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Borrowing Private Law in Latin America: Andrés Bello's Use of the *Code Napoléon* in Drafting the Chilean Civil Code

M. C. Mirow*

I. INTRODUCTION

The Chilean Civil Code of 1855 drafted by Andrés Bello was perhaps the most influential codification in the development of Latin American private law after independence from Spain. The Code was not only used in Chile, but was later adopted as a whole in El Salvador, Ecuador, Venezuela, Nicaragua, Colombia, and Honduras. Bello's code was a main source for and influence on the civil codes of Uruguay, Mexico, Guatemala, Costa Rica, and Paraguay.¹ Thus, the Chilean Civil Code was successful not only in Chile, but throughout Latin America.²

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1. Alejandro Guzmán Brito, *Andrés Bello Codificador: Historia de la Fijación y Codificación del Derecho Civil en Chile* 467-68 (1982); and Juan G. Matus Valencia, *The Centenary of the Chilean Civil Code*, 7 *Am. J. Comp. L.* 71 (1958). In other countries the influence of Bello's code has not been studied or was slight. For example, Bello's code is not mentioned in Rodolfo Batiza, *Las fuentes de la codificación civil en la evolución jurídica de México*, *Memoria del iii Congreso de Historia del Derecho Mexicano* 155-162 (1984), or in María del Refugio González, *El Derecho Civil en Mexico 1821-1871, Apuntes Para Su Estudio* (1988). Bello's code was also consulted by the Brazilian codifier, Teixeira de Freitas, as he prepared a draft of the Brazilian Civil Code. 1 Guzmán Brito, *supra*, at 467-68; Alejandro Guzmán, *Codificación y consolidación: una comparación entre el pensamiento de A. Bello y el de A. Teixeira de Freitas*, 10 *Revista de Estudios Histórico-Jurídicos* 269 (1985). Vélez Sársfield, the drafter of Argentina's Civil Code, noted that Bello's code was as valuable as the European codes in his work. Pedro Lira Urquieta, *Introducción y notas*, in 12 *Andrés Bello, Obras Completas de Andrés Bello* xliv (Augusto Mijares et al. eds., Caracas, 1954). (hereinafter *Lira, Introducción*) (hereinafter *Obras Completas*). Bello is not included in Abelardo Levaggi, *Las fuentes formales del derecho patrio argentino*, 14 *Revista Chilena de Historia del Derecho* 267-290 (1991), but is mentioned in Abelardo Levaggi, *El método del Código Civil Argentino y sus fuentes*, 10 *Revista de Estudios Histórico-Jurídicos* 159 (1985).

2. Bernardino Bravo Lira, *Difusión del Código Civil de Bello en los países de derecho castellano y portugués*, in *Andrés Bello y el Derecho Latinoamericano* 343, 343-73 (Rafael Di Prisco and José Ramos eds., 1987) (examining the powerful influence of Bello's code on the civil law of Colombia, Panama, El Salvador, Ecuador, Venezuela, Nicaragua, Honduras, and Uruguay and its lesser importance in relation to the civil codes of Brazil, Argentina, Paraguay and Mexico). With such similar antecedents, the civil codes of Latin America lend themselves to possible unification. Alejandro M.

The success of this code in Chile was the result of Bello's ability to select and combine different sources, to clarify language, to organize intelligently the provisions drafted, and to press for the project over twenty years during a politically difficult period.³ The fruit of Bello's effort was a code that at once provided rules that reflected certain European enlightenment, commercial, and economic values, yet maintained and upheld traditional property expectations that were embedded in Latin American society and family structures. Bello found the former principles in European codes, particularly the French Civil Code of 1804 and its commentators. The latter were extracted from the Spanish colonial law which continued to govern Chile after independence from Spain.

It is well known that Bello relied heavily on the French Civil Code of 1804 (*Code Napoléon* or *Code Civil*) in his work, but the French Code's influence cannot be explained by merely asserting, as one early twentieth-century author put it, the "intellectual and moral ascendancy exercised by France upon certain countries, especially those of the Latin blood."⁴ Bello's use of the French Civil Code can be best understood by placing his borrowing of French law into the legal and historical context of Chile. With this method as its goal, this article sets out important factors in borrowing one country's law for application in another and examines Bello's code in this light. For reasons explained below, Bello's provisions dealing with property and inheritance were selected for study. After analyzing the use of borrowed law in constructing these provisions for Chile generally, this study presents three examples from property and inheritance law under the Chilean code; two examples demonstrate where French models were welcomed, another where the French model was spurned for a solution based on colonial Spanish law. By illustrating the types of decisions and compromises Bello made in the codification process, these examples help us understand how his solutions led to the Code's acceptance in Chile and its eventual adoption in other countries.

Garro, *Unification and Harmonization of Private Law in Latin America*, 40 Am. J. Comp. L. 587, 587-616 (1992).

3. On codification see generally Csaba Varga, *Codification as a Socio-Historical Phenomenon* (Sándor Eszenyi et al. trans., 1991); and Jacques Vanderlinden, *Le Concept de Code en Europe Occidentale du XIIIe au XIXe Siècle, Essai de Définition* (Bruxelles, 1967). The Chilean Civil Code of 1855 was not the first codification of civil law in Latin America. Oaxaca (Mexico), Bolivia, and Peru had such codes before Chile. Guzmán Brito, *supra* note 1, at 466. The most comprehensive work on Bello as jurist is 1 & 2 Guzmán Brito, *supra* note 1. See also Alejandro Guzmán Brito, *Nuevo ensayo de una bibliografía sobre Andrés Bello considerado como jurista (1978-1988)*, 12 *Revista de Estudios Histórico-Jurídicos* 357-365 (1987-1988); and Dietrich Nelle, *Entstehung und Ausstrahlungswirkung des chilenischen Zivilgesetzbuch von Andrés Bello* (1988). Civil law codification for Chile was suggested as early as 1822 by the country's Supreme Director, Bernardo O'Higgins, who wanted the five French codes adopted for use. Guzmán Brito, *supra* note 1, at 31. In 1833, another proposal for codification was the victim of battles between the Senate and House. Guzmán Brito, *supra* note 1, at 34.

4. Alexander Alvarez, *The Influence of the Napoleonic Codification in Other Countries, in The Progress of Continental Law in the Nineteenth Century* 253-54 (Joseph H. Drake et al. eds. 1918, 1969). See also, Alejandro Guzmán, *Historia de la Codificación Civil en Iberoamérica* 238, 244 (2000); Carlos Ramos Núñez, *El Código Napoleónico y su Recepción en América Latina 185-188* (1997).

Bello's success was the result of his private work begun in 1833, of his introduction of legislation approving codification in 1840, his advocacy for the project, his editorial control of the newspaper *El Araucano*, and his cultivation of support from Chilean leaders.⁵ Before turning to the events and influences that shaped Bello's code, the political and legal background of Chile is helpful in understanding the context of the code. Similarly, some biographical information about Bello and the support he received from President Montt are important in understanding the success of the work.

II. THE CONTEXT OF BELLO'S PROJECT

A. Chile's Autocratic Stability

The political history of Chile after independence is somewhat atypical of the instability experienced by most newly independent Latin American republics. While some Latin American countries debated and fought over the relative merits of conservatism, liberalism, federalism, and centralism for most of the nineteenth century, Chile—at least to the extent that it affected the operation of the government—resolved these issues quickly and consequently maintained a relatively stable autocratic regime for most of the century.

With the news of Napoleon's invasion of Spain, Chilean Creoles established a governing junta that, at first, continued to rule in the name of Spanish royal authority. The junta moved towards independence, but their separatist actions and small army were put down in 1814 by Spanish forces from the Viceroyalty of Peru. Chile gained independence permanently in 1818 under the leadership of José de San Martín. After winning independence from Spain, San Martín appointed O'Higgins as the Supreme Director of Chile. Too liberal for Chile's elite, O'Higgins was forced out of power in 1823, and for a short period thereafter the country experienced political unrest.⁶

The period from 1818 to 1830 was politically unstable compared to the period after 1830 when a dictatorial autocracy was established. Various liberal presidents attempted to consolidate power and draft constitutions, none of which lasted. Nonetheless, "[t]he 'anarchy' of the period has often been exaggerated by Chilean historians; it was very limited in comparison with the turmoil then occurring on the other side of the Andes."⁷ In 1829, a coalition of conservative forces from the southern city of Concepción ousted the liberal government of Francisco Antonio Pinto who stepped down from the presidency. A brief civil war ended in April 1830.⁸ Thereafter, Diego Portales held dictatorial political power as Minister of Interior and Exterior Affairs and Minister of War and Navy from 1829 until his death in 1837.⁹

5. Guzmán Brito, *supra* note 1, at 34-36.

6. Simon Collier & William F. Sater, *A History of Chile 1808-1994*, at 48-50 (1996).

7. Simon Collier, *From Independence to the War of the Pacific, in Chile Since Independence* 1, 3 (Leslie Bethel ed. 1993).

8. *Id.*; see also Collier & Sater, *supra* note 6, at 50.

9. Collier & Sater, *supra* note 6, at 53.

Diego Portales never served as President of Chile; he preferred to rule from behind the scenes.¹⁰ He viewed himself as a conservative restorer rather than a social innovator.¹¹ His rule was marked by his protection of the landowning, merchant, and mining classes.¹² In contrast to many newly independent Latin American countries, Chile experienced stability from this authoritarian regime.¹³ Legal reform was a part of Portales's plan for increased stability, economic growth, and progress. For example, in 1834, Manuel Rengifo, Portales's Finance Minister, sought to encourage growth through "laws which remove[d] obstructive impediments to industry and which protect[ed] property and its discernment."¹⁴

The momentum of Portales's leadership continued long after his death, as successive presidents led the country during the period from 1829 to 1861 (known as the "autocratic republic").¹⁵ Liberal ideas, however, continued to be expressed in public and political arenas, often by eloquent advocates such as José Miguel Infante.¹⁶

The entire span of Bello's work in Chile was situated within this period of authoritarian, central government. The enactment of Bello's civil code also came on the heels of the 1851 civil war.¹⁷ Although the project was well underway by this point, Bello's code would offer stability in the wake of the 1851 civil war by consolidating and centralizing governmental power in a time of political unrest—a result typical of codification.¹⁸ To understand the improvement that Bello's code offered, a discussion of the state of private law up to this time is necessary.

B. The Disjointed State of Private Law in Chile from Independence to 1855

At the dawn of independence, colonial Latin America was politically bureaucratic and, in the propertied classes, socially litigious. From the thirteenth century in Spain, layer upon layer of Castilian private law built up as did, from the late fifteenth century, the more specialized rules relating solely to the Indies.¹⁹

10. *Id.*

11. Martín Alonso Pinzón, Andrés Bello Jurisconsulto 91-92 (1982).

12. Brian Loveman, Chile: The Legacy of Hispanic Capitalism 134-35 (2d ed. 1988).

13. Lira, *Introducción*, *supra* note 1, at xvii.

14. Collier & Sater, *supra* note 6, at 63.

15. Loveman, *supra* note 12, at 134. This autocratic period is also known as the *República Pelucona*, and some historians would extend it until 1891. Pinzón, *supra* note 11, at 85.

16. Collier, *supra* note 7, at 3.

17. *Id.* at 2.

18. "The linkages between classic continental codes and autocratic power are easy to establish." Mirjan Damaska, *On Circumstances Favoring Codification*, 52 *Revista Jurídica de la Universidad de Puerto Rico* 355, 360 (1983). See also M.C. Mirow, *The Power of Codification in Latin America: Simón Bolívar and the Code Napoléon*, 8 *Tul. J. Int'l & Comp. L.* 83, 86-89 (2000); Henry E. Strakosch, *State Absolutism and the Rule of Law: The Struggle for Codification of the Civil Law in Austria 1753-1811* (1967); Vanderlinden, *supra* note 3, at 223-25, 243; and Varga, *supra* note 3, at 334. Consolidation of power was also an aim of ancient codes. M.C. Mirow and K. Kelley, *Selections on Religion from the Justinianic and Theodosian Codes*, in *Religions of Late Antiquity in Practice* 263, 265-66 (Richard Valantasis ed., 2000).

19. Separate bodies of law, and sometimes institutions, governed commerce, mining, and the

These sources were occasionally compiled into authoritative collections, such as the *Recopilación de las Leyes de los Reinos de las Indias* (1680), which set out much of the public law for Spanish colonies. Spanish private law was compiled in 1567 in the *Recopilación de las Leyes de estos Reinos* (called the *Nueva Recopilación*) and again in 1805 in the *Novísima Recopilación de Leyes de España*. These collections did little to organize or to clarify the rules of application for a particular dispute, and in practice, it appears that the most common source for supplying rules of decision was a collection of laws from the thirteenth century known as the *Siete Partidas*. This source was available in an edition with glosses by Gregorio López from the mid-sixteenth century. Beyond Spanish legal sources, the *ius commune* of canon and Roman law and its method of legal argumentation in court provided subsidiary sources and approaches that were utilized by tribunals as tools of reason, not as authoritative sources. Although not officially sanctioned, the use of the sources and forensic methods of the *ius commune* was facilitated by the educational preparation of lawyers in the tradition and by the Roman law foundations of Spanish sources such as the *Siete Partidas*.²⁰ Commentary literature abounded—not only out of the *ius commune* tradition, but also from Spanish and colonial sources.

