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**Confronting the Colonial Legacy: Retaining and Rejecting
Spanish Colonial Law in Nineteenth Century Latin America**
A Comparative Case Study on Testamentary Freedom in Mexico and
Argentina

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INTRODUCTION: SPANISH COLONIAL LAW AND THE DIVERGENCE IN LATIN AMERICAN INHERITANCE REGIMES

Spain imposed on its American colonies an inheritance regime establishing laws of forced heirship, giving an absolute legal right to certain relatives to inherit a portion of the decedent's estate. Accordingly, if an individual died intestate, then his or her forced heirs included, in the following order, his children and then his parents.¹ Notably, Spanish colonial rules of inheritance restricted testamentary freedom. Only one-fifth of an individual's estate could be willed without restriction, while the remaining four-fifths of the estate, called the *legítima*, went to the forced heirs.² Children, as the first of the forced heirs, normally inherited the *legítima*. Where no children lived to inherit the *legítima*, then the *legítima* itself was reduced to two-thirds of the estate, with the share that could be willed freely by the testator increasing to one-third. The parents, as the second of the forced heirs, inherited this reduced *legítima*. In the absence of both children and parents as forced heirs, a testator could will his or her entire estate to whomever he or she chose.³

In short then, Spanish colonial inheritance law created a regulated and restricted regime of increasing degrees of testamentary freedom. Where the children lived, testamentary freedom was most restrictive, as the testator could only freely determine

¹ Arrom, 312-15; Deere, 655-61.

² *Id.*

³ *Id.*

the passage of one-fifth of his estate. Where children did not live, the testator gained more freedom to distribute his estate, as the parents automatically received two-thirds of the decedent's estate, and the testator retained freedom to will as to two-thirds of his estate. Where no children or parents lived, a testator then had absolute freedom to will his entire estate to whomever he or she desired.⁴

Spanish colonial inheritance laws, by restricting testamentary freedom, made it extremely difficult for a parent to disinherit a child.⁵ This principle entailed, at its core, a communal "socially situated view of the individual" that prioritized familial bonds over individual testamentary freedom.⁶ Spain thus bequeathed to the Americas an inheritance law regime that "proceeded from a notion of communal obligation as opposed to personal choice," a regime built into the Latin American legal structure between sixteenth century Spanish colonization and nineteenth century Latin American independence.⁷

⁴ Arrom, 312-15; Deere, 655-61. See also, Deere, Carmen Diana, and Magdalena León. *Liberalism and Married Women's Property Rights: Continuity and Change in Nineteenth Century Latin America*. Tech. 2003. Print. Paper Prepared for delivery at the meetings of the Latin American Studies Association, March 27-30, 2003, Dallas. [Hereinafter, "Deere technical paper"].

⁵ Rougeau, 1-8.

⁶ *Id.* at 6. Consider the analysis: "On the one hand, this freedom in a testator might be said to truly respect human dignity and personal freedom by liberating individuals from state-coerced obligations to bestow wealth on their children. Arguably, voluntary giving is a particularly authentic expression of the bonds of love and affection that we hope exist between parents and children. On the other hand, deference to individual choice reveals how freedom of testation can foster a destructive sense of power over others and can nurture an understanding of familial bonds as conditional and revocable. Although there will always be relationships between parents and children that break down, should not the default position of the law be to assume intergenerational loyalty within families and to encourage equality and sharing?"

⁷ *Id.* at 2.

Upon achieving independence and inspired by the movement to codify law begun by the 1804 French Civil Code, Latin American nations grappled with what to retain and reject from their colonial history. South American nations largely did the former and kept their Spanish colonial legal inheritance, including the forced heirship regime. In contrast, Mexico and Central American nations rejected forced heirship and, in turn, rejected their colonial legacy. In the place of forced heirship, Mexico and its neighbors established full testamentary freedom, rejecting the Spanish colonial emphasis on the communal, social placement of the individual in favor of personal freedom in the testator.

Latin American nations thus diverged in their legal regimes governing family law property rights during the nineteenth century, with the retaining or rejection of forced heirship an example of the phenomenon.⁸ Missing from the literature is an in-depth focus and examination of particular countries. Most scholarship instead focuses on a broad survey grouping all of Latin America together, without paying particular attention to the uniqueness of individual states. This paper thus devises a comparative case study focused on two states—Mexico and Argentina—to address that gap in the existing literature.⁹

⁸ Note: Latin America, within the context of this paper refers to the nations of Mexico, Central America, and South America, collectively. It excludes Brazil, a Portuguese colony with a distinct legal regime and legal history.

⁹ In doing so, it adds to the work of Arrom, Deere and León, and Mirow in particular (see the References and Works Consulted section of this paper).

THE CASE OF MEXICO: INDIVIDUAL FREEDOM AND THE MOVE AWAY FROM THE COLONIAL INHERITANCE

Mexico adopted a full testamentary freedom regime in its 1884 Civil Code, abolishing the forced heirship regime and allowing a competent testator through a will to decide who would be the beneficiary of his or her estate.¹⁰ While both Honduras (1880) and Guatemala (1882) established a full testamentary freedom regime earlier than Mexico, Mexico still remained ahead of Costa Rica (1887), El Salvador (1902), and Nicaragua (1903).

