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Open Borders in the Nineteenth Century:
Constructing the National, the Citizen and the Foreigner
in South America

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Abstract

This working paper describes and explains the historical origins of the division between the national and the foreigner in South America. In the early nineteenth century, all the previously Spanish possessions in South America as well as Brazil achieved independence. With this new freedom, countries turned their attention to asserting their statehood through the delineation of three constitutive elements: government, territory and population. The new governments had to define who were going to be considered as nationals, citizens and foreigners, and the rights that pertained to each of these categories. These countries were all concerned with attracting new settlers and very early on introduced constitutional provisions on open borders and equal treatment for foreigners. White, male Europeans were the principal addresses of open borders provisions in an effort to entice them to settle in territories presented as empty to the exclusion of indigenous groups, bring new industries, and contribute to the whitening of mixed race populations. Whilst weak statehood came with independence, forming nations was a much longer process and States used migration and citizenship policies as tools to define nationhood.

Keywords

Citizenship, migration, South America, naturalisation, nation

*'Of what benefit are the extensiveness, the richness, and geographical disposition of America to us; enslaved as we are? We have numerous and immense regions, unoccupied but by the inhabitants of the forest; but, you prevent man from entering them. If we cultivate the ground, you seize the principal part of the productions of our labour; and by shutting up our ports, you render the finest harbours, and the most extensive rivers in the world, nugatory or useless to us.'*¹

Introduction*

In the nineteenth century, open borders for people became a reality in South America, but this process was fraught with demographic, economic and racial implications.² Open borders was primarily a civilising project in which the agents were to be white male productive Europeans. For the early legislators, the ideal migrant populated regions conceived of as empty, brought industries that were needed to participate in global markets and contributed to the whitening of mixed race populations. As in the United States of America (USA), loosening restrictions on human mobility was not a humanistic project but rather a utilitarian one. Nonetheless, there were striking differences with respect to the USA.³ For instance, South Americans generally abolished slavery much faster. They granted nationality to all those born in the territory – not only to free white persons – through *ius soli*. Equal civil rights were offered to foreigners, albeit with no political entitlements. Moreover, whilst they facilitated naturalisation without any racial discrimination, at least on paper, the offices accessible to naturalised individuals were more restricted. In contrast, the USA only prohibited access to the positions of President and Vice-President by those not born in the territory.

Population was only one aspect of state formation and consolidation. With South American independence from Spain in the early nineteenth century, and in the case of Brazil from Portugal, the map of the region changed dramatically. This shift occurred with staggering speed between 1810 and 1826.⁴ Newly free, these ten countries began to assert their statehood and seek nationhood by delineating three constitutive elements: government, territory and population. Whilst independence came with weak statehood, the process of forming nations represented a much more arduous struggle.

¹ W. Burke, *South American Independence: Or, the Emancipation of South America, the Glory and Interest of England* (London: J. Ridgway, 1807), p. 12.

* The present working paper is mostly the result of work I conducted at the EUI as a Fernand Braudel Fellow between September and December 2015 and I would like to thank the Department of Law for support and for an excellent welcome during my period there. I would also like to thank numerous colleagues who have commented on previous versions of this work at presentations in South America, Europe and the USA, including: Rainer Bauböck, José Moya, Achilles Skordas, David Fitzgerald, Wojciech Sadurski, Jacopo Martire, Luisa Feline Freier, Matthew Brown, Marco Navas, Ana Santestevan and Ana Neyra. I would also like to thank Victoria Finn for her excellent editing and revision of the paper. The research leading to these results received funding from the European Research Council under the European Union's Seventh Framework Programme (FP/2007-2013) / ERC Grant Agreement no. 340430 for the project Prospects for International Migration Governance (MIGPROSP) awarded to Professor Andrew Geddes, in which I participate as co-investigator. This working paper will be Chapter 2 of my forthcoming book to be published by Cambridge University Press in 2018 and provisionally entitled 'The National vs the Foreigner in South America. 200 years of Migration and Citizenship Law.'

² Mexico, Central America and later the Dominican Republic and Cuba in many respects opted for similar choices to those followed by the ten emerging South American States, and were also influenced by the Spanish 1812 Cádiz Constitution. They are not part of the discussion here for the simple reason that the book of which this working paper is Chapter 2 deals exclusively with South America. In the 21st century the region has opted for new approaches to migration regulation, including regional free movement of people, which do not apply to Mexico, Central America, the Dominican Republic or Cuba.

³ On the USA, see: H. Motomura, *Americans in Waiting. The Lost History of Immigration and Citizenship in the United States* (Oxford University Press, 2006).

⁴ The remaining Dutch and British territories – present day Suriname and Guyana – only became independent in the twentieth century. French Guyana continues to be part of the French territory.

States used migration and citizenship policies as tools to define nationhood. In parallel, elites asserted and attempted to strengthen statehood in the name of their nascent nations.⁵

A state was first required to possess a public authority in charge of ordering and directing internal and external affairs.⁶ This public or political authority was what Vattel labelled ‘sovereignty.’ Sovereignty was crucial in his view since only states that were independent and sovereign had rights and were subject to the law of nations.⁷ At the time Vattel was writing in the mid-eighteenth century, sovereignty resided with the monarch or prince.⁸ Thereafter sovereignty was transferred to the nation due to the French Revolution, the 1789 Declaration of the Rights of Man and the 1791 French Constitution. This model was also adopted in the 1812 Cádiz Constitution, which greatly influenced South American constitutional thought. To establish their sovereignty, the newly liberated countries rapidly embarked on signing various international bilateral agreements, thereby re-affirming their independence while attempting to achieve international recognition.⁹

Second, with regard to territory, Simón Bolívar enunciated the principle of *uti possidetis juris 1810*. The principle established that the new republics should adopt the colonial administrative units that were in place in 1810. This year was presented as the last one in which Spanish decrees were valid. Therefore, 1810 was used as the starting point from which to temporarily delimitate territorial lines.¹⁰ Even though this principle found its way into many constitutions and treaties, territorial disputes sometimes ended in conflict.¹¹ Brazil independently rejected the principle; instead, in its bilateral delimitation agreements Brazil favoured *uti possidetis de facto*, by which territorial ownership was grounded on effective possession rather than colonial title.¹²

Finally, there was the matter of population. The fledgling states had to define who they would consider to be nationals, citizens and foreigners, and the rights that pertained to each category. In each territory, the classifications would have consequences for the particular conception and construction of the nation, national sentiment and national identity. In other words, they needed to settle who was going to be admitted into the body of the polity, who would be entitled to rights and who would be subject to obligations.

The purpose of this working paper is to investigate the four central elements that were at stake in legally constructing the national and the foreigner: original acquisition of nationality; the conditions under which nationals could become citizens in the sense of exercising full rights, including political ones; the requirements which foreigners needed to fulfil to obtain nationality, and their status once naturalised; and the rights of foreigners. In order to conduct this investigation, I rely on an analysis of the constitutions and citizenship and migration laws in all ten countries in the nineteenth century, as well as on secondary literature. This examination is important since there is robust historical

⁵ M. A. Centeno and A. E. Ferraro, ‘Republics of the Possible: State Building in Latin America and Spain’ in Centeno and Ferraro (eds.), *State and Nation Making in Latin America and Spain. Republics of the Possible* (Cambridge University Press, 2013), pp. 3-24.

⁶ E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758), Book 1, Chapter 1, §1.

⁷ *Ibid.*, § 4.

⁸ *Ibid.*, Book 1, Chapter 4.

⁹ As an example, see the various Peace, Friendship, Navigation and Commerce Conventions signed between Colombia and respectively the USA (Bogota, 3 October 1824), England (Bogota, 18 April 1825), Netherlands (London, 10 May 1829) and his Majesty the King of the French (Bogota, 14 November 1832). See also the Chile-USA Treaty of 12 October 1834.

¹⁰ C. A. Parodi, *Politics of South American Boundaries* (Greenwood, Westport: Praeger, 2002), p. 5.

¹¹ *Ibid.*, pp. 1 and 5. As Parodi explains, of the twenty-five existent territorial borders in South America, eight were marked by major wars, eight by lesser ones and five by some level of violence. Some of these conflicts still affect regional politics, such as the dispute between Bolivia and Chile in the International Court of Justice.

¹² B. García, *The Amazon from an International Law Perspective* (Cambridge University Press, 2011), pp. 53-54.

continuity in the region in the relationship between citizenship, migration and the legal construction of the national and the foreigner, with recent debates often being nothing more than a modern expression of historical discussions.

Birthright Citizenship in South America

After independence, all the constitutions of the new republics without exception adopted *ius soli* as the automatic route to nationality upon birth in the territory. This choice has proven resilient: all ten countries still automatically award citizenship to persons born in their territory.¹³

When the new constitutions were drafted, it was far from clear that *ius soli* would be the choice. At that time, *ius sanguinis* was much more prevalent both in theory and in practice. For example, Vattel argued that “natives, or natural-born citizens,” were “those born in the country, of parents who are citizens.” This was understood as a matter of self-preservation and perpetuation for society and the expected order of things, where “children naturally follow the condition of their fathers, and succeed to all their rights.” Vattel mentioned England as one of the few states where “the single circumstance of being born in the country naturalizes the children of a foreigner.”¹⁴ In contrast, France had included a form of *ius soli* in its 1791 constitution,¹⁵ but established *ius sanguinis* with its 1804 civil code.¹⁶ Meanwhile, in the USA *ius soli* was only available to free white men until after the Civil War, when the 1868 Fourteenth Amendment extended it to African Americans.¹⁷

Why did the new South American states opt for *ius soli*? Some authors argue that it was the result of an emphasis on “national territory rather than natural belonging or ethnicity.”¹⁸ Others cite the need to populate large territories, as reflected in the countries’ subsequent immigration traditions.¹⁹ Whilst such explanations help us understand why *ius soli* continues to apply after two centuries,²⁰ they miss the point as to why the South American states originally enshrined this principle in their earlier constitutions.

The Influence of the 1812 Cádiz Constitution

The Spanish 1812 constitution played a crucial role in the legal construction of the national and the foreigner, serving as a model, various aspects of which the new republics and Brazil followed almost verbatim. The Cádiz Constitution, as the 1812 text is known, was one of the first national constitutions to achieve global influence with its advanced articulation of the traits a modern state should possess.²¹ The particular circumstances in which it was drafted, with most Spanish territory occupied by

¹³ This general rule is only partially breached in Colombia, where *ius domicilii* functions as an additional condition, by which one of the parents must be domiciled in the country at the moment of birth.

¹⁴ De Vattel, *The Law of Nations*, Book 1, Chapter 19, §212 and 214.

¹⁵ France, Article 2, The Constitution of the 1791 National Assembly, 3 September 1791.

¹⁶ France, 1804 French Civil Code, Book I, Title I, Chapter I, Of the Enjoyment and Privation of Civil Rights, § 9.

¹⁷ The recognition of Asians and Native Americans as citizens took even longer; see Motomura, *Americans in Waiting*, pp. 72-73.

¹⁸ O. Vonk, *Nationality Law in the Western Hemisphere: A Study of Grounds for Acquisition and Loss of Citizenship in the Americas and the Caribbean* (Leiden: Martinus Nijhoff, 2014), p. 19.