There were many laws and little organization, and even skilled jurists lamented the labyrinthine nature of these often overlapping and conflicting sources. Applicable laws, once found, tended to be stylistically ornate, formulaic, and repetitive because they attempted to cover all situations or possibilities. In the largest economic centers, sophisticated lawyers used these sources much like their European counterparts. Legal sophistication, however, and the availability of sources declined rapidly as one left the centers.²¹

Some broad generalizations may be made about the substance of colonial private law. Generally speaking, the law of persons did not extend to a single legal subject bound by laws of universal application. Instead, private law rights and duties were derived from the various legal statuses upon which the law worked. Similarly, the law of property contained many levels of rights in property which were often conditional or which limited free alienation. This view of property was particularly evident in the law of succession in which various rules dictated the passage of property upon death. This body of law included forced shares for family members and the possibility of favoring first-born males though the primogeniture scheme common in *mayorazgos* (entailed estates).²²

Upon gaining independence from Spain, Latin American countries were presented with the task of establishing new legal institutions and sources of law.

church.

20. Javier Barrientos Grandon, *La Cultura Jurídica en la Nueva España* (1993); and I Guzmán Brito, *supra* note 1, at 50-54.

21. Charles R. Cutter, *The Legal Culture of Northern New Spain, 1700-1810*, at 4-6 (1995).

22. An entailed estate is a grant of property, usually real property, that removes the owner's ability to alienate the property during the owner's lifetime. To further dynastic ambitions, entails were often structured to benefit only the first-born male heir of each generation. See *infra* notes 157 to 188 and accompanying text.

Public and constitutional structures had to be improvised immediately, but private law adapted to independence at a slower rate. On one level, it was easy to decry the Spanish legal legacy, and jettisoning Spanish colonial law was easily combined with the casting off of the Spanish yoke. On another level, there were too many other important things to do, and the reform of private law had to wait. New systems of private law in Latin America were postponed amidst the political anarchy that followed independence in many countries. Lack of public funds, overtaxed and scarce legal talent, competing local interests, and conflicting views of national identity contributed to delays in restructuring private law. Despite the comparative political stability of Chile, private law reform was not a priority, and although the state of private law in Chile after independence was intolerable, it was substantially tolerated for a significant time. Some changes to private law were necessary immediately, but others did not come about for decades.

After gaining independence, Chile, like most newly independent countries, continued to use the private law then in existence provided that the rules in force comported with the ideals of the republic and the new constitution.²³ Where colonial private law raised intolerable conflicts with the spirit of independence, legislation remedied the most egregious situations.²⁴

The state of the private law following independence from Spain continued to be criticized on numerous grounds. Lawyers and litigants faced a multiplicity of individual laws, compilations of laws, and legal commentaries. The rules themselves were obscure, complex, contradictory, incoherent, uncertain, and disordered. Many provisions were marred with antique language and had fallen into disuse. Thus, there was great difficulty in knowing the law on any given point.²⁵

There were at least nine serious yet unsuccessful proposals for civil law codification or compilation in Chile from 1820 to 1840.²⁶ Juan Egaña's proposal in the early 1830s made it the farthest before being lost in battles between the House and the Senate, as well as in battles between those charged with drafting the code. Some wished a completely new code based on European models, others sought a Chilean edition of the *Siete Partidas*. The composition of the commission charged

23. 1 Guzmán Brito, *supra* note 1, at 79.

24. In Chile, for example, between 1810 and 1855, slavery was phased out, the full civil capacity of indigenous people was recognized, and marriage laws were liberalized. The only important change to property law came in 1852 with separate legislation, introduced by Bello, converting *mayorazgos* into interest payments based on the value of property. Regarding the law of succession, certain changes were made to forced shares from an estate, testaments by foreigners, and the intestacy rights of family members. Separate provisions addressing the law of obligations adjusted creditors' rights, interest rates, and mortgages. With the exception perhaps of the new mortgage laws, none of this legislation broadly reformed and reorganized Chilean private law as it was then applied. *Id.* at 83-84. The fact that Chile tolerated poor quality legal sources for a significant period of time was not unusual. "The indifference [to the quality of legal sources] is the more striking when it can be demonstrated, as often, that the poor quality of the existing sources was recognized, but changes were not forthcoming for a very long time." Alan Watson, *Sources of Law, Legal Change, and Ambiguity* xii (1998).

25. 1 Guzmán Brito, *supra* note 1, at 135-40, 242-54.

26. *Id.* at 151-202, 212-25.

with drafting the codification was also a point of political discord.²⁷ Following the executive's preference, the Senate asserted that the process of codification should be placed in the hands of one wise drafter, Andrés Bello, though he was criticized by others as being overly "devoted to the old way of things."²⁸ With different factions seeking different things, the project went underground and quietly progressed outside legislative scrutiny. Mariano Egaña and Diego Portales charged Bello with drafting a code, hopeful that his product would resurface under more favorable political circumstances.²⁹

Between the two extremes of redrafting the *Siete Partidas* and writing a completely new code, Congressman Manuel Camilo Vial suggested a middle position: the existing law should first be restated and consolidated and then reformed and organized along more modern lines.³⁰ Bello supported this approach in an article called "The codification of civil law," published in *El Araucano*.³¹ This proposal, however, was also the victim of a political impasse.³² Despite the failure of earlier proposals, Andrés Bello's undertaking bore fruit. Before examining the methods he used in drafting the Code, Bello's personal background and his close ties to Chile's political leaders are significant in gaining an understanding of his work and its success.

C. Andrés Bello's Arrival in Chile

Andrés Bello was born in 1781 in Caracas, in the Captaincy-General of Venezuela, where he obtained a classical education. By 1797 he served as private tutor to Simón Bolívar, who was just two years younger than Bello.³³ At nineteen, Bello joined Alexander von Humboldt's expedition.³⁴ After several administrative appointments in the mid-1800s, Bello was appointed an official (*oficial primero*) of the Ministry of Foreign Relations and accompanied Bolívar to England in 1810.³⁵

Bello remained in England from 1810 to 1829. During this period Bello supported Latin American independence from abroad and served the Chilean and

27. *Id.* at 169-98.

28. *Id.* at 192.

29. *Id.* at 198, 203.

30. *Id.* at 231-34. Iván Jaksic, *Andrés Bello: Scholarship and Nation-Building in Nineteenth-Century Latin America*, chapter 6 (forthcoming Cambridge University Press). The author thanks Professor Jaksic for sharing draft chapters of this book.

31. 1 Guzmán Brito, *supra* note 1, at 235; and 2 *id.* at 102.

32. 1 *id.* at 236.

33. Iván Jaksic, *The Selected Writings of Andrés Bello* xvii (Frances M. López-Morillas trans., 1997).

34. *Id.* at xvii. For descriptions of Alexander von Humboldt's renowned scientific voyage in South America from 1799 to 1804, see Douglas Botting, *Humboldt and the Cosmos* 66-176 (1973); L. Kellner, *Alexander von Humboldt* 16-65 (1963); Adolf Meyer-Abich, *Alexander von Humboldt 1769/1969*, at 13-70 (1969); and Leopold Zea & Mario Magallón, *El Mundo que Encontró Humboldt* (1999).

35. Iván Jaksic, *supra* note 33, at xviii.

Colombian legations to London.³⁶ He worked with James Mill on the papers of Jeremy Bentham.³⁷ While in England Bello met and gained the friendship of one of his chief supporters in Chile, Mariano Egaña, who would later work closely with Bello on Chile's legal reforms.³⁸ Bello married Mary Ann Boyland in 1814, and after her death in 1821, he married Isabel Dunn in 1824.³⁹ He had three children with Mary Ann and twelve with Isabel. Both wives were Catholic and of Irish origin.⁴⁰ With his offers to Bolívar of greater service unanswered and the Colombian legation insolvent, Bello left for Chile.⁴¹ Bello was in his late forties when he arrived in Chile in 1829.⁴²

Although a polymath of dazzling intellect, Bello was unappreciated and underused by his more powerful contemporaries. He taught Roman law in the Colegio de Santiago using Heineccius and Vinnius as texts.⁴³ In 1830 he took on various editorial duties at the newspaper *El Araucano*, which later served as a mouthpiece for his codification work.⁴⁴ He gained Chilean citizenship in 1832 and became the Undersecretary (*oficial mayor*) of the Ministry of Foreign Relations.⁴⁵ The same year, he published a book on the principles of international law.⁴⁶ Bello was consulted on the 1833 Constitution, a conservative document more the product of traditionalist jurists and scholastics than French-minded reformists.⁴⁷ In 1836, he was awarded a Bachelors in Laws from the University of San Felipe de Santiago, without ever completing the requirements to practice law.⁴⁸ The next year, he was elected to the Senate, as he would be again in 1846 and 1855, where he served notably in commissions dealing with codification.⁴⁹ In 1842, he founded the University of Chile, became its Rector, and later became a member of several faculties.⁵⁰ A year later, he published his *Instituciones de derecho romano*,⁵¹ a summary and translation of

36. *Id.*

37. *Id.* at xxx. James Mill (1773-1836) was a political economist who worked as Bentham's assistant from 1808 to 1818; he was the father of John Stuart Mill (1806-1873). A.W.B. Simpson, *Biographical Dictionary of the Common Law* 363-65 (1984). For Bentham's views on codification and their influence in Latin America see *infra* notes 116-119 and accompanying text.

38. Lira, *Introducción*, *supra* note 1, at xviii, xxi.

39. Jaksic, *supra* note 33, at xviii.

40. Pinzón, *supra* note 11, at 70.

41. Jaksic, *supra* note 33, at xviii.

42. *Id.*

43. 1 Guzmán Brito, *supra* note 1, at 109-110.

44. Pinzón, *supra* note 11, at 106-07. See also Guillermo Feliu Cruz, *La Prensa Chilena y la Codificación 1822-1878* (1966); and Laura Moscati, *La Problemática Giuridica nell'Opera pubblica de Andrés Bello*, in *Andrés Bello y el Derecho Latinoamericano*, *supra* note 2, at 477-80.

45. Jaksic, *supra* note 33, at xix.

46. 1 Guzmán Brito, *supra* note 1, at 104.

47. Collier & Sater, *supra* note 6, at 55, 58; and Pinzón, *supra* note 11, at 113.

48. Pinzón, *supra* note 11, at 122. Although Bello's father was a lawyer, Bello apparently did not wish to take the minor remaining steps to be admitted to practice. Máximo G. Pacheco, *Don Andrés Bello y la formación de jurista*, in *Andrés Bello y el Derecho Latinoamericano*, *supra* note 2, at 185, 191.

49. Jaksic, *supra* note 33, at xix.

50. *Id.*

51. 1 Guzmán Brito, *supra* note 1, at 104.

Heineccius's *Elementa juris civilis secundum ordinem Institutionum*.⁵² The text was widely adopted in Chile and was used by Manuel Montt, who later became President, when he taught Roman law.

Bello was also an accomplished linguist and grammarian. In 1851 he was made an honorary member of the Spanish Royal Academy. In the late 1850s Bello left public life to concentrate on writing short literary and intellectual works. He died in 1865, at age 84, in Santiago, Chile.⁵³ An incomplete manuscript entitled *Principios del derecho romano según el orden de las instituciones de Justiniano*, showing a strong reliance on the works of Savigny, was part of his unfinished work.⁵⁴

D. Andrés Bello's Chile

The decade leading up to Bello's introduction of the Civil Code was prosperous. Mining, particularly copper and silver, boomed from the 1840s through the period of our focus, the mid-1850s.⁵⁵ For the most part, land was held by comparatively few individuals. Their holding of large estates (*haciendas*) was criticized because the lands were often left uncultivated or underutilized. With the surplus of land and labor that Chile had, it was argued that these resources could be put to better economic use.⁵⁶ Pacific gold rushes, first in California and then in Australia, were an unexpected boon to the holders of large Chilean estates. Chile provided wheat for the speculators and miners who rushed to the gold rich regions.⁵⁷ "The tax records of 1854 show that some 850 landowners received about two-thirds of all agricultural income in central Chile."⁵⁸ Large landholders used *mayorazgos* to ensure the passage of their property to first-born sons.⁵⁹ *Haciendas* maintained their central place in Chilean society despite various innovations in landholding. "But in general it was the hacienda system itself, the basic underpinning of the nation's elite, which was most clearly consolidated by the changes of the mid-nineteenth century."⁶⁰ *Haciendas* were farmed by tenant farmers who, through custom, convenience, and societal structure, remained tied to these massive estates.⁶¹

52. Hugo Hanisch Espíndola, *El derecho romano en el pensamiento y la docencia de Andrés Bello*, 3 *Revista de Estudios Histórico-Jurídicos* 149, 173-90 (1978); and Pinzón, *supra* note 11, at 104. Pinzón gives a publication date of 1827 for this work, *id.* at 104, and a publication date for Bello's *Elementa de Heineccio* of 1843, *id.* at 144. On the work, see Sandro Schipani, *Andrés Bello Romanista-Institucionalista*, in *Andrés Bello y el Derecho Latinoamericano*, *supra* note 2, at 205, 205-258; and Klaus Luig, *Gli Elementa Juris Civilis di J.G. Heineccius come modello per le Istituciones de Derecho Romano di Andrés Bello*, in *Andrés Bello y el Derecho Latinoamericano*, *supra* note 2, at 259, 259-74.

53. Jaksic, *supra* note 33, at xix.

54. Hanisch Espíndola, *supra* note 52, at 149, 201-05.

55. Collier & Sater, *supra* note 6, at 76-79.

56. *Id.* at 63.

57. *Id.* at 80-82.

58. *Id.* at 81.