Mexico makes a strong case to study not only because it made some of the earlier innovations in the inheritance regime, but also because it served as a geopolitical center of the Viceroyalty of New Spain, with the seat of colonial government for the Viceroyalty located in Mexico City.¹¹ Mexico City and the area comprising modern day Mexico became a new world capital—a center of politics, law, economy and culture for

¹⁰ As Deere and León note in their Technical Paper, the abolition of the forced heirship regime had in fact been under discussion in Mexico during the 1870s, despite not being to abolish the regime with legal effect under 1884. See Deere (technical paper), 32.

¹¹ Spain divided its colonial Empire in the Americas into Viceroyalties (*Virreinos*). The Viceroyalty of New Spain (*Virreinato de Nueva España*) lasted from approximately 1521 (the conquest of the Aztec Empire) to 1821 (Mexican independence) and was administered by a viceroy appointed by the King of Spain. The viceroy of the New Spain resided in what is today Mexico City. It was one of the most expansive of the Spanish Viceroyalties, with New Spain consisting of the territories of modern day Mexico, Central America, portions of the modern day south and western United States of America, the Spanish East Indies (the Philippines) and West Indies (Cuba, Haiti, Dominican Republic, Jamaica).

the Spanish in the Americas.¹² And New Spain prospered, made wealthy through its robust mining and textile sectors, its export of silver, and its large urban populations that provided quality labor.¹³

Mexican revolutionaries first declared independence from Spain in 1810, and the devastation created by the Mexican War of Independence (1810-1821) that followed influenced Mexican political and legal culture. The most destructive combat during the war occurred in the prosperous central Mexico region, the center of New Spain's land, labor and capital. Mexico experienced tremendous economic damage.¹⁴ Mining production, one of New Spain's the most profitable industrial sectors, fell in value from an annual average 25 million pesos in the late colonial period to a low of 6.5 million pesos in 1819, with combatants destroying mining equipment and means of production.¹⁵ Already naturally limited in its available agricultural land, Mexico further suffered combatants burned farms and killed livestock.¹⁶ Mexicans lost faith in their institutions, and exported their capital or withdrew it from circulation, contracting

¹² The heartland of New Spain was the land comprising modern day Mexico, called the "Kingdom of New Spain." See Rodríguez O., Jamie E. "Down From Colonialism: Mexico's 19th Century Crisis."

¹³ Comparatively, Mexico had some of the largest cities in the Western Hemisphere by 1800. Mexico City, Guanajuato, and Querétaro, for instance, respectively had populations of 150,000, 60,000, and 50,000. The principal urban centers of the United States at the same time—New York, Philadelphia, and Boston—had 60,000, 41,000, and 25,000 people. See Rodríguez O.

¹⁴ Rodríguez O., citing José María Quirós, *Memoria de estatuto* (Veracruz, 1817) for estimates on the losses to the economy.

¹⁵ *Id.*

¹⁶ *Id.* As stated by Rodríguez O.: "Less than 10% of Mexico is arable without extensive man-made improvements, and even with such improvements, the arable soil increases to only about 15% of the nation's territory—an area equal to the arable land in the state of Kansas."

investment.¹⁷ In short, “the wars of independence severely damaged agriculture, commerce, industry, and mining, as well as the nation’s complex but delicate infrastructure.”¹⁸

Post-independence and leading to the passage of its first Civil Code (1870), Mexico had no prospect for recovering from this economic devastation. In its first 46 years of independence from 1821, Mexico had 56 different administrations.¹⁹ The army intervened in the political process, prevented civilians from controlling government, and became an instrument of corrupt politicians.²⁰ Mexico lacked a coherent ideology on governance, as divisions and conflicts arose between federalists and centralists, republicans and monarchists, and between advocates and opponents of clerical privilege.²¹ These divisions “transformed the 50 years between 1820 and 1870 into an epoch of violence, lack of property rights, and other forms of disorder.”²² Political instability and continuous internal warfare in Mexico negatively impact on economic growth by increasing policy uncertainty, discouraging domestic and foreign investment, and prohibiting necessary infrastructure investment in a nation topographically unsuitable for commerce.²³

¹⁷ *Id.*

¹⁸ Rodríguez O.

¹⁹ Ponzio, 2. In comparison, as Ponzio notes, the US in comparison had 13 administrations between 1817 and 1869.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Ponzio, 2; Rodríguez O.

Mexico also faced direct threats to its national and economic security by losing substantial land resources that could have been of value in an economic recovery. Most notably, its defeat in the Mexican-American War (1845-1848) resulted in the Treaty of Guadalupe Hidalgo, which ceded half of Mexico's national territory to the United States, and ensured that the United States, and not Mexico, would ultimately reap the economic benefits of the land ranging from Texas to California. The former center of New Spain, which upon independence consisted of the Mexican heartland, large portions of North America, and all of Central America, had dwindled to just the rough boundaries of modern-day Mexico by 1870, and between 1821 and that time, Mexicans feared the ever-present forces that threatened to reduce Mexican territory further.