¹⁹ *Ibid.*, p. 9; R. Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge: Harvard University Press, 1992), p. 33.

²⁰ For instance, in the case of Colombia, where *ius soli* has no longer been automatic since its 1886 Constitution, Escobar presents low immigration levels as a possible explanation for this unique regulation in South America. C. Escobar ‘Report on Citizenship Law: Colombia’, European University Institute, EUDO Citizenship, 2015, Florence, p. 16.

²¹ M. C. Mirow, *Latin American Constitutions. The Constitution of Cádiz and its Legacy in Spanish America* (Cambridge University Press, 2015).

Napoleonic troops, contributed to a liberal product whose prestige soon extended to Europe and the Americas.²² The constitution was in force in large parts, although not all, of the pre-independent American territories.²³ Importantly, the constitution was drafted by elected representatives from both the European part of Spain and the Americas, since 63 ‘Americans’ participated in the *Cortes* (representative body) legislative term between 1810 and 1813.²⁴ The text was thus the most prominent document readily available when the newly independent countries drafted their own constitutions.²⁵

The Cádiz text clearly set out that the Spanish nation comprised Spaniards from both hemispheres and was free, independent and sovereign. A clear political project lay behind this ground-breaking and pluralistic vision of the nation. Beyond equality between the residents of the two continents, the central idea was to reconfigure the whole system by transforming the colonial into a homogeneous society, “united by common political and economic interests” and therefore capable of “facing a collective national destiny.”²⁶

This inclusive understanding of the nation incorporating Spaniards from both hemispheres as equals – from the motherland and its colonies – raised crucial membership questions. To begin with, who would actually be considered a Spaniard? It must be remembered that this was a constitution for a large empire, the future of which was far from secure since the French occupation of the peninsula in 1808 spurred the hopes of several emancipatory movements. Creole elites despised centralism and the pre-eminence of *peninsulares*²⁷ in official positions and were eager to liberalise economic trade.²⁸ In this context, the American members of the Cádiz parliament advocated equality with those born in the peninsula. Any other prospect would have been unthinkable and rejected.²⁹ Those born in the two hemispheres – including *American Spaniards*, who were descendants of *peninsulares*, also called Creoles – had to have equal status.

The discussions rather revolved around the position of indigenous populations and those of African origin. This was not an ethical debate but instead was based on the political power of numbers. Each member of the *Cortes* was elected by 70,000 naturals³⁰ and the American representatives were all too aware of this.³¹ To maintain their pre-eminence in Congress, the *European Spanish* representatives pleaded against the inclusion of indigenous and *mestizo* communities in the electoral census,³² arguing that they were backwards and easily manipulated by Creole ruling classes.³³ This exclusion was rejected following opposition by the American group. However, when discussing the status of African descendants, the American block was split. Some Americans, such as the representative from Havana,

²² J. A. Escudero López (ed.), *Cortes y Constitución de Cádiz. 200 años* (Madrid: Espasa Calpe, 2011).

²³ R. Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (Oxford University Press, 2013), p. 17.

²⁴ M. T. Berrueto, *La Participación Americana en las Cortes de Cádiz. 1810-1814* (Madrid: Centro de Estudios Constitucionales, 1986), p. 3.

²⁵ M. C. Mirow, *Latin American Constitutions. The Constitution of Cádiz*.

²⁶ M. L. Rieu-Millan, *Los Diputados Americanos en las Cortes de Cádiz* (Madrid: Consejo Superior de Investigaciones Científicas, 1990), p. 173.

²⁷ The term *peninsulares* refers to Spaniards born in the European part of the Empire in the Iberian Peninsula.

²⁸ Berrueto, *La Participación Americana en las Cortes de Cádiz*, p. 12.

²⁹ This equality was already established by the Decree of 15 October 1810 on the equality of rights between Europeans and overseas Spaniards (**Decreto sobre igualdad de derechos entre españoles europeos y ultramarinos**).

³⁰ Naturals, or natural-born individuals, included women and children in Europe, although they were not entitled to vote. In Spanish America, it did not include *castas* (any individual of African descent on either the maternal or paternal side). See Mirow, *Latin American Constitutions*, pp. 91 and 97-99.

³¹ See Arts. 29 and 31, 1812 Cádiz Constitution.

³² Mestizos were individuals of mixed race, especially the offspring of a Spaniard and an American Indian.

³³ Rieu-Millan, *Los Diputados Americanos en las Cortes de Cádiz*, p. 173; also see pp. 111-117.

disapproved of their inclusion, reflecting the prejudices of white oligarchies. The Europeans also resisted their incorporation not only because of the aforementioned representation issues, but also because of the fear aroused by the Saint-Domingue black slave revolution and Haiti's subsequent 1804 declaration of independence.³⁴ The final compromise was an *ad hoc* status in which African descendants were considered part of the nation, but generally not citizens. This compromise – which was inclusive of the indigenous people and *mestizos* but excluded all those with any African ancestry³⁵ – meant the populations, and therefore the number of representatives, from the peninsula and the American provinces remained almost equivalent.³⁶ Finally, the constitution did not truly address the position of slaves, although those who obtained their freedom were to be included as part of the nation and therefore as Spaniards.³⁷ Political pragmatism meant that even those opposing slavery agreed to leave the issue untouched in order “to maintain union within the Spanish monarchy,”³⁸ in line with the interests of American deputies representing regions highly dependent on slave labour, particularly Cuba.

In conclusion, discussions regarding both indigenous peoples and African descendants related primarily to representational concerns rather than to ethical questions of inclusion or exclusion in the polity. An ongoing process of collective homogenisation was at stake, by which these groups were valued to the extent that they could serve the interests of both a new society and the reconfigured colonial system.³⁹ The preference for *ius soli* and the distinction between nationals and citizens is best understood by considering this background. Civil rights and obligations were granted to all male nationals, to the full body of the nation comprising Spaniards from both hemispheres. On the other hand, the status of citizen, understood as a holder of political rights, remained confined to a smaller category of nationals, thus allowing for a gradual transformation of society rather than a radical rupture with the established order.⁴⁰

Ius Soli in the Constitutions of the New Republics and Brazil

With independence, *ius soli* became enshrined in all the South American constitutions. It was granted to all freemen born in the territory, including both the indigenous and African descendant populations, but excluding slaves.⁴¹ Following what had occurred in Haiti,⁴² slavery was also soon abolished in most of the states as a result of the new constitutional order.⁴³ *Ius soli* was not simply a consequence

³⁴ *Ibid.*, pp. 146-168.

³⁵ At the time the term that was used to refer to individuals of mixed white and black ancestry was ‘mulattos.’

³⁶ Rieu-Millan, *Los Diputados Americanos en las Cortes de Cádiz*, p. 278.

³⁷ *Ibid.*, pp. 168-172.

³⁸ M. C. Mirow, ‘Visions of Cádiz: The Constitution of 1812 in Historical and Constitutional Thought,’ *Law, Politics and Society*, 53 (2010), pp. 59-88, on 75-76.

³⁹ Rieu-Millan, *Los Diputados Americanos en las Cortes de Cádiz*, p. 173.

⁴⁰ H. Sabato, ‘On Political Citizenship in Nineteenth-Century Latin America,’ *American Historical Review*, 106 (2001), pp. 1290-1315.

⁴¹ This was different in the case of the USA since neither the indigenous nor African descent populations obtained nationality. See E. Román, *Citizenship and Its Exclusions. A Classical, Constitutional, and Critical Race Critique* (New York University Press, 2010).

⁴² On this, see A. Ferrer, ‘Haiti, Free Soil, and Antislavery in the Revolutionary Atlantic,’ *American Historical Review*, 117 (2012), pp. 40-66.

⁴³ For Peru, see Article 11, 1823 Constitution; for Bolivia, Article 11(5), 1826 Constitution; for Argentina, Article 181, 1826 Constitution; for Uruguay, Article 131, 1830 Constitution; for Chile, Article 132, 1833 Constitution; and for Paraguay, Article 25, 1870 Constitution. In the case of Colombia this only took place with its third Constitution, that of Nueva Granada in 1832, Article 5(6). In Ecuador, it occurred in 1851 by means of a decree. In Venezuela, it was abolished with the adoption of a decree on 24 March 1854. In Brazil, slavery was only abolished with the adoption of the *Lei Áurea* on 13 May 1888.

of the equality advocated by the American representatives in Cádiz. Instead, it was the best means to create “citizens out of colonial subjects” and to forge “national communities from colonial societies marked by stark social divisions.”⁴⁴ Following the Cádiz model, sovereignty now resided in the nation.⁴⁵ The elites eagerly proclaimed the end of racial discrimination and the integration of Indians and blacks as nationals.⁴⁶ As San Martín, liberator of Peru, decreed in 1821, “in the future the aborigines shall not be called Indians or natives; they are children and *citizens* of Peru and they shall be known as Peruvians.”⁴⁷ *Ius soli* was thus a principle well suited to new, still politically fragile, states that were in the process of national construction and assertion over their territories and populations, although blacks and Indians were discriminated against in various ways, as will be seen below. Moreover, *ius soli* was not only an inclusive enterprise but also served the purpose of rejecting those born in the peninsula, who could be expected to oppose independence.⁴⁸ Thus, in chronological order, Venezuela, Colombia, Chile, Peru, Bolivia, Argentina, Uruguay, Ecuador, and Paraguay adopted *ius soli*.⁴⁹

Finally, and perhaps surprisingly, Brazil’s first Constitution of 1824 was also similar to those of the former Spanish territories. It too adopted *ius soli*⁵⁰ even though the 1822 Portuguese constitution, which had been in force in Brazil, only recognised *ius sanguinis*.⁵¹ The Cádiz constitution was well known in Brazil and had been adopted and published by decree by D. João VI in Rio de Janeiro – the then capital of the Kingdom – on 21 April 1821, although he decided to revoke it the following day.⁵²

⁴⁴ N. P. Appelbaum, A. S. Macpherson and K. A. Roseblatt, ‘Introduction. Racial Nations,’ in N. P. Appelbaum, A. S. Macpherson and K. Alejandra Roseblatt (eds.), *Race and Nation in Modern Latin America* (Chapel Hill: University of North Carolina Press, 2003) pp. 1-31, p. 4.

⁴⁵ 1819 Venezuelan Constitution, Preamble, Article 3 and Title III, Section I, Article 2; 1821 Colombian Constitution, Articles 1-2; 1822 Chilean Constitution, Articles 1-2; 1823 Peruvian Constitution, Articles 1-3; 1824 Brazilian Constitution, Articles 1 and 12; 1826 Bolivian Constitution, Articles 1-2 and 8; 1826 Argentinian Constitution, Articles 1-2 and 8; 1830 Uruguayan Constitution, Articles 1-4; 1830 Ecuadorian Constitution, Article 2. This is even clearer in the 1835 Ecuadorian Constitution, Articles 1-2 and the 1870 Paraguayan Constitution, Articles 1-2. Some consider the 1844 Paraguayan Political Administration law (Asunción, 16 March 1844) as the first country’s constitution. In this paper, we mostly refer to the 1870 Constitution since it is this second text which included all the provisions on access to citizenship, nationality and the rights of foreigners which had been absent in the 1844 document. In the Chilean case, provisional documents were adopted in 1812, 1814 and 1818. The first that can be considered a fully-fledged Constitution is the 1822 document, which also had the adjective ‘provisional’ deleted from its title.