59. *Id.* at 42, 50. See *infra* notes 156-187 and accompanying text.

60. Collier, *supra* note 7, at 18.

61. *Id.* at 15.

During the period of Bello's work, the Chilean government advanced the interests of the mine owners and large estate holders along with the interests of the shippers and traders who moved their products.⁶² From these activities grew steamships, railroads, banks, and state supported warehouses to facilitate the export business.⁶³ Political power, of course, followed financial success. For example, the President who made Bello's move to Chile possible, Francisco Antonio Pinto, was the owner of silver mines.⁶⁴ Likewise, Diego Portales was an exceptionally successful merchant having formed the firm of Portales, Cea y Cia, which distributed tobacco, playing cards, and liquor during the government of Ramón Freire in the mid-1820s.⁶⁵

E. President Montt's Support of Codification

"No reference to the history of codification and the broader process of nationalization of the law can afford to omit a mention of the role played by key political figures. In this sense, the history of codification is often an intensely personalized history."⁶⁶ Bello introduced his Civil Code during the presidency of Manuel Montt, who came to power on the heels of a minor civil war between the country's political groups battling over the succession of the presidency. Political squabbling in the capital coincided with local revolts and military mutinies. Casualties numbered 1,800 at the deciding battle late in 1851, and Montt came to power as President.⁶⁷

Montt, "who never laughed his entire life," was a ruler in the mold of Diego Portales. He saw his function as encouraging commerce and progress through the new technologies of the day. As he came to power in 1851, Montt, a member of the country's elite landholders (*hacendados*), also had the support of the country's mining families.⁶⁸ Montt had a passion for advancing the cause of education in Chile, an agenda Bello heartily supported. If not closely tied to drafting provisions of the Code, Montt seems to have been instrumental in ensuring the project's political success. As Minister of State, Montt kept the legislature informed of the "committee's"—i.e. Bello's—progress.⁶⁹ President Montt also proposed legislation that provided various forms of financial support and prizes for those drafting Chile's civil law.⁷⁰

62. Collier & Sater, *supra* note 6, at 74.

63. *Id.* at 84-88.

64. Pinzón, *supra* note 11, at 96.

65. *Id.* at 110.

66. Pierre Legrand, *Strange Power of Words: Codification Situated*, 9 Tul. Eur. & Civ. L.F. 1, 8 (1994).

67. Collier & Sater, *supra* note 6, at 104-09.

68. *Id.* at 83, 113.

69. 1 Guzmán Brito, *supra* note 1, at 338-39. Montt and Bello worked together on various other projects as well, including the founding of the University of Chile. Pinzón, *supra* note 11, at 142.

70. 1 Guzmán Brito, *supra* note 1, at 366.

In 1852, President Montt authorized the publication of Bello's finished draft of the code and named a revision commission to review Bello's work. The commission of nine jurists and law professors included Bello and another noted Chilean codifier, Gabriel Ocampo.⁷¹ The commission met on over 300 occasions, and these sessions were often chaired by Montt himself.⁷² The work of Montt, Bello, and Ocampo led to a draft which, after final editing by Bello, was presented to Congress in 1855.⁷³

Little comment was solicited from outside the legislature. Towards the end of the final draft, judges were asked to comment on the work, but generally they declined due to the short time given them. Indeed, due to the hours required to review the draft and its already burdening workload, the Supreme Court of Chile was unable to participate. Nevertheless, one set of comments from the appellate court of La Serena was submitted.⁷⁴

Montt's message to Congress in 1855 formally proposed Bello's code for adoption. The message was written by Bello and is a fundamental source for understanding Bello's work.⁷⁵ After approval by Congress, the code was given again to Bello to correct any remaining errors before its official publication. Although these corrections were to be limited to form and style, some substantive changes were made.⁷⁶

III. BELLO'S SOURCES AND METHOD

A. *Old and New Sources*

The final edition of the Chilean Civil Code of 1855 contains a preliminary section and four books: (1) persons, (2) things, (3) testaments and gifts, and (4) contracts and obligations. In broad terms, the provisions dealing with persons maintain many of the traditional aspects of family law found in canon law (e.g., the legally sanctioned power of the husband over the wife and her property, and over the children). The Code recognizes classes of illegitimate children with varying legal rights.⁷⁷ In contrast to the traditional character of the law of persons, the Code's property law regime reflects a less traditional outlook; in particular, it limits restrictions on the alienation of property. Nonetheless, the provisions governing the

71. *Id.* at 341, 369; Jaksic, *supra* note 30, chapter 6.

72. 1 Guzmán Brito, *supra* note 1, at 371.

73. *Id.* at 372-74.

74. *Id.* at 376-77; and 2 *id.* at 345-50.

75. 1 *id.* at 378; and 2 *id.* at 352.

76. For example, and notably for our purposes, Bello changed the text of Article 1415. As enacted, it read: "The right of transmission established by succession on death in article 957, applies to inter vivos gifts." The meaning was completely changed after Bello's revision: "The right of transmission established by succession on death in article 957, *does not* apply to inter vivos gifts." 1 *id.* at 383; and 2 *id.* at 429.

77. Lira, *Introducción*, *supra* note 1, at xxvii-xxxi.

disposition of property upon death do not favor free alienation to the extent allowed during the owner's lifetime according to the property provisions. Although Bello wanted to permit unrestricted testamentary disposition of property, a number of the more traditional strictures of family shares and legitim (following the rules of the *Siete Partidas*) found their place in the final draft. The provisions concerning contracts and obligations are, again, economically freer in their spirit, following, for the most part, the French Civil Code and its commentators.⁷⁸ Thus, the Code is a compromise between liberal and conservative values. The provisions dealing with property and commerce tend to follow economically liberal, contemporary trends. Those dealing with family and the disposition of family property maintain a more traditional position, looking back to the structure of colonial Spanish society. The success of Bello's code was no doubt in part due to striking a middle ground between economic liberalism and social conservatism.

B. Borrowing Law

Bello cautiously explained to Congress what sources he used to construct the Civil Code of 1855. He did not want to be seen as borrowing law without thinking of the particular attributes of Chile. In Bello's words: "You will realize that from the outset we did not want merely to copy any portion of other modern codes. We had to make use of them without losing sight of our country's peculiar circumstances."⁷⁹ Examining the Civil Code's regime for property and inheritance, Bello stated in the address to Congress that the Code's requirement of registration of property to convey title was borrowed from the provisions of German states which had been shown to work well.⁸⁰ *Fideicommissa* (testamentary trusts), according to the address, were preserved in the Civil Code, unlike other contemporary codes, but were limited so that successive trusts (entails) were avoided.⁸¹ For inheritance, as he stated in the address, Bello departed from European codes as models. "Intestate succession [was] the point on which the bill depart[ed] furthest from existing models."⁸² Bello stated in the address that he sought to better the condition of surviving children and spouses, and attempted to do so by stating legitim amounts or hereditary quotas in numerical figures rather than the looser standards set out in the *Siete Partidas*.⁸³ For contracts and obligations, Bello's address stated that he followed the French Civil Code and its commentators.⁸⁴ Concerning the style of drafting the Civil Code, Bello's address noted that he sacrificed brevity (which he equated with the French Civil Code) to include examples or illustrations, more like the method of the *Siete Partidas*.⁸⁵

78. *Id.* at xxxi-xxxviii.

79. Jaksić, *supra* note 33, at 271.

80. *Id.* at 275-76.

81. *Id.* at 278-79.

82. *Id.* at 279.

83. *Id.* at 281.

84. *Id.* at 281-84.

85. *Id.* at 285.

C. Factors in Borrowing Law

Bello examined his sources meticulously, but was not particularly concerned with explaining why he favored one source to another. In mid-nineteenth-century Chile, competing views of law were at play which simultaneously appropriated and reacted against the Spanish colonial paradigm. Although these considerations were located in a specific historical and political moment, they reflected more general aspects of what lawyers do when they borrow law. As an instance of legal borrowing or transplantation, the use of continental sources by Bello can best be understood through various overlapping factors.

According to Alan Watson, several factors guide legal transplantation, even if, because of their inter-relatedness, they cannot be presented systematically. Generally speaking, these factors include: (1) non-legal historico-political relations between donor and host;⁸⁶ (2) the shared language and proximity between the donor and host;⁸⁷ (3) the nationalistic concerns of the host;⁸⁸ (4) the lack of a strong native law in the host;⁸⁹ (5) the possible misinterpretation of the donor law by the host;⁹⁰ and (6) the donor being more "legally mature" than the host.⁹¹ These factors aid considerably in understanding Bello's selection and use of legal sources for the Chilean Civil Code.⁹²

The most obvious potential donor of legal principles to Bello's code was Spain. Although the relationship between Chile and Spain was still strongly affected by the recent memory of colonialism, by the 1830s, Chile had begun to consider

86. Alan Watson, *Legal Transplants: An Approach to Comparative Law* 51 (2d ed. 1993).

87. *Id.* at 93.

88. *Id.* at 51.

89. *Id.*

90. *Id.* at 99.

91. *Id.* at 55.

92. Watson, as a comparativist, has not been without his critics. *See, e.g.*, Richard Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 Mich. L. Rev. 785 (1982) (containing a book review of Watson's work, *Society and Legal Change* (1977)); J.W.F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* 12-16 (1996); William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 Am. J. Comp. L. 489 (1995); Pierre Legrand, *The Impossibility of "Legal Transplants"*, 4 Maastricht J. Eur. & Comp. L. 111 (1997) (regarding Watson's view as "a most impoverished explanation of interactions across legal systems," *id.* at 113, and stating that the comparative legal studies should be a "hermeneutic explication and mediation of different forms of legal experience within a descriptive and critical metalanguage." *Id.* at 123); Pierre Legrand, *John Henry Merryman and Comparative Legal Studies: A Dialogue*, 47 Am. J. Comp. L. 49-50 (1999); Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. Pa. L. Rev. 1121 (1983) (responding to Abel). The general approach, however, has been used with success. *See, e.g.*, Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 Am. J. Comp. L. 93 (1995); and Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 Am. U. L. Rev. 1483 (1997). Theories stand or fall on the battleground of application.

establishing relations with Spain.⁹³ Thus, questions about the historical relationship of the countries were not merely those of legal or cultural sources, but questions concerning the political future of Chile.⁹⁴ Chilean attitudes about Spain differed between the political parties. The Liberals sought to reject all of the old regime and to follow the enlightened path of the French Revolution.⁹⁵ The Conservatives had a much more complex approach to the placement of Spain in the intellectual and political constellation of the new republic.⁹⁶ One might expect that Spanish sources would have been shunned on political grounds after independence, but this was far from the case. Bello selectively used both views to further his project of codification. For example in 1839, Bello wrote: "We have cast off the yoke of Spain, and our republican courts are ruled by the *fueros* of the Spanish Middle Ages, and by the *pragmáticas* of the Fernandos, Carloses and Felipes."⁹⁷

Reformist rhetoric aimed at the public acceptance of new laws belies Bello's true thought about Spain:

Spain was the bridge to a Roman past as well as to legal and literary traditions that Chile could not afford to do without. . . . Traditions meshed (though some predominated, like Roman traditions in Spain, and Iberian traditions in Latin America), and they called for study and reflection rather than rejection in the name of emancipation and freedom.⁹⁸

This approach was consistent with Bello's work in other fields such as poetry and grammar.⁹⁹

It is not surprising, then, that Bello relied on numerous Spanish sources in his codification of private law. The notion of restating the *Siete Partidas* for contemporary use was a popular concept, and, indeed, Bello made significant use of this source.¹⁰⁰ In Bello's words: "Our civil legislation, above all the *Siete Partidas*, contains the best of the Roman jurisprudence, whose permanent rule over such a large and enlightened part of Europe attests to its excellence."¹⁰¹ Several other factors might have made the *Siete Partidas* an acceptable donor for Chilean private law. For example, this source's antiquity may have washed it of any negative association with colonial power and abuse. The *Siete Partidas* recalled a period of Spanish history before Bourbon excesses, when regional interests were

93. Jaksic, *supra* note 33, at xlv.

94. *See id.* at 196-212 for a convenient collection and interpretation of a number of Bello's journalistic writings on the political nature of relations with Spain.

95. Collier & Sater, *supra* note 6, at 106-07.

96. Bello's *Commentary on 'Investigations of the Social Influence of the Spanish Conquest and Colonial Regime in Chile'* by José Victorino Lastarria (1844) refutes Lastarria's liberal pleas for rejection of all things Spanish. Jaksic, *supra* note 33, at 154-168.

97. Pacheco, *supra* note 48, at 196 (quoting El Araucano, Dec. 6, 1839).

98. Jaksic, *supra* note 33, at xiv.

99. Antonio Cussen, Bello and Bolívar (1992).

100. 1 Guzmán Brito, *supra* note 1, at 49, 61, 189-96, 221-25. *See also* Aristóbulo Pardo, *Bello y las Siete Partidas*, in Andrés Bello y el Derecho 231-41 (1982).

101. 1 Guzmán Brito, *supra* note 1, at 415; and 2 *id.* at 158.

accorded great weight and numerous regions enjoyed relative political autonomy before the Crown.¹⁰² The rules the *Siete Partidas* provided were also, from the perspective of nineteenth-century Chile, politically neutral. These rules of private law lacked direct reference to the political subjugation of the colonial population and, in this way, could be contrasted with the content and the use of the *Recopilación de las Leyes de los Reinos de las Indias* which dictated public law and colonial structures.¹⁰³ The *Siete Partidas* were also based on Roman law, a favored source for Bello.