Political instability and violence prevented substantive legal changes from taking place as a matter of fact, and most colonial private law—including the forced heirship regime—continued in force (if not practice, due to a lack of property right enforcement) until being challenged during 1870s.²⁴ However, regardless of the instability in the political economy, between 1821 and 1870 Mexican intellectuals nonetheless “scrutinized the colonial legal system, discussed it openly, and proposed new constitutions and civil, criminal, and commercial codes to replace the body of law inherited from Spain.”²⁵ A domineering faction in the debate, liberal Mexican statesmen

²⁴ Vargas, 233.

²⁵ Arrom, 306.

and intellectuals increasingly pushed for a concept of modernity to rebuild the economy built upon the ideal of the importance of individual freedom and the rights of the individual—as opposed to the community or group.

Progressive Mexicans subsequently sought to abolish the forced heirship regime and the *legítima*. By doing so, they would encourage testamentary freedom to foster economic development for a stagnant and destitute nation by lifting restrictions on capital accumulation and the free flow of property.²⁶ Parents could invest their capital in the most productive way, and children who were no longer guaranteed an inheritance would efficiently apply themselves to study and work.²⁷ Testamentary freedom, in short, comported with a theory of individual freedom that became pervasive in Mexico.

Conservative Mexicans sought to maintain European colonial legal traditions and regimes, which facilitated the immense prosperity found in New Spain prior to independence.²⁸ The conservative approach viewed forced heirship regimes as “drawing on the longstanding tradition through various parts of continental Europe of the family forming a ‘community’ in which assets are pooled.”²⁹ But by 1867, when foreign invasion and subversion of Mexican territory was for the final time repudiated

²⁶ Arrom, 315.

²⁷ *Id.*

²⁸ Deere (technical paper), 2.

²⁹ Rougeau, 7.

and the Mexican conservatives “were wiped off the political and intellectual map,” economic liberalism came to be “irrevocably identified with the nation itself.”³⁰ As Hale notes, liberalism with an emphasis on the individual “became transformed from an ideology in combat with an inherited set of institutions, social arrangements, and values into a unifying political myth.”³¹

The embrace of individual freedom as the key to economic prosperity ensured the collapse of forced heirship regimes. These Spanish regimes represented a restriction on individual freedom—a community, social approach to family law—and thus came to be viewed as traditional, paternalistic regimes out-of-touch with modernity.³² “When peace had been firmly consolidated, the civil code [of 1870] was revised to eliminate a few imperfections of the earlier document.”³³ Changes to the inheritance regime establishing full testamentary freedom constituted the principle substantive change between the 1870 and 1884 Civil Codes. The 1870 Code exemplified the power of individual freedom and economic liberalism; the 1884 Code only continued and strengthened the consensus on individual freedom as the legal theory to ameliorate the poverty of the post-Independence period.³⁴ Testamentary freedom had been under discussion since the 1870s, with proponents arguing that testamentary freedom would

³⁰ Kuchař, 138.

³¹ Kuchař, 138.

³² Arrom, 307.

³³ *Id.* at 306; Vargas (b), 16-17.

³⁴ Arrom, 313; Vargas (a), 18 (stating that “Essentially, this [1884] Code reproduced the provisions of the Civil Code of 1870 regarding marriage and other civil status acts”).

stimulate work ethic and efficiency.³⁵ In this sense, the introduction of testamentary freedom “was designed to bring about social change, specifically economic development.”³⁶ As mentioned above, testamentary freedom would theoretically lift restrictions on capital accumulation, encourage the free flow of property, and encourage children to apply themselves given the lack of a guaranteed inheritance.³⁷

The 1884 Code abolished the *legítima* and established a full testamentary freedom regime in Article 217.³⁸ The abolition of the *legítima* ended the guaranteed inheritance of children altogether, and enlarged the parents’ individual freedom by allowing them to dispose with their property at their discretion. Parents thus acquired an enhanced bargaining power in family relations by maintaining a means to compel children to conform to their wishes—or loss a potential inheritance. Mexican legislators directly cited Anglo-American law as the rationale for adopting the regime, with one source from the era noting that “England...that great nation that is today the most free and perhaps the most civilized in the world, where testamentary freedom stimulates the citizenry to devote themselves to their work...the source of public and private virtues.”³⁹

³⁵ Deere (technical paper), 32.

³⁶ Deere (technical paper), 32.

³⁷ *Id.*

³⁸ *Código Civil del Distrito Federal y Territorios de Tepic y Baja California*. art. 217, (1884): “La obligación de dar alimentos no comprende la de dotar á los hijos, ni la de proveerlos de capital para ejercer el oficio, arte ó profesión á que se hubieren dedicado.”

³⁹ Macedo, 23-24; Arrom, 314.