⁴⁶ M. Loveman, *National Colors. Racial Classification and the State in Latin America* (Oxford University Press, 2014), pp. 79-80.

⁴⁷ Peru, Decree of August 27, 1821, cited in B. Anderson, *Imagined Communities. Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983), pp. 49-50.

⁴⁸ T. Schwarz, ‘Políticas de Inmigración en América Latina: El Extranjero Indeseable en las Normas Nacionales, de la Independencia hasta los Años de 1930,’ *Procesos Revista Ecuatoriana de Historia*, 36 (2012), pp. 39-72, p. 41. Certainly, reality during the wars of independence was much more complex since Indians, as well as slaves, sometimes “became allies of the Iberian forces simply because they were directly exploited by the criollos and they feared that independence would exacerbate their servitude.” J. Larrain, *Identity and Modernity in Latin America* (Cambridge: Polity 2000), p. 71.

⁴⁹ Venezuela, Title III, Articles 1-4, 1819 Constitution. This is even clearer in Article 10(1) of the 1830 Venezuelan Constitution, promulgated after the separation from Gran Colombia; Colombia, Art. 4, 1821 Constitution; Chile, Art. 4, 1822 Constitution; Peru, Art. 10, 1823 Constitution; Bolivia, Art. 11, 1826 Constitution; Argentina, Art. 4, 1826 Constitution. This last constitution was short-lived and access to citizenship was not regulated in the 1853 Constitution but instead by an 1857 citizenship law which provided for territorial birthright citizenship (Argentina, Citizenship Law 145, Buenos Aires, 7 October 1857); Uruguay, Art. 7, 1830 Constitution, Article 7; Ecuador, Art. 9, 1830 Constitution; Paraguay, Art. 35, 1870 Constitution.

⁵⁰ Brazil, Art. 6, 1824 Constitution.

⁵¹ Portugal, Art. 21, 1822 Constitution. This was possibly a result of the influence of the 1804 French Civil code.

⁵² On this, see V. de Paulo Barreto and V. Pimentel Pereira, ‘¡Viva la Pepa!: A história não contada da Constituição espanhola de 1812 em terras brasileiras’, *Revista do Instituto Histórico e Geográfico do Brasil*, 452 (2011), pp. 201-223.

The 1812 constitution had also served as one of the models for the Portuguese text of 1822.⁵³ Thus, *ius soli* was favoured, although it excluded slaves, who represented a quarter of Brazil's population at the time of independence.⁵⁴

A peculiarity of the Brazilian case was that it included as part of the nation those who resided in Brazil when it became independent but who had been born in Portugal or in Portuguese possessions.⁵⁵ This was a product of Brazil's independence settlement with Portugal, which was friendlier than those with Spain.⁵⁶ Some of the new republics also considered both those loyal to the Creoles' cause and resident in their territory nationals.⁵⁷ Unlike in Brazil, this was worded in a general manner and not addressed to Spaniards in particular, although it was obvious that they would benefit the most.

One final issue is worth mentioning. While *ius soli* prevailed, in a forward-looking legislative process *ius sanguinis* was not neglected. Access to nationality for those born outside the territory was included in the initial constitutions of all the ten new countries.⁵⁸ In most cases, nationality was passed on by either parent. This is a remarkable early form of gender neutrality at a time when many nationality laws, including the Cádiz constitution, only applied *ius sanguinis ex patre*.⁵⁹ It preceded a provision in the 1979 UN Convention on the Elimination of all Forms of Discrimination against Women by more than a century.⁶⁰

Nationals and Citizens in the New Order

Nationality and citizenship are sometimes used as synonyms. However, the word citizenship may have different meanings depending on whether it is formal – understood as membership of the state or nation – or substantive, interpreted as the possession of rights and duties.⁶¹ This conceptualisation of multiple forms of citizenship is apparent in the changing forms of electoral franchise with, for example, women being denied equal voting rights for decades.⁶²

The French Revolution, and its 1791 Constitution, introduced a crucial distinction between *citoyens français* and *citoyens actifs*. As Brubaker explains, '[t]hrough this distinction, the Constituent Assembly aimed to combine a universalist, egalitarian civil citizenship with a graded scheme of political citizenship.'⁶³ This later developed into the orthodox distinction between nationality and

⁵³ M. H. Saboia Bezerra, 'A Constituição de Cádiz de 1812,' *Revista de Informação Legislativa*, 198 (2013), pp. 89-112.

⁵⁴ J. Sacchetta, *Laços de Sangue. Privilégios e Intolerância à Imigração Portuguesa no Brasil (1822/1945)* (São Paulo: Edusp/Fapesp, 2011), p. 60.

⁵⁵ Brazil, Art. 6, 1824 Constitution.

⁵⁶ On this, see Sacchetta, *Laços de Sangue*, especially the Introduction and Chapter 1.

⁵⁷ Colombia, Article 4(2), 1821 Constitution; Argentina, Article 4, 1826 Constitution; Uruguay, Art. 8, 1830 Constitution, which also required such people to have a child born in the territory; Venezuela, Art. 11, 1830 Constitution.

⁵⁸ Colombia, Art. 4, 1821 Constitution; Chile, Art. 4(2), 1822 Constitution; Peru, Art. 10(2), 1823 Constitution; Brazil, Art. 6(2), 1824 Constitution; Bolivia, Art. 11(2), 1826 Constitution; Argentina, Art. 4, 1826 Constitution; Uruguay, Art. 8, 1830 Constitution; Ecuador, Art. 9, 1830 Constitution; Paraguay, Art. 35, 1870 Constitution. The only exception is Venezuela, which included this possibility in Article 10 of its 1830 Supreme norm rather than in the first one of 1819.

⁵⁹ This was the case in the first constitutions of all the countries except Colombia and Venezuela. For these two countries, the principle of *ius sanguinis* also deriving from the mother's line only came with their second constitutions in 1830. Argentina included this provision in its first 1857 Citizenship Law (Law 145, Buenos Aires, 7 October 1857).

⁶⁰ Article 9(2) of the 1979 UN Convention reads: 'States Parties shall grant women equal rights with men with respect to the nationality of their children.'

⁶¹ T. Hammar, *Democracy and the Nation State* (Avebury, Aldershot, 1990), p. 3.

⁶² W. Maas, 'Equality and the Free Movement of People: Citizenship and Internal Migration' in W. Maas (ed.), *Democratic Citizenship and the Free Movement of People* (Leiden: Martinus Nijhoff, 2013), pp. 9-30, p. 14.

⁶³ Brubaker, *Citizenship and Nationhood in France and Germany*, p. 87.

citizenship, the former indicating a legal bond between the state and the individual, and the latter adding political rights to that bond.⁶⁴ Thus, under the classical definition of the components of citizenship as membership of a political community, rights and benefits deriving from that membership and, finally, political participation in the development of the community,⁶⁵ the first two pertained to nationals, or *citoyens*, whereas the last one was only available to citizens or *citoyens actifs*. This division made its way into the Cádiz constitution. The question of who should enjoy political rights was fiercely battled over and later affected the new states in South America.

The Influence of the 1812 Cádiz Constitution

The Cádiz Constitution followed the then French tradition and distinguished between ‘Spaniards’ and ‘Spanish citizens.’ Spaniards were all those freemen born and settled in the *dominios de las Españas* (literally the dominions of the various ‘Spains,’ thus comprising the Americas and the Philippines), as well as their offspring, thereby also including *ius sanguinis ex patre* for the first generation living abroad. This encompassed indigenous communities, mestizos and Spaniards with an African ancestry, but excluded women and slaves.⁶⁶ Being a Spaniard – a national – carried the obligations to be loyal to the Constitution and the law, love the homeland, pay taxes and, most importantly, be conscripted.⁶⁷ As a counterpart, it also brought the enjoyment of civil rights.⁶⁸

However, only citizens had access to municipal employment and to the political rights of representation and voting.⁶⁹ Citizens were those Spaniards who resided in Spanish territory and were descendants (on both sides) from individuals from the Spanish dominions in either hemisphere.⁷⁰ In other words, while nationality was mainly obtained through *ius soli*, citizenship involved *ius sanguinis*. The first people immediately excluded by this definition were those of ‘African blood,’ even if African descent was found several generations earlier. In the minds of colonial officials, “the ‘stain’ of African origins (was) indelible.”⁷¹ These people were barred from exercising political rights, and were excluded from the calculation of the population size that formed the basis for proportional representation in a territory. The concept of African origin excluded all those who had any ‘mixed’ element in their ascending lines, whether they were *peninsulares*, Creoles or indigenous. Indeed, the representational base only included Spaniards originally from the Spanish territories in both lines of descent and foreigners who had become citizens.⁷² As previously argued, debates on membership, here understood as enjoying full political rights, were spurred by both ideological concerns and more immediate representational anxieties. European Spanish deputies feared that the addition of African descendants to the representational base would lead to American Creoles becoming masters of the

⁶⁴ Vonk, *Nationality Law in the Western Hemisphere*, p. 25.

⁶⁵ R. Bauböck, ‘Recombinant Citizenship’ in M. Kohli and A. Woodward (eds.), *Inclusions and Exclusions in European Societies* (London: Routledge, 2001), pp. 38-58.

⁶⁶ The term freemen could lead to discussion as to whether it was a way to refer to humans. Scholars analysing Article 5, the parliamentary debates and the general structure of the 1812 Constitution, have denied this. Therefore, women were neither citizens nor nationals. See I. Castells Oliván and E. Fernández García, ‘Las Mujeres y el Primer Constitucionalismo Español (1810-1823),’ *Historia Constitucional*, 9 (2008), 163-180.

⁶⁷ Spain, Arts. 6-9, 339 and 361, 1812 Cádiz Constitution.

⁶⁸ See, for example, Arts. 247, 280, 287 regarding access to justice, 306 on security of property and 371 on freedom of expression, 1812 Cádiz Constitution.

⁶⁹ See, among others, Arts. 23, 27, 29, 35, 45, 313, 317 and 330, 1812 Cádiz Constitution.

⁷⁰ Art. 18, 1812 Cádiz Constitution.

⁷¹ Loveman, *National Colors*, p. 62.

⁷² Art. 29, 1812 Cádiz Constitution.

destiny of the monarchy, as the Americas were slightly more populous than the European part of Spain.⁷³

The distinction between civil rights, which were available to all freeborn male Spaniards regardless of their race or social origin, and political rights, which were only enjoyed by those who were “recognized as being intellectually capable of participating in the *res publica*,”⁷⁴ made the enumeration of the circumstances under which the latter could be lost or suspended even more relevant. Citizenship was lost if one naturalised in another country or accepted employment from another government.⁷⁵ Citizenship rights could be suspended if an individual was a bankrupted debtor, a domestic servant, had an unknown employment status or when there was a judicial interdiction due to moral or physical incapacity. A literacy requirement was supposed to be introduced in 1830 but it never was.⁷⁶ The minimum age to exercise citizenship was set at 21 for voting and 25 for candidacy.⁷⁷ Women were always disqualified from being considered citizens.