Bello's work demonstrated mastery not only of the *Siete Partidas*, but also of a multitude of Spanish colonial sources. This familiarity shaped and informed his approach to these sources. Bello's work on international law demonstrated his allegiance to the Spanish Natural Law school of Vitoria and Suárez.¹⁰⁴ Yet, when Bello began his search for private law sources, Spain had not yet codified its private law; thus, there was little Bello could specifically borrow from Spain in the same way that he could borrow from France. When García Goyena's draft civil code for Spain became available in the early 1850s, Bello used this source for comparison to his work. Thus, it is not surprising to find Bello appropriating Spanish sources throughout his projects. Independence for Bello did not mean discarding the benefits of the past, and the Chilean nation, in Bello's mind, should have welcomed its historical ties to Spain.

Continuing the consideration of the non-legal historico-political relations between donor and host leads to an examination of France. The relationship between Chile and France was perhaps more complex than that between Chile and Spain. Napoleon's invasion of Spain and ouster of Ferdinand VII led circuitously to the independence of Latin America. French ideas were successfully adopted by Bolívar and other independence leaders. In shaping contemporary Chilean thought, the intellectual currency of France was of greater value in legal transplantation than the hard currency of English and North American investment. For example, even though most of Chile's external debt came from England, the government relied on the advice of the French economist Jean-Gustave Courcelle-Seneuil from 1855 to 1863.¹⁰⁵ Also, France was a more important influence on Chilean society and culture than England.¹⁰⁶

When Bello was drafting the Civil Code, the *Code Napoléon* was widely available, and he had ready access to this work. There is little doubt that the French Civil Code was the most famous and highly appreciated civil code in circulation and that the French jurists who interpreted it were given the utmost respect. In this regard, the French Civil Code served as a foreign talisman for Bello's project.¹⁰⁷

102. José Manuel Pérez-Prendes, *Curso de Historia del Derecho Español* 651-97 (1986).

103. Ricardo Levene, *Manual de Historia del Derecho Argentino* 173-83 (5th ed. 1985).

104. I Guzmán Brito, *supra* note 1, at 255.

105. Collier & Sater, *supra* note 6, at 74.

106. "France, also, perhaps even more than England, was a great source of new trends—in female dress, in furniture, literary taste, political rhetoric, and (in the Catholic Church) devotional practice." *Id.* at 90.

107. Miller, *supra* note 92 (assessing the place of the U.S. Constitution as a talisman in the

Although born in the French Revolution, as enacted under Napoleon, the French Civil Code was a moderate compromise between extremes of conservatism and liberalism. Its view of property rights, for example, was grounded in the equality of all members of society, and it sought to make property freely alienable.¹⁰⁸ In comparison with the law of the French *ancien régime* and of the Spanish colonial period, the French Code was an essentially liberal document.¹⁰⁹ Part of the French Code's success was due to its balance of revolutionary and traditional notions of society and law.¹¹⁰ Bello's use of the *Code Napoléon* was perhaps bolstered also by the political and historical parallels between France and Chile. As the *Code Napoléon* itself was the product of a political movement from *ancien régime*, through the social and political revolution of the Republic, to the authoritarian stability of Napoleon, Bello's code could trace its political pedigree through a similar path beginning with Spanish colonial royal power, through the radical reforms of O'Higgins during the early republic, to the authoritarian stability of the Portales era.

When appropriating provisions of the French Civil Code, Bello often chose not to translate directly. Challenged on this method by a law professor, Bello responded:

We do not see it necessary that when a provision of the French code is taken, that the text is translated literally, as it is counseled by the professor. This is a rule that cannot be followed without inconveniences, even given the case that that body of law is adopted in all its parts; for it contains articles whose drafting, as its commentators have noted, suffer from grave defects. But when that great work presents itself as a complete model, free from the imperfections that more or less all human works suffer; when we see in it a perfectly clear and harmonious whole, the very same person would counsel that, adopting one part of its provisions the terms should be varied at times to put them in accord and in harmony with the ideas and language with the others in which it was not thought proper to follow.¹¹¹

development of Argentine constitutionalism). See also, Shael Herman, *From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture*, 1984 U. Ill. L. Rev. 597 (viewing the French Civil Code as a new center for eighteenth-century French bourgeoisie).

108. 1 Marcel Planiol & George Ripert, *Treatise on the Civil Law* 62-63 (J. Denson Smith trans., 1939).

109. Carmen García Mendieta, *Más allá del liberalismo en algunas figuras jurídicas del derecho civil mexicano*, 1 Memoria del iv Congreso de Historia del Derecho Mexicano, 333, 333-40 (1988); Mariano Peset, *Una interpretación de la codificación española*, Memoria del ii Congreso de Historia del Derecho Mexicano 665, 668 (1981).

110. Jean-Louis Halpérin, *Histoire du Droit Privé Français depuis 1804*, 21-22 (1996); Jean-Louis Halpérin, *l'Impossible Code Civil* 265, 266, 270, 276-86, 296 (1992) (concerning the French Civil Code of 1804, Halpérin stated: "*le Code civil était fondamentalement une oeuvre de compromis*," *id.* at 275); John Henry Merryman, *The Civil Law Tradition* 26-30 (2d ed. 1985); André Tunc, *The Grand Outlines of the Code*, in *The Code Napoleon and the Common Law World* 19-42 (Bernard Schwartz ed., 1956, 1998); and Franz Wieacker, *A History of Private Law in Europe with Particular Reference to Germany* 273-75 (Tony Weir trans. 1995).

111. 1 Guzmán Brito, *supra* note 1, at 335.

Bello recognized not only the French Civil Code as useful, but also French commentary sources. In an article published in *El Araucano* in 1839, Bello praised the works of French jurists.¹¹² “The products of the juriconsults of France, which have enlightened their modern legislation with such modern philosophy, in which is found in no small part the fundamental principles of our legislation, would also give us the most appreciable resource.”¹¹³ Consistent with Bello’s rejection of literal translation of the *Code Napoléon* and with his respect for the French commentators on the Code and French law, he often turned to Delvincourt, Rogron, and even the pre-code writings of Pothier for both structural ideas and language to be incorporated into the Chilean Civil Code.¹¹⁴ In 1839, discussing the circulation of foreign books in Chile, Bello remarked concerning law books:

We see with satisfaction that the most celebrated French works of this kind have begun to circulate among us. Although Spanish jurists have nothing to envy the jurists of other nations in the extension and depth of their legal learning, it is right to confess that they are in general rather inferior to their neighbors in philosophy, in the use of a severe logic, in the analytical clarity of their exposition, and above all, in amenity and good taste, qualities that are their own and characteristic of the French.¹¹⁵

As noted earlier, one of the factors Watson suggests is important in selecting sources for borrowing is the linguistic similarity between the host and the donor. This might partially explain Bello’s attraction to Spanish and French sources.¹¹⁶ Nonetheless, Spain and France were not the only countries Bello considered as sources for his project. We cannot forget that Bello spent almost twenty years in England before arriving in Chile. He had married twice there and raised children there. He was also involved in a circle of intellectuals who led him to the works of Bentham.¹¹⁷ Bentham’s ideas concerning codification were already well circulated in Chile and Latin America by this time.¹¹⁸ Bello fortuitously satisfied several of Bentham’s considerations as to what sort of person would be ideally suited to the task of codifying laws for a country. Most likely with his own contribution in mind, Bentham suggested that codification should be carried out by an individual rather than

112. *Id.* at 103.

113. *Id.* at 280; and 2 *id.* at 158.

114. 1 *id.* at 406, 422-24.

115. Pinzón, *supra* note 11, at 140.

116. Geographical proximity, a factor proposed by Watson, does not come into play here. Furthermore, all of the recently independent countries of Latin America were in a similar state of legal development.

117. Jaksić, *supra* note 33, at xxx.

118. Jeremy Bentham, *Colonies, Commerce and Constitutional Law: Rid Yourselves of Ultramarina and other Writings on Spain and Spanish America* (Philip Scholfield ed., 1995); Jeremy Bentham, ‘Legislator of the World’: *Writings on Codification, Law, and Education xxxiv-xxxv, 370-78* (Philip Scholfield and Jonathan Harris eds., 1998); 1 Guzmán Brito, *supra* note 1, at 101-02; Mirow, *supra* note 18, at 97-100; and Miriam Williford, *Jeremy Bentham on Spanish America* (1980).

a committee; furthermore, a foreigner should be selected over a citizen of the country, because this would, in Bentham's view, free the codifier from internal political differences and permit the codifier to consider the greatest happiness of all the inhabitants of the country.¹¹⁹ Bello's Catholicism, however, clashed with the Bentham's utilitarianism.¹²⁰

Bello's work in Chile came on the heels of the influential debate on codification between Thibaut and Savigny. Indeed, Bello read and used Savigny's works concerning the systematization of law and Roman law.¹²¹ Responding to Thibaut's assertions that the time was ripe for civil law codification in Prussia, Savigny's reply launched the school of Historical Jurisprudence which sought to match legal development to the particular spirit of the nation, a *Volksgeist*. This process could only be accomplished through extensive study of the law's history and sociology.¹²² Bello was firmly in Savigny's camp, and it is possible that Bello saw himself fulfilling for Chile the agenda outlined in Savigny's works.¹²³ This approach to codification fit well with Bello's view of antiquity and Roman law; all the work Bello had done in Roman law became the background and guiding source of his codification project.¹²⁴ Bello viewed Roman law as an essential tool in interpreting and understanding the precodification civil law of Chile. In a newspaper debate in 1834 between Bello and the leading liberal thinker, José Miguel Infante, Bello responded to criticisms of the educational value of Roman law and Latin and of the use of Vinnius as a text. Responding to Infante, Bello wrote: "The Roman law, source of the Spanish legislation that governs us, is its best commentary . . . those who look at it as foreign legislation are themselves foreigners to our legislation."¹²⁵ Citing Savigny, he would repeat this theme in a speech to the University of Chile in 1848.¹²⁶

119. I Guzmán Brito, *supra* note 1, at 200; and Bentham, *Legislator*, *supra* note 118, at 279-97.

120. Pinzón, *supra* note 11, at 208-09.

121. I Guzmán Brito, *supra* note 1, at 258.

122. Manlio Bellomo, *The Common Legal Past of Europe 1000-1800*, at 14-18 (Lydia G. Cochrane trans., 1995); and Wieacker, *supra* note 110, at 303-316.

123. Pinzón, *supra* note 11, at 175-77, 211. Bello also used Savigny as a source of doctrinal law. Hugo Hanish Espíndola, *La influencia de Savigny en Bello en materia de personas jurídicas*, 5 *Revista de Estudios Histórico-Jurídicos* 67 (1980) (persuasively arguing that Bello's ideas and code provisions concerning juridical persons were borrowed from Savigny). See also Rolf Knütel, *Influences of the Louisiana Civil Code in Latin America*, 70 *Tul. L. Rev.* 1445, 1458-59 (Michael Brix trans., 1996) (further speculation concerning the origin of these and related provisions).

124. Hanisch Espíndola, *supra* note 52, at 149-231; Iván Jaksic, *supra* note 30, chapters 4, 6; Sandro Schipani, *Antecedentes del Código Civil Andrés Bello: de las Instituciones a los Principios Generales del Derecho* (Fernando Hinestrosa trans., 1989); and Pierre Villard, *I Romanisti Francesi nell'Opera di Andrés Bello*, in *Andrés Bello y el Derecho Latinoamericano*, *supra* note 2, at 275, 275-283.

125. Pinzón, *supra* note 11, at 121. An account of the debate between Bello and Infante is found in Hanish Espíndola, *supra* note 52, at 149, 163-67.

126. Pinzón, *supra* note 11, at 144.

This approach also lent support to Bello's use of the French code.¹²⁷ In 1833, Bello translated and published in *El Araucano* Portalis's *Preliminary discourse on the Civil Code*.¹²⁸ In particular, this writing noted the importance of Roman law in the preparation of the French Civil Code:

The history of Roman legislation is, little more or less, that of every people.¹²⁹ . . . The written law, composed of Roman laws, has civilized Europe. The discovery that our grandparents made of Justinian's compilation was for them a type of revelation. In that time, our courts took a more regular form, and the terrible power of judging was placed under principles. The greater part of those who criticize Roman law, with as much bitterness as flippancy, blaspheme against that which they do not know.¹³⁰

Thus, the French code was commendable as a new work, but also commendable in that the new work was grounded in Roman law. With this link to Roman law, the French code shared a common base with the Spanish law of Chile.

The shared roots of Chilean and European law served as sound justification for looking to modern codes as guides. At the inaugural session of the legislature in 1834, President Prieto, in an address drafted by Bello, appealed to this justification. With the codes of Europe in mind, he stated:

Their civil codes, derived from the same source, recognize the same fundamental rules as the legislation that governs us; they have simplified it; they have corrected its deviations; they have made it accessible to the understanding of all; they have adapted it to the needs of our time. What stops us from taking advantage of such precious material?¹³¹

Indeed, besides the French Civil Code, Bello also consulted the *Allgemeines Landrecht für die preussischen Staaten* (1794), and the Austrian *Allgemeines bürgerliches Gesetzbuch* (1811), as well as codes of Sicily, Louisiana, Sardinia, Holland, Peru, and the draft Spanish civil code of Florencio García Goyena (1852).¹³²

127. Concerning the use of Roman law by the French Code, see Mario Ascheri, *John Minor Wisdom Lecture on Civil Law: A Turning Point in the Civil-Law Tradition: From Ius Commune to Code Napoléon*, 70 Tul. L. Rev. 1041, 1046-49 (1996); and I Planiol & Ripert, *supra* note 108, at 57. Concerning the Roman law basis of the French code, see André-Jean Arnaud, *Les Origines Doctrinales du Code Civil Français* (1969); and Pedro N. Zelaya Etchegaray, *Portalis y el sentido del texto*, 14 Revista Chilena de Historia del Derecho 259, 259-66 (1991).

