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# Multiculturalism and Constitutionalism in Latin America

José Antonio Aguilar Rivera<sup>†</sup>

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## Abstract

José Antonio Aguilar Rivera discusses recent reforms to the constitutions of several Latin American states. According to Aguilar Rivera, these reforms tend to recognize and protect the multiethnic and multicultural nature of Latin American societies. While acknowledging that some have lauded these changes as progressive moves towards a more developed form of democracy, Aguilar Rivera reaches the opposite conclusion. He argues that these trends in Latin American constitutionalism represent an “authoritarian regression” rather than an enhancement of democracy. Aguilar Rivera begins by discussing and critiquing prevalent Western theories of multiculturalism, particularly the versions set forth by Canadian theorists Charles Taylor, Will Kymlicka, and James Tully. He then proceeds to contextualize the discussion of multiculturalism within the framework of Latin American constitutionalism, providing an overview of the history of constitutional development in Latin America. Following this contextualization is a discussion and a criticism of recent Latin American constitutional reforms aimed at protecting minority cultures. Drawing on examples from Colombia, where courts, wishing to respect the autonomy of indigenous communities, have permitted those communities to practice forms of criminal adjudication and punishment that Aguilar Rivera views as inimical to the values of a liberal democracy. Ultimately, Aguilar Rivera determines the efforts to protect multiculturalism in Latin America to be a “toxic cocktail” of cultural relativism and accommodation.

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Latin America has seen in recent decades a wave of constitutional reform. Transitions to democracy often involve rewriting charters in order to end authoritarian regimes. Among the reforms introduced in the constitutions are cultural rights for minorities as well as referenda and other direct democracy mechanisms. Over the past decade, seven Latin American countries (Bolivia, Colombia, Ecuador, Mexico, Nicaragua, Paraguay, and Peru) adopted or modified constitutions to recognize the multiethnic, multicultural nature of their societies. While many countries where democratic rule has been well established for a long time have debated for decades these provisions, many Latin American nations have moved swiftly to introduce them in their charters. Some of the most dramatic and unexpected achievements in the constitutional recognition of cultural differences have occurred in Latin America.<sup>1</sup> Is the Revolution announced by Western political philosophers taking place in these less developed countries? Is Latin America at the forefront of a progressive movement towards a deeper form of democracy? I will argue in this article that this trend is a sign of authoritarian regression, not of enhanced democracy.

## I THE POVERTY OF MULTICULTURALISM

Multiculturalism has been, for the most part, an intellectual enterprise of Anglo-American political philosophers and social theorists. Some of the major theorists of multiculturalism such as Charles Taylor, Will Kymlicka, and James Tully are Canadian or teach in Canada.<sup>2</sup> While some academics, such as Iris Marion Young, have been bold in their proposals for group rights and institutions that encompass new understandings of cultural diversity, the institutional arrangements of the United Kingdom, the United States, and even Canada have not seen a sharp departure from the model of liberal democracy.<sup>3</sup> Much of the multicultural rhetoric remains confined to professional journals and campuses. While many countries are struggling to establish liberal constitutions after decades of communist or military rule, political theorists in the West are rejecting precisely these ideals. For instance, Tully argues that:

[C]onstitutions are not fixed and unchangeable agreements reached at some foundational moment, but chains of continual intercultural negotiations and agreements in accord with, and violation of the conventions of mutual recognition, continuity and consent. In sum, as the people remove modern constitutionalism from its imperial throne

<sup>1</sup> See, e.g., Donna Lee Van Cott, *A Political Analysis of Legal Pluralism in Bolivia and Colombia*, 32 J. LATIN AM. STUD. 207, 207 (2000) (comparing recent efforts in Bolivia and Colombia to implement constitutionally mandated regimes of legal pluralism).

<sup>2</sup> See CHARLES TAYLOR ET AL., *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (Amy Gutmann ed., 1994); JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

<sup>3</sup> See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 8–13 (1990).

and put it in its proper place, what remains to be seen look to me like the outlines of the black canoe in dawn's early light.<sup>4</sup>

Equality before the law, common institutions and individual rights are not defining traits of modern constitutionalism according to Tully. Instead, he argues:

[A] contemporary constitution can recognize cultural diversity if it is conceived as a form of accommodation of cultural diversity. It should be seen as an activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their ways of association over time in accord with the conventions of mutual recognition, consent and continuity.<sup>5</sup>

The result of this approach is to see constitutionalism as merely one of many “discourses” available to “culturally-situated” persons. Therefore, according to Tully:

Instead of a grand theory, constitutional knowledge appears to be a humble and practical dialogue in which interlocutors from near and far exchange limited descriptions of actual cases, learning as they go along. Accordingly, the language and institutions of modern constitutionalism should now take their democratic place among the multiplicity of constitutional languages and institutions of the world and submit their limited claims to authority to the three conventions, just like all the others.<sup>6</sup>

Tully aims to describe a “post-imperial” view of constitutionalism. In this view,

[T]he value of progress is also preserved and transformed. Progress is not the ascent out of the ancient cultural assemblage until one reaches the imaginary modern republic, from which one ranks and judges the less developed others on the rungs below. Rather, it consists in learning to recognize, converse with and be mutually accommodating to the culturally diverse neighbors in the city we inhabit here and now.<sup>7</sup>

While there is little danger that the United States will consider in the near future the Bill of Rights of her Constitution as only one of the “languages” of constitutionalism, these theories can and have inspired constitution makers in Latin America and other countries. Will Kymlicka, for instance has deliberately sought to influence constitution making in Eastern Europe and elsewhere. His

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<sup>4</sup> TULLY, *supra* note 2, at 183–84.

<sup>5</sup> *Id.* at 184.

<sup>6</sup> *Id.* at 185.

<sup>7</sup> *Id.* at 185–86.

theory of multicultural citizenship has found receptive ears in several countries.<sup>8</sup> In a laudatory article in the *Wall Street Journal*, Kymlicka is described as “a slight, self-effacing philosophy professor with a habit of wearing red Converse sneakers at formal occasions.”<sup>9</sup> According to the *Wall Street Journal*, Estonian officials called on Kymlicka for critical guidance. He diligently

[F]lew to the Baltic nation and frankly told the government it had to do more to help Russians preserve their language and culture—and not fear such moves would weaken the dominant position of ethnic Estonians. The Estonians took the advice and now are introducing an expanded program of support for Russian language schools and cultural groups. They have also launched a public advertising campaign to promote the virtues of diversity.<sup>10</sup>

Because of his

[F]orceful writing, politicians in Europe, Asia and North America are starting to draw inspiration from his ideas on how best nations can meet minority demands. The Council of Europe has asked Mr. Kymlicka for advice on how to better define European citizenship. Germany’s Free Democrats, the leading liberal political party, have asked the philosopher to help draft a charter on minority rights. The Canadian government has sought his views on special arrangements for Native Americans and French-speaking Quebec. Mr. Kymlicka is also credited with influencing debates on the minority status of Arabs in Israel, Catalans in Spain, Maoris in New Zealand and the Hungarian minority in Romania. He has advised Flemish speakers in Belgium on their tense relations with the French-speaking community.<sup>11</sup>

It appears that Kymlicka’s theory carries little empirical weight.

Western political theorists tell constitution makers in Europe and Latin America that the old idea of constitutionalism will not work anymore. Those countries, they argue, would be better off if they would let go that idea. William Galston argues:

[T]he conclusions of liberal theory, whatever they may be, are manifestly inadequate as blueprints for practical policy making in the post-Cold War world. In some circumstances (South Africa, for example), the best response to ethnic strife may be constitution making

<sup>8</sup> For a collection of academic commentaries on Kymlicka’s theory of multicultural citizenship, see G. Pascal Zachary, *A Philosopher in Red Sneakers Gains Influence as a Global Guru: From Estonia to New Zealand, Nations with Ethnic Strife Turn to Will Kymlicka*, WALL ST. J., Mar. 28, 2000, at B1. See also CAN LIBERAL PLURALISM BE EXPORTED? WESTERN POLITICAL THEORY AND ETHNIC RELATIONS IN EASTERN EUROPE (Will Kymlicka & Magda Opalski eds., 2002).