Thus, in contrast to nationality, citizenship was a much more limited privilege, from which several groups were excluded on the grounds of origin, gender, social background or wealth. It was also discriminatory on grounds of race. Freeman, who would mostly have been former black slaves, could become Spaniards if they had obtained their freedom within the territory. Thus, any free African descendant was immediately considered a Spaniard on birth in the territory and was capable of enjoying the same civil rights and carrying out the same duties as the rest of the nation. These people could also become citizens if Parliament granted them a citizenship charter under certain conditions, namely that they had performed services for the homeland, were distinguished by their talent, application and conduct, were born from legitimate wedlock, were married, resided in the territory and performed a profession, trade or useful industry with their own capital.⁷⁸ In brief, to become a citizen, the *African Spaniard* needed to be a paragon of virtue. The ideal citizen was a prosperous independent active worker, was literate, free from ‘African blood’ and male. This representation also made its way into the Americas.

Nationals and Citizens in the Constitutions of the New Republics and Brazil

The same distinction between passive citizens – usually called nationals – and full citizens – labelled with terms such as *sufragante*, *elector* or *ciudadano activo* – was enshrined in all of the first South American constitutions, along with the various exclusions limiting access to full citizenship.⁷⁹ The same was true regarding the duties and civil rights coupled with nationality, the political rights of citizens and the suspension and loss of citizenship. In chronological order, this was the case in Venezuela, Colombia, Chile, Peru, Brazil, Bolivia, Argentina, Uruguay, Ecuador and Paraguay.⁸⁰

⁷³ Rieu-Millan, *Los Diputados Americanos*, p. 278.

⁷⁴ J. Varela Suanzes-Carpegna, ‘Propiedad, Ciudadanía y Sufragio en el Constitucionalismo Español (1810-1845),’ *Historia Constitucional*, 6 (2005), pp. 105-123, p. 106.

⁷⁵ Art. 24, 1812 Cádiz Constitution. It could also be lost by judicial sentence and for residing outside Spanish territory without a government licence for five years.

⁷⁶ Arts. 24 and 25, 1812 Cádiz Constitution.

⁷⁷ See Arts. 21, 45, 75, 91, 251, 317, 330, 1812 Cádiz Constitution.

⁷⁸ Art. 22, 1812 Cádiz Constitution.

⁷⁹ Some countries did not make such a distinction and labelled both as citizens. However, they included several conditions that needed to be satisfied in order to access political rights and therefore full citizenship. These countries were Argentina, Brazil, Paraguay and Uruguay. In the case of Uruguay, foreigners can never become nationals but only legal citizens. See A. Margheritis, ‘Report on Citizenship Law: Uruguay’, European University Institute, EUDO Citizenship, Florence, 2015.

⁸⁰ Venezuela, Title III, Arts. 1-9, Title I Arts. 13 and 16, Title IV, Art. 2, Title VI, Sections 2 and 3, 1819 Constitution (Venezuela differentiated between active and passive citizens); Colombia, Arts. 4-5, 15-17, 21-22, 156, 178, 1821

The image of the ideal citizen closely followed what had been established in Cádiz. The qualities of the citizen were described in “racialized and gendered terms.”⁸¹ The holder of political rights had to be male, literate, married and individually autonomous, either through property, trade, capital or an independent profession. Only these men were “deemed to have ‘civic virtue’; only they were capable of self-government; and only they accrued equal rights.”⁸² This clearly excluded large segments of the population, most immediately women, unmarried people and those younger than the age of majority (usually 21 or 25). Criminals, the insane and debtors were also excluded. Finally, domestic servants and farm workers were not included either. Thus, whereas the nation was inclusively defined through *ius soli*, the political sphere remained reserved for a minority. Discrimination certainly did not end with independence.⁸³ Whilst both indigenous communities and African descent populations were incorporated into the nation, their rights were often violated. When it came to political voice, Creole elites continued to hold sway.⁸⁴ This understanding of the nation, with the white elite of European origin holding a dominant role, greatly influenced immigration and naturalisation policies.

The Naturalisation of Foreigners

With naturalisation, the rite of passage from foreigner to national citizen is, in principle, complete. The new citizen should in theory enjoy the same full political rights and equal treatment as those who acquired citizenship by birth. Today, naturalisation is mainly understood as a process by which the individual accesses further rights. Historically, military service or obligatory conscription worked as powerful deterrents against foreigners acquiring citizenship. Indeed, Napoleon himself preferred *ius soli* to *ius sanguinis*, as was finally adopted in the 1804 French civil code, since “he was more concerned with the military obligations that could be imposed on citizens than with the civil rights they would enjoy.”⁸⁵

Naturalisation in Spain has been regulated since at least the sixteenth century. Foreigners were forbidden from accessing and trading with the Americas, known as *Las Indias*.⁸⁶ They only had two legal routes to joining the fruitful business taking place between the two continents: obtain a royal licence or naturalise.⁸⁷ A third possible route was a sort of regularisation procedure for migrants who had illegally settled in the Americas. This was known as *composición* and entailed paying a sum of money. It allowed the individual to naturalise and rightfully remain in *Las Indias*. The Crown’s need of funds played a crucial role in the regulation. An early regularisation mechanism was the 1596 Royal

(Contd.) _____

Constitution; Chile, Arts. 6-9, 14-16, 37, 199, 219, 243, 1822 Constitution; Peru, Arts. 10, 15-25, 30, 193-194, 1823 Constitution; Brazil, Arts. 6-8, 90-96, 136, 173-179, 1824 Constitution; Bolivia, Arts. 11-19, 20, 24, 79, 98, 109, 112, 116, 132, 149, 155, 157, 1826 Constitution; Argentina, Arts. 4-6, 13, 15, 24, 69, 152, 166, 1826 Constitution; Uruguay, Arts. 6-12, 116, 122, 140, 146, 1830 Constitution; Ecuador, Arts. 9-13, 24, 58-59, 64-66, 1830 Constitution; Paraguay, Arts. 35-41, 1870 Constitution.

⁸¹ Appelbaum, Macpherson and Roseblatt, ‘Introduction. Racial Nations,’ p. 4.

⁸² *Ibid.*, p. 4.

⁸³ Loveman, *National Colors*, pp. 80-81.

⁸⁴ For example, as late as 1870, of one million inhabitants in Bolivia, only 20,000 could vote. Mirow, *Latin American Constitutions*, p. 170; See also Larrain, *Identity and Modernity in Latin America*, pp. 70-74.

⁸⁵ Brubaker, *Citizenship and Nationhood*, p. 88.

⁸⁶ This was forbidden since the beginning of the colonial expansion after the first voyages of Cristobal Colón, and continued in the following centuries through several royal decrees. See, for example, Felipe II Decree, 6 June 1556, establishing the death penalty for those who traded with foreigners. Cited in R. H. Zorrilla, *Cambio social y población en el pensamiento de Mayo (1810-1830)* (Buenos Aires: Belgrano, 1978), pp. 26-27. For an in-depth analysis, see T. Herzog, *Defining Nations. Immigrants and Citizens in Early Modern Spain and Spanish America* (New Haven: Yale University Press, 2003).

⁸⁷ Others preferred to trade through intermediaries or resorted to piracy. See A. Domínguez Ortiz, ‘La Concesión de “Naturalezas para Comerciar en Indias” durante el Siglo XVII,’ *Revista de Indias*, 19 (1959), 227-239.

Decree, which was applied several times in the following decades.⁸⁸ A few years later, in 1608, the requirements for naturalisation were set out in a royal decree, although other informal arrangements had already been in place.⁸⁹ The number of naturalisations granted was always extremely low and reflected the zeal with which the Spanish Crown protected its monopoly on trading with the Americas.⁹⁰ The Cádiz Constitution echoed these concerns.

The Influence of the 1812 Cádiz Constitution

There were four different categories of people in the Spanish Constitution of 1812: nationals, citizens, African descendants and foreigners, who could become Spaniards either by obtaining a naturalisation certificate from the Cortes or by residing in any town for ten years.⁹¹ Once naturalised, the new nationals could become citizens by obtaining a special citizenship certificate from Parliament. Thereafter, they enjoyed political rights and access to municipal jobs. To qualify for citizenship, marriage to a Spanish woman was required together with one of the following qualifications: having brought a significant invention or industry to the territory of the *Españas*; having acquired real estate for which direct taxes had been paid; having established commerce with the new national's country of provenance; or having performed noteworthy services in the defence of the nation.⁹² These four routes – industry, property, commerce and important services – deeply influenced South America.

There were two remarkable paradoxes. First, foreigners who had naturalised could access citizenship more easily than *African Spaniards*. Second, naturalised foreigners were nevertheless disqualified from occupying the highest offices in the three branches of government: executive, legislative and judicial. Naturalised citizens could not serve as members of Parliament, Secretaries of Office (ministers), judges or magistrates, or be part of the State Council.⁹³ Therefore, the status of naturalised foreigner lay somewhere between the Spaniard and the Spanish citizen, but it was always ahead of the *African Spaniard*. Indeed, unlike the latter, they not only had an easier route towards full political rights but were also included in the population counts used to determine political representation in the two hemispheres.⁹⁴

Naturalisation of Foreigners in the Constitutions of the New Republics and Brazil

As previously mentioned, members of the South American elite resented several aspects of their relationship with the colonial authorities: centralism, the pre-eminence of *peninsulares* in official positions and the impossibility of liberalising trade. A fourth resentment can be added. Many decades before the Argentinian Alberdi wrote his famous sentence “to govern is to populate,”⁹⁵ other thinkers who were deeply influenced by English liberalism had already clarified the need to open borders for

⁸⁸ R. Konetzke, ‘Legislación sobre Inmigración de Extranjeros en América durante la Época Colonial,’ *Revista Internacional de Sociología*, 3 (1945), 269-299.

⁸⁹ The requirements can be summarised as twenty years’ residence, ten in some cases, in Spain, being married and possessing a particular amount of wealth in property (Domínguez Ortiz, ‘La Concesión de Naturalezas’, p. 228).

⁹⁰ See *ibid* for the number of naturalisations in different periods. For example, during the last quarter of the sixteenth century, only twenty-five foreigners were naturalised.

⁹¹ Art. 5, 1812 Cádiz Constitution.

⁹² Arts. 19-20, 1812 Cádiz Constitution. According to Art. 21, those born in Spain to foreign parents, and therefore already Spaniards by virtue of the *ius soli* provision of Art. 5, could become citizens at the age of 21 if they performed a useful profession, trade or industry and had never left the territory without government licence.

⁹³ Arts. 96, 193, 223, 231, 251, 1812 Cádiz Constitution.

⁹⁴ Arts. 28-29, 1812 Cádiz Constitution.