Abolishing forced heirship and introducing testamentary freedom clearly increased the bargaining power and authority of parents as compared to children. The system also likely produced inequalities by reducing legal protections for women. Spanish colonial law adhered to the principle of equal partition and inheritance, regardless of gender. Unrestricted testamentary freedom ended obligatory partible inheritance, and thus reduced the mandatory legal protection that women had historically enjoyed during the colonial period. A parent may have been more likely, in a society notable for a machismo culture that admires masculinity at a social level, to favor bequeathing assets to male heirs, as opposed to their sisters. As Deere further notes, testamentary freedom “could have reinforced male privilege in inheritance, particularly of land,” and reduced women’s bargaining power both in the marriage market and within marriage itself since “their fall-back position was greatly weakened.”⁴⁰

The appreciation of the free individual as the conceptual key to economic prosperity facilitated the rejection of colonial regimes in Mexico, for “the spread of ideals of liberty and the enshrinement of the individual rather than the family as a unit of concern” became a guiding principle on how to restructure law.⁴¹ These liberal principles rooted in individual freedom as opposed to the emphasis on community

⁴⁰ Deere (technical paper), 34.

⁴¹ Yeager, Gertrude M, *Confronting Change, Challenging Tradition: Woman in Latin American History*, 90.

became predominantly seen as the way to recover from the poverty of a lost generation extended to family law. Of particular emphasis, the liberal revolution in Mexico succeeded because of the more limited power of the Catholic Church and conservative or traditional forces.⁴²

Various Central American nations went just as far as or further than Mexico in adopting family law regimes based on principles of individual freedom by, in the first instance, making a separation of property regime the default marital regime and not just a formal option.⁴³ These Central American nations also established testamentary freedom regimes.⁴⁴ Unsurprisingly, these Central American nations had histories similar to that of Mexico—histories characterized by economic collapse, the continual loss of national territory, and the diminution of the state.

The modern nations of Central America were all part of colonial New Spain, and Central America as an entire entity only separated and fragmented from Mexico in 1823. This Central American Federation (1823-1838) ultimately broke up into the five countries of El Salvador, Costa Rica, Honduras, Nicaragua and Guatemala in 1839, again due to political instability, violence, and economic poverty that starkly contrasted

⁴² Mirow (b), 148 (noting that in Mexico by 1870, the Catholic Church had less power than in other Latin American countries, and in any event, clung to a more liberal tradition than those elsewhere).

⁴³ As mentioned above, these Central American nations included: Costa Rica (1887), El Salvador (1902), Nicaragua (1903), and Honduras (1906). Guatemala adopted the separation of property regime as well in 1877, although it did not make the regime the default rule.

⁴⁴ Guatemala (1882), Costa Rica (1887), Honduras (1880), El Salvador (1902), and Nicaragua (1903).

with New Spain prosperity.⁴⁵ This history is important insofar as noting that the same degree of political and economic instability and insecurity over increasingly shrinking borders impacted Mexico also impacted El Salvador, Costa Rica, Honduras, Nicaragua and Guatemala, indeed leading to their creation from the Central American Federation.

More importantly, the Central American nations adopted an appreciation of the individual conceptually similar to that of Mexico at a time when progressive Mexicans prevailed at the time. By 1870, economic liberalism embodied in individual freedom had become synonymous with modernity and erasing the economic deprivation of the past. With the consensus in Mexico and Central America firmly on individual freedom by 1870, and with the defeat of conservatives not just intellectually but also in physical number and strength, liberal leaders had enough power to impose their regime.⁴⁶

As Deere notes, Mexico and the Central American states as a matter of geography also had a much easier way than their South American counterparts to view the successes of liberal regimes. Mexican elites perceived that Mexico directly felt that the fruits of that success—Mexico had fought a war with the United States in which Mexico not only was defeated, but also lost half of its national territory, something that could have testified to the power behind the United States liberal, republican model of government and institutions. These institutions in the United States based on freedom

⁴⁵ Prados de la Escosura, "Colonial Independence and Economic Backwardness in Latin America," 5.

⁴⁶ Deere (technical paper), 37.

and economic liberalism could have been seen in Mexico—in a much easier way than South American nations given geography—as a key to unleash a society’s potential.

THE CASE OF ARGENTINA: IMMIGRATION, NATIONAL IDENTITY, AND MAINTAINING THE COLONIAL LEGACY

Because the notions of individual freedom that touched family law in the former colonies of New Spain did not manifest to the same extent in South America, these nations largely kept the colonial forced heirship inheritance regimes. Argentina in particular makes a logical and unique case to study, however, because it comprised a capital of the Spanish colonial empire, was a nation built upon European immigration and thus had extensive contacts with European intellectual ideas, and actively encouraged the import of Europeans into its new nation for the explicit purpose of adopting European, and specifically northern European, legal norms as the key to progress. Despite the same emphasis of its leaders on individual freedom associated with the “Anglo-Saxon” race as a key to prosperity, Argentina retained its colonial inheritance regime, tying up capital and restraining its free use. The explanation for why Argentina diverged from Mexico despite certain common ideals of its liberal statesmen to adopt economic liberal norms attests to unique cultural influences in Argentina that continue to impact its legal development today.