<sup>9</sup> Zachary, *supra* note 8.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

that emphasizes federalism and communal guarantees; in other circumstances, it may be necessary to undertake the division of multi-ethnic state into a multiplicity of states, each with a dominant ethnic group; in still others circumstances, where groups are geographically intermingled and cannot be disentangled, strengthened central state institutions capable of using the threat of coercion to keep the peace may be the best anyone can do.<sup>12</sup>

In advising the Estonian citizens, Kymlicka candidly argued:

Even if we can identify some emerging trends regarding the accommodation of ethnocultural diversity in the West, it doesn't follow that Estonia should uncritically adopt these Western models. It is rarely possible or appropriate to simply transplant institutions or policies from one country to another, particularly when they have such different histories and economic conditions as those in the Western and Eastern Europe.<sup>13</sup>

According to Kymlicka, instead of copying, it would be better to have multicultural innovation. However, these theoretical certainties fly in the face of empirical evidence that show that interethnic cooperation has been much more common than what is often thought.<sup>14</sup> While some ethnic conflicts are intractable, many others are not.

During the early nineteenth century, Latin American constitution makers looked for advice from Europe and the United States. Books such as Benjamin Constant's *Handbook of Constitutional Politics* were read avidly by politicians eager to learn how to draft liberal constitutions.<sup>15</sup> While some of the institutions of representative government were then quite new because not forty years had elapsed since the United States Constitution had been enacted, Latin Americans took all the theories that came from France and North America. With a few exceptions, such as Simón Bolívar, they lacked a critical perspective to assess what was offered as a fool-proof constitutional model. I believe that we are making, at the beginning of the twenty-first century, the same mistake again. Many

<sup>12</sup> WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* 63 (2002).

<sup>13</sup> Will Kymlicka, *Estonia's Integration Policies in a Comparative Perspective*, in *ESTONIA'S INTEGRATION LANDSCAPE: FROM APATHY TO HARMONY* 29, 29 (2000). Kymlicka argued:

We are still at the first stages of developing theories or models of ethnic relations in the West. To be sure, most Western countries have a long (and sometimes bloody) history of dealing with ethnic diversity within a liberal-democratic constitutional framework. But until very recently, the lessons from this history have not been articulated into a well-defined theory, and so the actual principles and ideals which guide Western democracies remain obscure, often even to those who are involved in managing ethnic relations on a day-to-day basis.

*Id.*

<sup>14</sup> See James D. Fearon & David D. Laitin, *Explaining Interethnic Cooperation*, 90 *AM. POL. SCI. REV.* 715, 716–17 (1996).

<sup>15</sup> See BENJAMIN CONSTANT, *CURSO DE POLÍTICA CONSTITUCIONAL* (Marcial Antonio López trans., 2d ed. 1823).

politicians and legal scholars have accepted the tenets of “liberal pluralism,” “multicultural citizenship,” or “legal pluralism” with their eyes closed.

Unlike other parts of the world, where liberalism had been practically absent until very recently, constitutional liberalism has a long and rich history in these countries. The first constitutional experiments in Spanish America were undertaken almost two hundred years ago. Such nations, one would think, should be better protected against the latest academic fads of North American professors. However, they are not. Why? Only the complex history of liberalism in Latin America can begin to provide some kind of answer to this question.

## II THE PRESENCE OF THE PAST

During the nineteenth century, liberal elites in Latin America succeeded in introducing the notions of constitutionalism and modern representative government in the context of traditional political systems. Elected presidents with legally defined powers replaced the rule of absolutist monarchs, and the idea of citizenship emerged for the first time as the basic principle of legitimate government. Most liberal regimes in the region, however, were unable to achieve the gradual incorporation of opposition parties and the expansion of political representation that characterized successful constitutional democracies in this century. After a more or less extended experiment with popular government, different forms of authoritarianism generally replaced liberalism as a model of government. What factors account for this result?

A conventional view of nineteenth-century Latin America sees the failure of the liberal project in the inability of liberal elites to break with authoritarian mental patterns and practices inherited from the colonial period. Against this interpretation, I argue that the divorce between liberalism and democracy in Latin America was the unintended outcome of the formal and informal institutions created by the liberal elite in the process of consolidating national unity and lowering the levels of conflict in the competition for power.<sup>16</sup> The realization of political order in a context of territorial fragmentation and factional conflict led to the creation of a centralized form of government and a system of electoral control by the ruling elites that through time prevented the evolution of the liberal regime into a stable constitutional democracy. This failure sealed the course of a process of democratization that perhaps until this day has found it difficult to reconcile the legacy of the liberal tradition with the principles of democratic pluralism and popular participation. Most Latin American nations have paid lip service to individual rights and liberal democracy for more than one hundred years. While this is true, the assertion that liberal ideology was ultimately irrelevant to affect the mental and behavioral patterns inherited from colonial times should be revised. In spite of the decades of factional struggle and cyclical outbursts of dictatorship that followed independence in many Latin

<sup>16</sup> See José Antonio Aguilar-Rivera & Gabriel L. Negretto, *Rethinking the Legacy of Liberalism in Latin America: The Cases of Argentina (1853–1916) and Mexico (1876–1910)*, 32 J. LATIN AM. STUD. 361, 361–62 (2000).

American countries, the search for a constitution and the reform of the old order was the main motivation behind the different groups in dispute. Later on, as most countries entered a phase of increasing political stability by the mid-nineteenth century, the observance of constitutional norms and liberal values were also essential to understanding crucial conflicts among the political elite. For example, as Charles Hale indicates, major political controversies during the regime of Porfirio Díaz in Mexico turned on the interpretation and application of the constitution of 1857.<sup>17</sup> While a fraction of the old liberal elite saw in the centralization of power under Díaz a betrayal of the principles of the constitution of 1857, “new” or “conservative” liberals defended the institutional changes of the regime as necessary to satisfy the demands of political order and economic progress.<sup>18</sup>

The predominant interpretations about the nature of liberalism in nineteenth-century Latin America may be seen as different versions of a single thesis: the inability of liberal institutions and values to break with the colonial past. According to one of these versions, liberalism was an “exotic” import, an ideology of limitation of powers and individual rights unable to take root in a cultural and social *milieu* dominated by the principles of the centralist-corporate state inherited from Spain. A second, slightly different version, poses, instead, that there was no duality between liberal doctrines and institutions adopted from the great revolutions of the late eighteenth century and a political reality anchored in the mental patterns and practices of the *ancien régime*. In this perspective, Latin American liberalism was just a particular form of political authoritarianism very much in touch with the non-democratic tradition of the colonial empire.<sup>19</sup>

The work of Claudio Véliz is closely identified with the view that the liberal project in Latin America had no indigenous roots. The adoption of liberalism, in his opinion, was the result of an obsessive attitude of imitation of everything foreign that characterized Latin American elites in the aftermath of independence. The institutions of modern representative government and free-market capitalism were part of what he calls the liberal “pause”: a period during which the legacy of the centralist and mercantilist state inherited from Spain seemed suspended. But only in appearance, because this tradition, says the author, would remain in force until its reemergence in the first decades of this century.<sup>20</sup>

Different authors have echoed these ideas. Richard Morse, for instance, ar-

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<sup>17</sup> Charles Hale, *The Reconstruction of Nineteenth Century Politics in Spanish America: A Case for the History of Ideas*, 8 *LATIN AM. RES. REV.* 53, 65 (1973). See also CHARLES HALE, *EL LIBERALISMO MEXICANO EN LA ÉPOCA DE MORA: 1821–1853* [MEXICAN LIBERALISM IN THE MORA PERIOD: 1821–1853] (1999).

<sup>18</sup> See CHARLES HALE, *THE TRANSFORMATION OF LIBERALISM IN LATE NINETEENTH-CENTURY MEXICO* 64–102 (1989) (noting the ideological transformations of Mexican liberalism under Díaz).

<sup>19</sup> See, e.g., CLAUDIO VÉLIZ, *THE CENTRALIST TRADITION OF LATIN AMERICA* 163–88 (1980) [hereinafter VÉLIZ, *CENTRALIST TRADITION*]. See also CLAUDIO VÉLIZ, *THE NEW WORLD OF THE GOTHIC FOX: CULTURE AND ECONOMY IN ENGLISH AND SPANISH AMERICA* (1994); Richard M. Morse, *The Heritage of Latin America, in THE FOUNDING OF NEW SOCIETIES* 163–64 (Louis Hartz ed., 1964); EDMUNDO O’GORMAN, *LA SUPERVIVENCIA POLÍTICA NOVO-HISPANA: REFLEXIONES SOBRE EL MANARQUISMO MEXICANO* [NOVOHISPANIC POLITICAL SURVIVAL: REFLECTIONS ON MEXICAN MONARCHISM] (1969).