128. I Guzmán Brito, *supra* note 1, at 262.

129. Portalis, *Lejislación, Discurso preliminar del proyecto de código civil de Francia por Mr. Portalis*, *El Araucano*, Aug. 17, 1833, at 3 (No. 153, trans. A. Bello into Spanish).

130. Portalis, *Lejislación, Discurso preliminar del proyecto de código civil de Francia por Mr. Portalis*, *El Araucano*, Aug. 30, 1833, at 3 (No. 155, trans. A. Bello into Spanish).

131. I Guzmán Brito, *supra* note 1, at 271; 2 *id.* at 111.

132. 1 *id.* at 423. Bello most likely made use of the several civil law concordances that were available during his drafting of the Chilean Civil Code, including: Fortuné Anthoine de Saint-Joseph, *Concordance entre les Codes Civils Etrangers et le Code Napoléon* (1840) (Anthoine de Saint-Joseph's

Bello's approach to codification and his use of foreign sources did not go without criticism. Even in the early 1850s, when it appeared that the political path had been cleared for the enactment of Bello's code, several individuals attacked the project for its plagiarism of foreign works and asserted that the *Siete Partidas* was the proper basis for legal reform.¹³³ This argument repeated one of the political hurdles Egaña's proposal was unable to clear twenty years earlier, leading to a political impasse between the Senate and the House. In the changed climate of the 1850s with Montt (a former member of the legislative commission) as President, Bello's plan did not succumb to these attacks.

Another factor Watson suggests to those concerned with legal change is the nationalistic concerns of the host. Bello saw himself as an intellectual builder of the Chilean nation. His poetry and grammatical works demonstrate his desire to carve out a distinctly Latin American identity, and he brought this project with him to Chile.¹³⁴ Nationalist sentiments could be used by Bello to advance his codification program, and Bello asserted numerous times that Spanish law had to be cast away or recast in Chilean molds. The desire to build a strong and powerful nation, already occurring in economic and military terms, suffered from the lack of a strong native law. Spanish colonial private law was already straining under the demands of late colonial commerce and society. By the 1850s, the situation had become even worse. Commercial development, trade, and society had deviated greatly from the mercantilistic underpinnings of the Spanish colonial law. Internal (the northern mining region) and external (California and Australia) gold rushes resulted in an increasingly mobile society which in turn affected both class and family structures. In commercial matters, Spanish colonial private law suffered not only from its lack of organization, its overlapping and conflicting sources, and its association with the colonial power, but also from its increasing distance from the contemporary Chilean economic position and national self-perception. Furthermore, national unity and cohesiveness could be fostered by creating national codes that differentiated the country from countries with other laws and from a community of countries sharing *ius commune* sources.¹³⁵

Bello's various drafts of the Code, his notes to these drafts, his studies on Roman law and Spanish language, and his journalistic works suggest that he was

Concordance is itself found distributed throughout Duranton, *Cours de Droit Français suivant le Code Civil* (1841)); García Goyena, *Concordancias, Motivos, y Comentarios del Código Civil Español* (1852); and Verlanga de la Huerta & Muñiz Miranda, *Concordancia entre el Código Civil Francés y los Códigos Civiles Extranjeros* (2d ed. 1847). Rolf Knütel, *supra* note 123, at 1449-52. Concerning the influence of the Louisiana code, see Knütel, *supra*; José María Castan Vazquez, *Reciprocal Influences between the Law of Spain and Louisiana*, 42 La. L. Rev. 1473, 1482-84 (1982); and Shael Herman, *Louisiana's Contribution to the 1852 Project of the Spanish Civil Code*, 42 La. L. Rev. 1509 (1982). On Bello's use of codes generally, see Nelle, *supra* note 3.

133. 1 Guzmán Brito, *supra* note 1, at 344-60.

134. Cussen, *supra* note 99; Jaksic, *supra* note 33, at xxxiii-xli; and Jaksic, *supra* note 30.

135. Bernardino Bravo Lira, *La codificación de los derechos nacionales en Europa e Iberoamérica y su disociación del derecho común*, 15 *Revista Chilena de Historia del Derecho* 147, 147-71 (1989).

quite sensitive to the historical distance between nineteenth-century Chile and many of his sources. Misinterpretation, resulting from removing a rule from its particular moment in time, is often a concern in the borrowing process. Certainly there were elements of his sources that only made sense within the context of their original application. Chile was not the thirteenth-century Castile of the *Siete Partidas*, nor the early nineteenth-century France of Napoleon's Civil Code. Bello appeared to be well aware of this. For example, in his drafting of forced share provisions for family members out of a decedent's property, Bello noted that "the Falcidian quarter and the Trebellianic quarter were true legitims in the Roman law and they are in our present law. Both have been abolished in this draft because the reasons that gave motive to their establishment do not exist among us."¹³⁶ Even in an area where, as this article argues, Bello attempted to replicate the more traditional family structures of colonial Spanish society in his new code, Bello subjected provisions to the inquiry suggested by Savigny: How does this provision, in this case borrowed from the past, fit with the *Volksgeist*?

Bello's understanding of these sources was also affected by the commentaries he used. Recent studies have demonstrated Bello's extensive use of French commentary sources, and it is clear he often preferred the explanations of Delvincourt, Rogron, and Pothier, to the language of the French Code itself.¹³⁷ To what extent Gregorio López changed or misinterpreted the meaning or nature of the *Siete Partidas* has, it appears, not been explored, but it was this mid-sixteenth-century version of the text that Bello consulted. Nonetheless, it is very likely that Bello was aware of the possibility of changes and shifts in laws and in their commentaries. As a teacher of Roman law, Bello had used the works of both Vinnius and Heineccius and was aware of the different approaches these commentaries had taken.¹³⁸ This, coupled with his extensive studies of Spanish language and grammar, would have made him, as his notes indicate, a critical reader of his source texts.

Changing focus to another factor proposed by Watson, the problem of borrowing sources may also be viewed from the relative legal maturity or development of the donor and host countries. Chile and the other newly independent countries of Latin America suffered from legal underdevelopment both in relationship to their own needs as developing commercial nations and in relationship to the pools of contemporary civil law available in Europe. There can

136. 13 Obras Completas, *supra* note 1, at 185.

137. Alejandro Guzmán Brito, *El pensamiento de Bello sobre codificación entre las discusiones chilenas en torno a la fijación del derecho civil*, 443-44 Atenea 239, 259 (1981).

138. In fact, like the selection of teaching texts today, the selection of a text for Roman law in nineteenth-century Chile could signal one's political outlook. It appears that to some, Bello's use of Vinnius marked him as a conservative of the old school, because more liberal professors used Heineccius. Nonetheless, Bello then demonstrated his versatility by adopting the latter author for teaching and for his own work on Roman law. Pinzón, *supra* note 11, at 102-03. Bello's use of Vinnius as a teaching text may have been based purely on the politically negative implications of such use, and it appears that Bello was much more influenced by Heineccius. Hanisch Espíndola, *supra* note 52, at 149, 173-82.

be little doubt that France and other European countries provided civil law regimes and structures that were substantially more mature than those in place in mid-nineteenth-century Chile. The European bodies of law benefitted from their reputation as being products of legally well-developed countries that were economically and politically powerful in the Atlantic world. Achieving a level of legal development on par with these countries provided a useful theme for countries suffering from political and economic underdevelopment and an invitation to adopt their successful codifications. In the address to Congress introducing the Civil Code of 1855, Bello began by describing Chile as having reached the point where it must take a step already taken by other legally sophisticated nations: "Many of the most civilized modern nations have felt the need to codify their laws."¹³⁹

Assuming that Watson's factors adequately describe the process of Bello's use of sources in constructing his civil code, Watson warns us of a pitfall inherent in his analysis: We must not embellish what is borrowed. For example, if there is no evidence that law was borrowed, we cannot infer it from a borrowing of, say, fashion or literary style. This caution does not apply to Bello's project, where he carefully articulated the foreign sources that influenced his project. Nor is there risk of exaggerating the extent of an implemented transplant when the influences and sources are so clearly evident as they are in Bello's code.

While this article attempts to use factors extracted from Watson's work on other instances of borrowing, it does not purport to present these factors systematically because various interrelated factors converged to produce the success of Bello's draft. The extent to which the transplants noted here have changed the donor law must be left for another study.¹⁴⁰

In summary, Bello's selection of sources was influenced by a number of interrelated factors: external considerations constructed from history, politics, language, nationalism, intellectual trends, and the state of Chilean society and commerce combined with the internal considerations Bello brought to the task. These internal aspects included his work in Roman law, his years in England, his exposure to the works of Bentham and Savigny, his deep interest in language and legal texts, and his personal perseverance over decades to bring the code to completion despite political obstacles. Bello's care in determining the quality and appropriateness of the sources he applied to his project is noteworthy.¹⁴¹

Bello's project was supported by four pillars: (1) medieval and colonial Spanish law; (2) the work of Savigny and Roman law; (3) the ideas of Bentham and utilitarian codification; and (4) the European codes, especially the *Code Napoléon*. These elements were connected and acted together. To Bello they also provided positive changes. For example, after noting that the laws needed to be organized in such a way to provide better access and purged of "the shackles that limit civil

139. Jaksic, *supra* note 33, at 270.

140. Watson, *supra* note 86, at 11-15.

141. It appears Bello was unusual in this regard. Agents of legal change are often indifferent to the quality of their sources, even when the need for legal reform is widely recognized. Watson, *supra* note 24, at xii.

liberty," Bello wrote in 1836: "All this is the object of the operation that the famous Bentham has named codification. . . . Logic does not have to be forced to recommend this system, looking at the two great monuments that eternalize the memory of the Roman emperor and the French emperor."¹⁴²

Before considering specific instances of borrowing, it is worth reminding the reader of an important division found in Bello's code and his approach towards borrowing law. In familial and societal matters, Bello remained conservative or traditional in outlook and sought medieval Spanish law as a model, notably the *Siete Partidas*. In economic and commercial matters, Bello sought more liberal rules, and, therefore, looked to the French Civil Code as a model.

IV. BORROWING PRIVATE LAW FOR THE INHERITANCE PROVISIONS OF THE CHILEAN CIVIL CODE

A. *Why Inheritance Law?*

In 1833 or 1834, following the political impasse that led Egafía's codification proposal to be shelved, Portales instructed Bello to begin work on a civil code for Chile.¹⁴³ The first area of law to be codified by Bello was the law relating to the succession of property. Bello stated that he selected this area because it was the most defective area of private law resulting from the multiple influences and circumstances that made up the applicable body of rules. Some rules were derived from Roman law, others came from Castilian customs, and others came from medieval collections of law.¹⁴⁴ Bello suggested that with such variation of sources and rules, the question of what to use as a base for codification was politically less contentious.¹⁴⁵ Bello probably understood well the fundamental political and social aspects of changing inheritance law. Certainly, he considered a statement made by Portalis in his preliminary discourse on the French Civil Code which Bello himself translated for *El Araucano* in 1833. There, Portalis wrote: "It is necessary to destroy the entire system of succession, because it is of great value to create a new order of citizens for a new order of property owners."¹⁴⁶ An additional factor that made this area of law an attractive starting place for Bello was its relative cohesiveness. Because the laws relating to succession could have been enacted as a whole without incorporation into a civil code, the project might still have been useful even if a new civil code had not been enacted. Furthermore, Bello's

142. 1 Guzmán Brito, *supra* note 1, at 275; and 2 *id.* at 134.

143. "An authoritarian ruler espousing a comprehensive social theory can pick his own chief draftsman, and faces little difficulty in avoiding unprincipled compromises." Damaska, *supra* note 18, at 360.

144. 1 Guzmán Brito, *supra* note 1, at 294-95; and 2 *id.* at 175.

145. 2 Guzmán Brito, *supra* note 1, at 175.

146. Portalis, *Lejislación, Discurso preliminar del proyecto de código civil de Francia por Mr. Portalis*, *El Araucano*, Aug. 17, 1833, at 2 (No. 153, trans. A. Bello into Spanish).

selection of this area also reflected wider popular support for reformation of inheritance provisions.¹⁴⁷ Thus, a number of factors led Bello to begin with the laws relating to succession of property. It was recognized as an area in need of major change and the path to approval would be easier. It also bore the promise of societal change. Finally, it was a discrete area of law that could be enacted separately.

