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Empire of Justice

INTRODUCTION

Corruption today is a crucial concern for Latin America, and many nations have relatively clear definitions of the crime on the books. Yet corruption in the Spanish empire from roughly 1492 to the early 1800s differed. Theologians, legal experts, and laypeople debated the meaning and boundaries of corruption, and the limits of gift giving and bribery were malleable to some degree. Jurists weighed various judicial sources to assess the crime, as the crown was not the only authority producing rules. Instead, Spaniards appreciated the Roman and the canon (Church) law and their manifold interpreters. Their doctrines had to conform to natural law, which was essentially reason, as past generations understood that notion. In addition, the maxims revealed in the Bible coexisted with the royal mandates, such as the *Law of the Indies* (law for Spanish America), and the local customs, including the indigenous traditions.

Latin American historians have always paid attention to canon and royal law and local customs, though English-speaking Latin Americanists have preferred focusing on social practices. Scholars, largely outside the United States, have also analyzed the actions of social networks composed of patrons and clients. Their contributions have greatly advanced our knowledge about justice in New Spain (colonial Mexico), although they have often overlooked the working of the law. Meanwhile, legal scholars have skillfully traced changing judicial concepts but often neglected their application in trials "on the ground."[1] This chapter focuses on the shifting

[1] According to Herzog, *Upholding Justice*, 9, 19, justice "was a communal rather than a state-run enterprise … and the dominating rules in Quito were social and theological, not legal … and these rules proceeded from a source other than the king," and she affirms that "law embodied a system of thought that was expressed in royal and local decrees." Much then depends on the

meaning of the law between 1650 and 1755 by drawing on the scholarship, published discourse, and archival sources. Legal concepts from a variety of sources mattered deeply for *novohispanos* (those from New Spain), especially when assessing corruption. Judges of various standing

definition of legality, because the Roman and canon laws (*leges*) constituted a crucial part of justice and were not strictly speaking theology. In *Frontiers of Possession: Spain and Portugal in Europe and the Americas* (Cambridge, MA: Harvard University Press, 2015), 262, Herzog modifies this view in that in "all these dynamics, law mattered to an enormous degree." According to Yannakakis, *The Art of Being*, 118, "decisions of individual local magistrates rather than judicial precedent and previous case decisions determined the enactment of justice," and "justices ruled based on specific enactment or codified clause." Owensby, *Empire of Law*, 45, maintains that there were three main aspects of justice, the "*derecho* … the legal order ensuring 'good government,' the published *ley*, and the customs"; while Bianca Premo, "Custom Today: Temporality, Customary Law, and Indigenous Enlightenment," *HAHR* 94, no. 3 (2014): 355–380, traces innovations among the customs. Legal scholarship on the European *ius commune* is vast and often high quality; just to cite a few examples, O. F. Robinson, T. D. Fergus, and W. M. Gordon, *European Legal History: Sources and Institutions* (Oxford: Oxford University Press, 2000); Bartolomé Clavero Salvador, *Historia del derecho: derecho común* (Salamanca: Ediciones Universidad de Salamanca, 1994); Stephan Meder, *Rechtsgeschichte: Eine Einführung*, 5th amended ed. (Cologne: Böhlau, 2014); Hans Schlosser, *Neuere europäische Rechtsgeschichte: Privat- und Strafrecht vom Mittelalter bis zur Moderne*, 2nd ed. (Munich: C. H. Beck, 2014); Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500–1650)* (Leiden, Boston: Martinus Nijhoff Publishers, 2013). Scholars also analyze legal ideas as they applied to indigenous people, see, e.g., Thomas Duve, *Sonderrecht in der Frühen Neuzeit: Studien zum ius singulare und den privilegia miserabilium personarum, senum und indorum in Alter und Neuer Welt* (Frankfurt: Vittorio Klostermann, 2008); Orazio Condorelli, "Diego de Covarrubias e i diritti degli Indiani," *Rivista Internazionale di Diritto Comune* 25 (2014): 207–267; Kenneth Pennington, "Bartolomé de las Casas," in *Great Christian Jurists in Spanish History*, eds. Rafael Domingo and Javier Martínez-Torrón (Cambridge: Cambridge University Press, 2018), 98–115. On government, see, e.g., Carlos Garriga, "Sobre el gobierno de la justicia en Indias (siglos xvi–xii)," *Revista de Historia del Derecho* 34 (2006): 67–160. Canon law is, for example, studied by Osvaldo Rodolfo Moutin, *Legislar en la América hispánica en la temprana edad moderna. Procesos y características de la producción de los Decretos del Tercer Concilio Provincial Mexicano (1585)* (Frankfurt: Max Planck Institute for European Legal History, 2016); McKinley, *Fractional Freedoms*; Jorge Eugenio Traslosheros Hernández, *La reforma de la iglesia del antiguo Michoacán. La gestión episcopal de fray Marcos Ramírez de Prado (1640–1666)* (Morelia: Universidad Michoacana de San Nicolás de Hidalgo, 1995); Jorge Eugenio Traslosheros Hernández and Ana de Zaballa Beascoechea, eds., *Los indios ante los foros de justicia religiosa en la Hispanoamérica virreinal* (Mexico City: UNAM, 2010). How these combined laws and customs actually played out in *novohispano* courts is less known; some examples are Jaime del Arenal Fenochio, "La Justicia civil ordinaria en la ciudad de México durante el primer tercio del siglo xviii," in *Memoria del X Congreso del Instituto Internacional de Historia del Derecho Indiano* (Mexico City: Escuela Libre de Derecho, UNAM, 1995); Victor Gayol, *Las reglas del juego*: vol. 1 of *Laberintos de justicia. Procuradores, escribanos y oficiales de la Real Audiencia de México (1750–1812)* (Zamora: El Colegio de Michoacán, 2007), 37–39; Manuel Torres Aguilar, *Corruption in the Administration of Justice in Colonial Mexico: A Special Case* (Madrid: Dykinson, 2015).

ruled on conflicts, while the crown sent *visitas* (judicial investigations) to enforce rules, uncover malfeasance, and gather information about the realms. At the same time, social networks glued together the colonial society, supported or defied the crown, and shaped the *visitas*. In addition, social bodies with their own jurisdictions, such the Jesuit order, determined the lives of *novohispanos*. These social bodies often had great autonomy, lived by their own norms, and mediated royal rule. This chapter sets the stage for this book by sketching the importance of the six key sources of the law (there were more) which defined the view of corruption. Moreover, the chapter outlines the influence of social networks and social bodies on judges and *visitas*, while casting an eye on the changing nature of the empire as a whole.