<sup>20</sup> VÉLIZ, *CENTRALIST TRADITION*, *supra* note 19, at 163–88.



gues that, behind the rhetoric of liberal constitutionalism, the pervasive reality in Latin America was that of the patrimonial state inherited from Spain. Liberalism, in his perspective, was a disruptive ideology that simply aggravated the loss of authority and legitimacy left by the fall of the Spanish Empire. The proof of this assertion, according to Morse, is that only conservative Chile, which in the 1830s re-created a patrimonial state under republican form, escaped the political conflicts and struggles which characterized most Latin American nations after independence.<sup>21</sup>

Morse's argument is followed by Edmundo O'Gorman, who argues that Mexico had a monarchic historical constitution that outlived the colonial period.<sup>22</sup> According to O'Gorman, the liberal ideology embraced by important sectors of the Mexican elite, in spite of its emphasis on legality and universal rights, was impotent to change traditional ideas and practices, such as the lack of compliance with formal rules or the prevalence of clientelistic networks of authority. An illiberal past, in other words, frustrated, for O'Gorman, the modernizing attempts of Spanish American liberal elites.<sup>23</sup>

The inability of liberalism to change political and social reality is also one of the core assumptions of Cecil Jane's interpretation of nineteenth-century Latin America. He contends that the failure of liberalism in this region should be traced to the legacy of the Spanish culture. According to Jane, Spaniards were idealistic extremists who sought both order and individual liberty in such perfect forms that politics went from the extreme of despotism to the extreme of anarchy, rather than finding a stable compromise between those two contending principles. Conservatives in power, he argues, carried the "pursuit of order" to such an extreme as to provoke a violent reaction on behalf of liberty. Likewise, when liberals enacted "standard western liberal protections of the individual," Spanish Americans did not use these liberties with the responsibility expected by

<sup>21</sup> Morse, *supra* note 19, at 163–64.

<sup>22</sup> O'GORMAN, *supra* note 19, at 53–90.

<sup>23</sup> In an attempt to challenge this interpretation, different historians debated for years whether there was an authentic liberal tradition in Mexico. Daniel Cosío Villegas, for instance, in his well known history of Mexico claimed that political practice after the *Reforma* and *República Restaurada* (the era of liberal dominance) had "betrayed" the political constitution of the country. See 7 DANIEL COSÍO VILLEGAS, *HISTORIA MODERNA DE MÉXICO* [MODERN HISTORY OF MEXICO] (1955). Jesús Reyes Heróles, to the contrary, proposed that liberalism had been successful in establishing an alliance between the middle classes and the lower strata of the population. See 2 JESÚS REYES HERÓLES, *EL LIBERALISMO MEXICANO* [MEXICAN LIBERALISM] 109–30 (1961). See also Virginia Guedea, *Las primeras elecciones populares en la ciudad de México, 1812–1813* [*The First Popular Elections in Mexico City, 1812–1813*], in 6 ESTUDIOS MEXICANOS 1–28 (1991); Marco Bellingeri, *Las ambigüedades del voto en Yucatán. Representación y gobierno en una formación interétnica 1812–1829* [*The Ambiguities of Voting in Yucatán: Representation and Government in an Interethnic Form*], in *HISTORIA DE LAS ELECCIONES EN IBEROAMÉRICA, SIGLO XIX: DE LA FORMACIÓN DEL ESPACIO POLÍTICO NACIONAL* [HISTORY OF ELECTIONS IN LATIN AMERICA, NINETEENTH CENTURY: ON THE FORMATION OF THE NATIONAL POLITICAL ARENA] 227, 237 (Antonio Annino coord., 1995). Whereas Cosío Villegas focused on the second half of the nineteenth century, Reyes Heróles' optimism was grounded in an analysis of the first decades after independence. He believed that there was a "liberal continuity" since independence only broken by the Porfirian regime. In his view, the Mexican revolution updated the liberal spirit. His reading of liberalism reconciled the past and the present. See COSÍO VILLEGAS, *supra*.

the “Englishmen who had developed these liberties, but rather carried them to the extreme of anarchy.”<sup>24</sup>

A different, but related version of the thesis that continuity, rather than break, explains the political dynamics of Latin American countries after independence is represented by the work of Brian Loveman. According to this author, the liberal-constitutional movement in nineteenth-century Latin America was from the very beginning a peculiar form of authoritarianism that simply provided legal foundations to arbitrary rule. The pervasive inclusion of constitutional regimes of exception that gave presidents the power to suspend constitutional rights and the recognition of the military as protector of the political system created what he calls the “constitution of tyranny.”<sup>25</sup> As he puts it:

In practice, liberalism and authoritarianism merged; dictators and constitutional presidents executed opponents, sent adversaries into exile, censored the press, jailed and abused authors and publishers, and confiscated property—in short, ruled their nations with virtually absolute authority. They usually did this, however, in accord with the constitutions that purportedly guaranteed civil liberties, civil rights and popular sovereignty.<sup>26</sup>

Loveman’s analysis has the merit of indicating that the institutions created by Latin American liberals were *not* irrelevant to understanding the political development of the region. It seems true that constitutional regimes of exception had, through time, a negative impact on the process of democratization in the sense that they were used to marginalize and prevent the emergence of political opposition. I believe, however, that Loveman’s interpretation, as well as the standard interpretation of Latin American liberalism, is mistaken in its foundations and conclusions.

Véliz’s view of Latin American liberalism as a mere of imitation of foreign institutions is based on an oversimplification. It is certainly true that, in the aftermath of independence, political elites in Latin America looked for models of republican government created abroad, particularly in the United States. The attraction exercised by the American model was due to the fact that Americans, who, just like Creoles, had broken with a colonial empire, provided the only visible case of a stable and prosperous republic. No models of this type were available in France, where the brief and quite unhappy experience with a parliamentary republic was followed by the plebiscitary dictatorship of Napoleon, the Restoration and the constitutional Monarchy of Louis Philippe. What was created in Spanish America was not a disguised form of royal authority but rather a new mode of authority, based substantially on republican principles.

Since the early years of independent political life, however, influential Creole leaders reacted against the attempt to “transplant” foreign institutions. Such

<sup>24</sup> 3 THE CAMBRIDGE HISTORY OF LATIN AMERICA 414 (Leslie Bethell ed., 1985) (citing LIONEL C. JANE, *LIBERTY AND DESPOTISM IN SPANISH AMERICA* (1929)).

<sup>25</sup> BRIAN LOVEMAN, *THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA* 3–9 (1993).

<sup>26</sup> *Id.* at 6.

was the case of Simón Bolívar, for instance, who praised the American constitution but deemed it unsuitable for Colombia.<sup>27</sup> Moreover, after a few decades of experience with imported institutions, Bolívar's skeptical attitude toward foreign models was the starting point of a second generation of liberal elites who struggled for a design of institutions able to suit local conditions.

While the federalist ideal was initially attractive to liberal intellectuals and local leaders, it proved unable to solve the problems that the consolidation of national authority presented in the context of the territorial fragmentation and institutional vacuum left by the fall of a centralist and absolutist monarchy. After an early experience with loose federal structures, most countries started to adopt either unitary forms of government or centralized forms of federalism in which the central government was invested with different instruments to control political autonomy in the provinces. Something similar happened with the system of distribution and division of powers in the central government. While early liberals preferred a presidential system with checks and balances, sometimes even providing greater powers to the legislature, the pervasive factional struggle to control state positions and policies gradually created the need to strengthen executive authority, often by means of emergency powers. In other words, whether it was the doctrine of federalism or the division of powers, constitution making in Latin America since the 1840s was the result of a learning process in which foreign institutions were constantly re-adapted to fit specific local conditions.<sup>28</sup>

Recent historical studies on comparative elections in the early nineteenth century show that one of the peculiarities of Spanish America was the precocious adoption of modern forms of representation and universal suffrage when restrictions on voting were predominant in Europe.<sup>29</sup> While only a fraction of the adult male population participated in elections that were often vitiated by government manipulation, studies such as those of Richard Warren on popular participation in early elections in Mexico, and of Hilda Sabato on elections in Argentina from 1850 to 1880, show that the selection of representatives by universal suffrage often had an impact on popular participation that challenges the usual depiction of elections as an exclusive elite affair.<sup>30</sup> Moreover, even in countries where for-

<sup>27</sup> Simón Bolívar, Speech Before Congress at Angostura (Feb. 15, 1819), in *DISCURSOS Y PROCLAMAS [SPEECHES AND PROCLAMATIONS]* 34, 53–54 (Rufino Blanco-Fombona ed., 1913).