Like Mexico and Central America, Argentina had extensive contacts with Europe, and its leaders heavily emphasized European ideals as the key to prosperity

post-independence. Mexico's contacts had included both conflict and transactions with the United States, which lay on its borders. Spain, England, and France directly intervened in its affairs, with France going so far as instilling an Emperor on the throne of Mexico as late as the 1860s, increasing contacts across the Atlantic.⁴⁷ Argentina's contacts were of a more economic nature. It became a central part of the "informal" British Empire, with the nation being one of Britain's key sources of primary products during its Industrial Revolution. It also became a center for European foreign investment. Theoretically, Argentina would have been exposed to British ideals of individual freedom just as much Mexico, and if not, more so.⁴⁸ American and European contacts by both nations could have facilitated in both nations equally the penetration of liberal ideas regarding all aspects of social life.⁴⁹

Like its South American counterparts, Argentina maintained its colonial family law regimes, including its forced heirship regime, in its 1869 Civil Code. Article 3591 of the Code states: "The regime of forced heirs is a right of succession limited to a specified

⁴⁷ For example, Spain did not recognize independence until 1836, and attempted to reconquer Mexico between 1821 and 1836. The aforementioned Mexican-American War occurred between 1845 and 1848 culminating in a decisive United States victory. The first French intervention occurred in 1838, and the second direct French intervention in Mexico occurred between 1861 and 1867, culminating in France imposing an Emperor on the Mexican throne and establishing regime change in the Second Mexican Empire, which collapsed. These interventions involved physical invasions of Mexican territory.

⁴⁸ Aguirre, Robert D. *Informal Empire: Mexico and Central America in Victorian Culture*.

⁴⁹ Deere (technical paper), 37. In this sense, this paper criticizes Deere, who asserts that geography in and of itself played the crucial role in the adoption and forsaking of marital regimes. Geography could not have played the crucial role-Argentina had far more exposure to western European ideals than Mexico through the influx of British capital and its extensive trade within the British Empire, but still retained its forced heirship regime.

portion of the inheritance. The capacity of the testator to make his testamentary dispositions with respect to his patrimony, extends only to the amount above the legal portion which the law assigns to his heirs.”⁵⁰ Article 3592 further establishes that “All persons called to an intestate succession are entitled to a legal portion” of the testator’s estate, and Article 3593 sets the legal portion of legitimate children (that is, the *légítima*) at four-fifths of all property existing at the time of the death of the testator.⁵¹ The Code then establishes that ascendants receive two-thirds of the property of succession when the children are unavailable.⁵² The remaining provisions of Titles X and XI establish additional legal mandates on disposition of property.⁵³

Distinguishing characteristics between Argentina and Mexico explaining why Argentina maintained the colonial regime include an Argentine intellectual divergence and demographic changes in the nineteenth century. Actual immigration trends and immigration patterns shaped the cultural composition of Argentina in such a way that maintaining the colonial regime codified in the 1869 Code naturally followed. After 1853, as the country became increasingly ethnically Spanish and Italian, laws and

⁵⁰ *Código Civil* (1869), art. 3591: “La legítima de los herederos forzosos es un derecho de sucesión limitado a determinada porción de la herencia. La capacidad del testador para hacer sus disposiciones testamentarias respecto de su patrimonio, sólo se extiende hasta la concurrencia de la porción legítima que la ley asigna a sus herederos.”

⁵¹ *Id.* at arts. 3592: (“Tienen una porción legítima, todos los llamados a la sucesión intestada en el orden y modo determinado en los cinco primeros capítulos del título anterior.”); 3593: (“La porción legítima de los hijos es cuatro quintos de todos los bienes existentes a la muerte del testador y de los que éste hubiera donado, observándose en su distribución lo dispuesto en el art. 3.570.”).

⁵² *Id.* at art. 3594: (“La legítima de los ascendientes es dedos tercios de los bienes de la sucesión, observándose en su distribución los artículos 3571.”)

⁵³ See *id.* at arts. 3595-3621.

institutions continued to reflect Latin European ideals, such as the communal theory of family law. Notions of individual freedom were less likely to be implemented in family law with Spanish and Italian foreign-born immigrants increasingly constituting the nation's ethnic makeup.

The desire to facilitate immigration characterizes the early immigration law of Argentina. Article 25 of the 1853 Constitution stated: "The Federal Government will encourage European immigration, and it will not restrict, limit or burden with any taxes the entrance into Argentine territory of foreigners who come with the goal of working the land, improving the industries and teaching the sciences and the arts."⁵⁴ Article 20 incentivized immigration by allowing foreigners "all the civil rights of the citizens," and gave new immigrants vast freedoms to engage in commerce, industry, and property ownership.⁵⁵ Article 20 did not, however, obligate foreigners to renounce their original citizenship, and allowed them to stay indefinitely in Argentina.⁵⁶ Argentina's first immigration law, Law 817 of 1876, reaffirmed and buttressed the constitutional

⁵⁴ CONST. ARG. art. 25 (1853): "El Gobierno federal fomentará la inmigración europea; y noprodrá restringir, limitar ni gravar con impuesto alguno la entrada en territorio argentino de los extranjeros que traigan por objeto labrar la tierra, mejorar la industrias, e introducir y enseñar las ciencias y las artes."