1.1 THE SIX PILLARS OF JUSTICE

Justice in the Spanish empire drew on a multitude of norms among them the Roman law. The classical lawyers, for example, had defined justice as "the continuous and unimpaired will of giving to each their due." Spaniards generally agreed with this dictum, yet the multitude of early modern norms made it difficult to ascertain what each person was actually due. Judges therefore ideally balanced the various legal and theological sources against one another, heard all involved parties in the conflicts, and applied the accepted ways of litigation. They also decided on a case-by-case basis and therefore every sentence differed from another. By adhering to this process, the judges resolved conflicts in a just manner. In the late seventeenth century, however, the judicial plurality began to dissolve. The Roman and canon laws lost influence, while the importance of the royal law and its interpreters rose. Later, some jurists even demanded to cast out the entire plurality and write an entirely new and systematic code.[2]

[2] According to *Institutes* 1.1.1, "*Iustitia est constans et perpetua voluntas ius suum cuique tribuens*." Thomas Aquinas, *Justice*, vol. 37 of *Summa Theologiae*, ed. Thomas Gilby (Cambridge: Blackfriars, 1975), IIa–IIae, Q. 58, art. 11, obj. 3, understood justice as "dispensing to each their own (*reddere unicuique quod suum est*)"; see also Q. 61, art. 1, obj. 2. See also Juan de Azcargorta, *Manual de Confesores ad Mentem Scoti*, reprint from probably 1718, 273; Herzog, *Upholding Justice*, 9; António Manuel Hespanha, "Porque é que existe e em que é que consiste um direito colonial brasileiro," in *Brasil-Portugal: Sociedades, culturas e formas de governar no mundo português (séculos XVI–XVIII)*, ed. Eduardo França Paiva (São Paulo: Annablume. 2006), 29; Hespanha, "Paradigmes de légitimation, aires de gouvernement, traitement administratif et agents de l'administration," in *Les figures de l'administrateur. Institutions, réseaux, pouvoirs en*

Yet before these changes began, Roman law permeated legal thinking. Emperor Justinian (527–565) had cast an important foundation when he ordered his jurists to compile the vast judicial knowledge of the time. Between 533 and 534, the jurists produced four books, including the *Institutes* that were designed as a teaching tool and contained the phrase "giving to each their due." The jurists also devised the *Digest*, which assembled the interpretations of the important lawyers, while the *Code* comprised the emperors' orders. Finally, the *Novels* added Justinian's most recent mandates. Publishing the four books was an enormous achievement. Yet while Rome straddled Asia and Africa at that time, its rule in Europe had diminished. Many schools that taught the requisite skills to understand the four books had shut their doors. As a result, only some isolated pockets on the Italian peninsula adopted Justinian's collection.[3]

A revival blossomed in eleventh-century Bologna (Italy), deeply influencing Iberia and most of Europe. The scholars in that city were among the first to gather Justinian's scattered texts and revere them as sacred. They richly interspersed notes or glosses at the margins of the laws to explain the concepts, and they became known as the *glossators* for their style. In the later medieval period, the school of the *commentators* penned separate and longer treatises and superseded the glossators. Both schools set themselves apart from lay judges by studying in Latin at colleges and universities. They used the dialectical method of scholasticism to flesh out the principles and harmonize the apparent contradictions in Justinian's collection. This revival rubbed off on Spain's juridical culture. For example, the words for consultation of a Council, a decree, an edict to the public, or a legal opinion descended directly from the Roman model. Spanish literati also extolled Roman law and its interpreters as bulwarks of virtue and liberty. For the poet Francisco de Quevedo (1580–1645), the Roman norms "did not allow passion, anger, or bribery, and with sure method and due and universal process" they punished sins.[4]

Espagne, en France et au Portugal 16e–19e siècle, eds. Robert Descimon, Jean-Frédéric Schaub, and Bernard Vincent (Paris: EHESS, 1997), 20.

[3] James Arthur Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 57–59; Petri Murillo Velarde, *Cursus Iuris Canonici […]* (Matritum [Madrid]: Ex typographia Emmanuelis Fernández, 1743), preámbulo, paras. 10–12; Pennington, "Bartolomé de las Casas," 107–108; Meder, *Rechtsgeschichte*, 109–111.

[4] Francisco de Villegas Quevedo, *Fortuna con seso*, in *Obras de D. Francisco de Quevedo Villegas, Caballero del Habito de Santiago, Secretario de S. M. y Señor de la Villa de la Torre de Juan Abad* (Madrid: Joachín Ibarra, 1772), 2: 525–531, quote on 527. In addition, compare *consulta, decreto, edicto*, and *respuesta* to a Roman *Senatus*

Canon (Church) law joined Iberian judicial culture as the second pillar in the medieval period. Following the example set by the glossators, clergymen collected important Church decisions in the first half of the twelfth century. The popes later recognized the collection as the official Church Decree, and other priests gathered additional council resolutions, papal decisions (decretals), and the writings of the Church fathers. This body of norms evolved into its own discipline over time and separated from theology. Yet canon law also remained deeply intertwined with Roman law as jurists of the two fields continually conversed with one another. These two combined sources and their interpretations eventually became known as the *ius commune* (or the general law).[5]

Some interpreters of the *ius commune* rose to great renown, and their doctrines became law themselves. The Italian commentator Bartolus de Sassoferrato (1313/14–1357), for example, left a mark on the universities of the early Spanish empire, although his influence declined much in the seventeenth century. Many attorneys originally claimed that they "were not jurists unless they were Bartolists."[6] The sixteenth-century jurist Jerónimo Castillo de Bobadilla, for instance, cited Bartolus amply. Castillo de Bobadilla argued that the good *corregidor* (a district judge akin to an *alcalde mayor*), who usually had no academic training, should rule according to the law and the common opinion of the recognized jurists. Castillo de Bobadilla continued that it would be better in any case for the judge to consult his legal

consulta, an imperial *decretum* or *edictum*, and an attorney's *responsa prudentium*; see Brundage, *Medieval Origins*, 75–94; Robinson, Fergus, and Gordon, *European*, 2–3; Decock, *Theologians*, 28–55; Meder, *Rechtsgeschichte*, 21, 89, 197–212.

[5] Brundage, *Medieval Origins*, 1, 42–45, 96–107; Meder, *Rechtsgeschichte*, 153.