⁹⁵ Juan Bautista Alberdi was an Argentinian political theorist and diplomat (1810-1884): J. B. Alberdi, *Bases y Puntos de Partida para la Organización Política de la República Argentina, derivados de la Ley que preside al Desarrollo de la Civilización en América del Sud* (Buenos Aires: Imprenta Argentina, 1852).

the migration and settlement of Europeans to populate large extensions of territory. The Spanish position made this impossible unless independence were achieved. William Burke was possibly the first to clearly verbalise this. This obscure character, whose existence is questioned by some observers,⁹⁶ wrote his works in England in 1807-1808 before moving to Caracas in 1810. Later, in 1810 and 1811, several articles were published under his name in the *Gazeta de Caracas*. They were subsequently compiled in two volumes with the title *Derechos de la América del Sur y México*. These writings made a plea in favour of the arrival in South America of foreigners with capital, entrepreneurship, industry and useful knowledge in the sciences or arts. Attracting such migrants required the South American countries to provide them with as many advantages as possible, including immediate equal rights and naturalisation after residence of just three years.⁹⁷

Whether Burke really existed, or whether he was in reality a pseudonym for Francisco de Miranda,⁹⁸ is irrelevant for our purposes. What matters here is the fervent plea in favour of open borders, which would lead to new towns becoming “the habitation of civilized men,” to increases in production, which would greatly alleviate “the wants and distresses of other countries” and, most importantly from the English point of view, to “new and numerous markets for the sale of European manufactures.”⁹⁹ Burke set out a clear chain of events, which was mirrored in the minds of other early thinkers and independence leaders: migration by Europeans would lead to advancing civilization, which would lead to increased manufacturing and production through intensive farming and exploitation of vast territories, which would lead to economic growth through free trade with Europe. At the time, population was considered the “beginning of industry and the foundation of States’ happiness.”¹⁰⁰ By today’s standards, the continent was scarcely populated,¹⁰¹ with an estimated nine million residing in the whole of Spanish South America.¹⁰² Many independence leaders – including not only Miranda, but also Bolívar, Andrés Bello and Bernardino Rivadavia, the first Argentinian President – spent time in London. There, these leaders befriended Jeremy Bentham and James Mill, fervent advocates of utilitarian, laissez faire and free trade liberal doctrines. These connections decisively influenced the thinking of early legislators, which was in stark opposition to the previous Spanish Crown’s monopoly on trading routes.¹⁰³

⁹⁶ Some authors are of the opinion that William Burke was a pseudonym used by Francisco de Miranda and his friend the British economist and utilitarian philosopher James Mill. See M. Rodríguez, “William Burke” and Francisco de Miranda: *The Word and the Deed in Spanish America’s Emancipation* (Lanham: University Press of America, 1994). Racine, however, briefly refers to him as a journalist: K. Racine, *Francisco de Miranda: A Transatlantic Life in the Age of Revolution (Latin American Silhouettes)* (Lanham: Rowman & Littlefield Publishers, 2002), pp. 183-184.

⁹⁷ W. Burke, *Derechos de la América del Sur y de México* (Caracas: Academia Nacional de la Historia, 1959 ed.), pp. 144-147.

⁹⁸ Francisco de Miranda has been considered one of the fathers of South American Independence. He resided in London for several years in the late seventeenth and early eighteenth centuries before returning to what is now Venezuela to unsuccessfully attempt its independence. See Racine, *Francisco de Miranda*.

⁹⁹ Burke, *South American Independence*, p. 15. See also W. Burke, *Additional Reasons for our Immediately Emancipating Spanish America: Deduced from the New and Extraordinary Circumstances, of the Present Crisis and Containing Valuable Information, Respecting the Late Important Events both at Buenos Ayres and in the Caraccas: as well as with Respect to the Present Disposition and Views of the Spanish Americans: Being Intended as a Supplement to “South American Independence”* (London: J. Ridgway, 1808).

¹⁰⁰ Preamble, Argentina, Decree on donation of land to foreigners settling in the country, 4 September 1812.

¹⁰¹ For example, in Argentina there were less than half a million residents by 1810: see Moya, *Cousins and Strangers*, p. 45.

¹⁰² Burke, *South American Independence*, p. 47. Of these, Burke – or Miranda – mentioned that only two million were Spaniards, Creoles or persons of mixed race; of the two million, around half were Spaniards (*peninsulares*), and of these around a fifth were ecclesiastics, monks and nuns.

¹⁰³ See K. Racine “‘This England and This Now’: British Cultural and Intellectual Influence in the Spanish American Independence Era,” *Hispanic American Historical Review*, 90 (2010), 423-454. However, for some cautionary remarks on the influence of Bentham on South America’s independence leaders, see J. Harris, ‘Bernardino Rivadavia and Benthamite “Discipleship,”’ *Latin American Research Review*, 33 (1998), 129-149.

Free movement and open border provisions rapidly made their way into the early laws and constitutions adopted by the South American governments. The 1811 Venezuelan Constitution introduced a novel clause, which all the countries in the region replicated sooner or later: “All foreigners of any nation will be admitted into the State.”¹⁰⁴ The same article provided for equal treatment regarding personal property and security. Naturalisation was possible after seven years of residence.¹⁰⁵ Also in 1811, the Act of Federation of the United Provinces of Nueva Granada¹⁰⁶ provided that asylum would be granted to all foreigners seeking peaceful domicile, as long as they respected the laws, brought healthy intentions and some useful industry and would for that purpose obtain a naturalisation certificate. Argentina followed suit by adopting a decree in 1812 offering its immediate protection to members of any nation and their families willing to fix their domicile in its territory.¹⁰⁷ Finally, in 1813 Simón Bolívar invited all foreigners of any nation and profession to settle in Nueva Granada.¹⁰⁸ These models exerted a profound influence on South American constitutionalism in the nineteenth century. In country after country, open border provisions and clauses announcing admittance for all foreigners with freedom, security and equal rights for themselves and their properties were enshrined among their supreme norms.¹⁰⁹

Open borders were coupled with equal treatment and naturalisation after short residence periods. These enticements targeted European migrants. It should be remembered that when Alberdi stated that to govern was to populate he saw such settlement as a means of civilization. As such, it was only to be performed by those he considered to be civilised; that is, by Europeans. Immigration by others deemed less virtuous – such as Ottomans, Indians, Chinese or Africans – was to be avoided.¹¹⁰ Even with this caveat in mind, the free movement of people represented a radical split from the previous colonial system and its restrictions.

¹⁰⁴ Art. 169, 1811 Venezuelan Constitution, Valencia 21 December 1811. This was the first constitution in the region and was repealed on 21 July 1812 when Francisco de Miranda capitulated against the Spanish army. This clause had already been introduced in 1811 by the 1st of July Law, which set out the rights of individuals (*Derechos del Pueblo*). Art. 25 declared that all foreigners of any nation would be welcomed in the province of Caracas.

¹⁰⁵ Venezuela, Art. 222, 1811 Constitution. The same wording was used in Art. 320 of the 1812 Caracas Constitution. A similar clause had been introduced earlier in the 1811 Merida’s Province Constitution, which in its third article established that all foreigners, provided they were Catholic, would be admitted to live and become domiciled in the province. See Art. 3, Constitution of the Merida Province, 31 July 1811.

¹⁰⁶ Art. 38, Acta de Federación de las Provincias Unidas de la Nueva Granada, 27 November 1811. Also see Art. 9, Title XIII, of the Cartagena de Indias Constitution, 14 June 1812. Similar provisions were included in the Constitution of Barcelona Colombiana, 12 January 1812.

¹⁰⁷ Argentina, Decree on donation of land to foreigners settling in the country, 4 September 1812. Even earlier before independence, the provisional junta adopted another Decree in 1810 allowing English, Portuguese and other foreigners from countries not at war with Argentina to freely settle in its territory: cited in R. H. Zorrilla, *Cambio Social y Población en el Pensamiento de Mayo (1810-1830)* (Buenos Aires: Belgrano, 1978), p. 44.

¹⁰⁸ G. Parra Aranguren, *La Nacionalidad Venezolana de los Inmigrados en el Siglo XIX* (Caracas: Editorial Sucre, 1969), p. 32. Decree 16 August 1813.

¹⁰⁹ Colombia, Art. 183, 1821 Constitution; Venezuela, Art. 218, 1830 Constitution; Uruguay, Art. 147, 1830 Constitution; Ecuador, Art. 107, 1835 Constitution; Bolivia, Art. 162, 1839 Constitution, and an earlier law of 24 May 1826 promulgated by Mariscal Sucre; Argentina, Art. 25, 1853 Constitution; Paraguay, Art. 33, 1870 Constitution; Brazil, Art. 10, 72, 1891 Constitution and a 1926 Amendment to it. In Chile, the preamble to the 1822 Constitution discussed the need to attract foreigners by offering them all the freedoms they enjoy in other regions. In Peru, the right of entry was only explicitly recognized in Art. 29 of its 1920 Constitution, although it was implicit in previous ones. Earlier, a Decree of 14 March 1835 by General Salaverry had introduced a right of entry and automatic citizenship for any foreigner settling in Peru and registering in its civil registry. This was opposed by conservatives, leading to an annulment of the provision. For Peru, see M. E. del Rio, *La Inmigración y su Desarrollo en el Perú* (Lima: Sanmarti y Cia, 1929).

¹¹⁰ It is true that Alberdi cautioned against the naivety of seeing all European migrants as worthy. In his view, whereas everything civilised was European, not everything European was civilised and there were more savages in European territories than in all of South America. Alberdi, *Bases y Puntos de Partida para la Organización Política de la República Argentina*.

Early on, South America started a race to attract permanent European settlers by means of numerous laws and policies. These included dispatching immigration propaganda agents to Europe¹¹¹ and the legally ratified provision of land, tax exemptions, free accommodation, assistance with finding jobs and internal transport to final destinations.¹¹² The laws and decrees were either aimed at Europeans generally or to particular countries in the old continent.¹¹³ However, numerically speaking, these programmes were a failure as the numbers of arrivals never met expectations, which was a major headache for the national parliaments debating how to increase population sizes. Whilst *ius soli* ensured that the children of migrants would automatically become nationals, easier access to naturalisation was considered a way to promote the entrance of more industrious white settlers.¹¹⁴ Sometimes this was automatic upon arrival¹¹⁵ or after only one year.¹¹⁶ In some countries, foreign residents were spontaneously declared nationals if they had resided in the territory since before independence or the adoption of the constitution¹¹⁷ and had registered as citizens.¹¹⁸ However, it was only in the late nineteenth century that foreigners, mainly southern Europeans, arrived in large numbers, and mostly to Argentina, Brazil and Uruguay.

The requirements for naturalisation remained similar throughout the nineteenth century and followed the model adopted in the 1812 Cádiz Constitution. The South American countries were looking for virtuous foreigners. In the official narrative, virtue was essentially equated with independence of means. Generally, only four paths, corresponding to those in the 1812 Cádiz Constitution, could be followed to become a national: property, capital invested in trade or commerce, performance of an industry, science or art or outstanding services in favour of the state.¹¹⁹ Literacy was also necessary. Marriage was always understood as an element which, when not a *sine qua non* condition,¹²⁰ reduced the period of residence required for access to nationality.¹²¹ Marriages contracted with nationals were further rewarded with shorter residence requirements.¹²² As Brown states, foreigners “who married Creole women became linked to the national family through affection and

¹¹¹ See Moya, *Cousins and Strangers*, p. 50.

¹¹² See, for example, the Argentinian law of 2 August 1821 offering transport to European families who settled in the country. See also the decree of 22 September 1822 offering transport and land to European families going to Patagonia beyond the Indian frontier. See the later Argentinian law 817 of 19 October 1876, known as the ‘Ley Avellaneda’; Chile, Colonisation Law of 18 November 1845 offering land and other benefits to foreign settlers; Colombia, Decree of 11 June 1823 (Bogota, 7 June 1823) giving the executive the power to promote immigration by Europeans and North Americans with provisions offering land for this purpose; Ecuador Law No. 47, Quito, 17 July 1861 promoting the arrival of US nationals and Europeans; Peru, Decree 25 January 1845 granting land and tax exemptions for 20 years; Uruguay, Law 2096 to encourage migration, 10 June 1890; Venezuela, Law 24 of May 1845 providing land to immigrants.

