the 1857 constitution in general were good and not in need of wholesale change. See VÍCTOR M. MARTÍNEZ BULLÉ GOYRÍ, *LOS DERECHOS HUMANOS EN MÉXICO EN EL SIGLO XX* 27 (1998).

author puts it, “the concept of human dignity, called to be protected by law and by social institutions, was enriched by reaching concrete individuals, men in history with hunger and thirst, with material needs that are presuppositions for the exercise of their liberty.”¹³⁰

This immediate, concrete concern for the conditions of the people stands out in the work of the Congress, and must be regarded as the first source of the 1917 Constitution’s innovations. The delegates’ reforms were not the product of a general theory, nor of the mechanical importation of foreign ideas but rather of the tangible experience of the Revolution.¹³¹ A human solidarity with the poor and the working class prevailed over abstract ideology: “In the heart of the congress, even on the lips of the distinguished members of the radical group, . . . we observe only . . . an authentic preoccupation for the concrete problems of the fields [*campo*] and of laborers, problems that were . . . posed as burning realities of life, stripped of all conceptual clothing.”¹³² These are not “natural rights” in the sense of being the result of understanding and reflecting on any theory of natural law, but natural rights in the existential sense of belonging to the human person as such, engaged in specific activities in which human dignity and freedom is at stake.¹³³

The second source, which goes more specifically to the actual language of the constitutional provisions of Article 123, was some of the progressive social and labor legislation of other countries. One of the principal drafters of Article 123 was José Natividad Macías, a well-known lawyer from Guanajuato with “one of the best legal minds of the convention.”¹³⁴ Macías was a friend of the First Chief of the Constitutionalist government, Venustiano Carranza, who appointed Macías to a prominent position in the Social Legislation Section of the Ministry of Public Instruction. In this capacity, Macías had prepared in 1915 a proposed labor code for the Carranza government, based on his travels to the United States to observe working

130. MARTÍNEZ, *supra* note 129, at 31.

131. See ALFONSO NORIEGA CANTÚ, *LOS DERECHOS SOCIALES, CREACIÓN DE LA REVOLUCIÓN DE 1910 Y DE LA CONSTITUCIÓN DE 1917* 77–87 (1988). Regarding generally the material conditions of the Mexican people in the years prior to the Constitutional Congress, see NIEMEYER, *supra* note 123, at 7–10.

132. NORIEGA, *supra* note 124, at 95. Cf. NIEMEYER, *supra* note 123, at 133, 234 (“The predominant theme in these debates was simple humanitarianism. What motivated the delegates more than anything else was the wish to enhance the quality of life for the Mexican worker and his family, to restore his dignity as a human being, and to give him a just share of the national income.”).

133. NORIEGA, *supra* note 124, at 96–97.

134. NIEMEYER, *supra* note 123, at 51. The details of Macías life and work in this paragraph are all drawn from *id.* at 50–51, 113–14, 119, 121. For the history and debate on Article 123 in the Constitutional Congress generally, see also JORGE SAYEG HELÚ, *2 EL CONSTITUCIONALISMO SOCIAL MEXICANO: LA INTEGRACIÓN CONSTITUCIONAL DE MÉXICO (1808–1986)* 280–92 (2d ed. 1987).

conditions and meet labor leaders, and based on his study of the labor legislation of the United States, England, France and Belgium. Although political conditions did not allow the code to be promulgated at that time, it did end up serving as the principal model for what would eventually be Article 123 of the Constitution.

Finally, a third source for the Constitution's social guarantees should also be noted—one that represents both a continuity with the tradition of Latin American human rights thinking and also a deep irony in the work of the Constitutional Congress. There is good reason to conclude that the pervasive presence and influence of Catholic social doctrines that became prominent in the decades preceding 1917 also contributed to the social guarantees of the Constitution. In the first papal encyclical on the "social question," *Rerum Novarum* in 1891, Pope Leo XIII addressed the conditions of workers, emphasizing the need for state intervention to protect them, guaranteeing for instance a just wage and the freedom to organize for collective bargaining.¹³⁵

The irony, of course, is that Mexico was a paradigmatically anticlerical state throughout most of the 19th century, and during the Revolutionary years between 1910 and 1917 the persecution of the Catholic Church was sometimes extreme.¹³⁶ In the Constitutional Congress, aside from the social provisions of the constitution, nothing was more central to the debate and work of the assembly than the "Jacobin" hostility toward religion generally and the Catholic Church in particular.¹³⁷ Yet, a closer look at the history shows that the air of Catholic social mobilization had nevertheless been quietly blowing since the turn of the century and had become a prominent part of the public discourse.¹³⁸ Without much publicity, the Mexican Catholic Social Action movement began toward the end of the 19th Century, and the next decade witnessed four different National Catholic Congresses, a number of gatherings known as "Catholic social weeks" and "agricultural weeks" and the organization of a confederation of Catholic workers' societies.¹³⁹ The constant theme of these events was a concern for