[6] Clavero, *Historia*, 27, quotes the dictum "*Nemo jurista nisi bartolista*." See also Meder, *Rechtsgeschichte*, 199, note 30, 204–206. Peter Weimar, "Bartolus of Saxoferrato," in *The Oxford International Encyclopedia of Legal History*, ed. Stanley N. Katz (Oxford: Oxford University Press, 2009). See also Robinson, Fergus, and Gordon, *European*, 65–66; Schlosser, *Neuere europäische*, 75. According to Paul Koschaker, *Europa und das römische Recht* (Munich: C. H. Beck, 1966), 104–105 (admittedly dated), the Castilian *Pragmática* of 1449 determined that when the laws were silent, Bartolus and Baldus decided the issue. According to Pennington, "Bartolomé de las Casas," 100–101; and Condorelli, "Diego de Covarrubias," 210, Bartolomé de las Casas and Diego de Covarrubias (1512–1577) extensively discussed Bartolus. See also Susanne Lepsius, "Bartolus de Saxoferrato (1313/14–1357)," in *Handwörterbuch der deutschen Rechtsgeschichte (HRG)*, eds. Albrecht Cordes, Hans-Peter Haferkamp, Heiner Lück, Dieter Werkmüller, and Ruth Schmidt-Wiegand, 2nd ed., (Berlin: Erich Schmidt Verlag, 2008), 1: 450–453. www.hrgdigital.de/HRG.bartolus_de_saxoferrato_1313_14_1357.

adviser, who fully understood the interplay of scholarly arguments, including Bartolus's view, with the Roman, canon, and royal laws.[7]

Legal practitioners often also called on the Bible, the Church fathers, or other theological principles, and the divine law became the third pillar of legality. "Christ is justice himself," one early modern jurist held, and the faith commanded the king to safeguard that sacred underpinning of society. Many therefore cited the divine law in their arguments.[8] When the *visitador general* (investigative judge) Francisco Garzarón inspected the *audiencia* (high court) of Mexico City between 1716 and 1727, for instance, he insisted that a corrupt judge report to jail. Yet the delinquent ran off and pleaded with the king for mercy. He declared that his escape was "a natural defense, because Christ himself as a child escaped from Herod's slaughter and taught his disciples to flee elsewhere when persecuted by a city ... and Saint Paul practiced the same by descending from the Roman walls in a basket ... while Saint Peter fled from most heinous chains and prison when an angel saved him." The judge used that theological narrative for his defense, which the crown prosecutor in Madrid accepted without any astonishment. The prosecutor even suggested absolving the defendant from the charge of disobeying Garzarón's orders.[9]

While theological arguments ran strong, sixteenth-century secular ideas increasingly challenged the late medieval consensus. Humanists favored logic over ancient authority to explain natural phenomena. Especially French jurists began attacking the prevailing interpretations. They perceived Justinian's collection as a historical source that had developed over centuries with often opposing aims. Their insight vitiated the medieval enterprise of harmonizing the inherent contradictions of the collection. As a result, the sacred and immutable status of the Roman law took a blow. The humanist jurists derided their Bartolist colleagues as "ignorant donkeys" for ruminating profusely on each separate law. Instead, these modern jurists favored elegant treatises on a subject matter for which they assembled all applicable rules to assist the practicing attorneys.[10]

[7] Castillo de Bobadilla, *Política*, book 1, chap. 12, paras. 11–15. The *Política* was republished several times until 1775. Note that some *alcaldes mayores* had academic training in law, such as the mid-eighteenth-century *alcalde mayor* of Puebla; see Miguel Manuel Davila Galindo to Revillagigedo, Puebla, 14 Jan. 1754, AGN, Subdelegados 34, fol. 368v.

[8] Castillo de Bobadilla, *Política*, book 2, chap. 11, para. 21.

[9] Pedro Sanchez Morcillo to king, Mexico City, 28 July 1724; *parecer* (legal opinion) of the prosecutor of the Council of the Indies, Madrid, 16 Feb. 1727, AGI, Escribanía 287 B, *pieza* 38, fols. 14–14v, 18.

[10] Manlio Bellomo, *The Common Legal Past of Europe, 1000–1800*, trans. Lydia G. Cochrane (Washington, DC: Catholic University of America Press, 1995), 206–208;

André Tiraqueau (1488–1558), for example, marked a milestone by proposing to avert crime rather than punishing ruthlessly. He opposed defining a cruel penalty for each offense as had been the norm, and instead "sought to prevent others from sinning."[11] Tiraqueau suggested taking into account the seriousness of the committed crime and the personal qualities of the offenders including their age, sex, and mental condition. To this end, the jurist expanded the judge's *arbitrio* (judgment) to tailor the sentence to the circumstances of the crime. Tiraqueau and the humanists made an impression on the Spanish empire. The *arbitrio* unfolded and buttressed court rulings that even most commoners in Mexico City found appropriate well into the eighteenth century.[12]

Jurists reconciled these developing interpretations with natural law, the fourth pillar of justice. Natural law virtually meant reason as the cosmic order revealed it. The idea that the law had to be reasonable went back to the Romans, who compared human life to nature when ascertaining the principles that shaped the law. Cicero, for instance, espoused "the true

the quote on ignorant donkeys appears in Schlosser, *Neuere europäische*, 109, see also 108–21; Robinson, Fergus, and Gordon, *European*, 173–175. According to Michael Stolleis, *Histoire du droit public en Allemagne. La théorie du droit public impérial et la science de la police 1600–1800*, trans. Michel Senellart (Paris: Presse Universitaire de France, 1998), 132, Machiavelli (1469–1527) and his peers abandoned viewing history as the unfolding of salvation during which the all-knowing God avenged evil deeds and awarded the righteous. Instead, history followed a secular and cyclical logic according to fortune, necessity, or facts.

[11] Tiraqueau (Andreas Tiraquellus) cited here the philosopher Seneca, *De Ira*, in *Moral Essays*, ed. John W. Basore, vol. 1 (London and New York: Heinemann, 1928), book 1, chap. 16, www.perseus.tufts.edu/hopper/collections.

[12] Michael C. Scardaville, "Justice by Paperwork: A Day in the Life of a Court Scribe in Bourbon Mexico City," *Journal of Social History* 36, no. 4 (2003): 979–990; Jonathan Otto, "Tiraquellus, Andreas (André Tiraqueau)," in *The Oxford International Encyclopedia of Legal History*. According to Alejandro Agüero, "La tortura judicial en el antiguo régimen. Orden procesal y cultura," *Direito e Democracia* 5, no. 1 (2004): 207, the sixteenth-century jurist Angelo Gambiglioni defined "*arbitrio* of a judge as no other thing than jurisdiction." See also Massimo Meccarelli, "Dimensions of Justice and Ordering Factors in Criminal Law from the Middle Ages till Juridical Modernity," in *From the Judge's Arbitrium to the Legality Principle. Legislation as a Source of Law in Criminal Trials*. Comparative Studies in Continental and Anglo-American Legal History, vol. 31, eds. Georges Martyn, Anthony Musson, and Heikki Pihlajamäki (Berlin: Duncker & Humblot, 2013), 54, 57–59; Bernardino Bravo Lira, *El juez entre el derecho y la ley. Estado de derecho y derecho del Estado en el mundo hispánico, siglos xvi a xxi* (Santiago, Chile: Lexis Nexis, 2006), 334–336; Schlosser, *Neuere europäische*, 92, 119–123. The debate over appropriate sentencing raged also over the question of whether judges should choose the most probable or just any probable ruling for a conflict as part of the theological problem of probabiliorism; see Azcargorta, *Manual de Confesores*, 170–172.