⁵⁵ *Id.* at art. 20: "Los extranjeros gozan en el territorio de la Nación de todos los derechos civiles del ciudadano; pueden ejercer su industria, comercio y profesión; poseer bienes raíces, comprarlos y enajenarlos; navegar los ríos y costas; ejercer libremente su culto; testar y casarse conforme a las leyes. No están obligados a admitir la ciudadanía ni a pagar contribuciones forzosas extraordinarias. Obtienen nacionalización residiendo dos años continuos en la Nación; pero la autoridad puede acortar este término a favor del que lo solicite, alegando y probando servicios a la República."

⁵⁶ *Id.*

language.⁵⁷ Law 817 encouraged the immigration of any immigrant who could prove his aptitude to develop an industry, the land, or a useful occupation by establishing official agents in Europe to entice European emigration and creating a state apparatus to organize and regularize the process of receiving them.⁵⁸ It incentivized immigration by subsidizing a foreigner's voyage to Argentina, obligating Argentina to help new immigrants find work, and paying for the initial lodging of any immigrants, among other provisions.⁵⁹ While it came after the passage of the Civil Code, its impact would only serve to reduce the motivation to change the forced heirship regime.

Through these laws, Argentina specifically intended to 1) acquire a large population of European migrants for scientific, cultural, and economic development; and 2) address labor shortages and population scarcity by acquiring cheap agricultural workers who could develop the country's vast land resources. Reality facilitated these perceived needs. Upon achieving independence, Argentina faced the prospect of being sovereign over a tremendous amount of undeveloped territory with a scarce

⁵⁷ See generally, *Ley 817, Inmigración y colonización*, arts. 1-128 (1876). The law was sanctioned on October 6, 1876, and promulgated on October 19, 1876. Law 817 is often referred to as the "Avellaneda Law," named after President Avellaneda of Argentina who helped design the law.

⁵⁸ *Ley 817, Inmigración y colonización*, art. 12 (definition of an immigrant): "Repútase inmigrante, para los efectos de esta ley, a todo extranjero jornalero, artesano, industrial, agricultor o profesor, que siendo menor de sesenta años, y acreditando su moralidad y sus aptitudes, llegase a la República para establecerse en ella, en buques a vapor o a vela, pagando pasaje de segunda o tercera clase, o teniendo el viaje pagado por cuenta de la Nación, de las provincias, o de las empresas particulares protectoras de la inmigración y la colonización." See also arts. 1-3 (creating a department of immigration), 4-5 (creating agents of immigration), 6-8 (creating commission of immigration), 18-41 (regularizing process by which ships could bring immigrants).

⁵⁹ *Id.* at arts. 4, 12-14, 45: (art. 45: "Los inmigrantes tendrán derecho a ser alojados y mantenidos convenientemente a expensas de la Nación, durante los cinco días siguientes a su desembarco.")

population, far too small to settle and develop the land, much less protect the national sovereignty from its more populous, but territorially smaller, neighbors. Within this already scarce population, Argentina's leaders perceived a lack of skilled, talented and educated native work force, viewing the *mestizo* masses as racially and culturally unsuitable to drive high level economic growth in the industrial and scientific sectors.⁶⁰

The 1853 Constitution, and later the 1876 Law, explicitly reflected these economic needs and cultural perspectives by emphasizing "working the land" and improving industry and science as the goals of Argentine immigration law. European immigrants, and particularly northern Europeans of the "Anglo-Saxon" race, would provide the latter by supplying Argentina a skilled, wealthy, educated and modern labor force which had built the industrialized European economies of the nineteenth century.⁶¹

"Argentine writers and intellectuals preferred northern Europeans, who, they alleged, were racially superior and would further aid the 'whitening' of the *mestizo* more than people from the south or east of Europe."⁶² Juan Batista Alberdi, the architect of the 1853 Constitution, and Domingo Faustino Sarmiento, the domineering philosopher, opposed native Argentines populating the country, and, perceiving British, German, and other northern Europeans as models of habits of order, discipline, and industry,

⁶⁰ Benitez, 9-14; Alberdi, 422, 427-28, 440; Urien, 147; Sarmiento, 23; DeLaney.