135. Pope Leo XIII, *Rerum Novarum: Encyclical Letter on Capital and Labor* (May 15, 1891) in 2 *THE PAPAL ENCYCLICALS 1878–1903*, 241 (Claudia Carlen ed., 1981). Papal encyclicals are typically denominated by the first few words of their Latin texts; in this case, *Rerum Novarum* means "New Things."

136. See generally CASILLAS, *supra* note 124, at 215–427.

137. See NIEMEYER, *supra* note 123, at 60–100.

138. See generally MANUEL CEBALLOS RAMÍREZ, *EL CATOLICISMO SOCIAL: UN TERCERO EN DISCORDIA* (1991). It was, in fact, one of the revolutionary grievances against the porfirian dictatorship that Díaz had tacitly allowed the Church to flourish and to ignore the formal legal restrictions imposed on it. See NIEMEYER, *supra* note 123, at 10; CASILLAS, *supra* note 124, at 384–88.

139. See CEBALLOS, *supra* note 138, at 175–251; CASILLAS, *supra* note 124, at 355–57.

poverty, the conditions of workers, education, and agrarian reform.¹⁴⁰ In 1911, Mexico saw the creation of its first political party ever to bear the word “Catholic” in its name, the National Catholic Party, with one of the party’s explicit goals to promote the principles of *Rerum Novarum*.¹⁴¹ It sought factory legislation, protection of labor unions, cooperatives, and land distribution to the poor—very radical reforms from the liberal 19th century perspectives of Mexico’s governing elite.¹⁴² In some states of the federation, including the central and populous state of Jalisco, the National Catholic Party acquired control long enough to actually implement some of its legislative program.¹⁴³ These were widely seen as the vanguard of national reform efforts.

It is not possible to pinpoint the influence of all this activity on the constitutional congress of Querétaro and its 1917 document. Without a doubt, Catholic social doctrine did not *directly* shape the social provisions of the Constitution. The National Catholic Party had been forced out of existence by then, even though it later made a brief return under a different name,¹⁴⁴ and in any event no political party bearing the name of or having an affiliation with any religious denomination was allowed to participate in the election of delegates.¹⁴⁵ Other political opponents of the Revolution were also barred from participating, and many of the delegates were forced to defend their revolutionary credentials before being accepted by the assembly.¹⁴⁶ Moreover, even the few delegates to the Constitutional Congress who were staunch Catholics would not have had the temerity to suggest that anything explicitly Catholic ought to be taken into consideration in a positive way by the assembly—it would be hard to overstate the animosity with which any such proposal would have been received.¹⁴⁷

Nevertheless an inference of indirect influence is very reasonable. Above all, the whole intellectual and political environment of the first decade of the century was suffused with the ideas and rhetoric of the Catholic social agenda.¹⁴⁸ Even though the Constitution does not provide a

140. See CEBALLOS, *supra* note 138, at 175–251; CASILLAS, *supra* note 124, at 418–21.

141. See CEBALLOS, *supra* note 138, at 395–416; CASILLAS, *supra* note 124 at 421–25; QUIRK, *supra* note 124, at 28–31.

142. See QUIRK, *supra* note 124, at 26.

143. See *id.* at 32–33; Laura O’Dougherty Madrazo, *De Urnas y Sotanas: El Partido Católico Nacional en Jalisco* (doctoral dissertation, El Colegio de Mexico, 1999).

144. See QUIRK, *supra* note 124, at 28, 111.

145. See CASILLAS, *supra* note 124, at 402.

146. See NIEMEYER, *supra* note 123, at 31–59.

147. Note, for example, that in addition to including in the constitution prohibitions on any religious groups owning real property (Art. 27) or establishing or directing primary schools (Art. 3), the Congress only narrowly rejected proposals to ban all oral confessions and to require any priests to be married. See NIEMEYER, *supra* note 123, at 80.