reason that correlates with nature."[13] Justinian's collection also recognized that humans and animals showed similarities in matrimony and child rearing. Later, reason breathed new life into Spanish scholasticism at Salamanca.[14] During Garzarón's investigation, officials used natural law to ward off unwanted royal limitations on their fees, for example. An *audiencia* usher, who guarded the doors and carried documents among the offices, held that "natural law ... allowed demanding more than what is assigned, because there is much work to do and no salary." It was therefore reasonable that he charged Indians higher fees for his services so that he could make a living.[15] *Novohispano* judges stated a similar point. In their view, reason justified accepting gifts because of the considerable costs of living in Mexico City.[16]

When such practices became ingrained, they joined the customs, the fifth pillar of justice. In the early modern societies, many customs had the force of law and shaped judicial sentencing. Customs arranged much of the indigenous land ownership, for instance. Indian *alcaldes* (magistrates) usually observed the communal traditions in this regard, alleging that they had done so since immemorial times. The *Law of the Indies* explicitly recognized those "norms and customs that the Indians have had since old times for their good government and order, and those customs and usages, which they have obeyed and practiced since becoming Christians."[17]

[13] Cicero, *De legibus*, 1, para. 43, cited in Meder, *Rechtsgeschichte*, 261.

[14] *Digest* 1.1.1.3; *Institutes* 1.2. in Krueger and Mommsen, *Corpus Iuris Civilis*. The *Digest* included the definition of the late classical jurist Domitius Ulpianus. According to José Mariano Beristáin de Souza, Fortino Hipolito Vera, and José Rafael Enríquez Trespalacios, *Biblioteca Hispano Americana Septentrional o catalogo y noticias de los literatos* [...], 2nd ed. (Amecameca, Tipografía del Colegio Católico, 1883), 2: 60, *visitador* José de Gálvez called the *novohispano* jurist Baltasar Ladrón de Guevara the "American Ulpianus," indicating the lasting prestige of the classical lawyer. See also Borah, *Justice by Insurance*, 6–7; Meder, *Rechtsgeschichte*, 261–62; Schlosser, *Neuere europäische*, 149.

[15] Defense of Francisco de Castro, AGI, Escribanía 289 A, *Relazion*, fol. 383v. According to Linda Levy Peck, *Court, Patronage, and Corruption in Early Stuart England* (London: Routledge, 1993), 195, the Duke of Buckingham (1628–1687) also used natural law to ward off corruption accusations.

[16] According to Castillo de Bobadilla, *Política*, book 2, chapter 11, para. 45, esp. note f, the fourteenth-century commentator Angelus Ubaldus, based on Saint Paul's 1 Tim. 5:18, approved of judges who accepted food provided they did not draw a salary.

[17] *Recopilación de leyes de los reynos de las Indias mandada imprimir y publicar por la Magestad Católica del Rey Don Carlos II. Nuestro Señor* [...]. 1741, facsimile (Madrid: Consejo de la Hispanidad, 1953), www.leyes.congreso.gob.pe/leyes_indias.aspx, henceforth noted as *Law of the Indies*, book 2, title 1, law 4; similar were the *Institutes* 1.2.9. See also Murillo Velarde, *Cursus Iuris Canonici*, book 1, title 4, para. 114; de la Puente Luna and Honores, "Guardianes de la real justicia," 25, 31–32, 36; Renzo Honores, "El

In addition, for example, no explicit written code governed the conduct of people who moved to other places in the Spanish empire. The king occasionally intervened to award new citizenship to migrants, but in most cases, newcomers to towns performed along unwritten guidelines. When they showed their commitment to the faith, the community tacitly included them in the citizenry. At the same time, the towns usually denied the same rights to Romany (gypsies), Jews, or blacks and frowned upon them as rule breakers.[18]

Finally, the royal law of the land issued by kings and queens formed the sixth pillar of justice. In the 1260s, the king of Castile set an important milestone in this regard by publishing the *Siete Partidas* (Seven Parts). This collection comprised ample royal communications and Spanish translations of the Roman law. King Philip II (1556–1598) later ordered his jurists to draft a new compilation, incorporating the *Siete Partidas* and other Castilian collections. These jurists also selected suitable *reales cédulas* (royal provisions) from an immensity of the king's communications. When they completed the process, the king published the *Law of Castile* in 1567.[19] In a similar move, the crown assembled the *Law of the Indies*. By the middle of the sixteenth century, the crown had issued about 10,000 provisions for the Americas, filling 200 books. Legal experts began compiling them, but *reales cédulas* kept pouring out until 500 books could not hold them anymore. Finally, the American-born jurist Antonio de León Pinelo and his colleague, Juan de Solórzano y Pereyra, concluded the work in 1636. They arranged the rules according to subject matter, creating an authoritative guideline for the Indies.[20]

licenciado Polo Ondegardo y el debate sobre el Derecho Consuetudinario en los Andes del siglo XVI," unpublished manuscript. On the intertwining of customary law and *ius commune*, Yanna Yannakakis and Martina Schrader-Kniffki, "Between the 'Old Law' and the New: Christian Translation, Indian Jurisdiction, and Criminal Justice in Colonial Oaxaca," *HAHR* 96, no. 3 (2016): 517–548.

[18] Herzog, *Defining Nations. Immigrants and Citizens in Early Modern Spain and Spanish America* (New Haven: Yale University Press, 2003), 6–9, 201–208. Robinson, Fergus, Gordon, *European*, 108, on sentences confirming customs.

[19] *Recopilación de las leyes destos reynos hecha por mandado de la Magestad Catholica del Rey don Philipe Segundo nuestro señor* […] (Alcalá de Henares: Juan Iñiguez de Liquerica, 1581), henceforth cited as the *Law of Castile*; Xavier Gil, "Spain and Portugal," in *European Political Thought, 1450–1700: Religion, Law, and Philosophy*, eds. Howell A. Lloyd, Glenn Burgess, and Simon Hodson (New Haven, CT: Yale University Press, 2007), 432; Decock, *Theologians*, 33–36.