¹¹³ Brazil, Immigration Law of 14 January 1823 addressed to the Portuguese; Venezuela Decree of 13 June 1831 addressed to inhabitants of the Canary Islands in Spain. On the latter, see Parra Aranguren, *La Nacionalidad Venezolana*, pp. 37-42.

¹¹⁴ Argentina, with its 1853 Constitution, its 1869 Citizenship Law (Law 346 Buenos Aires 1 October 1869) still in force and its 1876 Immigration Law, represents the clearest example of this vision. See F. J. Devoto, *Historia de la Inmigración en la Argentina* (Buenos Aires: Editorial Sudamericana, 2003).

¹¹⁵ Peru, Art. 19, 1823 Constitution; Colombia, Law 14, 11 April 1843; Brazil, Decree 808, 23 June 1855.

¹¹⁶ Venezuela, Art. 6, 1819 Constitution.

¹¹⁷ Colombia, Art. 4, 1821 Constitution; Ecuador, Art. 9(4), 1830 Constitution; Uruguay, Art. 8, 1830 Constitution.

¹¹⁸ Argentina, Art. 4, 1826 Constitution.

¹¹⁹ Chile, Arts. 4 and 5, 1822 Constitution; Brazil, Art. 5, Naturalisation Law, 23 October 1832; Ecuador, Art. 6, 1835 Constitution. Sometimes these requirements were relaxed when the country was unsuccessful in attracting enough migrants. For example, in 1843 Colombia adopted a decree by which the executive could naturalise foreigners even if they did not have property or capital and with no residence period required. See Colombia, Law 14, 11 April 1843 and Decree, 5 June 1843.

¹²⁰ Chile, Art. 6, 1823 Chilean Constitution; Venezuela, Art. 6, 1819 Constitution.

¹²¹ Peru, Art. 20, 1823 Constitution.

¹²² Chile, Art. 6, 1828 Constitution; Uruguay, Art. 8, 1830 Constitution; Ecuador, Art. 6(3), 1835 Constitution; Paraguay, Art. 36, 1870 Constitution.

love and through their children who were *naturales* of the *patria*.¹²³ This gendered narrative presented the perfect citizen as protecting “the sexual virtue of their women dependents.”¹²⁴ The importance attached to marriage also reflected the Catholic Church’s exclusive power in this domain, since civil marriages only became a reality – and a strongly contested one – in the 1880s in countries like Chile, Argentina and Uruguay.¹²⁵

Thus, the South American elite expected the same qualities of an ideal citizen as of an ideal immigrant. From the very beginning, the vision was that of a married white European male with independent means. However, unlike in the USA, where only free white persons could naturalise until 1870,¹²⁶ race did not play such a central role in South American naturalisation laws, at least on paper. For example, even if Asians were not the main targets of immigration policies, they were explicitly invited to naturalise in Colombia in 1847 and in Venezuela in 1855.¹²⁷

In stark contrast, and in line with the Cádiz model, newly naturalised individuals were not considered worthy to exercise the highest mandates in the three branches of government. In other words, full legal equality was not extended to new nationals. This was the result of a dichotomy between open door policies and concerns over the loyalty of new subjects during a period when there was a looming threat of invasion by European powers.¹²⁸ The members of the ruling elites also wanted to avoid direct competition for representative positions.¹²⁹ Indeed, it was not uncommon during legislative debates for them to refer to the new nationals as ‘naturalised foreigners,’ a contradictory term in itself.¹³⁰ Furthermore, prohibitions on migration during colonial times meant that local populations, and also the Catholic Church, were not accustomed to foreigners in general, let alone to those who were Protestants or Jews, who had previously kept a low profile or converted to Catholicism. Besides mercenaries who had fought in the independence wars, these early newcomers were mainly merchants. They often had their own established networks and were thus in a better position to take advantage of the transatlantic trade. This created resentment among local artisans, who suffered from the abundance of cheap imported foreign goods now available after the Spanish trade monopoly ended.¹³¹

¹²³ M. Brown, *Adventuring through Spanish Colonies. Simón Bolívar, Foreign Mercenaries and the Birth of New Nations* (Liverpool University Press, 2006), pp. 195-196.

¹²⁴ N. P. Appelbaum, A. S. Macpherson and K. A. Roseblatt, ‘Introduction. Racial Nations’, pp. 16-17.

¹²⁵ M. C. Mirow, *Latin American Law. A History of Private Law and Institutions in Spanish America* (Austin: University of Texas Press, 2004), pp. 147-148.

¹²⁶ Motomura, *Americans in Waiting*, pp. 73-75.

¹²⁷ Colombia, Law of 2 June 1847 and Decree of 10 September 1847; Venezuela, Executive Decree of 2 July 1855.

¹²⁸ R. Zahler, ‘Heretics, Cadavers, and Capitalists. European Foreigners in Venezuela during the 1820s’ in M. Brown and G. Paquette (eds.), *Connections after Colonialism. Europe and Latin America in the 1820s* (Tuscaloosa: University of Alabama Press, 2013) pp. 191-206.

¹²⁹ Herzog has shown that the distinction between natives and foreigners who naturalised was already prevalent in Spanish America in the eighteenth century. This was a construction used by merchant associations to maintain their monopoly over various commercial interests and to exclude individuals who had naturalised from such trade. Herzog, *Defining Nations*, pp. 94-118.

¹³⁰ See the debates in Venezuela in 1843 on who could hold a position as Senator in F. Vetancourt Aristeguieta, *Nacionalidad, Naturalización y Ciudadanía en Hispano-América* (Caracas: El Cojo, 1957), p. 64. See also the debates in Peru denying naturalised citizens access to employment in J. Basadre, *La Iniciación de la República. Tomo Primero* (Lima: Fondo Editorial de la Universidad Nacional Mayor de San Marcos, 2002). In Brazil, Art. 136 of the 1824 Constitution provided that foreigners, even if naturalised, could not be ministers. Still today, this continues to appear in legal texts. Interestingly, in its Spanish wording the term foreigner comes before naturalised (‘extranjero naturalizado’) thus reinforcing the continuing foreignness of the individual even after naturalisation. For example, see the Colombian Law 6 of 1991 on the medical anaesthesiology specialisation.

¹³¹ Zahler, ‘Heretics, Cadavers, and Capitalists’, pp. 195-198; D. Rock, ‘Porteño Liberals and Imperialist Emissaries in the Rio de la Plata. Rivadavia and the British’ in Brown and Paquette (eds.), *Connections after Colonialism*, pp. 207-222.

Traditionally, the highest positions in the executive, legislative and judicial branches were reserved for citizens by birth.¹³² In other cases, newly naturalised individuals had to wait a number of years before they could perform any of these functions.¹³³ This still applies today in all 10 countries: with different degrees of restriction, they all limit access to the executive, legislature and judiciary, which may seem peculiar from a comparative perspective.

The Rights of Foreigners

According to Brubaker, the French Revolution produced the concept of ‘foreigner’ as a consequence of having invented the national citizen.¹³⁴ The status of foreigners had, however, been the subject of much earlier regulation. For example, Vattel stated in the mid-eighteenth century that they enjoyed “only the advantages which the law or custom gives them.”¹³⁵ In some respects, foreigners were clearly underprivileged, notably when it came to the *droit d’aubaine* and the *droit de détraction*, both of which were widespread practices in Europe until the nineteenth century.¹³⁶

The legal status of foreigners improved in Europe during the nineteenth century. They had, both in theory and often in practice, the right to equal enjoyment of certain civil rights. For example, in 1874 the first session of the Institute of International Law in Geneva acknowledged that international law required the recognition of foreigners’ civil rights and the legal capacity to realise those rights. This was a duty of international justice, rather than being derived from bilateral treaties, and thus was independent of their existence.¹³⁷ Foreigners were granted certain civil rights, such as protection of the freedom to contract, to own or transfer property, to access tribunals, to engage in trade and to acquire land.¹³⁸ Despite the theoretical extension of civil rights, even in the period before the First World War, when passport controls became pervasive,¹³⁹ individual foreign citizens could be deported for various reasons, including being “poor, sick, or perhaps because of a criminal offence, but also for direct political reasons, ‘in the public or national interest’.”¹⁴⁰

¹³² This applied to becoming President in Venezuela (Title VII, Section I, Art. 2, 1819 Constitution), Colombia (Art. 106, 1821 Constitution), Peru (Art. 75, 1823 Constitution), Argentina (Art. 69, 1826 Constitution), Chile (Art. 82, 1822 Constitution), Bolivia (Art. 79, 1826 Constitution), Ecuador (Art. 33, 1830 Constitution), Uruguay (Art. 74, 1830 Constitution) and Paraguay (Art. 35, 1870 Constitution). Exclusions for other positions such as Ministers or Members of Parliament were also present in Brazil and in Paraguay’s first constitutions and in many of the other countries’ succeeding ones.

¹³³ For example, 12 years in Colombia to become a Senator (Art. 96, 1821 Constitution); 9 years in Argentina to become a Senator, Governor or Magistrate of the Supreme Court (Arts. 24, 112 and 131, 1826 Constitution); 10 years in Uruguay to become a Minister and 14 years to become a Senator (Arts. 30 and 87, 1830 Constitution); 6 years in Bolivia to become a Senator (Art. 46, 1826 Constitution).

¹³⁴ Brubaker, *Citizenship and Nationhood*, pp. 67-72.

¹³⁵ De Vattel, *The Law of Nations*, Book 1, Chapter 19, §213.

¹³⁶ The *droit d’aubaine* meant appropriation by the sovereign of a deceased foreigner’s property coupled with an inability to inherit; the *droit de détraction*, replaced this and referred to a tax imposed on the right of a foreigner to inherit property. L. Lütz, *Essai Historique sur le Droit d’Aubaine en France* (Geneva: Imprimerie Ramboz et Schuchardt, 1866). This was, for example, abolished in France by the **Loi du 14 juillet 1819 relative à l’abolition du droit d’aubaine et de détraction**.

¹³⁷ Institut de Droit International, Session de Genève – 1874 Utilité d’un accord commun des règles uniformes de droit international privé.

¹³⁸ See, for example, for Spain, Art. 25, 1869 Constitution; for France, Art. 11, 1804 Civil Code granting civil rights to foreigners on the basis of reciprocal agreements with other states; for Germany, see Brubaker, *Citizenship and Nationhood*, pp. 67-72.

¹³⁹ J. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press, 2000).

¹⁴⁰ Hammar, *Democracy and the Nation State*, p. 42.