⁶¹ *Id.*

⁶² *Id.*

actively cited the civilizing impact such immigrants would have on Argentina.⁶³

Ultimately, as one scholar notes, they believed:

“the government should encourage the immigration of Anglo-Saxons...[who] ‘are identified with the steamship, with commerce, and with liberty, and it will be impossible to establish these things among us without the active cooperation of that progressive and cultivated race.’ Spanish immigrants, in contrast, were unwelcome and would only compound Argentina’s difficulties. Stridently anti-Spanish, Alberdi argued that Spaniards were “incapable of establishing a republic,” either here in America or there in Spain. Spaniards and Britons were different, these individuals believed, not because of inherited or genetic qualities, but because they belonged to different cultural, linguistic, and religious traditions.”⁶⁴

European immigrants, and specifically British and Germans, would facilitate the socio-economic institutions necessary for economic growth naturally by bringing their perceived “inherent cultural traits,” such as the Western European ideals of economic liberalism, individual freedom, and scientific innovation associated with the economies of the western European Great Powers.⁶⁵ Immigrants, both Europeans and those from any region with any “useful” skill, would serve an additional fundamental purpose by providing agricultural labor exploit Argentina’s massive land resources. Massive immigration could increase the ratio of labor to land so as to allow Argentina to take advantage of its agricultural potential through an agricultural export strategy.⁶⁶

⁶³ *Id.*

⁶⁴ DeLaney.

⁶⁵ Benitez, 9-14; Alberdi, 422, 427-28, 440; Urien, 147; Sarmiento, 23; DeLaney.

⁶⁶ Albarracin, 35-41.

Argentina's early immigration laws facilitated a massive increase in immigration that began in the 1850s. Between 1852 and 1869 (when the Code was passed), the population of Buenos Aires, the center of law and the economy, doubled in its number of residents, with half of the population being foreign born by 1869.⁶⁷ Europeans comprised the vast majority of these early immigrants, as after 1852 Argentina made a special effort to attract them through foreign offices setup in Europe.⁶⁸ However, the ethnic makeup of these immigrants was overwhelmingly Italian and Spanish, who shared more cultural, "Latin" and Catholic religious ties with Argentina than other ethnic groups. Between 1857 and 1870, Italians comprised 70% of the immigrants coming in to Argentina, with the next largest ethnic group being Spaniards (15%).⁶⁹ The Italian and Spanish immigrants likely found the strong sway of the communal notions of law reflective of their own heritage in inheritance preferable, or at the least, acceptable.

The Catholic Church in Latin America generally opposed changes to family law, in part because of its power in the domain and its inclination towards traditionalism. Italian and Spanish immigrants, being predominantly Catholic, likely strengthened the Church's power against altering family law and inheritance schemes, especially as its strength accrued with the new arrivals. Italian and Spanish immigrants arriving in

⁶⁷ Bethell, 44.

⁶⁸ Bethell, 44.

⁶⁹ *The Immigration Offices and Statistics from 1857 to 1903.*

increasing numbers would also oppose changes to a family law regime that not only contradicted institutions they were culturally used to, but also those that conflicted with the Church. Dalmacio Vélez Sársfield, the architect of the Civil Code, noted as much by claiming that in regards to family law in a Catholic country with an increasing Catholic immigrant population: “the mission of the laws [is] to keep and strengthen the power of customs, not to weaken and corrupt them.”⁷⁰ He expressed a message of keeping tradition, not altering it.

Deere notes that in the South American nations with substantial Catholic Church influence, changes to family law met fierce resistance, regardless of the prevalence of economic liberal notions of individual freedom within the intellectual legal framework. In Colombia, for instance, the decree on civil marriage and divorce was approved during the height of its liberal revolution of the mid-1850s. However, opposition to civil divorce by the Catholic Church and the conservative parties “was so strong that this portion of the decree was rescinded three years later.”⁷¹ Whereas Mexico and Central American nations experienced the height of liberalism in law between 1870 and 1910, Colombia entered a period known as the *Regeneración* (1880-1894), where the church and its allies “predominated in restricting civil matrimony,” and used its power prevent changes to the legal landscape.⁷² Likewise in Argentina, the accomplishment of the

⁷⁰ *Código Civil*, note on Article 167.

⁷¹ Deere (technical paper), 8.

⁷² *Id.*

drafters of the 1869 Code in placing marriage under civil authority quickly led to Catholic Church opposition and a reform restoring Church control of marriage.⁷³ Well into the twentieth century, Argentina, Chile and Uruguay continued contesting civil marriage—a testament in part to the power of the Church in these nations to resist changes to the status quo.⁷⁴

In Argentina, the combination of a large population coming from a tradition of communal theories of law and a Catholic background likely stymied the penetration of individual freedom into the 1869 Code. Other countries, notably Mexico, secularized marriage as early as the 1850s, in part because the Church in Mexico contained liberal priests who, in the tradition of revolutionary Miguel Hidalgo, were more willing to embrace breaks from the past.⁷⁵ In Mexico and Central America, the power of the Catholic Church had been significantly limited.⁷⁶ This diminution in Church power did not occur in Argentina, where more Catholic immigrants were arriving in the country.