148. See CASILLAS, *supra* note 124, at 413. See generally CEBALLOS, *supra* note 36.

definitive indication of its different inspirations, it cannot be denied that the platforms of Catholic Social Action and the National Catholic Party bear remarkably strong resemblances to the provisions incorporated into the Constitution on labor and agrarian reform, in particular—resemblances too strong to be merely accidental. A side-by-side comparison shows that Article 123 of the Constitution corresponds in almost every clause to some part of the basic texts and principles espoused by the Mexican social Catholic movement, from *Rerum Novarum* to the declarations of the different national congresses and Catholic social weeks of the preceding decade.¹⁴⁹ The parallel is clear enough to have led various Catholic observers justifiably to claim a sort of intellectual paternity over some of the social provisions of the 1917 Constitution.¹⁵⁰

A less decisive fact, but one suggestive enough to mention, is that among the few Catholics in the Constitutional Congress was none other than the author of the 1915 draft labor code and one of the principal draftsmen of Article 123, José Natividad Macías—in fact, his nickname among the more anticlerical delegates was “Monsignor.”¹⁵¹ Distrusted by some in the Congress because of his close ties to Carranza and his suspected “reactionary” tendencies, he was nevertheless given responsibility for the new provisions because of his strong experience with and commitment to progressive labor legislation.¹⁵² We will never know how much of this originated in, or was encouraged by, his familiarity with Catholic social politics, but under the historical circumstances it would seem unwarranted to ignore it.

To be very clear, however, none of this is meant to suggest that the 1917 Constitution and Mexico’s leadership in the development of the Latin American human rights tradition is really just a consequence of Catholic doctrine or culture—that would be just as reductionist as a blunt conclusion that it is “socialist,” *tout court*.¹⁵³ But there are other important reasons for affirming the connection between the two.

149. *Id.* at 402–13 (providing side-by-side, article-by-article analysis).

150. See, e.g., CASILLAS, *supra* note 124, at 401.

151. See NIEMEYER, *supra* note 123, at 51.

152. See NIEMEYER, *supra* note 123, at 112–21.

153. Even if this were the point, one would have to recognize that there are several ways that the Catholic social action agenda would have differed from the social and economic program of the Constitutional Congress. For instance, the methods for achieving reform that the Constitution adopted were far more harsh than Catholics had been inclined to promote, and the Constitution pays somewhat less attention to the cultivation and protection of intermediate forms of association between the individual and the states—like the cooperatives and mutual-aid societies created under the National Catholic Party’s auspices. Where the Catholics emphasized the foundations of reform in mutual charity, the Constitution entrusted more power to the state leviathan.

First, it helps us see why and how this Mexican constitutional history became so significant as a chapter in the history of the Latin American human rights tradition rather than remaining simply an idiosyncratic, autochthonous story. The fact that the 1917 Constitution did have such a widespread impact on the region, even in many systems that were not necessarily socialist in ideological orientation, attests to the fact that it tapped into the broadly shared understandings of human dignity and society that are the foundation of expressions of human rights. It was located within a history recognizable throughout Latin America. Second, the parallel between Mexican revolutionary social policies and Catholic social activism highlights the continuation of one of the Latin American tradition's central themes: seeking to combine and balance the individual and the communal aspects of human rights. That dynamic was evident in Las Casas and the conquest, and in Bolívar and the liberal republican revolutions. The basic underlying goal of Mexican social Catholicism was to navigate the narrow way between the Scylla of a brutally atomistic liberal capitalism and the Charybdis of excessive socialist collectivism. The Constitution of 1917 shared that basic aim, accepting the received tradition of individual rights and supplementing it with greater recognition and protection of the social dimensions of the human person.

That is the "social liberalism" that Mexico bequeathed to constitutionalism generally.¹⁵⁴ Like Las Casas and the liberal revolutionaries before them, the architects of the Mexican constitutional moment of 1917 appropriated the existing discourse of rights of their time, subjected it to the test of their experience and emerged with their own metamorphosed contribution. A short thirty years later, Mexico carried that banner with zeal and pride into the arena of international human rights.

VI. CONCLUSION

With these few broad strokes I have tried to make a case here that the Latin American contributions to the formal birth of international human rights law in 1948 were the reflection of a long and deep tradition of the idea of human rights in the region, one that was as old as the turbulent encounter between Europe and the New World. From those beginnings, it was strongly universalistic in its orientation, founded on the equal dignity of all members of the family. Continuing to build on its origins, it absorbed the political and intellectual currents of republican revolution, and produced a constitutional

154. See SAYEG, *supra* note 134, at 387–90. Cf. NORIEGA, *supra* note 131, at 82 (seeing "social liberalism" as part of a long and fertile Mexican tradition).