[20] Arndt Brendecke, *Imperio e información: funciones del saber en el dominio colonial español* (Madrid, Frankfurt: Iberoamericana/Vervuert, 2012), 350–351; Bravo Lira, *Derecho común y derecho propio en el Nuevo Mundo* (Santiago de Chile: Ed. Jurídica

The *Law of the Indies* gave the Americas their own legal collection akin to the special *fueros* (rules) of the peninsular kingdoms. The collection described the Indies as "great kingdoms and seignories" in the empire instead of lesser provinces.[21] The aim of this phrase was to appease the American elites and increase their loyalty to Madrid. This mattered, because King Charles II (reigned 1665–1700) of Spain remained childless. The other European powers at that time discussed partitioning the Spanish empire among themselves. As a response, Madrid sought to tie the Americans firmly to the crown by publishing the new collection in 1680 and enshrining the status of the overseas kingdoms.[22]

The *Law of the Indies* generally superseded older collections and *reales cédulas* in the Americas. Its rules and its interpreters increasingly served as guidepost for judges and the Council of the Indies (the appeals court for American affairs), and reform-minded jurists tended to draw on other sources less frequently.[23] For instance, in 1719, Garzarón suspended a judge for buying a house in Mexico City, among other charges. The crown opposed such acquisitions, because they indicated that the ministers joined society and became corruptible. The judge showed in his defense a *real cédula* from 1663 allowing such a purchase. Yet the prosecutor of the Council of the Indies rebutted this argument in 1724 by maintaining that the *Law of the Indies* nullified the older *reales cédulas*. The prosecutor convinced the king and the Council, who convicted the judge.[24]

At the same time, locals on occasion suspended those newly arriving orders that they found undesirable. *Novohispano* judges and officials

de Chile, 1989), 30. See also James Muldoon, "Solórzano's *De indiarum iure*: Applying a Medieval Theory of World Order in the Seventeenth Century," *Journal of World History* 2, no. 1 (1991): 29–45.

[21] *Law of the Indies*, book 2, title 2, law 1.

[22] Pietschmann, "Antecedentes políticos de México, 1808: Estado territorial, estado novohispano, crisis política y desorganización constitucional," in *México, 1808–1821. Las ideas y los hombres*, eds. Pilar Gonzalbo Aizpuru and Andrés Lira González (Mexico City: El Colegio de México, 2014), 31, 34; Rodríguez O., "*We Are Now*," 20; Víctor Tau Anzoátegui, "Entre leyes, glosas y comentos. El episodio de la recopilación de Indias," in *Homenaje al Profesor Alfonso García-Gallo* (Madrid: Editorial Complutense, 1996), 4: 279–81.

[23] *Law of the Indies*, book 2, title 1, law 1; Tau Anzoátegui, "Entre leyes, glosas y comentos," 270–81; Bernd Hausberger and Óscar Mazín, "Nueva España: Los años de autonomía," in *Nueva Historia general de México*, eds. Erik Velásquez García et al. (Mexico City: Colegio de México, 2010), 269; Yannakakis, *The Art of Being*, 115–127.

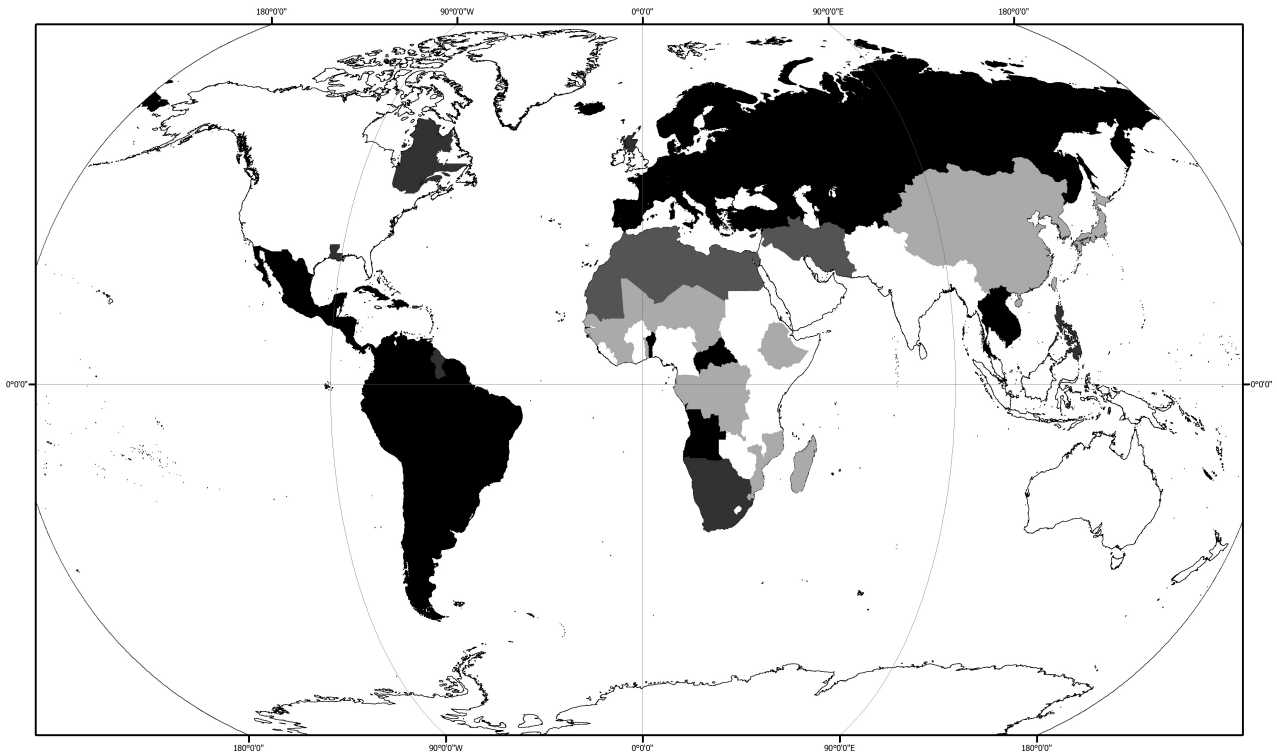
[24] *Parecer* of José de Laysequilla, Madrid, 14 Aug. 1724, AGI, Escribanía 287 B, *pieza* 39, fols. 132–135. See also *Law of the Indies*, book 2, title 16, law 55.

returned the provisions to Spain when they collided with local experience or breached other rules. They requested additional instructions addressing these concerns. The functionaries also maintained that the "unjust law does not oblige the conscience" to act and preferred to "obey but not to execute" the royal mandate. In this way, colonials vowed loyalty to the crown while stalling the particular measure. Such maneuvering pervaded the Atlantic world. In the Austrian-Hungarian empire, for example, the ministers on occasion respectfully tabled the orders and sent them back to Vienna. They and their Spanish colleagues ultimately built on Roman traditions of forging a consensus to implement change.[25]