<sup>28</sup> See Frank Safford, *Politics, Ideology and Society in Post-Independence Spanish America*, in *3 THE CAMBRIDGE HISTORY OF LATIN AMERICA*, *supra* note 23, at 347, 350–54.

<sup>29</sup> See JOSÉ ANTONIO AGUILAR RIVERA, *EN POS DE LA QUIMERA: REFLEXIONES SOBRE EL EXPERIMENTO CONSTITUCIONAL ATLÁNTICO [IN PURSUIT OF THE CHIMERA: REFLECTIONS ON THE ATLANTIC CONSTITUTIONAL EXPERIMENT]* 129–66 (2000); Francois-Xavier Guerra, *The Spanish American Tradition of Representation and Its European Roots*, in *26 J. LATIN AM. STUD.* 1, 13 (1994); EDUARDO POSADA-CARBÓ, *ELECTIONS BEFORE DEMOCRACY: THE HISTORY OF ELECTIONS IN EUROPE AND LATIN AMERICA* 6 (1996); Marcela Ternavasio, *Nuevo régimen representativo y expansión de la frontera política. Las elecciones en el estado de Buenos Aires: 1820–1840 [New Representative Regime and Expansion of the Political Frontier. Elections in the State of Buenos Aires: 1820–1840]*, in *HISTORIA DE LAS ELECCIONES EN IBEROAMÉRICA, SIGLO XIX: DE LA FORMACIÓN DEL ESPACIO POLÍTICO NACIONAL* *supra* note 22, at 65–66.

<sup>30</sup> See Richard Warren, *Elections and Popular Political Participation in Mexico, 1809–1836*, in *LIBERALS, POLITICS, AND POWER* 30, 30–52 (Vincent C. Peloso & Barbara A. Tenenbaum eds., 1996); Hilda Sabato, *Citizenship, Political Participation, and the Formation of the Public Sphere in*

mal restrictions on voting applied, elections still had a significant effect on the process of democratization. As J. Samuel Valenzuela indicates, the Chilean constitution of 1833, in spite of its restrictions on voting, was the framework of one of the most successful experiences of institutionalization of political competition and progressive inclusion of the electorate in Latin America.<sup>31</sup> This finding goes against the core of Morse's argument about the pre-modern character of Chilean institutions.

As Brian Loveman argues, Latin American liberals left an institutional legacy, such as broad emergency powers, with a strong potential for abuse in hands of authoritarian leaders.<sup>32</sup> He neglects, however, the environment where these provisions were created. More than a reflection of an authoritarian mentality, the constitutionalization of emergency powers was an attempt to prevent the arbitrary use of these powers in political contexts plagued by factional conflict and internal strife. Whereas dictators like Rosas were able to execute political opponents with no other limits than their own will, Argentine presidents after the constitution of 1853 could resort to emergency measures only under the conditions and limits established by the law. The legalization of emergency powers also averted the de-legitimation of the constitution when the government was forced to use those powers outside the constitutional framework. This, for instance, was the primary reason why the Mexican constitution of 1857—by all means one of the most liberal constitutions of the time—included provisions for emergency powers that had been absent in previous documents.

One should emphasize that Latin Americans *did not* invent emergency powers. While the relationship between these provisions and liberal constitutionalism is a troubled one, many classic liberal authors recognized that extraordinary powers are necessary during emergencies. Locke, the father of classic liberalism, admitted that there were many things “which the Law can by no means provide for, and those must necessarily left to the discretion of him, that has the Executive Power in his hands to be ordered by him, as the public good and advantage may require.”<sup>33</sup> Similarly Montesquieu, in a passage of the *Spirit of the Laws*, indicated that there are cases in which a “veil should be drawn for a while over liberty, as it was customary to cover the statues of the Gods.”<sup>34</sup> These theoretical premises are perfectly consistent with the historical reality of any liberal state. As Neumann has observed, the liberal state “was precisely as strong as it needed to be in the circumstances. It acquired substantial colonial empires, waged wars, held down internal disorders, and stabilized itself over long periods

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*Buenos Aires, 1850–1880*, in 136 PAST & PRESENT 139, 162 (1992).

<sup>31</sup> See J. Samuel Valenzuela, *Building Aspects of Democracy Before Democracy: Electoral Practices in Nineteenth Century Chile*, in ELECTIONS BEFORE DEMOCRACY: THE HISTORY OF ELECTIONS IN EUROPE AND LATIN AMERICA 223, 224–25, 248–50 (Eduardo Posada Carbó ed., 1996).

<sup>32</sup> LOVEMAN, *supra* note 24, at 404. For a critique of Loveman's assertions, see José Antonio Aguilar Rivera, EL MANTO LIBERAL: LOS PODERES DE EMERGENCIA EN MÉXICO 1821–1876 [THE LIBERAL MANTLE: EMERGENCY POWERS IN MEXICO 1821–1876], at 67–70 (2001).

<sup>33</sup> See JOHN LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT § 159 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

<sup>34</sup> CHARLES DE SECONDAT, BARON DE MONTEQUIEU, THE SPIRIT OF THE LAWS 199 (Neil H. Alford et al. eds. & trans., 1984) (1748).

of time.”<sup>35</sup>

In terms of ideology, Latin American liberals were deeply affected by the task of creating an effective state authority and usually placed the values of order and stability above the idea of political liberty. They created, in terms of Merquior, a conservative brand of “nation-building” liberalism whose main concern was the creation rather than the limitation of political power.<sup>36</sup> This, however, does not turn Latin American liberalism into an insidious form of authoritarianism. As it was the case with the American founders, Latin American liberals were opposed to despotic and arbitrary rule and sought an effective protection of civil rights. They simply wanted a strong legal authority for exceptional times, trusting that the progress of civilization would in the future reduce the need to restrict the sphere of political liberty. Ultimately, their concern on strengthening state authority was no different from the ideology of post-revolutionary French liberals, like Constant or Guizot, who also wanted an equilibrium between popular sovereignty and political liberty on the one hand, and effective order and authority on the other.

The liberal ideology of Latin American elites was no less adverse to democracy and popular participation than was the liberalism of the fathers of the modern liberal republic. In a way similar to Madison or Siéyes, Latin American liberals used the term “republic” or “representative government” in the sense of rule by an elected aristocracy. As Bernard Manin points out, this form of government not only rejected the idea of rule by the people but it also *presupposed* that, with or without voting qualifications, the elected representatives would always form a separate political class distinguished by virtue of its superior culture and social position.<sup>37</sup> In this sense, the fact that most liberal regimes in nineteenth-century Latin America evolved as oligarchic regimes with sharp divisions between rulers and ruled in terms of wealth, social position, and even race, does not lead to the conclusion that those regimes were only liberal in name. Perhaps with less pronounced distinctions, a similar separation between rulers and ruled could be seen in European liberal regimes at the time, like the British, which later evolved into stable constitutional democracies.

Difficult as it was, the application of notions like republican government or constitutionalism in an environment shaped by the influence of a centralist and patrimonialist state gradually acquired a symbolic dimension that changed traditional models of political legitimacy. In most countries, the liberal-constitutional movement not only replaced the authority of hereditary monarchs with elected presidents, but also provided a solid background for the development of notions of citizenship that had been absent during the colonial period. Because liberal elites usually manipulated elections by means of fraud or corruption, conventional interpretations of nineteenth-century Latin America maintain that, if not in theory, the actual practice of liberal regimes made impossible a meaningful

<sup>35</sup> Franz Neumann, *Approaches to the Study of Political Power*, in 3 THE DEMOCRATIC AND THE AUTHORITARIAN STATE 8 (Herbert Marcuse ed., 1957).

<sup>36</sup> J.G. MERQUIOR, LIBERALISM OLD & NEW 75–80 (1991).

<sup>37</sup> BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 94 (1997). *See also* AGUILAR RIVERA, *supra* note 29, at 129–65.

experience with popular participation before the beginning of democratization. However, while the evidence for distorted electoral practices abounds, the idea that elections had no impact in terms of citizen participation must be critically assessed.