rights language with a strong devotion to both liberty and equality, a distinctively positive conception of freedom and an emphasis on the relationship of rights and responsibilities. When this heritage met the economic and political transformations of the 20th century, the tradition aimed again at synthesizing the individualistic with the social and economic dimensions of human dignity. Throughout, one of the consistent characteristics of the Latin American tradition has been its capacity to appropriate, adapt and transform received ideals in the crucible of experience and practice.¹⁵⁵

The Latin American story does not end in 1948, of course. On the contrary, the region's important contributions to the idea of human rights have continued since then. Although it points us beyond the horizon of this article, one can identify any number of positive Latin American interventions in the global human rights movement in the last 50 years, ones that highlight the strong tradition of the region. The most obvious and well-known, of course, is the wealth of the Inter-American regional human rights system, including especially the jurisprudence of the Inter-American Court of Human Rights.¹⁵⁶ Less familiar are the active roles that Uruguay, Mexico, Chile, and other Latin American nations played in developing labor rights and the right to an adequate standard of living in the International Covenant on Economic, Social and Cultural Rights.¹⁵⁷ The drafting of the International Covenant on Civil and Political Rights witnessed strong participation from almost all the Latin American countries—Brazil, Chile, Mexico, and Uruguay, most notably—on a variety of fronts ranging from the right to life to the equality of spouses in marriage.¹⁵⁸ Cuba joined Mexico in seeking protection for motherhood in the context of the Convention on the Elimination of All Forms of Discrimination Against Women,¹⁵⁹ while Venezuela and Argentina were critical actors in the negotiation of the Convention on the Rights of the Child.¹⁶⁰ We can find the continent's

155. Cf. Jesús Antonio de la Torre Rangel, *El reconocimiento del otro: raíz de una concepción integral e histórica de los derechos humanos*, 6 ANUARIO MEXICANO DE HISTORIA DEL DERECHO 263, 266, 271 (1994) (arguing that the strength of the Spanish-American tradition of human rights generally comes from the link between theory and concrete, historical practice).

156. See generally INTER-AMERICAN HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM (Thomas Buergenthal & Robert E. Norris eds., 1993).

157. See MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 228, 230, 250–60, 289–301 (1995).

158. See generally MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1987).

159. See LARS ADAM REHOF, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 83 (1993).

160. See THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 23, 28 (Sharon Detrick ed., 1992).

diplomatic delegations playing important roles in forging international consensus regarding problems of racial discrimination, intolerance, and the dignity of women.¹⁶¹ Most recently, the examples set in the region for establishing accountability in conditions of transitional justice situations,¹⁶² and for affirming the relationship between democracy and human rights,¹⁶³ are models for the growth and strength of universal human rights. Any one of these merit further study, and each of them grows in significance when understood within the context of a larger regional tradition of human rights.

At the same time, of course, many other parts of the larger story of human rights in Latin America, both past and present, have necessarily been omitted here. In the expanses of centuries and continental distances there are also a variety of dissenting voices, competing lines of thought, and, perhaps most of all, vast contradictions between the persistent idea of human rights and the persistent violation of them. Yet, in the end if there is a recognizable continuity within the history of the Latin American human rights idea, none of these complexities and paradoxes negate it.¹⁶⁴ Even in the continent's darkest times of "dirty war," the responses of many Latin Americans were worthy of a modern-day Las Casas, tempering the edge of the idea of universal human rights in the hottest fire of experience. The contradictions simply mean that there is more, and more difficult, work to do in explaining and reconciling the many divergent strands of human rights. In a world grappling with the challenges that globalization poses to human dignity, the work of knitting together in a more coherent way those different strands of the idea of human rights will be done best by retrieving and appropriating the tradition of Latin America, as well as that of every other history and people.

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161. See, e.g., Regional Conference of Experts for Latin America and the Caribbean on Economic, Social and Legal Measures to Combat Racism, with Particular Reference to Vulnerable Groups, 25–27 October, 2000, available at <http://www.unhchr.ch/html/racism/02-recomstia.html>; Conference on Tolerance in Latin America and the Caribbean, September 12–16 1994, Final Statement, available at <http://www.unesco.org/tolerance/final.htm> (last viewed 9 Feb. 2003); Regional Program of Action for the Women of Latin America and the Caribbean, 1995–2001, U.N. Doc. E/CN.6/1995/5/Add.3
162. See, e.g., COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Philip E. Berryman trans., 1993).
163. See, e.g., INTERNATIONAL HUMAN RIGHTS IN CONTEXT 903–18 (Henry Steiner & Philip Alston eds., 2d ed. 2000).
164. Paul Gordon Lauren makes this point marvelously with respect to the evolution of human rights generally. See PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 20–36 (1998).