These evolving ideas circulated in the Atlantic world. The Spanish empire acknowledged the *ius commune*, and so did the Holy Roman Empire (Germany), France, and Italy. Even the English common law, which struck a different course than continental European law, conversed with canon and Roman law. Jurists advanced new legal solutions in response to the expanding economies and vibrant intellectual life. They avidly read their colleagues' works beyond any political or linguistic boundaries. For example, legal experts in the Holy Roman Empire cited the Spanish attorney Diego Covarrubias. *Novohispano* teachers and students alike read Italian, French, Dutch, or German scholars writing in Latin or as synthesized by others. The eighteenth-century rector of the University of Guatemala prepared his lectures by studying the Bavarian canonist Johann Georg Reiffenstuel. Another striking example are the eighteenth-century *Recitations*, a Latin comment on the Roman laws written by a lawyer from Saxony (Holy Roman Empire). The text was later translated into Spanish and freely adapted to the Americas. The Atlantic legal culture fused the *ius commune* with its own traditions.[26]

[25] Garriga, "Sobre el gobierno," 108. According to Antonio Annino, "El primer constitucionalismo Mexicano, 1810–1830," in *Para una Historia de América III. Los nudos 2*, eds. Marcello Carmagnani, Alicia Hernández Chávez, and Ruggiero Romano (Mexico City: Fondo de Cultura Económica, El Colegio de México, Fideicomiso Historia de las Américas, 1999), 155, "I obey but do not execute (*obedezco pero no cumplo)*" adapted the Roman principle that "what concerns all, needs to be approved by all." See also Decock, *Theologians*, 28; Hespanha, "Porque é que existe," 23–26; Pennington, "Bartolomé de las Casas," 103–104; Reinhard, *Geschichte der Staatsgewalt: Eine vergleichende Verfassungsgeschichte*, 3rd ed. (Munich: C. H. Beck, 2003), 80. Azcargorta, *Manual de Confesores*, 182, knew that "it is debatable whether binding laws – even papal ones – depend on the consent of the inferiors."

[26] Robinson, Fergus, and Gordon, *European*, 72–89; Tau Anzoátegui, *El Jurista en el Nuevo Mundo. Pensamiento. Doctrina. Mentalidad* (Frankfurt: Max Planck Institute for European Legal History, 2016), 42; Bravo Lira, *El juez*, 338; Clavero, *Historia*, 18–20; Herzog, *Frontiers*, 260. According to Decock, *Theologians*, 54, the Spanish



MAP 2 The Global *Ius Commune*. Today's legal systems that build directly on the *ius commune* are marked in black, while the regions colored in gray have mixed legal systems with heavy infusions of *ius commune* concepts.
Map drawn by Ana Gabriela Arreola Meneses, based on *JuriGlobe*, University of Ottawa, www.juriglobe.ca/eng/rep-geo/index.php. and Maximilian Dörrbecker, *Map of the Legal Systems of the World*, https://en.wikipedia.org/wiki/Common_law#/media/File:Map_of_the_Legal_systems_of_the_world_(en).png.

In New Spain, many scholars were familiar with the legal culture. Theologians wrote manuals to prepare priests for administering the sacraments, especially for the confession. The clergymen drew on the *ius commune* and widely disseminated its concepts in relatable ways. In addition, professors at the University of Mexico City owned parts of Justinian's collection and its interpreters. The first professor of rhetoric in the sixteenth century, for instance, owned eleven books written by Bartolus, while early eighteenth-century booksellers sold humanists such as André Tiraqueau. The university professors in Mexico City cited these legal scholars when discussing the Roman and royal law.[27]

When law students graduated from the university, they often joined the *colegio de abogados* (college of attorneys) to practice, or they became salaried *relatores*. The *relatores* worked for the *audiencia* and assessed whether litigation had the standing to go to trial. They also summarized the documents submitted to court and greatly simplified the work for the judges. Most other lawyers spent four years in residence with an experienced attorney. When they completed that phase, they took an exam at the *audiencia*, at least in theory. The *audiencia* then admitted them to represent clients. Many, if not all, of these lawyers became lesser nobles or

scholastic Juan de Medina, for example, cited the German Conrad Summenhart von Calw; Samuel Pufendorff was also cited. Thomas Duve, "Von der Europäischen Rechtsgeschichte einer Rechtsgeschichte Europas in globalhistorischer Perspektive," *Rechtsgeschichte – Legal History* 20 (2012): 36–39; Olivia Moreno Gamboa, "Comercio y comerciantes de libros entre Cádiz y Veracruz en el tránsito hacia un nuevo orden (1702–1749)," in *Resonancias imperiales: América y la Paz de Utrecht de 1713*, eds. Iván Escamilla González, Matilde Souto Mantecón, and Guadalupe Pinzón Ríos (Mexico City: Instituto Mora, UNAM, 2015), 296.

[27] Decock, *Theologians*, 46. According to Enrique González González and Víctor Gutiérrez Rodríguez, "Los cadedráticos novohispanos y sus libros. Tres bibliotecas del siglo xvi," in *Dalla lectura all'e-learning*, ed. Andrea Romano (Bologna: Clueb, 2015), 91–93, 96, the admittedly sixteenth-century libraries contained publications by Andrea Alciato (1492–1550) and Guillaume Budé (1467–1540). Moreno Gamboa "Historia de una librería novohispana del siglo xviii" (MA thesis, UNAM, 2006), 132–133, and Moreno Gamboa, "Comercio y comerciantes de libros," 295–296, shows that a bookseller sold sections of the *corpus iuris civilis* in 1730 and Tiraqueau's books in 1732, but did not offer anything written by Bartolus. Judging by Jesús Yhmoff Cabrera, *Catálogo de obras manuscritas en Latín de la Biblioteca Nacional de México* (Mexico City: UNAM, Instituto de Investigaciones Bibliográficas, 1975), e.g., 8, 54, few juridical manuscripts in Latin survive in the National Library of Mexico, although María Fernanda González Gallardo, *Las tesis de licenciados y doctores en leyes de la Real Universidad de México en el siglo XVII: Código* (Mexico City: Instituto de Investigaciones Jurídicas / UNAM, 2017) points to the body of theses written in Latin and kept in that library.

confirmed their status upon graduating from the university.[28] Most of them also joined the college of attorneys. This must have been some kind of a social body, perhaps a confraternity associated with a church. In 1724, the Council of the Indies chided the "college of attorneys for having charged excessive fees and gifts." Subsequently, the college became more formalized in 1760 as an independent social body.[29]