### III THE SIRENS OF MULTICULTURALISM

Even if the dominant view of the impact of constitutionalism in the region is wrong, the fact remains that its success in key areas was limited. Constitutional limitations to power, democracy, and individual rights failed to firmly anchor in Latin America. In spite of the actual shortcomings of constitutions, until very recently most Latin Americans recognized as valid the inherited ideals of nineteenth-century liberal constitutionalism, such as equality before the law and a political (not cultural) notion of citizenship. The distance between ideal and reality was seen as a challenge that had to be bridged. Here enters Anglo-American multiculturalism. Such theories found a keen ear among Latin American elites. Why? Unlike previous anti-liberal movements that directly challenged liberal democracy and capitalism, multiculturalism does not present itself as a rival of liberalism. It disguises itself as a reform movement within liberalism. At the starting point of his theoretical voyage, Kymlicka acknowledged that his brand of “liberalism” was different from what Spanish Americans had until then considered liberalism. In his seminal book, *Liberalism, Community and Culture*, Kymlicka argued:

My concern is with this modern liberalism [from J.S. Mill to Rawls and Dworkin], not seventeenth-century liberalism, and I want to leave it entirely open what the relationship is between the two. It might be that the developments initiated by the ‘new liberals’ are really an abandonment of what was definitive of classical liberalism.<sup>38</sup>

This move is telling, since neither John Stuart Mill nor John Rawls saw themselves as departing from the tradition of Locke, Montesquieu, or Tocqueville. Previous critics of liberalism had been open in acknowledging that they were *not* liberals, but something else.<sup>39</sup> However, Kymlicka and others in his camp dressed their theory in the robes of liberalism. A fifth column in the midst of Anglo-American liberalism was born. In regard to multiculturalism, Brian Barry asserts:

The deeper point is that the policies advocated in its name are not liberal. If this is so, it is natural to ask why it should be thought by anybody that policies aimed at promoting diversity or tolerance (as they are defined by contemporary political philosophers) have any claim to count as implications of liberalism. The most important

<sup>38</sup> See WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 10 (1989).

<sup>39</sup> See STEPHEN HOLMES, *THE ANATOMY OF ANTI-LIBERALISM* 2–3 (1993).

reason is that liberalism has in recent years been equated by many people with cultural relativism.<sup>40</sup>

One does not need to follow Leo Strauss and his disciples to demur the ascendancy of relativism in the world.

By the time multiculturalism became an intellectual fad in the academic world, relativism had spread widely in Latin America. How this happened is not clear, and an account of the rise of relativism in Latin America and elsewhere falls beyond the scope of this article. After successive waves of colonizing theories—positivism, Marxism, populism, etc.—relativism captured the imagination of Latin Americans. While relativism also made inroads in countries where liberal democracy was well established, in Latin America it found fertile soil to grow. For the historical reasons discussed above, in institutional and philosophical terms these countries were very vulnerable to the allure of multiculturalism. Since liberalism in Spanish America was mainly imported from France, it was mostly concerned with constitutional limitations of power, not with the philosophical foundations of liberalism. Also, the memories of injustices committed against the indigenous peoples in the past (and present) contributed to the success of the agenda of multiculturalism. In most countries guilt was pervasive and policies such as symbolic recognition afforded a cost-effective means to appease it.<sup>41</sup>

The question remains: Are multiculturalist policies liberal in any significant sense? Barry is right when he asks:

If a liberal is not somebody who believes that liberalism is true (with or without inverted commas), what is a liberal? The defining feature of a liberal is, I suggest, that it is someone who holds that there are certain rights against oppression, exploitation and injury to which every single human being is entitled to lay claim, and that appeals to 'cultural diversity' and pluralism under no circumstances trump the value of basic liberal rights.<sup>42</sup>

In regard to the Kymlicka scheme, Barry argues:

A theory that has the implication that nationalities (whether they control a state or a sub-state polity) have a fundamental right to violate liberal principles is not a liberal theory of group rights. It is an illiberal theory with a bit of liberal hand-wringing thrown in as an optional extra.<sup>43</sup>

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<sup>40</sup> BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 127 (2001).

<sup>41</sup> See JOSÉ ANTONIO AGUILAR RIVERA, *EL FIN DE LA RAZA CÓSMICA: CONSIDERACIONES SOBRE EL ESPLENDOR Y DECADENCIA DEL LIBERALISMO EN MÉXICO* [THE END OF THE COSMIC RACE: CONSIDERATIONS ON THE SPLENDOR AND DECADENCE OF LIBERALISM IN MEXICO] 34–59 (2001).

<sup>42</sup> BARRY, *supra* note 40, at 132–33.

<sup>43</sup> *Id.* at 140.

According to Barry, Kymlicka's bottom line is exactly the same as that of "whole-hearted cultural relativists. For he agrees with them that it would be 'cultural imperialism' for liberals to bring pressure to bear on regimes that violate human rights in an attempt to increase the number of people in the world who enjoy their protection."<sup>44</sup> On this account Kymlicka is not a liberal despite his protestations to the contrary.

I would like to explore specific ways in which multiculturalist policies have hindered the democratization process in Latin America. Multiculturalism has called into question the historically unfulfilled objective of achieving equality before the law and to subject all citizens, including the most powerful among them, to a single body of norms. Traditionally, the rich and powerful have managed to exempt themselves from the common laws. If this is true everywhere it is even more so in Latin America. There, privileged minorities have always enjoyed special rights. Many countries are still struggling today to make real the claim that there should only be one status of citizen (no estates or castes), so that everybody enjoys the same legal and political rights. The idea was that these rights should be assigned to individual citizens, with no special rights (or disabilities) accorded to some and not others on the basis of race or group membership. Thus, as Barry argues:

[I]n advocating the reintroduction of a mass of special legal statuses in place of the single status of uniform citizenship that was the achievement of the Enlightenment, multiculturalists seem remarkably insouciant about the abuses and inequalities of the *ancien régime* which provoked the attacks on it by the Encyclopaedists and their allies. It is not so much a case of reinventing the wheel as forgetting why the wheel was invented and advocating the reintroduction of the sledge.<sup>45</sup>

Special self-government rights for minorities are well known in Spanish America. Before the independence in the nineteenth century, Indians lived in separate towns and enjoyed some degree of self-government. These were the *repúblicas de indios*. This arrangement followed the common practice among empires throughout history of ruling outside their core area by recognizing (or creating) local leaders who were expected to maintain order and produce some amount in taxes or tribute. The Spanish colonial authorities considered Indians as permanently underage, and therefore they merited paternalistic protection. The term "legal pluralism" connotes the simultaneous existence of distinct normative systems within a single territory, a condition usually associated with colonial rule.<sup>46</sup> Today, many multiculturalists seek to revive premodern ways of thinking about political authority. The modern state represented an enormous gain for liberty and equality over such arrangements, precisely because it gave everyone the same rights. In a follow-up to his *Culture and Equality*, Barry contends: "I want to

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 11.

<sup>46</sup> Van Cott, *supra* note 1, at 209.



add that many countries still have to achieve the wheel, and in these countries the multiculturalists' doctrine encourages the belief that they are better off to stick to the sledge."<sup>47</sup>

Many constitution makers around Latin America see themselves as partaking in a broader movement of "post-nationalist" constitutionalism. They have read that post-nationalist constitutions reject universalistic notions of citizenship based exclusively on uniformly applied individual rights and emphasize multiple forms of citizenship through a variety of institutions and autonomous domains of sovereignty that maximize the effective participation of diverse groups in society.<sup>48</sup> This brand of constitutionalism argues that the Western constitutional tradition lacks a conception of culturally-alienated peoples or groups. "Old" constitutionalism was, allegedly, developed to facilitate contestation within a culturally and socially homogeneous political community. While this argument is a mistaken reading of the historical record,<sup>49</sup> it is widely accepted in Latin America. Multicultural constitutionalism, democratic deliberation understood as the reasoned exchange of arguments, is inadequate. Instead, deliberation becomes a new form of "cultural dialogue." According to Tully:

The exchange of public reasons also cannot be separated from the cultural, linguistic, ethnic and gendered identities of those participating or from their substantive conceptions of the good, as the earlier theorists of deliberation sometimes assumed. Just as deeply ingrained sexist, racist and diversity-blind attitudes can operate to exclude oppressed and subordinated people, they can also operate to discount and ignore their modes of argumentation once they are included, both in practice and in theories of deliberation.<sup>50</sup>

The exclusion of cultural groups is not the only problem for post-nationalist constitutionalism. Even if the excluded can exercise power over their lives, the issue of cultural assimilation still remains. Active participation will not suffice. As Tully claims:

[R]ecent repatriation of limited self-governing powers by indigenous peoples from the states that have taken their lands, destroyed their customary practices of governance and reduced their populations to a fraction of pre-contact levels perpetuates a powerful form of assimilation called domestication or internal colonization . . . . The ways local residents in poor countries are induced to participate in deliberations associated with development projects and employ their local knowledge in these settings often have the effect of gradually

<sup>47</sup> Brian Barry, *Second Thoughts: Some First Thoughts Revived*, in MULTICULTURALISM RECONSIDERED 228, 228–29 (Paul Kelly ed., 2002).