By 1836, Bello had prepared a list of ten topics for the project which were presented to and discussed by the Council of State. These ten topics were:

1. the right of representation by the heirs of a deceased beneficiary
2. the amounts of legitim for forced shares to family members
3. the scope of testamentary acts
4. the prohibition of placing property in successive trusts
5. the division of written testaments into nuncupative and closed, and the creation of four privileged testaments: verbal, maritime, military, and plague
6. the prohibition of substitutions for children
7. contingent beneficiaries
8. the Falcidian and Trebellianic quarters¹⁴⁸
9. gifts imputed to legitims (advancement of heirs)
10. the irrevocability of gifts to descendants.¹⁴⁹

It appears that the Council took no action on these topics other than approving them. In 1839, Bello published in *El Araucano* his suggestion to reform the law concerning the passage of property upon the simultaneous death of a married couple.¹⁵⁰ The same year, he published an article addressing the calculation of the third and fifth parts for family shares called the *mejora* (a share required to be distributed to a member or members of the decedent's family at the decedent's selection).¹⁵¹

Progress in drafting was met in the early 1840s with a much more hospitable political climate for the civil code project. A new five-member commission, including Bello, Mariano Egaña, and Manuel Montt (then Minister of Justice), turned its attention to reviewing Bello's draft on succession.¹⁵² The draft was published first in *El Araucano* and again as a separate pamphlet in 1846. By this point, Bello had become the only active member of the committee—a committee which had absorbed an earlier, separate revision committee to make changes suggested by the Congress.¹⁵³

147. 2 Guzmán Brito, *supra* note 1, at 175. Inheritance law was also the first area to be addressed by those working on a civil code for Colombia under Bolívar. Mirow, *supra* note 18, at 107.

148. For Falcidian: J. Inst. 2.22. For Trebellianic: J. Inst. 2.23.7 and S.C. Trebellianum.

149. 2 Guzmán Brito, *supra* note 1, at 130-31.

150. 1 *id.* at 295; and 2 *id.* at 144-48.

151. 1 *id.* at 295; and 2 *id.* at 155-57.

152. 1 *id.* at 306-12.

153. *Id.* at 313, 320-23, 337.

B. Foreign Law in the Inheritance Provisions of the Civil Code of 1855

Foreign law, in particular the French Civil Code, was often used in Chile as a source of guidance to the structure or content of new law. Nonetheless, Guzmán Brito has noted that the portion of the Chilean Civil Code addressing inheritance law (Book III) owes little of its internal organization to the French Civil Code of 1804. Concerning Book III, Guzmán Brito has observed that only two aspects of the Chilean Civil Code reflect Bello's consultation of the French Civil Code. First, Bello followed the order of the French code by placing the provisions on intestate succession ahead of those on testate successions. Second, Bello followed the French model by placing the provisions on donations in Book III along with the provisions governing the laws of succession; this differed from the Spanish *Siete Partidas*, which included the laws of donation under the division of contracts. Guzmán Brito states that:

Apart from this double precise influence of the French code, other important influences are not noticed and we tend to think that in this area Bello also used an original order, but that does not mean that for the creation of his system he did not have in mind the codes available in his time, which gave him the general view from which he formed his own system.¹⁵⁴

It has also generally been accepted that Bello did not make much use of the French Civil Code in drafting the articles for intestacy and testamentary succession. Support for this view can be gleaned from President Montt's address to Congress in 1855. In contrast to his discussions of other books of the Code, Bello made no mention in the address he drafted for Montt of his use of the French code for his provisions in Book III.¹⁵⁵

While scholars readily acknowledge the profound influence of the French Civil Code on Bello's drafting of Book IV (addressing contracts and obligations, which, in volume, amounts to about half of Bello's code), they are reluctant to suggest that although the intestacy and testamentary provisions of Book III are based for the most part on colonial Spanish law (especially the *Siete Partidas*), the French Civil Code made substantial incursions into this portion of Bello's work as well. Concerning the succession provisions, Guzmán Brito wrote that: "[t]he influence of French law [was] scarce [there]."¹⁵⁶ Nonetheless, Bello's use of French sources in Book III provides a hitherto unexplored example of his approach to borrowing law. Not only does a closer examination refute the accepted view that the French Civil Code was not an influential source for his provisions on inheritance, but it also demonstrates that Bello's broader method of balancing the needs of Chilean society with economic progress was used in the development of the substantive content of Book III.

154. *Id.* at 406.

155. Jaksić, *supra* note 33, at 279-81.

156. Guzmán Brito, *supra* note 137, at 259.

C. *Following and Rejecting the French Civil Code*

1. *Following the Spirit of the French Civil Code: The Abolition of Mayorazgos*

An important part of the French Revolution was the shedding of feudal social structures and their associated methods of landholding.¹⁵⁷ By decrees on May 15-28, 1790, and April 8, 1791, the Constituent Assembly did away with primogeniture and instituted an inheritance system of equal partition of property to children.¹⁵⁸ Entails (*majorats*), successive trusts of land held in primogeniture succession, were abolished by the French Legislative Assembly on August 25, 1792.¹⁵⁹ Article 896 of the French Civil Code of 1804 codified this position:

Entails are prohibited. Every disposition by which the donee, the heir appointed or the legatee, shall be charged to preserve and render to a third person, shall be null, even with regard to the donee, the heir appointed and the legatee.¹⁶⁰

Dispositions by parents were granted only a slight exception to this principle. Article 1048 of the French Civil Code states:

The property which fathers and mothers have the power to dispose of, may be by them conferred in whole or in part, on one or more of their children, by acts during life or by will, with the condition of surrendering such property to the children born or to be born, in the first degree only, of the said donees.¹⁶¹

Thus, the French Civil Code permitted the passage of property restricted for one degree, that is, to the children of the donee under the gift or will. The French Civil Code prohibited the imposition of primogeniture by requiring that even dispositions made under the provision above were valid only as far as they were "for the benefit of all the children born and to be born of the party subjected thereto, without

157. Marcel Garaud, *Histoire Générale du Droit Privé Français de 1789 à 1804: La Révolution et la Propriété Foncière* (1958). See also Jean Bart, *Perspectives historique*, in *Liberté et Droit Économique* 23-39 (Gérard Farjat & Bernard Remiche eds., 1992); Jean Brissaud, *France*, in *A General Survey of Events, Sources, Persons and Movements in Continental Legal History* 203, 274-75 (Ernst Freund ed., Rapelje Howell trans., 1912, 1968); Jean Imbert, *Histoire du Droit Privé* 75-76 (6th ed. 1985); Anne-Marie Patault, *Introduction Historique au Droit des Biens* 162-165 (1989); and *Propriété et Révolution* (Geneviève Koubi ed., 1990).

158. Olivier Devaux, *A propos de la transmission du patrimoine: la loi du 17 nivôse An II*, in *Propriété et Révolution*, *supra* note 157, at 100.

159. Garaud, *supra* note 157, at 221-22. See also Brissaud, *supra* note 157, at 277; and Jean Brissaud, *A History of French Private Law* 732 (Rapelje Howell trans., 1968).

160. Code civil art. 896 (1804) (Fr.) (anonymous trans. 1960).

161. Code civil art. 1048 (1804) (Fr.) (anonymous trans. 1960).

exception or preference of age or sex."¹⁶² In fact, Napoleon saw the French Civil Code's abolition of entails as an important feature. Concerning the abolition of entails and the partition of property equally among children under the French code, one scholar observed:

How clearly the political implications of these measures were recognized is proved by the well-known letters in which Napoleon admonished his brother, the King of Naples, speedily to introduce in his realm the Code, so that existing entails would be destroyed and the old nobility reduced to powerlessness. "Then, when you have achieved this," Napoleon exhorted his brother, "open up the possibility of new entails to your most loyal supporters. There is no better way to insure the security of your dynasty."¹⁶³

In Chile, the legal device of the *mayorazgo* enabled land holders to place or to entail land in successive trusts in order to pass property to the first born male, mimicking the common feudal scheme of primogeniture.¹⁶⁴ The institution was subject to both political and economic criticism. In the struggle for independence, almost all holders of *mayorazgos* were royalists.¹⁶⁵ Consistent with republican values, and perhaps also to punish these landholding royalists, O'Higgins unsuccessfully attempted to abolish *mayorazgos* as early as 1818. Early liberal constitutions also attempted their abolition, but *mayorazgos* did not disappear rapidly and continued to exist in Chile until the mid-nineteenth century.¹⁶⁶

Bello's code sought to ensure private property rights for the individual. Closely tracking Article 544 of the French Civil Code, the Chilean Civil Code defines property as "the right to enjoy and dispose of things in the most absolute manner, provided that it is not prohibited by laws or regulation."¹⁶⁷ In one sense,

162. Code civil art. 1050 (1804) (Fr.) (anonymous trans. 1960).

163. Max Rheinstein, *The Code and the Family*, in *The Code Napoleon and the Common Law World* 141 (Bernard Schwartz ed. 1998) (quoting Letters of June 5, 1806, 12 Correspondance de Napoléon Ier 432). *Majorats* were, in fact, created from 1806 to 1808. Halpérin, *l'impossible*, *supra* note 110, at 285.

164. Under Castilian law imported to Chile, there were two general types of *mayorazgos*. One type, granted with royal license, permitted a primogeniture scheme of succession over all of one's property. The other type, under law 27 of the Laws of Toro (1505), permitted the grantor to carve out those portions of his property that were not subject to legislation that predetermined distribution to family members (*el tercio*, the third part, or *el quinto*, the fifth part) and place them under primogeniture succession. Creation of new *mayorazgos* of second type was prohibited in 1789. Bartolomé Clavero, *Mayorazgo: Propiedad Feudal en Castilla 1369-1836*, at 125, 297 (1974). See also 1-3 Domingo Amunátegui Solar, *La Sociedad Chilena del Siglo XVIII: Mayorazgos y Títulos de Castilla* (1901, 1903, 1904) (describing more than a dozen Chilean *mayorazgos* in depth and the related practice of purchasing Castilian titles of nobility); Ricardo Donoso, *Las Ideas Políticas en Chile 90-93* (2d ed. 1967) (listing Chilean families holding *mayorazgos*); and Guillermo S. Fernández de Recas, *Mayorazgos de la Nueva España* (1965) (transcribing documents relating to over 60 *mayorazgos* in Mexico).

165. Collier & Sater, *supra* note 6, at 36.

166. *Id.* at 42; and Donoso, *supra* note 164, at 95-126.

167. Pinzón, *supra* note 11, at 264. 12 Obras Completas, *supra* note 1, at 409; Código civil art.

this definition of property could support entailed property such as *mayorazgos* since founding a *mayorazgo* could be seen as merely one exercise of absolute enjoyment and disposition of property. In another sense, *mayorazgos* hinder the absolute enjoyment and disposition of the property of their successive beneficiaries. Restrictions on the alienation of land were viewed as an obstacle to the economic and social progress of the new country, and *mayorazgo* land was not freely marketable. The problems that entails created for landholding classes have been examined at length in the English context, and similar difficulties were likely to exist in the early nineteenth-century Chile. Where the most important and most common interest in land was a life estate, raising cash and managing debt took pride of place in the affairs of the landed classes.¹⁶⁸

The values of class equality and free alienation of land competed fiercely with the protection of the vested property interests in entailed lands. Although it had gained independence from a royalist regime, Chile had not undergone the social revolution that permanently reconfigured France. For political reasons, Bello could not simply abolish entails as the French Civil Code did. Instead, with the goal of their abolition in mind, Bello sought a uniquely Chilean solution following the lead of the French legislation. Through Bello's actions, the institution of the *mayorazgo* was first recast, then abolished.¹⁶⁹

Bello's resolution of the legal and social problems of *mayorazgos* in Chile demonstrated his ability to adapt and construct acceptable compromises in the midst of heated political and social debate that existed in Chile from the first days of independence until the 1850s. The Chilean Constitution of 1828 abolished *mayorazgos*; Article 126 reads in part:

Mayorazgos and all entails impeding the free alienation of estates are forever abolished. Their present possessors may dispose of them freely, except for the third part of their value which is reserved for the immediate successors who will dispose of them with the same liberty.¹⁷⁰

Because this provision was only in existence for about five years (until the conservative Constitution of 1833), it appears to have operated on only one *mayorazgo*, and the status of the institution was frequently debated during this period.¹⁷¹ A fixed solution concerning *mayorazgos* could not be reached during the drafting of the Constitution of 1833. After considering and debating three earlier

582 (1855). Similar definitions are found in Roman law, but it is likely the text was re-read in the new French spirit. André-Jean Arnaud, *Les Origines Doctrinales du Code Civil Français* 179-95 (1969).

168. John Habakkuk, *Marriage, Debt, and the Estates System: English Landownership 1650-1950*, at 243-358 (1994). The abolition of entails in the United States seems to have addressed symbolic rather than functional concerns. Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776-1970*, at 38 (1997).

169. See Norma Mobarec Asfura, *Bello y las leyes de exvinculación*, in Andrés Bello y el Derecho, 351-56 (1982) (briefly discussing Bello's work in the Senate from 1848 to 1852 in drafting provisions concerning *mayorazgos*).

170. Donoso, *supra* note 164, at 103.

171. *Id.* at 104.

draft provisions on the topic, the Congress in Article 162 accepted the following purposefully ambiguous language delaying any final action:

Entails of whatever kind, both those established until now and those established in the future, do not impede the free alienation of the properties over which they rest, ensuring the value of those properties alienated to the successors named in the respective institution. A separate law shall establish the way to make this disposition effective.¹⁷²

Some interpreted this provision as abolishing *mayorazgos*, while others interpreted the same as reestablishing them. Clearly a new provision was necessary, and the content of such a provision was debated from 1833 forward, during which time some holders of *mayorazgos* sought individual legislation concerning their holdings.¹⁷³ In 1845, resolution of the law governing *mayorazgos* took a major step forward when García Reyes submitted a draft article which would convert entails of land into entails based on the value of the property, producing an entailed interest stream at four percent of the value.¹⁷⁴ By 1848, the proposal had passed the House but encountered resistance in the Senate where the committee to report on the proposed legislation was divided between two members favoring the proposal (Bello and Ramón Errázuriz) and one member holding out for a position in line with colonial notions of the *mayorazgo* (Juan Francisco Meneses).¹⁷⁵ The debate spilled out from the Senate to the press and public during the next few years, and widely divergent opinions were expressed concerning the meaning and validity of the provisions addressing *mayorazgos* in the Constitutions of 1828 and 1833. Some, including Bello's son, Juan Bello (then a Congressman), argued that the Constitution of 1828 effectively and permanently abolished all *mayorazgos*.¹⁷⁶

By July 1852, the Senate sought a solution, and under the guidance of Andrés Bello, the provision was rapidly introduced, debated and passed. Bello's solution, apparently based on García Reyes's proposal, provided for an assessment of value of the entailed property. A stream of income at four percent, based on the assessed value, was then guaranteed by the original property or other lands using a legal device called a *censo*.¹⁷⁷ The interest produced was to be distributed in accordance with the rules of distribution set out in the *mayorazgo*, and the land itself was freely

172. *Id.* at 106.