In addition, the legal agents without university training played much larger roles than historians have thought before. *Procuradores* (procurators) especially represented Natives and other commoners in matters of process. They submitted briefs, moved paperwork through the legal machinery, and contracted attorneys when necessary. Procurators often acquired substantial knowledge and successfully acted akin to lawyers. They even crafted their own judicial arguments for the courts, although the crown forbade them to do so. This is why I refer to both academically trained jurists and procurators as legal practitioners or experts in this book. In addition, notaries investigated crimes, questioned suspects, and copied or summarized papers. That may seem like a straightforward task, but the slant of their summaries and the aim of their interrogations deeply influenced the judicial verdicts.[30]

When legal experts went to work, they continuously weighed the royal law and local custom against Roman, canon, and biblical principles, and

[28] Rodolfo Aguirre Salvador, *Por el camino de las letras: el ascenso profesional de los catedráticos juristas de la Nueva España, siglo XVIII* (Mexico City: UNAM, 1998), 104–105; Enrique González González, ed., *Proyecto de estatutos ordenados por el virrey Cerralvo (1626)* (Mexico City: UNAM, 1991), 77–82; on New Grenada, Victor M. Uribe-Uran, *Honorable Lives: Lawyers, Family, and Politics in Colombia, 1780–1850* (Pittsburgh: University of Pittsburgh Press, 2000), 20–22. Garzarón generally did not call lawyers officials, because they dealt with matters of justice, but for the sake of clarity, I include them in this group to distinguish them from the judges. On acquiring nobility, see Mazín, "La nobleza ibérica," 64–72.

[29] Sentence of the Council of the Indies, Madrid, 10 Feb. 1724, AGI, Escribanía 1183 folder *1721–1730 Francisco Garzarón*. Óscar Cruz Barney, "Prólogo," in *Los abogados y la formación del Estado mexicano*, eds. Óscar Cruz Barney, Héctor Felipe Fix-Fierro, and Elisa Speckmann (Mexico City: UNAM, Instituto de Investigaciones Jurídicas, 2013), xiii; Mayagoitia, "Las últimas generaciones de abogados virreinales," ibid., 5; Christian Hillebrand, *Die Real Audiencia in Mexiko* (Baden-Baden: Nomos, 2016), 125, and others maintain that the college was formally founded in or near 1760, but apparently there existed a precursor during Garzarón's *visita*.

[30] McKinley, *Fractional Freedoms*, 5; Kathryn Burns, *Into the Archive: Writing and Power in Colonial Peru* (Durham, NC: Duke University Press, 2010), 14, 24; Gayol, *Laberintos de justicia*, 1: 141–145, see also 172–194; Herzog, *Upholding Justice*, 53; de la Puente Luna and Honores, "Guardianes de la real justicia," 25. On earlier practices, Brundage, *Medieval Origins*, 353–364; Hillebrand, *Real Audiencia*, 117–133.

no clear boundary separated the law from social practices. Historians describe that complexity as "judicial pluralism," which differed markedly from modern ideas of a (relatively) unequivocal, systematic, and hierarchical legality.[31] The indigenous community of Meztitlan (Hgo.), for instance, complained in 1724 that a local resident had bought the appointment as *alcalde mayor*. The viceroy and the *audiencia* heard the case and agreed that a *real cédula* from 1691 permitted purchasing the appointment.[32] The viceroy's adviser then cited the contrary opinion of Roman emperor Severus Alexander (222–235) and noted that several theologians condemned selling offices as tantamount to selling justice. He balanced these points against the *Law of Castile* and the "*Law of the Indies* which did not hold that offices with jurisdiction were unsellable." The adviser finally emphasized that Charles de Borromeo, a sixteenth-century saint, had also sold his principality with his judicial duties, which was "licit and honest because his pious aim was giving alms to the poor." The adviser pondered the mandates of these different normative sources and concurred with the viceroy and the *audiencia* that the *alcalde mayor* could serve his post.[33]

The precise relationship among the six pillars of justice was often contested, although Spaniards generally preferred the specific over the general rule. Typically, the *Law of the Indies* reigned supreme in the Americas, followed by the *Law of Castile* and the *Siete Partidas*. Meanwhile, the Roman law and its interpreters did not have direct validity in the Spanish empire, but their concepts deeply infused

[31] Tau Anzoátegui, "El poder de la costumbre. Estudios sobre el Derecho Consuetudinario en América hispana hasta la Emancipación," in *Nuevas aportaciones a la historia jurídica de Iberoamérica*, ed. José Andrés-Gallego (Madrid: Fundación Histórica Tavera, Hernando de Larramendi/ Mapfre, 2000); Hespanha, "Porque é que existe," 22–23; Duve, *Sonderrecht*, 196–198; Hillard von Thiessen, "Korruption und Normenkonkurrenz: Zur Funktion und Wirkung von Korruptionsvorwürfen gegen die Günstling-Minister Lerma und Buckingham in Spanien und England im frühen 17. Jahrhundert," in *Geld–Geschenke–Politik: Korruption im neuzeitlichen Europa*, eds. Jens Ivo Engels, Andreas Fahrmeir, and Alexander Nützenadel (Munich: Oldenbourg, 2009), 93.

[32] Governor, *alcaldes*, and officials to viceroy, Meztitlan, n. d., AGI, México 492, *cuaderno* 8, fols. 35v–36v; Toribio Fernández de Rivera for the *alcalde mayor* Francio de Herrera Beltrán to viceroy, probably Atotonilco el Grande, ibid., fol. 36v; José Franciso de Landa for the governor and *común y naturales* of Meztitlan to viceroy, n. d., ibid., fols. 37v–40v; *real acuerdo*, Mexico City, 11 Feb. 1724, ibid., fols. 41–43; royal order, Buen Retiro, 7 June 1691, ibid., 77v–89v.