<sup>48</sup> BARRY, *supra* note 40, at 10.

<sup>49</sup> See IRA KATZNELSON, LIBERALISM'S CROOKED CIRCLE, 131–58 (1996).

<sup>50</sup> James Tully, *The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy*, 65 MOD. L. REV. 204, 224 (2002).

creating a western identity and outlook and commodifying their traditional knowledge.<sup>51</sup>

There has been a tidal wave of constitutional reform in Spanish America. Latin American countries replacing or reforming constitutions in recent years include: Argentina (1994), Bolivia (1994), Brazil (1988, 1994, 1997), Chile (1989, 1994, 1997), Colombia (1991), Costa Rica (1996, 1997), Dominican Republic (1996), Ecuador (1996, 1998), Mexico (1994, 1995, 2001), Nicaragua (1987, 1995), Panama (1994), Paraguay (1992), Peru (1993), Uruguay (1997), and Venezuela (1999).<sup>52</sup> Let me offer a particular example of the multiculturalist ideology in action: Colombia. In 1991, Colombians held a constitutional assembly. The new constitution included special rights for minorities, as well as provisions for establishing a “participatory” democracy. According to Donna Lee Van Cott, “the need to build a new political order by imbuing political institutions with democratic values capable of legitimating the state and regime—generated a rupture with [Colombia’s] Liberal constitutional tradition.”<sup>53</sup> It was believed that the prior tradition promoted a culturally and ethnically homogeneous vision of national identity based on the myth of a mestizo nation.<sup>54</sup> “The new model explicitly recognized the failure of the creole nation-building project and beg[an] a new one based on the veneration of ethnic and cultural diversity.”<sup>55</sup>

According to many participants in the constitutional debates, “the prior, homogeneous, exclusionary model of national identity was judged to lie at the root of the failure of democracy. Thus political reform was mixed inextricably with the process of defining a national identity that embraced society’s linguistic and cultural diversity.”<sup>56</sup> This constituted an ideological rupture with the vision of the nation—and of society—constructed and propagated by the elites at the beginning of the nineteenth century and “thus, an opportunity for reconciliation and the mutual creation of a more viable national project.”<sup>57</sup>

In a country ridden by civil strife, the presence of Indian representatives had a powerful symbolic effect. “In their presentations and in their written proposals, the indigenous delegates argued repeatedly that the road to national unity and identity, consensus, and reconciliation was through recognition and protection of ethnic and cultural diversity.”<sup>58</sup> Thus, the Indians’ goal of inserting a special chapter on ethnic rights in the constitution was linked to the broader aim of reconciliation understood as participatory democracy. Since the widespread violence that Colombia experienced entailed the violation of fundamental rights, the protection of the rights of ethnic minorities was seen as emblematic of a new

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<sup>51</sup> *Id.*

<sup>52</sup> DONNA LEE VAN COTT, *THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA* 11 (2000).

<sup>53</sup> *Id.* at 7–8.

<sup>54</sup> *Id.* at 8.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 16.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 73.

regime of rights protection. Ethnic rights, it was assumed, would help to stop the political violence. According to Van Cott:

[R]ecognition of indigenous rights furthered substantive goals. For example, recognizing indigenous authorities and territories implied a dramatic extension of the reach of a historically weak state into areas long dominated by extralegal authorities. Granting indigenous jurisdiction fosters the allegiance of indigenous authorities to the state while helping to establish the state as the source of authority. Recognizing indigenous customary law dramatically extends the reach of the rule of law, filling a geographically huge vacuum of legality.<sup>59</sup>

The *illusion* of the rule of law was thus created. In Colombia, the logic of the Ottoman Empire was recreated to make up for the weakness of the state. Unlike deep economic and political factors underlying violence, national identity could be easily “amended” by a symbolic act in the constitution. It was also a cost-effective measure. However, ethnic rights proved to be a false solution to Colombia’s intractable structural problems. From the time of the National Constitutional Assembly (ANC), “[e]ditorialists used the example of the inclusion of Indians to demonstrate the representativeness of the body; to deflect charges that the ANC lacked legitimacy because of low turnout in the ANC elections.”<sup>60</sup> Aware of this symbolic leverage, the indigenous delegates threatened to not sign the final text of the constitution if their demands with respect to territorial rights were not included. According to Van Cott:

Their refusal to sign would have impugned the legitimacy of the reform process, appearing to imply that the rights of the most excluded Colombian social group had been trampled upon . . . . In order for the controversial articles to be passed, the language was deliberately left vague, with specifics left to statutory legislation.<sup>61</sup>

For some, “it would prove to be a hollow victory, as the lack of consensus on this issue would impede the full implementation of indigenous and black territorial rights.”<sup>62</sup>

The new constitution was immediately criticized for its excessive length, its inelegant and inconsistent language, for several contradictions and ambiguities, and for the inclusion of diverse populist offerings and regulations. “Colombian constitution makers rejected the [idea] that the basis of political solidarity in the constitution should be the creation of rights and the mutual acceptance of procedures.”<sup>63</sup> Most constituents believed that a strictly procedural charter would

<sup>59</sup> *Id.* at 74–75. The proposals demanded various things: recognition of the multiethnic and pluricultural character of Colombia; recognition of the political, administrative, and fiscal autonomy of ethnic territories; state protection for ethnic cultures and languages; greater representation of indigenous peoples in political bodies at all levels; participation in economic policy and planning decisions; and the inalienability of communal land rights.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 77.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 78.

not inspire the patriotism or feeling of community necessary to establish a viable democratic regime. They required a civil religion for their state.

A new title (Title 4) established all forms of direct democracy: elections, plebiscites, referenda, popular consultations, open meetings, legislative initiatives, and recall. Article 40 of the constitution established plebiscites, referenda, and the recall of municipal, departmental, and national representatives (except the president). The government created Workshops for a New Citizen.<sup>64</sup> These bodies “were designed to promote the transformation of Colombia’s passive, submissive, individualistic citizens into an active, participatory national political community.”<sup>65</sup> Such declarative measures were cost-effective. As Van Cott recognizes:

One important aspect of democratic participation that Colombia’s constitution makers did not address was the problem of extreme economic inequality . . . . Aside from redistributing resources from the center to the periphery, the constitution makes no effort to redress extreme economic inequalities, which are without a doubt among the root causes of violence in Colombia.<sup>66</sup>

The recognition and protection of ethnic rights became the pillars of the new “participatory democratic model” of Colombia. The political theory of multiculturalism came in handy to make the argument for special rights. According to Van Cott:

[C]onstitution-makers made an argument for group-conscious policies similar to that of Iris Marion Young: A disadvantaged social group merits special group-conscious policies because its oppression by a dominant culture renders ‘its own experience invisible,’ which can only be remedied ‘by explicit attention to and expression of that group’s specificity,’ and because such policies may be necessary ‘to affirm the solidarity of groups, to allow them to affirm their group affinities without suffering disadvantage in the wider society.’<sup>67</sup>

More broadly, theorists argue that liberal democratic guarantees of equal rights and special rights protecting cultural identities are insufficient to sustain democratic “discourse” in a multicultural political community. In such societies, state and society must endeavor to propagate a “militant tolerance” of diversity.<sup>68</sup> As we will see below, the newly created Constitutional Court of Colombia would come to exemplify this “militant tolerance.”

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<sup>64</sup> *Id.* at 82.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 83.

<sup>67</sup> YOUNG, *supra* note 3, at 173–74. Young claims that, “[a] democratic cultural pluralism thus requires a dual system of rights: a general system of rights which are the same for all and a more specific system of group-conscious policies and rights.”

<sup>68</sup> Kenneth Bayne, *Liberal Neutrality, Pluralism, and Deliberative Politics*, 12 PRAXIS INT’L 50, 51–57 (1992–93).