The Influence of the 1812 Cádiz Constitution

On the particular question of the rights of foreigners, the Cádiz Constitution remained by and large silent. The provisions on the right to property and individual liberty included all residents, be they nationals or not.¹⁴¹ Most rights, however, were exclusively reserved to Spaniards.¹⁴² Except in the context of routes toward nationality and, eventually, citizenship, there were few articles in which the word ‘foreigner’ appeared. As previously explained, even foreigners who had naturalised were excluded from holding certain elective positions. Foreigners were also forbidden from travelling to and trading with *Las Indias*. In the case of the peninsula, where several foreign merchants had settled – most notably in Seville and Cádiz – there was always the possibility of naturalising after a period of ten years, or earlier if the individual obtained a naturalisation certificate. The particular legal status of those who remained foreigners was the subject of a number of royal decrees, and was also part of bilateral arrangements with other European powers.¹⁴³

The Rights of Foreigners in the Constitutions of the New Republics and Brazil

Foreigners were encouraged to migrate to the new territories with open border provisions, short residence requirements for naturalisation and the other benefits mentioned above. Their rights were also specifically integrated into many of the early constitutions, which often conferred: equal civil rights; the exercise of any industry, trade or profession; possession, purchase and sale of property; and, in some cases, freedom of religion.¹⁴⁴ The rights of particular nationalities were also the subject of bilateral navigation and commercial agreements between the new countries and various European powers.¹⁴⁵ Similar provisions on access to justice, personal property, freedom to trade or freedom of religion were incorporated into these treaties.

Foreigners who did not naturalise also enjoyed two rights not available to nationals, namely exemption from military service and diplomatic protection by their respective countries. While the first prerogative created resentment among national populations, the second had more far-reaching and significant consequences. During the nineteenth century, both the USA and European powers frequently resorted to what has been labelled “arrogant diplomatic protection” in their relations with Latin America.¹⁴⁶ This meant the practice of employing diplomatic means – or even using force – rather than normal procedural mechanisms before local tribunals when the foreigner was a US or European national residing in the region. These practices often interfered in the internal affairs of the newly established sovereign republics and Brazil.¹⁴⁷

According to the contemporary Argentinian scholar Carlos Calvo, these sorts of diplomatic claims were rejected when they were put forward between European powers since otherwise nationals would

¹⁴¹ Art. 172, 1812 Cádiz Constitution.

¹⁴² See, for example, Arts. 247, 280, 287, 373, 1812 Cádiz Constitution.

¹⁴³ J. M. González Beltrán, ‘Legislación sobre Extranjeros a finales del Siglo XVIII,’ *Revista de Historia Moderna y Contemporánea*, 8-9 (1997), 103-118.

¹⁴⁴ Argentina, Art. 20, 1853 Constitution; Brazil, Art. 72, 1891 Constitution; Bolivia, Art. 162, 1839 Constitution; Chile, Art. 12, 1833 Constitution; Colombia, Art. 183, 1821 Constitution; Ecuador, Art. 107, 1835 Constitution; Paraguay, Art. 33, 1870 Constitution; Peru, Art. 178, 1839 Constitution; Venezuela, Art. 218, 1830 Constitution.

¹⁴⁵ See, for example, those between Colombia and the USA, 3 October 1824; Argentina and Great Britain, 2 February 1825; Brazil and Great Britain, 17 August 1827; Gran Colombia and the Netherlands, 10 May 1829; Colombia (Nueva Granada) and France, 28 October 1844; Peru and Belgium, 16 May 1850; Argentina and Prussia, 19 September 1857; and Venezuela and Italy, 20 September 1862.

¹⁴⁶ R. Gómez Arnau, *México y la Protección de sus Nacionales en Estados Unidos* (México D.F: Universidad Nacional Autónoma de México, 1990), p. 35.

¹⁴⁷ See examples of this in M. Offut, *The Protection of Citizens Abroad by the Armed Forces of the United States* (Baltimore: The John Hopkins Press, 1928).

have had fewer rights than foreigners originating from dominant states.¹⁴⁸ Thus, the 1868 *Calvo Doctrine* proposed two standards. On the one hand, it set out the need to exhaust local remedies and the impossibility of diplomatic claims unless justice had been denied at the national level. On the other hand, and as a corollary to the first principle, it established the equal treatment of both nationals and foreigners with regard to civil rights, including the protection of property and access to tribunals. These principles influenced several constitutions in the region and the adoption of various covenants at regional congresses.¹⁴⁹

Naturalisation rates were always extremely low. For example, by 1914 only 1.4 percent of all foreigners had naturalised in Argentina compared to 52 percent in the USA. Moya argues that this resulted from a lack of incentives to naturalise.¹⁵⁰ Foreigners enjoyed most citizenship rights except the vote – and the value of this was dubious considering the largely oligarchical political systems that prevailed. In turn, they were exempted from military service and continued to enjoy diplomatic protection. The situation was rather different in the USA. For a start, the military draft included foreigners. Moreover, acquiring the right to vote could offer benefits that were more tangible in particular cities. Many municipal jobs, for example, required citizenship.¹⁵¹ Faced with similar low naturalisation rates, Brazil and Venezuela opted to naturalise their foreigners without their consent. These ‘great naturalisations’ led to serious condemnation and protests by the governments of the European countries of origin.¹⁵²

A final point must be re-emphasised. The desire to attract Europeans to settle in territories that were presented as being as empty as deserts¹⁵³ was part of a demographic, economic, political and racial project. Whereas *ius soli* in principle considered those born in the territory to be members of the nation, some have seen this as an ideological device to flatten the cultural indigenous reality and to “negate the Indian as a space of difference” in, for example, Peru and Bolivia.¹⁵⁴ Certainly, at the same time that indigenous peoples were being incorporated into the new national body, processes of internal ‘othering’ portrayed them as enemies and savages, such as in the case of the Mapuches in Chile.¹⁵⁵ In Rouquié’s words, “the elimination of the guarantees granted to Indians by the Spanish crown and the formally egalitarian spirit of liberalism that dominated the new republics opened the way for the breakup of Indian communities.”¹⁵⁶ Through the expansion of the frontiers, native groups were either exterminated or forcefully assimilated in Argentina, Chile and Uruguay. In Brazil and Colombia, the

¹⁴⁸ C. Calvo, *Derecho Internacional Teórico y Práctico de Europa y América* (Paris: D’Amijot: [Caminos de Hierro], 1868), p. 393.

¹⁴⁹ Convención relativa a los derechos de extranjería (Segunda Conferencia Internacional Americana, 1901-1902), Mexico City, 29 January 1902; Convención – Condiciones de los extranjeros (Sexta Conferencia Internacional Americana, La Habana – 1928), Habana, 20 February 1928. The Convention was signed by all the South American states and Costa Rica, Cuba, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, the Dominican Republic and the USA.

¹⁵⁰ Moya, *Cousins and Strangers*, p. 489.

¹⁵¹ *Ibid.*, p. 489.

¹⁵² Brazil, Decree 58A, 14 December 1889 and Art. 69, 1891 Constitution; see Saccheta, *Laços de Sangue*, pp. 125-131. Venezuela, Resolution 1 December 1865; see Parra Aranguren, *La Nacionalidad Venezolana*, pp. 88 and for similar proposals in Argentina, see L. A. Bertoni, ‘La naturalización de los extranjeros, 1887-1893: ¿Derechos políticos o nacionalidad?’, *Desarrollo Económico*, 32 (1992), pp. 57-77.

¹⁵³ For example, Alberdi considered South America to be ‘deserted’: Alberdi, *Bases y Puntos de Partida*, p. 90.

¹⁵⁴ J. L. Martínez, V. Gallardo and N. Martínez B, ‘Construyendo identidades desde el poder: los indios en los discursos republicanos de inicios del siglo XIX,’ in G. Boccara (ed.), *Colonización, resistencia y mestizaje en las Américas, siglos XVI-XX* (Quito: ifea/Ediciones Abya Yala, 2002), pp. 27-46.

¹⁵⁵ V. Romero, ‘Legislación y Políticas en Nueva Granada y Chile para atraer la Inmigración Extranjera a mediados del Siglo XIX,’ *Amérique Latine Histoire et Mémoire. Les Cahiers ALHIM*, online version 24 (2012), published online 8 February 2013.

¹⁵⁶ Rouquié, *The Military and the State*, p. 21.

prevailing understanding was that the only way to *civilise* the country was through a gradual replacement of natives with Europeans.¹⁵⁷ As Rouquié eloquently puts it, “the mechanisms for the exclusion of those who are dominated are ambivalent and involve both together and separately the methods of obligatory cooptation and marginalization.”¹⁵⁸ Open borders always represented a civilising utilitarian project, not a humanistic one.

Discussion

In a comparative perspective, the South American countries have both more restrictive and more open features than the USA, Europe and other regions. In one sense, they appear to be more open as they all have, like the USA, territorial birthright citizenship and short residence periods to access nationality. Moreover, recent legislative practice on migration has included more generous provisions with regard to extending equal rights to foreigners, including voting rights, enunciations of non-criminalisation, the right to migrate and open borders.¹⁵⁹ Nonetheless, naturalised citizens face limitations on serving in the highest state offices. Furthermore, the naturalisation requirements, beyond the length of residence, are often difficult to fulfil in practice and the procedures are cumbersome, so naturalisation rates remain strikingly low.¹⁶⁰

All these characteristics can be traced back to the particular circumstances of independence from Spain and Portugal. Indeed, the 1812 Cádiz Constitution was used as a model and it introduced many elements still present today, such as *ius soli* and limitations on naturalised nationals. By contrast, the context of post-colonial societies resulted in open borders, short-term residence periods before naturalisation and equal treatment of foreigners. Previous migration prohibitions applicable to non-Spaniards led to open borders and the promise of equal treatment for residents and foreigners alike. To clarify, this was not an invitation to the entire world to emigrate to South America. Through constitutional law, the ruling Creole elites clearly delineated the image of the perfect citizen, matching that of the perfect migrant. He was portrayed as a white, male, married, autonomous and industrious European, or a European descendant. These gendered and racialised views were preserved for several decades. Opening borders did not derive from a humanist or cosmopolitan approach, but rather from a demographic racial project with the clear aim of populating large territories with white European settlers and, often in the process, eradicating indigenous communities. This was a state and nation-building exercise in a period of transition from colonial societies into republics, where collective identities were far from settled and where the relationship with foreigners was vital in determining the boundaries of the polity.¹⁶¹ Two questions are pertinent here. First, how is it possible that so many new countries followed the same pattern? Second, and perhaps more importantly, how can we explain the persistence of both liberal and conservative elements through almost 200 years of constitutional practice?

¹⁵⁷ Larrain, *Identity and Modernity*; R. J. Cottrol, *The Long, Lingering Shadow: Slavery, Race, and Law in the American Hemisphere* (Athens, Georgia: University of Georgia Press, 2013), especially Ch. 4; T. Katerí Hernández, *Racial Subordination in Latin America The Role of the State, Customary Law, and the New Civil Rights Response* (Cambridge University Press, 2012), especially Ch. 2; R. Gaune and M. Lara (eds.), *Historias de racismo y discriminación en Chile* (Santiago de Chile: Uqbar, Santiago de Chile, 2009).

¹⁵⁸ Rouquié, *The Military and the State*, p. 29.

¹⁵⁹ D. Acosta and L. F. Freier, ‘Turning the immigration policy paradox up-side down? Populist liberalism and discursive gaps in South America’, *International Migration Review*, 49 (2015), 659-697.

¹⁶⁰ D. Acosta, *Regional Report on Citizenship. The South American and Mexican Cases*, EUI, EUDO Citizenship, Florence, 2016.