173. *Id.* at 106-110.

174. Lira, *Introducción*, *supra* note 1, at xxiv; and Donoso, *supra* note 164, at 112-13.

175. Donoso, *supra* note 164, at 112-13.

176. *Id.* at 114-23.

177. *Id.* at 124-26. Voluntary conversions and pledges of the property interests in a *mayorazgo* into a stream of payments or a lump sum had long used the institution of the *censo*. Spain abolished and restored the *mayorazgo* as a permitted legal device several times during the first half of the nineteenth century; it was finally abolished there in 1841. Clavero, *supra* note 164, at 162-69, 361-392. The term "*censo*" covers several different kinds of legal transactions. Here it is used as a contract securing a stream of income at a certain percentage with real property. For various types of *censo*s see, M.C. Mirow, *Latin American Legal History: Some Essential Spanish Terms*, 12 *La Raza L.J.* 43, 53 (2001).

alienable by the possessor and would descend according to the established rules of testate and intestate succession. This was Bello's solution.¹⁷⁸

This legislation converted the entailed land into freely alienable property, while providing compensation to those with entail interests through *censos de capital*. This solution found its place in Bello's code not in the provisions dealing with property but rather in Book IV (contracts and obligations) under Title 27 sandwiched between a title on leases and a title on civil corporations.¹⁷⁹ Under Title 27, payments out of the land bound with the *censo* followed a primogeniture scheme of distribution: at each level the man excluded the woman, and the older excluded the younger. Failing a direct line of legitimate descendants, the next line of legitimate descendants from the nearest ascendant was selected. For *censos* resulting from the conversion of an entail or *mayorazgo*, on the failure of legitimate descendants, the payments were to be distributed according to the rules of intestate succession.¹⁸⁰ Using this method, Bello shaped a Spanish colonial credit device to remove hindrances on the alienability of land.¹⁸¹

Article 982 states: "In intestate succession, neither sex nor order of birth is considered."¹⁸² With the enactment of this provision, any remaining doubt about the demise of *mayorazgos* was dispelled. *Mayorazgos* were converted into interest payments following a primogeniture scheme. This scheme would gradually be phased out as lines of legitimate descent ceased. Bello's drafting, consistent with both the social and commercial spirit of the age, slowly abolished the medieval institution and made land more freely alienable without driving the landed classes to political action. This provision helped Chilean land move from class marker to economic capital.¹⁸³ By his efforts, Bello followed the spirit of the French Civil Code without adopting its language or methods.

With the problem of prior *mayorazgos* solved, Bello moved to abolish the creation of legal devices that could mimic the primogeniture scheme. Two provisions abolished the means to establish entails: One did away with *fideicommissa*, the other with successive usufructs.¹⁸⁴ Article 745 states:

It is prohibited to create two or more successive *fideicommissa*, so that the *fideicommissum* operates for one person, who acquires it with the burden of establishing it for another.

178. Donoso, *supra* note 164, at 124-26.

179. Lira, *Introducción*, *supra* note 1, at xxiv.

180. 13 *Obras Completas*, *supra* note 1, at 769; *Código civil* art. 2045 (1855).

181. Gisela von Wobeser, *El uso del censo consignativo para realizar transacciones crediticias en la Nueva España, siglos xvi al xviii*; 2 *Memoria del iv Congreso de Historia del Derecho Mexicano* 1163 (1988).

182. 13 *Obras Completas*, *supra* note 1, at 46; *Código civil* art. 982 (1855).

183. 1 Guzmán Brito, *supra* note 1, at 416.

184. *Id.* at 455. The *mayorazgo* was a form of *fideicommissum*, or successive testamentary trust. Usufructs could be used in the same way. Clavero, *supra* note 164, at 53-56, 136-37.

If in fact they are created, the *fideicommissum* operates for one of the named beneficiaries, and the expectation of the others [under successive *fideicommissa*] will be forever extinguished.¹⁸⁵

Similarly, Article 769 abolished successive usufructs:

It is prohibited to create two or more successive or alternative usufructs. If in fact they are created, the remote beneficiaries will be considered contingent beneficiaries in the case where the first beneficiaries renounce the first usufruct.

The first usufruct that has effect will make the others expire, but it will only last for the time that was [originally] designated.¹⁸⁶

Thus, Bello solved what one author called the “most important social issue” of the day—the abolition of *mayorazgos*.¹⁸⁷ He first found a novel solution for removing the impediments of the underlying land’s transfer while maintaining the beneficial wealth-producing aspect for the families involved. He then ensured that similar structures could not be created under the new Code.¹⁸⁸

2. Following the Letter of the French Civil Code

At times, more than the spirit of the French code was borrowed by Bello in drafting the provisions on inheritance. One example concerns property that is not immediately divided among beneficiaries. Articles 1317-1349 of the Chilean Civil Code (addressing the partition of inherited property) closely parallel the French Civil Code. For example, Article 1317 states that no beneficiary is obligated to suffer property not being divided and distributed, but a renewable agreement, not to exceed five years in duration, may be made to keep the property as a whole. In drafting this provision, Bello followed Article 815 of the French Civil Code and Rogron’s commentary.¹⁸⁹ Article 815 of the French Civil Code of 1804 states:

No one can be compelled to remain without division, and distribution may be always sued for, notwithstanding prohibitions and conventions to the contrary. The distribution may nevertheless be suspended by agreement during a limited time; such agreement cannot be made obligatory beyond five years; but it may be renewed.¹⁹⁰

Bello’s corresponding provision states:

No co-beneficiary of a universal or singular thing will be obligated to remain in non-division: the partition of a devised object may always be

185. 12 Obras Completas, *supra* note 1, at 504; Código civil art. 745 (1855).

186. 12 Obras Completas, *supra* note 1, at 521; Código civil art. 769 (1855).

187. Lira, *Introducción*, *supra* note 1, at xxiv.

188. The limitation on the period of testamentary trusts and usufructs is, of course, very similar to the limitation imposed by Article 896 of the French Civil Code.

189. 13 Obras Completas, *supra* note 1, at 300; Código civil art. 1317 (1855).

190. Code civil art. 815 (1804).

requested provided that the co-beneficiaries have not stipulated to the contrary. The non-division may not be stipulated for more than five years, but this term complete, the stipulation may be renewed. . . .¹⁹¹

Despite its economic benefit, such an agreement was not possible under the colonial Spanish law.¹⁹² Almost all of the substantive provisions for the operation and distribution of undivided property were borrowed from the French Civil Code, occasionally supplemented by provisions from García Goyena's draft civil code for Spain.¹⁹³ The division of the profits from undivided property was governed by Chilean Civil Code Article 1338 which closely tracks French Civil Code articles 1014 and 1015.¹⁹⁴ Likewise, Chilean Civil Code article 1347 (governing losses, charges, and damages against the property) follows the guidance of Articles 883, 884 and 885 of the French Civil Code.¹⁹⁵ The French Civil Code article 885 states:

Each of the coheirs is personally bound, in proportion to his hereditary share, to indemnify his coheir against the loss which his eviction has caused him. If one of the coheirs is found to be insolvent, the portion in which he is bound must be equally assessed upon the party indemnified and all the solvent coheirs.¹⁹⁶

Bello's version states:

Payments to cure defects [*pagos de saneamiento*] are divided between the participants in proportion to their shares. The proportion of an insolvent participant falls upon all in proportion to their shares, including the one who has to be indemnified.¹⁹⁷

Another example of the borrowing of French law evident in this portion of Bello's code concerns the ability of a creditor of the decedent to petition to have the decedent's property administered separately in order to ensure payment of the debts before the interests of the heirs and legatees are satisfied. For these provisions, Bello followed Article 878 of the French Civil Code and, at several places, the commentaries of Delvincourt.¹⁹⁸

Bello adopted French law on these succession provisions because of the inherent commercial nature of the relationship created. Property administered by a community of heirs became, in essence if not in law, a partnership which needed rules to spell out the individual economic aspects of the activity. Likewise, ensuring that debts were efficiently collected from the debtor's estate touched on commercial concerns. Where the succession provisions involved society and family structures,

191. 13 Obras Completas, *supra* note 1, at 300; Código civil art. 1317 (1855).

192. 13 Obras Completas, *supra* note 1, at 298.

193. *Id.* at 299-320.

194. *Id.* at 312-13.

195. *Id.* at 317-18.

196. Code civil art. 885 (1804).

197. Código civil art. 1347 (1855); 13 Obras Completas, *supra* note 1, at 317.

198. 13 Obras Completas, *supra* note 1, at 341-45.

the provisions were based on colonial Spanish law (such as the *Siete Partidas*). Nonetheless, where commercial concerns touched the administration of decedents' property, Bello followed French law just as he did when he drafted the more general provisions for contracts and obligations.

3. French Civil Code Provisions Rejected

Legal thinkers of the French Revolution were wary of freedom of testamentary dispositions. They viewed such freedom as dangerous to the state because it aided the accumulation of family wealth, and dangerous to the family because it might turn the father into a tyrant with respect to his children, who might develop jealousies and rivalries amongst themselves. Free testamentary disposition also meant that a testator might perpetuate a primogeniture inheritance scheme, at least for one generation. Consequently, there were proposals to limit testamentary dispositions to one-fourth or even one-tenth of the testator's possessions. Nonetheless, lawyers of the *pays de droit écrit* accepted the idea of testaments and the freedom offered by Roman law. The very restrictive provisions of the early revolutionary legislation were simplified and loosened in their final form in the French Civil Code, but the Code maintained a distrust of absolute freedom of disposition by will.¹⁹⁹ The French Civil Code varied the amount legally set aside for descendants according to their number:

Free gifts, whether by acts during life, or by will, shall not exceed the half of the property of the disposer, if he leave at his decease but one legitimate child; the third part if he leave two; the fourth part if he leave three or more of them.²⁰⁰

Bello preferred testamentary freedom and, therefore, chose not to follow the French regime. At first, hoping to expand testamentary freedom from Spanish colonial restrictions, Bello sought to limit forced shares under the application of legitim. Indeed, the notes to his drafts of 1841 and 1853 indicate his desire to incorporate testamentary freedom. He thought it was best to leave such decisions to the judgment of the parent rather than the operation of law. Bello also may have had a personal basis for this preference. Bello had three children with his first wife and twelve with his second (eight of these children were born in Chile).²⁰¹ Bello himself must have considered how the more restrictive Spanish colonial provisions would apply to his family. Under pressure from the drafting commission to limit testamentary dispositions in conformity with colonial practice, Bello attempted a modified plan. He suggested that only one half of the descendant's estate be subject to forced shares of legitim, while the other half might be disposed of freely.²⁰²

199. Brissaud, *A History of French Private Law*, *supra* note 159, at 745-48.

200. Code civil art. 913 (1804).

201. Pinzón, *supra* note 11, at 70. Iván Jaksić has kindly corrected these figures (correspondence of Sept. 15, 2000).

202. Carlos Salinas Araneda, *Notas sobre los orígenes de la cuarta de mejoras en nuestra*

This proposal would have effectively abolished *mejoras* (additional forced shares for a member or members of the decedent's family). Furthermore, in comparison with Spanish colonial civil law, freedom of testamentary disposition over one half of one's property would have marked a substantial expansion of the pre-code law under which four-fifths of an estate were subject to shares for family.²⁰³ Bello was forced to adjust his proposal to meet the political sentiments that reflected the societal and family expectations of contemporary Chile's ruling elite.

It seems that even this compromise position was too liberal. In fact, the revision commission reinstated *mejoras* as a fourth share carved from the portion not subject to restriction.²⁰⁴ As a result, the testator had complete testamentary freedom over one quarter of the estate if he was survived by family members (so that *mejoras* provisions were applicable) and freedom over one half if he was not. In the absence of legitimate family members, the testator could dispose of all the estate.²⁰⁵ While the legitim provisions dictated the recipient of the property (subject to its provisions), the one quarter *mejoras* could be left to one or more legitimate descendants to the exclusion of others.²⁰⁶ It is also worth noting that Bello expanded the application of the provision to include a share for a surviving spouse, not just the surviving wife as provided for in the *Siete Partidas*.²⁰⁷

Bello stated that his sources for the legitim provisions governing who would be a forced heir and the size of the legitim were the pre-independence Spanish laws (particularly the *Siete Partidas*) and Roman law, rather than other early sources such as the *Fuero Juzgo*, and the *Fuero Real* (both from the thirteenth century), and the *Leyes de Toro* (1505).²⁰⁸ Because the forced share provisions had to match the expectations of Chilean society, Bello selected those provisions from the Spanish colonial law.²⁰⁹ External political pressures forced Bello into reducing the testamentary freedom that he had originally sought. Bello, however, managed to provide final rules that were more permissive than the colonial law and equalized the spousal share to benefit a surviving husband as well.