While the indigenous delegates failed in the ANC to achieve a separate, comprehensive statement of ethnic rights, they were able to secure the institutionalization of the presence of the Indians as a distinctive group with special rights in Colombian society. They are mentioned no less than twenty times in the constitution.<sup>69</sup> The constitution recognized the collective and inalienable nature of the existing Indian lands (*resguardos*). The Constitution recognized Indian pre-constitutional jurisdictional and autonomy rights over their traditional lands, as opposed to property rights. By granting constitutional recognition to the indigenous territories, the Colombian State allowed for the exercise of indigenous customary legal systems as well as the exercise of self-government rights by indigenous *cabildos* or other native forms of self-government.<sup>70</sup> Article 171 created a national two-seat senatorial district for indigenous persons.<sup>71</sup> Likewise, Article 176 states that “the law may establish a special election district (yielding a maximum of five representatives) to ensure participation in the House of Representatives by ethnic groups, political minorities, and Colombians residing abroad.”<sup>72</sup> According to Van Cott:

The Colombian constitution fully embraces neither the communitarian nor the traditional Liberal positions with respect to the rights of cultural communities. Instead, the text reflects the approach of Will Kymlicka and Yael Tamir of recuperating from the liberal tradition the valorization of cultural membership as a necessity for the full realization of the Liberal vision of equality. However, on certain issues the constitution strays into the sphere of communitarianism, to assign rights directly to communities rather than to individuals, and to allow certain conditions under which cultural community rights may prevail over the freedom of individuals—for example, by recognizing the prevalence of the customary law of unacculturated indigenous communities. Colombian constitution makers’ inclination to support the ‘cultural survival argument’ of communitarians—the idea that cultural associations merit protection apart from the rights of their members in order to ensure the survival of the culture in the face of internal and external threats—would be affirmed by the Constitutional Court, which has attempted to provide concrete guidelines for the harmonization of conflicting liberal and communitarian norms. The ‘cultural survival argument’ is vehemently rejected by most political theorists claiming any ties to the Liberal tradition, including Kymlicka and Tamir.<sup>73</sup>

Van Cott is mistaken. If not overtly, the argument of “cultural survival” is implicitly built into Kymlicka’s theory of minority rights. Barry argues multiculturalists are typically bold in theory and timid in practice: “Whether they

<sup>69</sup> VAN COTT, *supra* note 52, at 85.

<sup>70</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 246.

<sup>71</sup> *Id.* at art. 171.

<sup>72</sup> *Id.* at art. 176.

<sup>73</sup> VAN COTT, *supra* note 52, at 87–88.

approve or not, the writings of authors such as Taylor and Kymlicka are in fact cited in support of policies that can only result in the violent oppression of the vulnerable.”<sup>74</sup> Is this true? In order to answer this question, let us consider how the 1991 Colombian constitution was implemented.

When the Colombian constitution was implemented, it created perverse incentives for certain groups. As some have argued, institutionalizing group representation offers opportunities and incentives for political entrepreneurs to whip up intragroup solidarity and intergroup hostility in the pursuit of power. According to Van Cott, in Colombia, indigenous people’s organizations are vulnerable to criticism “since the state and political elites can criticize the large indigenous organizations without suffering charges of Indian-bashing if they can hold up weak and fragmented indigenous authorities as more ‘authentic.’”<sup>75</sup> These are the inevitable wages of essentializing political conflicts. Likewise, the allegedly virtuous effects of assured representation have flown out the window. The congressional representation of ethnic minorities has been mainly symbolic rather than substantive. It could hardly have been otherwise. Indigenous senators have lost prestige amid charges of co-optation and corruption. Like other politicians, “[they] must satisfy their constituencies’ demand for patronage and public works by cooperating with the government and political parties on close votes.”<sup>76</sup> This is how politicians act. However, some observers claim that political bargaining, by precluding open political confrontation, has compromised the loftier goal of achieving indigenous self-determination.<sup>77</sup> This only shows how the expectations of ethnic entrepreneurs were out of touch with the way democratic institutions actually work.

The expectations of direct democracy have not been fulfilled either. Many believe that the truly substantive areas were placed out of reach of the people. “In particular, citizen participation has been altogether removed from the spheres of macroeconomic policy-making and the deliberations of the National Congress.”<sup>78</sup> The belief that the institutions of representative democracy would not collide with the “participatory” provisions of the constitution was mistaken. Such belief led to unrealistic expectations of popular control over the Congress and the process of economic policy-making.

Much more important is the abuse of human rights that the new constitution fostered. Article 246 of the 1991 constitution reads:

The authorities among the native peoples may exercise judicial functions within their territorial areas in accordance with their own rules and procedures, which must not be contrary to the Constitution and laws of the Republic. The law shall establish the forms of coordination of this special jurisdiction with the national judicial system.<sup>79</sup>

<sup>74</sup> Barry, *supra* note 47, at 230.

<sup>75</sup> VAN COTT, *supra* note 52, at 103.

<sup>76</sup> *Id.* at 110.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 92.

<sup>79</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 246.

In fact, the legislation required by Article 246 was never passed.

In the absence of implementing legislation, the Constitutional Court of Colombia developed a standard for implementing the right to the integrity of a community and established precedents for the protection of collective rights, even though only individual rights are listed as fundamental rights.<sup>80</sup> By 1999, more than thirty-seven rulings had considered the issues of pluriculturalism, indigenous constitutional rights, and indigenous jurisdiction.<sup>81</sup> The Court also protected the rights of indigenous communities to collective property, collective subsistence and the maintenance of cultural and ethnic diversity, both as rights of indigenous communities and as mandates of the state to protect all kinds of diversity for the benefit of all Colombians. The rulings of the Court have been more significant in regard to the right to judge civil and criminal matters within indigenous territories according to indigenous law. According to the Court, cultural traditions are to be respected, depending on the evaluating court's judgment with respect to the extent that those traditions have been preserved. Therefore, the more contact an indigenous community has had with Western culture, the less weight may be given to its cultural traditions. In practice, this gives the Court the impossible task of measuring the degree of assimilation of a given community. Also, the decisions of and sanctions imposed by indigenous tribunals must not violate fundamental constitutional rights or the international human rights incorporated by the Constitution. "Finally, the Court established the supremacy of indigenous customary law over ordinary civil laws that conflict with cultural norms and over legislation that does not specifically protect a constitutional right of the same rank as the right to cultural and ethnic diversity."<sup>82</sup> The chimera of a fundamental right to diversity would not be harmless.

As the case of the conflict between the Páez *cabildo* (a form of township government imposed on the Indians by the Spanish Crown and later adopted and "naturalized" by indigenous cultures) and seven indigenous defendants showed in 1997, these three standards proved to be mutually exclusive. This case merits our detailed attention. The issue of special indigenous jurisdiction gained national attention in Colombia when Francisco Gambuel, a Guambiano Indian living in the Páez community, sued the *cabildo* of Jambal, Cauca. The Páez are the largest and politically most dominant indigenous group in the southwestern region of Cauca, the area of greatest indigenous concentration in the country and the origin of the national indigenous movement. It is an area of intense rural land conflict where several guerrilla organizations maintain active fronts and compete with drug traffickers, paramilitary organizations, and public authorities for control over the use of force.<sup>83</sup>

In this case, a conflict erupted between the *cabildo* and seven indigenous defendants. The indigenous defendants were banished from the community, stripped of their political rights as Indians and sentenced to varying amounts of

<sup>80</sup> VAN COTT, *supra* note 52, at 111–12.

<sup>81</sup> *Id.* at 112.

<sup>82</sup> *Id.* at 113.

<sup>83</sup> I follow closely Van Cott's recollection of the events. See Van Cott, *supra* note 1, at 219–20.

lashes (*azotes*) with a leather whip. The sentence followed the defendants' conviction as "intellectual authors" of the assassination of the town's indigenous mayor. Local guerrillas actually claimed responsibility for the murder, but the indigenous defendants were convicted because they publicly linked the mayor to the paramilitaries, which inspired an indigenous sector of the Ejército de Liberación Nacional (ELN) guerrillas to kill him. Gembuel's supporters argued that the *cabildo's* ruling violated Páez norms of procedure—a claim sustained by a confidential memorandum from an indigenous legal expert. He argued that there was no evidence of intellectual authorship, but only of *tardecer*. *Tardecer* is a concept in Páez law that attributes guilt to a prior act that may have inspired a later outcome, even if no causal link could be proven. Traditionally, Páez law never excluded a community member as punishment for their first offense, but Gembuel and his associates did receive such a punishment. A non-indigenous lower court ruled that the *cabildo* had denied the defendants the opportunity to defend themselves, that the traditional judges in the case were biased, and that the whipping constituted torture, and therefore was illegal under international law, which had constitutional rank in Colombia.<sup>84</sup>