European immigration drastically increased between 1870 through 1914, which likely increased the resistance of the masses and the political establishment to alter family law. Furthermore, the Argentine economy entered a boom between 1870 and 1914, and so the economic rationales underlying testamentary freedom were likely not

⁷³ Mirow (b), 147-48.

⁷⁴ Mirow (b), 147-48.

⁷⁵ *Id.* at 147.

⁷⁶ *Id.* at 147-48.

even on the political agenda given the profound growth the country experienced. The agricultural export model succeeded and drove economic growth. Exports grew exponentially during the period because Argentina successfully increased the ratio of labor to land such that the nation could make productive use of its vast territory.

Argentina soon became the third largest exporter of grain in the world, one of the largest exporters of food generally, and maintained a substantial trade surplus.⁷⁷

Argentina's integration into the international economy ensured a market to export to, as the increasing supply of primary products produced by Argentina had an increasingly high demand among the industrializing Great Powers of Europe.⁷⁸ Driven by the high domestic production of its natural land resources, Argentina quickly surpassed its former colonizer Spain in aggregate output, and indeed per capita income in Argentina rivaled that of 1914 Germany—one of the largest economies of the time period.⁷⁹

Migrants played an essential role in Argentina's progress because they "were mainly responsible for the increasing agricultural output—in cereals, sugar, cotton, wine and fruits" and for an increase and improvement in cattle herds.⁸⁰ Whereas testamentary

⁷⁷ Albarracin, 47.

⁷⁸ Argentina became incorporated in the "informal" British Empire, and intertwined in nineteenth century trade.

⁷⁹ Albaraccin, 56.

⁸⁰ Hartwell, 293-94; But keep in mind, the immigration of northern Europeans envisioned by Argentina's intellectuals as being the catalyst for scientific development largely did not occur, as southern Europeans, generally due to a cultural, Latin affinity, made up the bulk of Argentine immigrants.

freedom in Mexico could free capital and help improve a damaged economy, Argentina had no need to look to innovative, anti-traditional ways to improve its rising economy.

Ultimately, while the agricultural model succeeded, Argentina received not northern Europeans who it sought to instill individual freedom institutional ideals into the country, but instead overwhelmingly immigrants from Italy and Spain.

Consequently, because its population came to comprise a predominantly southern, Latin European cultural group, its inheritance regime never had the impetus to change. An Argentina comprised of mostly southern Europeans, including the Spanish, would not change the very institutions that they were most familiar with and enjoyed in their own original countries. In other words, because Argentina received Italian and Spanish immigrants who came to make up the majority of its population, Argentina had the opposite effect Alberdi and Sarmiento sought—Argentina had acquired a population intrinsically *resistant* to a change from a communal perspective of law to one rooted in individual freedom. Northern European migrants predominantly immigrated to the United States, perhaps again because of cultural affinities with United States institutions—like that of economic liberalism and individual freedom.

Between 1871 and 1914, Argentina received roughly 6 million immigrants, nearly 80% of them arriving from southern Europe (still mostly from Italy and Spain). Notions of testamentary freedom, which never reached Argentina by 1869, certainly did not afterward, with the open door policy of the 1876 Immigration Law facilitating the

passage of Catholic southern Europeans, and a strong economy casting off the political agenda the need to alter or change existing institutions.

CONCLUSION: IMPLICATIONS OF THE DIVERGENCE IN THE CONTEXT OF LATIN AMERICA

Latin American legal history represents not only its own substantive field to study, but also adds to the understanding of European legal history. Spain controlled the most substantial empire in the Americas, and imposed its legal institutions on its newly controlled territories. These institutions in the realm of family law included a forced heirship inheritance regime, representative of the Spanish emphasis on a more communal, paternalistic theoretical approach to family law. It bequeathed this legacy to its American colonial possessions, including Mexico and Argentina.

Mexico and the Central American states abandoned this regime when they abandoned the theoretical approach to law underlying the Spanish colonial era. Mexico and the Central American states adopted a legal theory of individual freedom as a guiding notion to create a new nation distinct and separate from the colonial past. These ideas infiltrated family law and evinced themselves in the Mexican Civil Codes of 1870 and 1884. In contrast, Argentina kept the colonial regime. The combination of mass Latin European immigration identified with communal theories of law, a more traditional Catholic identity, and a robust economic growth comprised factors

supporting the keeping of the Spanish regime. Argentina consequently maintained the existing family law regimes that the colonial era bequeathed to them.

The divergence in Latin America suggests an additional avenue for research that can be done regarding European legal history: the desire of former European colonies to retain or abandon their colonial legacies. The particular divergence in Latin America covered in this paper may have been replicated elsewhere given the expanse of not only the Spanish Empire, but also the French, British, and Portuguese overseas empires. Why these divergences occur speaks to the identity of a state and its people, and offers insight into how we can appreciate other legal systems and theoretical approaches to law. For lawyers entering a more globalized profession entailing negotiations across borders, many between Europe and Latin America, understanding the foundations of their law and the legal ideas undergirding those laws can provide valuable insights to overseas partners and clients, making the lawyer more efficient and likely to produce positive results.

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