The conflict between economic liberty and traditional social order is illustrated by the above examples. An overview of the Chilean Civil Code leads to the conclusion that Bello's drafting decisions were guided by liberal economic concerns

legislación civil, 2 *Revista de Estudios Histórico-Jurídicos* 147, 150 (1977).

203. 13 *Obras Completas*, *supra* note 1, at 173.

204. Salinas Aranedo, *supra* note 202, at 156. Salinas suggests that the final inclusion of the *mejoras* resulted from the draft Civil Code by García Goyena for Spain which retained the *mejoras*. *Id.* at 155-56.

205. 1 Guzmán Brito, *supra* note 1, at 456. Bello's code includes natural children and parents as those entitled to claim a part of the legitim. Noting that the *Siete Partidas* included siblings, Bello excluded them. 13 *Obras Completas*, *supra* note 1, at 185; *Código civil art. 1182* (1855).

206. 13 *Obras Completas*, *supra* note 1, at 204; *Código civil art. 1195* (1855).

207. 13 *Obras Completas*, *supra* note 1, at 180.

208. 13 *Obras Completas*, *supra* note 1, at 188.

209. In the same way, although more generally, the family law provisions of Book I have also been recognized as following these rules.

and traditional societal expectations. For example, the family law provisions in Book I are guided by the *Siete Partidas* which incorporated traditional societal expectations; while the contracts and obligations provisions in Book IV are guided by the French Civil Code which embraced a more modern economic and social spirit. This study demonstrates that within Book III (law of succession) Bello's drafting can be understood as a careful selection, on an article by article basis, between these competing ideals. Where the passage of wealth to family was involved (legitim and *mejoras*), Bello reluctantly followed Spanish colonial law. Where commerce was involved (regime of undivided property and the collection of debts), Bello turned to the French Civil Code. Thus, Bello was consistent in his selection and use of sources based on this general principle, and this analysis may be useful in exploring Bello's selection of sources for other portions of the Chilean Civil Code.

V. CHILEAN CODIFICATION AND LATIN AMERICAN CODIFICATION

The process detailed above, which led ultimately to the Chilean Civil Code, may also shed light on larger regional trends in codification during the second half of the nineteenth century throughout Latin America. Two recent studies of codification provide interesting material for comparison with the approach taken in this study.²¹⁰ These works address codification of commercial rather than civil law in two other Latin American countries, Colombia and Argentina. The approaches taken by these books and this article suggest models of thinking about how codification takes place and may be useful as other works reinterpret the development of other Latin American civil codes.

A. Colombia

Analyzing the creation of the Colombian Commercial Code of 1853, Charles Means has persuasively argued that irrational borrowing of foreign law is an indicator of legal underdevelopment, but also noted that:

Borrowing is not necessarily inconsistent with autonomous legal development: a foreign statute may be adopted because it precisely matches the concerns of the borrowing jurisdiction. Legal borrowing does, however, carry the possibility that individual provisions will be adopted merely because the borrowing jurisdiction lacks the interest or competence to modify the former model.²¹¹

Means argued that the Colombian experience illustrates the difficulties created by the irrational borrowing of foreign law (in that case the Spanish Commercial Code

210. Jeremy Adelman, *Republic of Capital: Buenos Aires and the Legal Transformation of the Atlantic World* (1999); and Robert Charles Means, *Underdevelopment and the Development of Law: Corporations and Corporation Law in Nineteenth-Century Colombia* (1980).

211. Means, *supra* note 210, at 181.

of 1829). He submitted that borrowing led to further problems by driving a wedge between the law as written and, in some cases, the institutional impossibility of acting in conformity with the written provisions.²¹² Bello's success stands in stark contrast to what Means described as "the tendency for Latin American countries to enact laws with little regard for social reality and less for effective implementation."²¹³ Indeed, it was the careful adaptation of Bello's borrowed sources to the social and economic needs of Chile that led to the acceptance of his code in Chile and other similarly situated countries.

The legal development of Colombia also suffered from consuming political battles, in this case between Federalists and Centralists. In Means's view, it was not until after the country was united that Colombia gained control of its legal development by adopting the Panamanian Commercial Code of 1869 (itself grounded in Ocampo's Chilean Commercial Code of 1867).²¹⁴ Chile, unlike Colombia, did not experience political anarchy after independence and, thus, was able to take charge of its legal development at an earlier date.

B. Argentina: *Quasi-law and the Caudillos*

Taking into account that the movement toward codification was almost universal in Latin America, different events shaded the codification process in Argentina in the mid-1850s.²¹⁵ Having a mercantilistic economy based on precious metals and later primary staples in the late colonial period, the political and social spheres of the River Plate region suffered from a lack of absolute private property as recognized by the political power.²¹⁶ The ultimate shift toward state-recognized and state-enforced private property is viewed as the defining moment that established the post-independence Argentine political constitution. Nonetheless, independence from Spain did not immediately bring about this shift. Instead, following independence, Argentina entered a period of control by *caudillos*,²¹⁷ who ruled under a system aptly described by Adelman as "quasi-law."²¹⁸ Under "quasi-law" the public power of the *caudillos* was maintained by their control of private property rights. Their rule was not characterized by an absence of a legal order, but rather by an "incomplete legal order."²¹⁹ Booming trade in the 1840s led the

212. *Id.* at xiii, 151.

213. *Id.* at 151.

214. *Id.* at 206, 262.

215. In fact, for the entire western legal world the period has been labeled the "age of codification." Bellomo, *supra* note 122, at 1. See also Bernardino Bravo Lira, *La Codificación en Chile (1811-1907), dentro del marco de la codificación europea e hispanoamericana*, 12 *Revista de Estudios Histórico-Jurídicos* 51 (1987-1988); and Damaska, *supra* note 18, at 355.

216. Adelman, *supra* note 210, at 65-69.

217. For the importance of these regional autocratic rulers, see John Lynch, *Caudillos in Spanish America 1800-1850* (1992).

218. Adelman, *supra* note 210, at 115.

219. *Id.* at 112. "Rosas and his filial type ruled through an incomplete (not absent) legal order." *Id.*

merchant class to support, at first, the caudillistic rule of Rosas.²²⁰ The number of large rural estates also increased significantly during this period despite partible inheritance regimes and uncertain law related to landholding, both of which worked against such accumulation of large holdings.²²¹ At first the owners of these large estates, often the recipient of the *caudillos'* goodwill, supported their benefactors. Nonetheless, the incompleteness of quasi-law led to diminished support:

Merchants and their landed cousins thrived off Rosas's preservation of Buenos Aires' grip on Atlantic trade; private capital needed to preserve the political power of the regional capital. On the other hand, by ruling through quasi-law, he did not create *public* institutions of governance to allow property owners to contract under stable and credible conditions. This was a transition, but under Rosas, one that would remain by definition. In the end, it was the internal contradictions of his quasi-legal regime that prevented the new capitalists of Buenos Aires from fully identifying with his brand of rulership.²²²

At the same time, merchants and landholders sought independent, stable public institutions to handle their contractual relationships. According to Adelman, the exclusive, relational justice meted out by the merchant guilds (*consulados*) increasingly came to be run by lawyers and, therefore, became more formal and impersonal.²²³ The multi-layered sources of merchant law, and in many instances their antiquity, provided ready material for the highly-trained *ius commune* lawyers of the period.²²⁴ Frustrated by the subtlety and unpredictability of the merchant forum, litigants sought new public institutions and rules for commerce. Merchants and landholders were also aware that embedding stable private property into public law would benefit them by increasing the stakes that they all had in recognizing and maintaining private property.²²⁵ Thus, the desire for unshakable private property led to changes in political power and public law.

In Argentina, Adelman argues that the source for new rules of private property was not, in the long run, "unworkable, abstract, indeed destructive principles imported from abroad."²²⁶ Instead, following local historicism, Argentine drafters sought Argentine solutions. "Europe was not the source of clues for a new jurisprudence; local experience was."²²⁷ Although pressure for commercial law reform was applied by merchants before the fall of the Rosas (especially through the powerful Buenos Aires merchant Amancio Alcorta), the Constitution of 1853 called for a set of national codes: civil, commercial, penal, and mining.²²⁸ The Buenos

220. *Id.* at 125.

221. *Id.* at 34-36, 128-30.

222. *Id.* at 132.

223. *Id.* at 145-50.

224. *Id.* at 240-41.

225. *Id.* at 165-66, 237.

226. *Id.* at 171.

227. *Id.* at 172.

228. *Id.* at 239-40, 245.

Aires Commercial Code drafted by Dalmacio Vélez Sársfield and Uruguayan Eduardo Acevedo was enacted by the Argentine legislature in 1859, even though the civil code, upon which it was to depend, had not yet been drafted.²²⁹ It obtained national application in 1862 when Buenos Aires and the Confederation settled their differences under President Mitre.²³⁰ The Argentine Civil Code appeared in 1869, and the Civil and Commercial Code were brought into harmony in 1889.²³¹ The Commercial Code, according to Adelman, successfully managed "to inscribe rights into a formal code that would doctrinally exhaust—and therefore make unassailable—contract and property law."²³² From that point, legal formalism would provide a protective fortress for those rights.²³³

The political situation in Chile after independence was, of course, quite different from the corresponding period in Argentina. The *caudillos* never established power in Chile.²³⁴ Also, Chile avoided some of the difficulties other newly independent countries experienced because it was compact and had a relatively small, homogeneous population.²³⁵ Although Chile suffered from division caused by competing liberal and conservative views, it avoided the federalist/centralist division that so deeply injured Argentina. Only in the late 1820s did Chile make any movement towards a federalist system.²³⁶ In fact, even in the midst of the nineteenth century, it was recognized that Chile was exceptional in terms of its stability and economic progress.²³⁷

Nonetheless, in both Argentina and Chile, it was the group pressure of landholding and trading interests that effectively pushed for legal reform and codification. A stable, predictable property regime was essential for economic progress, and codification provided this in both countries. Furthermore, codification led to a centralization of power through the control of private law.

There are of course difficulties in making comparisons between the processes of civil law codification in Chile and the processes of commercial law codification in Argentina and Colombia. The works of Adelman and Means offer no opportunity to test the tentative conclusions of this article concerning the source of Bello's family property regimes because the work of those authors is confined to commercial law and commercial codes. Nonetheless, if Vélez Sársfield's commercial property regime was endemic rather than imported, the contrast with Bello's approach is notable.

229. *Id.* at 245-46.

230. *Id.* at 246.

231. *Id.*

232. *Id.* at 281.

233. *Id.*

234. Lynch, *supra* note 217, at 83, 130, 235. Lynch observes Chile's "exceptional immunity to caudillism" in this period. *Id.* at 130.

235. Collier & Sater, *supra* note 6, at 51-52.

236. *Id.* at 49.

237. Collier, *supra* note 7, at 1.

VI. CONCLUSION

Various external and internal factors influenced Bello's preparation of the Chilean Civil Code of 1855. It has long been noticed that for family law aspects of the Code, Bello relied on colonial Spanish rules, especially those extracted from the *Siete Partidas*. For commercial principles, Bello sought the guidance of the French Civil Code and French commentators. This article has attempted to show that evidence of this method can be discovered in various provisions dealing with the succession of property (the first portion of the Code to receive Bello's attention). Thus, Bello was consistent in this method of selecting sources used in the codification process dependent on particular social and economic aims. Indeed, the first portion of his work is exemplary of and a useful model for understanding his overall approach to selecting sources for the Code, regardless of the sequence of the influences. This approach is useful in understanding not only the method that Bello used to construct the book on inheritance, but it may also be useful for analyzing other aspects of his code.

This article has also sought to place Bello's selection and use of sources into the historical and political context of his project. His work was the product of his individual experience and study, but also the intellectual and political forces at play in Chile at the time. This realization reveals not only the value of the factors presented by Alan Watson in a different context of legal transplantation from his original study, but also how his factors draw the researcher into social and political considerations of legal development that both inform and go beyond purely autonomous legal development.

The interests of property, capital, and trade do not wait for legal mechanisms even in the midst of political and social chaos. Thus, in the realm of private law, legal order within political chaos is possible.²³⁸ Nonetheless, political stability was necessary to provide an environment in which legal reform and development could be brought to fruition. Argentina and Colombia were unable to create well-suited commercial law codes until the uncertainties of caudillism and separatist federalism were quelled by authoritarian central rule. Even under the relative political stability of the Portales era, over twenty years passed before Chile enacted Bello's civil law codification. As Portales and Montt knew well, codes bolstered authoritarian regimes. Indeed, authoritarian political aims were advanced not only through the conservative familial and societal aspects of the Chilean Civil Code but also through its liberal economic and commercial provisions. This mix made it ready for borrowing by other Latin American countries in similar familial, social, economic, and commercial positions. Other countries aspiring to the perceived political stability and economic prosperity of Chile in the mid-nineteenth century also looked to the Chilean Civil Code of 1855 as a way to move towards Chilean successes.

238. This is based on the author's observations and can be extrapolated from the work of others. See, e.g., Yves Dezalay & Brian Garth, *Argentina: Law at the Periphery and Law in Dependencies: Political and Economic Crisis and the Instrumentalization and Fragmentation of Law* (American Bar Foundation Working Paper No. 9708, 1997).