A new investigation ensued and a new trial was ordered. Following an appeal by the Páez *cabildo*, a higher court affirmed the lower court's ruling, observing that corporal punishment, even if it did no permanent physical harm, violated the defendants' fundamental constitutional rights. The case generated international controversy when Amnesty International accused the *cabildo* of condoning torture. Gembuel and his followers claimed that they were being persecuted because they were political rivals of the *cabildo* leadership. The case then went up to the Constitutional Court. On October 15, 1997, the Court upheld the *cabildo's* determination of guilt and sentencing.<sup>85</sup> In his decision, Magistrate Carlos Gaviria Díaz concurred with the Páez *cabildo* that the intention of the whipping is not to cause excessive suffering but, rather, to represent the ritual purification of the offender and the restoration of harmony to the community.<sup>86</sup> The extent of physical suffering was ruled insufficient to constitute torture. Gaviria Díaz concluded with the observation that "only a high degree of autonomy would ensure cultural survival."<sup>87</sup>

Earlier, the Court had defined the scope of indigenous special jurisdiction in a 1996 ruling on a claim brought by an Embera-Chamí Indian that his *cabildo* had violated his right to due process, ruling that the standard for interpreting indigenous jurisdiction must be "the maximum autonomy for the indigenous community and the minimization of restrictions to those which are necessary to safeguard interests of superior constitutional rank."<sup>88</sup> According to Van Cott:

<sup>84</sup> *Id.*

<sup>85</sup> See Corte Constitucional (C.C.) [Constitutional Court], octubre 15, 1997, M.P: C. Gaviria Díaz, Sentencia T-523/97, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) available at <http://www.corteconstitucional.gov.co/relatoria/1997/T-523-97.htm> [hereinafter *Corte Constitucional T-523/97*]; Van Cott, *supra* note 1, at 220–21.

<sup>86</sup> See Corte Constitucional T-523/97.

<sup>87</sup> *Id.*

<sup>88</sup> Corte Constitucional (C.C.) [Constitutional Court], agosto 8, 1996, M.P: C. Gaviria Díaz, Sentencia T-349/96, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) available at <http://www.corteconstitucional.gov.co/relatoria/1996/T-349-96.htm>



The decision [was] noteworthy for its defense of the *cepo* [stocks], a form of corporal punishment common to indigenous communities that was imported from Spanish colonial law. A number of the punishments used today by indigenous communities are derived from Spanish colonial rule, but indigenous authorities insist that these have become part of their own 'authentic' culture, as most cultures continuously borrow and adapt practices from cultures with which they have contact.<sup>89</sup>

One wonders why indigenous communities then could not adopt new institutions and norms from a more recent dating. The Constitutional Court, however, ruled that the stocks, although painful, did no permanent damage to the offender. Moreover, it was used prudently for a brief duration of time by the indigenous authorities. As such, it did not constitute cruel or inhumane treatment. Finally, the Court exempted indigenous customary law from the Western expectation that pre-established sanctions would be meted out in similar cases.<sup>90</sup> Also, a later decision (T-496) extended the territorial scope of indigenous jurisdiction territories to a personal jurisdiction in cases where a judge deemed the cultural alienation of an indigenous defendant to warrant it.<sup>91</sup>

Thus, Van Cott affirms:

[N]ot only were corporal punishment and expulsion ruled constitutional, the Court in the Jambaló case applied its decision to a community whose level of cultural assimilation is high relative to more isolated, less educated communities. This would appear to lower the burden of proving cultural 'purity' on the part of indigenous authorities. The decision also contributes to the inconsistencies demonstrated by the Constitutional Court in developing and applying the constitution's ethnic rights regime.<sup>92</sup>

The Court "has fluctuated between a vision that seeks a consensus on minimal universal norms and the restriction of the exercise of indigenous jurisdiction to a sphere of universally accepted rights, and a vision that recognizes an intangible sphere of ethnic diversity whose integral nature precludes restriction."<sup>93</sup>

The rulings of the Constitutional Court of Colombia convey a warning. While the ideological justifications of human rights abuses committed in the past by Latin American dictators have disappeared, these new violations of fundamental rights have a progressive façade. The subordination of indigenous special jurisdiction to the Colombian Constitution and legislation would appear to imply that conflicting elements in customary law are to be superseded. If this were

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[corteconstitucional.gov.co/relatoria/1996/T-349-96.htm](http://corteconstitucional.gov.co/relatoria/1996/T-349-96.htm).

<sup>89</sup> Van Cott, *supra* note 1, at 218.

<sup>90</sup> *Id.* at 219.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 221.

<sup>93</sup> *Id.*

the case, there would be little objection. However, multiculturalists tend to criticize this limitation because it “tends to downgrade the role of traditional norms or relegate them to further study, special legislation or other ‘future’ measures which are not easily forthcoming.”<sup>94</sup> The former Chief Magistrate of the Colombian Constitutional Court agrees. Carlos Gaviria Díaz argued “that to subject indigenous jurisdiction to this limit would be absurd, since it would nullify the meaning of autonomy under Article 246 by implying that Indians must conform to all the procedures of the Colombian penal code, including the creation of pre-existing written laws.”<sup>95</sup> How can a constitutional court uphold such rulings? In order to understand Judge Gaviria’s opinions as well as the travesty offered by the Constitutional Court of Colombia, we must consider the troubled history of liberal constitutionalism in Latin America discussed in section II. Colombia demonstrates the danger of multiculturalism in action.

#### IV CONCLUSION

In a friendly but critical essay on the philosophical work of Michael Walzer, Judith Shklar poignantly asserts:

A modern state, and that was from the first the great case made for it, not only stands above the warring groups but exists to mitigate by lawful coercion the murderous proclivities generated by racial, ethnic, and religious solidarity. The strong state, as Hegel noted, not only protects, it encourages the freedom of the individual as well as of voluntary associations, but only as long as they submit to a single system of law equally applicable to all. Without it we are reduced to life as it is endured in Lebanon. Walzer’s clubs are creatures of a nostalgia that he can afford only because he lives in a constitutional democracy built on Enlightenment principles and not in a suffocating little city-state or in a community of enforced conformity to collective values. That his longing for them amounts to an interpretation of the immanent spirit of his fellow citizens strikes me as absurd. They are here precisely because they wanted to say good-bye to all that.<sup>96</sup>

<sup>94</sup> *Id.* at 216 (quoting Jorge Dandler, *Indigenous Peoples and the Rule of Law in Latin America: Do They Have a Chance?*, in *WORKSHOP ON THE RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA* 13, 13–15 (Gina Bekker & Robert Patrick eds., 1998)).

<sup>95</sup> *Id.* at 216 (citing Carlos Gaviria Díaz, *Alcances, contenidos y limitaciones de la Jurisdicción Especial Indígena* [Scope, Content and Limitations of the Special Indigenous Jurisdiction], in *MINISTERIO DE JUSTICIA Y DEL DERECHO, ET AL., “DEL OLVIDO SURGIMOS PARA TRAER NUEVAS ESPERANZAS”: LA JURISDICCIÓN ESPECIAL INDÍGENA* [“WE EMERGED FROM OBLIVION TO BRING NEW HOPE”: THE SPECIAL INDIGENOUS JURISDICTION] 159, 165 (1997)).

<sup>96</sup> *JUDITH SHKLAR, POLITICAL THOUGHT AND POLITICAL THINKERS* 385 (Stanley Hoffman ed., 1998).

Much the same could be said of Kymlicka and his followers. In Mexico and other parts of Latin America, mob lynching is fairly common.<sup>97</sup> The tradition of communities taking justice into their own hands is very old. It is already mentioned in *Fuente Ovejuna*, a classic play by Lope de Vega, a sixteenth-century playwright.

What exactly, asks Barry, is it about multiculturalism that causes it to be such a menace in any society in which liberal ideas are not deep-seated and liberal institutions are weak? “Let me take multiculturalism as constituted for this purpose by cultural relativism and accommodation of culturally distinctive groups. Then my answer is that combining these two ingredients creates a toxic cocktail.”<sup>98</sup> The case of Colombia is a clear illustration of this mixture. Who would like to drink it?

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<sup>97</sup> For recent lynchings in Mexico, see José Antonio Aguilar Rivera, *La soga y la razón* [*The Rope and the Reason*], in COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS, LINCHAMIENTO: JUSTICIA POR PROPIA MANO: CASOS ESPECIFICOS [LYNCHING: VIGILANTE JUSTICE: SPECIFIC CASES] 13, 13–33 (2003).

<sup>98</sup> Barry, *supra* note 47, at 230.