¹⁶¹ M. Brown, ‘Not Forging Nations but Foraging for Them: Uncertain Collective Identities in Gran Colombia’, *Nations and Nationalism*, 12 (2006), 223-240.

Diffusion in South America's Construction of the Foreigner and the National

Many of the legislative choices regarding citizenship and migration that were adopted in South America originated from the influence of the Cádiz Constitution. Three reasons can be proposed for this. First, the Cádiz Constitution had been in place over large parts of the territories that later became independent countries.¹⁶² Second, numerous American deputies had participated in its drafting. Third, this Constitution carried enormous prestige in liberal circles and was influential not only in the Americas but also in Europe.¹⁶³ This explains the adoption of *ius soli*, the distinction between nationals and citizens, the limited possible routes to naturalisation and the restrictions on political rights of representation for those who naturalised. These four elements perfectly suited the needs of the ruling elites in the new republics, and in Brazil. These legislative choices cannot be considered legal transplants since in many respects they were a continuation of the previous framework and practices. In other words, concepts and institutions that had already been in place were replicated and adapted to the postcolonial reality in which the new countries faced similar challenges. In any case, it is important to stress that other constitutional models (mainly from the USA, England and France) were also important in early South American constitutionalism.¹⁶⁴ However, it was the Cádiz example that most affected our present subject of study.

By contrast, the closed borders, long residence periods before naturalisation and limited rights for foreigners worked against the hope of attracting European settlers to populate large territories. They were also self-defeating when it came to open trade in global markets, something that had not been possible under the Spanish Crown's monopoly. The race to attract migrants resulted in clauses granting equal treatment and short-term residence periods before naturalisation. Any other strategy would have been counterproductive. Here we can refer to legal transplants as playing a crucial role in South America through a process of emulation.¹⁶⁵ The legislators were, of course, aware of how other countries in the region were dealing with the matter. At least from the 1830s onwards, national representatives often met in regional congresses and were also in contact through links forged in, for instance, London, Paris or New York, and through transnational networks of newspapers. Knowledge of foreign rule is of central importance for successful transplantation.¹⁶⁶ Open borders is the best example of this. The phrase 'any foreigner of any nation will be welcomed to the territory,' first used in the 1811 Venezuelan Constitution, was then copied verbatim by various other countries.

More interestingly, the countries that first adopted more restrictive conditions were forced to liberalise their immigration laws in a process of strategic adjustment¹⁶⁷ so as not to be left behind in this race for migrants. For example, Peru and Ecuador – which in their first constitutions did not grant extensive rights to foreigners and stipulated long residence periods before naturalisation¹⁶⁸ – changed their laws to make them more appealing. Consequently, diffusion and legal transplants became normal at the regional level. The 1821 Colombian Constitution played an important role. This constitution covered the territory of what was then known as Gran Colombia, which also included present-day Ecuador, Panama and Venezuela. Moreover, Simón Bolívar and other important independence heroes

¹⁶² This was, for example, the case in Ecuador and Peru and during certain periods in Chile, Colombia and Venezuela, although it was not in Argentina, for instance.

¹⁶³ Escudero López (ed.), *Cortes y Constitución de Cádiz*, especially the chapters in Volume III.

¹⁶⁴ J. Simon, *The Ideology of Creole Revolution: Imperialism and Independence in American and Latin American Political Thought* (Cambridge University Press, 2017), pp. 38-39.

¹⁶⁵ A. Watson, *Legal Transplants. An Approach to Comparative Law* (Athens, Georgia: University of Georgia Press, 1993, second ed.).

¹⁶⁶ A. Watson, 'Comparative Law and Legal Change', *Cambridge Law Journal*, 37 (1978), 313-336, p. 315.

¹⁶⁷ D. S. Fitzgerald and D. Cook-Martin, *Culling the Masses. The Democratic Origins of Racist Immigration Policy in the Americas* (Cambridge Massachusetts: Harvard University Press, 2014), p. 26.

¹⁶⁸ These residence periods were as long as five years. See, for example, Ecuador, Art. 6, 1835 Constitution; Peru, Art. 10, 1823 Constitution.

participated in the Congress of Cúcuta, at which the final text was drafted. Earlier failed constitutions, such as the 1811 Venezuelan one, also had a clear influence. This aligns with the findings of other authors who have pointed out that “[c]ountries with similar levels of power often model their policies after each other reciprocally, in a process of iterative emulation.”¹⁶⁹

Path Dependency in South America’s Legal Construction of the Foreigner and the National

Persistent central elements in the relationship between the national and the foreigner through 200 years of constitutional practice merit our attention. Once again, the work of Alan Watson is illuminating here. Watson argues that not only most legal change takes place through transplantation but, most decisively, longevity of the law is the general rule and that “to a large extent law possesses a life and vitality of its own” despite “changes in societal structure.”¹⁷⁰ In his view, several countervailing forces determine whether legal change takes place or not. There are forces working in favour of change (“pressure forces”), and ones resisting any alteration. However, since order and stability is essentially society’s stake in the law,¹⁷¹ and since “the ruling elite have a generalised interest in no change,” the pressure forces must be much stronger than the opposition ones for transformation to take place.¹⁷² In the political science literature, this has been analysed within the framework of path dependency theories designed to explain how history matters.¹⁷³ This is a framework that we can apply to some of the elements in the case at hand.

In Gargarella’s opinion, the two foundational ideas behind Latin America’s constitutionalism were “individual autonomy” and “collective self-government.”¹⁷⁴ The two notions lie at the core of the division between nationals, citizens and foreigners and of the rights that pertain to each category, including political ones. Gargarella points out that three different approaches have been prevalent since independence: conservative, republican and liberal.¹⁷⁵ In his view, the dominant force has been an alliance between the liberal and the conservative projects, as reflected in two centuries of constitutional practice.¹⁷⁶ The conservative paradigm “implied a commitment to two theoretical positions of enormous importance in America, namely political elitism and moral perfectionism.”¹⁷⁷ The liberal approach had a “double commitment to the equilibrium of powers and the state’s moral neutrality,” which was based on the value of “individual autonomy.”¹⁷⁸ This opposed the “moral perfectionism” of the conservatives, notably their “vocation to organize society around the demands of a particular religion,” and also contrasted with them in proposing a “list of individual, inviolable, and unconditional rights” since conservatives “made rights dependent on the needs of religion.”¹⁷⁹ According to Gargarella, both sides – being elitist – were mostly concerned with, and agreed upon, preventing the expropriation of property and the rise of more radical governments based on an extended franchise. Consequently, the two tendencies were combined in a liberal-conservative

¹⁶⁹ Fitzgerald and Cook-Martin, *Culling the Masses*, p. 23.

¹⁷⁰ Watson, ‘Comparative Law and Legal Change,’ pp. 314-315.

¹⁷¹ A. Watson, *The Nature of Law* (Edinburgh University Press, 1977).

¹⁷² Watson, ‘Comparative Law and Legal Change,’ p. 331.

¹⁷³ See, among others, P. Pierson, *Politics in Time. History, Institutions, and Social Analysis* (Princeton University Press, 2004); J. Mahoney, and K. Thelen (eds.), *Explaining Institutional Change. Ambiguity, Agency and Power* (Cambridge University Press, 2010).

¹⁷⁴ Gargarella, *Latin American Constitutionalism*, p. 5.

¹⁷⁵ *Ibid.*, p. 6.

¹⁷⁶ *Ibid.*, Chapter 2.

¹⁷⁷ *Ibid.*, p. 11.

¹⁷⁸ *Ibid.*, p. 14.

¹⁷⁹ *Ibid.*, p. 15.

alliance. This led to the “formula of limited political liberties and ample civic (economic) liberties.” This architecture was diffused, gained stability and remained “basically the same” for 150 years.¹⁸⁰

This explains why the two projects fundamentally agreed on the construction of the national, the citizen and the foreigner. For example, the liberals and the conservatives shared views on limiting the extension of citizenship and its corresponding political rights through legal devices such as property, literacy or economic requirements.¹⁸¹ They also agreed on the idea of limiting access to political positions for newly naturalised individuals. At the same time, economic development was then understood to be a consequence of migration, larger populations and entrance into world trade markets. Both the liberals and the conservatives agreed on this and shared the image of the ideal migrant as a white European male with property, capital or knowledge.

As a result, significant digressions from this approach were by and large absent during the nineteenth century. One exception was the adoption of the 1886 Colombian Constitution. This document, which was considered to be very conservative, was approved in a highly specific context of economic struggles and internal and external conflicts. This ended a very liberal period, epitomised by the 1863 Constitution.¹⁸² The conservative character of the 1886 text is evident from its limitations on access to citizenship, its reduction of the rights of naturalised citizens and of foreigners’ rights in general. Most importantly, the 1886 Colombian Constitution ended the absolute *ius soli* tradition in the country, which makes Colombia an outlier in the region.

Importantly, however, although central features such as *ius soli* have continued until today, the figure of the foreigner was later deconstructed during the twentieth century. From the 1880s, South American laws began to associate the foreigner with criminality, political subversiveness, idleness, labour market competition and immorality. Through this process, the foreigner was portrayed as a threat to how the members of the elite imagined the nation, either because of individual traits – e.g. political ideas, age and health – or because of collective national, racial or ethnic constructions – e.g. the exclusion of Asians, blacks, Roma or Jews. The twentieth century is not discussed here, but those interested can refer to Chapter 4 of the forthcoming book on which this working paper is based.¹⁸³

Conclusion

During the nineteenth century, the construction of the national, the citizen and the foreigner was a complex social and legal process. The 1812 Cádiz Constitution profoundly influenced this construction, as did the early constitutional texts in Colombia and Venezuela, which emphasised open borders, equal treatment and short residence periods before naturalising. The immigration project was intended to address not only concerns regarding the size and distribution of the population, but also to contribute to the whitening of local populations and the segregation of indigenous groups. In the nineteenth century, the elite used migration and citizenship policies as tools to define nationhood. As López Alves states, “weak states in formation struggled to link institutions of government with heterogeneous populations that were lumped together under the label of a ‘one and unifying nation’ in the context of strong international pressures.”¹⁸⁴ The commonality of interests between the liberal and conservative elites was thus crucial in providing continuity and stability to the legal regulation of the

¹⁸⁰ *Ibid.*, p. 198.

¹⁸¹ *Ibid.*, pp. 47-49.

¹⁸² *Ibid.*, p. 40.

¹⁸³ See also D. S. Fitzgerald and D. Cook-Martin, *Culling the Masses. The Democratic Origins of Racist Immigration Policy in the Americas* (Cambridge Massachusetts: Harvard University Press, 2014).

¹⁸⁴ F. López-Alves, ‘Visions of the National: Natural Endowments, Futures and the Evils of Men’ in Centeno and Ferraro (eds.), *State and Nation Making in Latin America and Spain. Republics of the Possible* (Cambridge University Press, 2013), pp. 282-306, on 288.

national, the citizen and the foreigner. This was necessary to preserve the colonial social order that privileged a miniscule minority of the population. The elite's vision was one of a gradual transformation of society, rather than a radical rupture with the previous colonial order, with the exclusion of the indigenous and black populations, mainly from political rights. This created new boundaries in the slow process of creating national communities.

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