[33] *Parecer* of Dr. José Meléndez, Mexico City, 22 Jan. 1725, AGI, México 492, *cuaderno* 8, fols. 101–107; *Law of Castile*, book 7, title 3, law 7; similar exhortations against selling offices in *Novels*, 8, preface and 1.

jurisprudence.[34] Yet jurists and procurators did not always strictly observe that hierarchy. Juan de Hevia Bolaños, a brilliant legal agent working in Lima, exemplified this uncertainty in his discussion of Church protections for offenders. "Although imperial civil law," he explained, referring to the Roman collection, and the "royal law of the *Siete Partidas* order that adulterers, rapists of virgins, murderers, and debtors . . . cannot seek asylum in the church . . . Church law corrects this case, which is applicable since this is an ecclesiastical issue . . . according to the common opinion of the doctors . . . and the customs which have affirmed Church law." For Hevia Bolaños, the important jurists and customs concurred that canon law displaced both royal and Roman rules in this matter.[35]

Moreover, at least some *novohispano* ministers held that customs and process were more specific than royal law, especially when justifying their own actions. A civil judge claimed, for example, that a "particular custom is a law that nullifies other written ones," including the royal and Roman law.[36]

[34] Murillo Velarde, *Cursus Iuris Canonici*, book 1, title 32, para. 344. The hierarchy is debated; see Decock, *Theologians*, 34–35; Jesús Vallejo, "El cáliz de plata. Articulación de órdenes jurídicos en la jurisprudencia del ius commune," *Revista de Historia del Derecho* 38 (2009): 7–13, http://www.scielo.org.ar/scielo.php?script=sci_arttext&pid=S1853-17842009000200002&lng=es&nrm=iso; Bravo Lira, *Derecho común*, 7–8; Alejandro Guzmán Brito, "Prólogo," in Bravo Lira, *Derecho común*, 7–8; Alejandro Agüero, "Local Law and Localization of Law. Hispanic Legal Tradition and Colonial Culture (16th–18th Centuries)," in *Spatial and Temporal Dimensions for Legal History. Research Experiences and Itineraries*, ed. Massimo Meccarelli and María Julia Solla Sastre (Frankfurt: Max Planck Institute for European Legal History, 2016), 116–122, www.rg.mpg.de/1091047/gplh_6_aguero.pdf; Carlos Garriga, "Concepción y aparatos de la justicia: las Reales Audiencias de Indias," in *Convergencias y divergencias: México y Perú, siglos xvi–xix*, ed. Lilia Oliver (Mexico City: University of Guadalajara, El Colegio de Michoacán, 2006), 35–36; Pennington, "Bartolomé de las Casas," 107; Meder, *Rechtsgeschichte*, 22, 253–254.

[35] Juan de Hevia Bolaños, *Curia Filipica, primero, y segundo tomo. El primero dividido en cinco partes, donde se trata breve y compendiosamente de los juicios, mayormente forenses, eclesiasticos y c ... el segundo tomo en tres libros distribuido, donde se trata de la mercancia, y contratación de tierra y mar*, with an index by Nicolás de la Cueva (Madrid: Francisco de Hierro, 1725), vol. 1, part 3, para. 12, no. 49. According to Alejandro Agüero and Francisco Javier Andrés Santos, "Republicanismo y tradición jurídica en los albores de la independencia: la significación americana del Tratado de los Oficiales de la República de Antonio Fernández de Otero," in *Actas del XIX Congreso del Instituto Internacional de Historia del Derecho Indiano*, ed. Thomas Duve (Madrid: Dykinson, 2017), vol. 1, 344, the *Curia Filipica* was the "most published book in the history of Spanish juridical literature."

[36] Defense of Juan Díaz de Bracamonte, AGI, México 670 B, *Relación*, fol. 142. Miguel de San Antonio, *Resumen de la theologia moral de el Crisol arreglado al exercicio prudente de las operaciones humanas, y practica de los Confesores* (Madrid: en la imprenta de Ángel Pascual Rubio, 1719), 7, suggested that attorneys could levy fees according to customs; drawing on Aquinas, *Summa*, IIa–IIae, Q. 71, a. 4 co. Felipe Castro Gutiérrez, "La fuerza de la ley y el asilo de la costumbre. Un proceso por fraudes y abusos en la real

One attorney added that "just and reasonable custom predominates and is preferable to the official fee in those locales" where the schedule did not adequately provide for the attorneys.[37] Another lawyer maintained in 1722 that the "municipal law is no other thing than the fee schedule," meaning that the customs of a town allowed him to ignore the official fee schedule imposed by a crown minister.[38] For many, the word *estilo* also referred to judicial process at a court of justice and resembled custom. An attorney argued that his client "never demanded or took more than *estilo* allows . . . and if others gave him one peso then because this was *estilo,* and . . . ruling against *estilo* is legally void . . . it should remain in force because of its tradition and age."[39]

Many legal experts agreed with these officials that customs remained valid as long as the courts applied or the king tacitly approved them. Lawyers often cited a judicial precedent to demonstrate that a particular custom was still in use. When such direct evidence was lacking, implicit tolerance often sufficed. In this line of thinking, a *novohispano* attorney insisted in 1724, that "the custom that the agents receive some amounts . . . is in force and vigor" and existed within plain "view, knowledge, and sufferance of that Senate and therefore the Prince . . . and with their tacit consent." The lawyer compared here the *audiencia* of Mexico City to the Roman legislature and showed that no "prohibitive law, statute, constitution . . . and law of the Indies" indicated that the king had withdrawn his tolerance of this particular custom.[40]

casa de Moneda de México," *Revista de Indias* 77, no. 271 (2017): 786–787, notes similar claims about the role of custom.

[37] Print *por Don Miguel Truxillo*, AGI, México 670 A, fol. 17v. Simon de Carragal on behalf of Juan José Aguilera, AGI, Escribanía 289 B, *Relazion*, fol. 41, argued that the *Siete Partidas* justified breaking the fee schedule, although *partida* 1, title 2, law 6 probably did not permit customs to displace the written royal law.

[38] Defense of Fernando de Quiroga, AGI, Escribanía 289 A, *Relazion*, fol. 1549. See the *Law of the Indies*, book 2, title 1, law 1, which recognized the "municipal laws of each city"; *Siete Partidas*, part 1, title 2, laws 4–9. The *audiencia* to king, Mexico City, 27 Feb. 1719, AGI, Escribanía 281 A, *cuaderno* 14, fols. 56–66, recognized both the "law of the Indies … and other municipal laws of these kingdoms."

[39] Testimony of don Manuel de Rivas for scribe Francisco de Castro, AGI, Escribanía 289 A, *Relazion*, fols. 380v–382v. Murillo Velarde, *Cursus Iuris Canonici*, book 1, title 4, paras. 114–118, distinguished *estilo* as judicial process from the unwritten custom, and so did Quevedo, *Fortuna con seso,* 527; while the *RAE* (1732) p. 635 defined *estilo* as both "legal procedure" and "custom." See also Inés Gómez, "Entre la corrupción y la venalidad: Don Pedro Valle de la Cerda y la visita al Consejo de Hacienda de 1643," in Andújar Castillo and Ponce-Leiva, *Mérito, venalidad y corrupción*, 239.

[40] Print *por Don Miguel Truxillo*, AGI, México 670 A, fols. 17v–18. Similarly, Manuel de Rivas on behalf of Francisco de Castro, AGI, Escribanía 289 A, *Relazion*, fols. 380v–381, declared that "custom … has the force of law according to common consent," while defense of Francisco de Alexo de Luna, AGI, Escribanía 289 A, fol. 352–352v, explained that charging inmates presentation fees was "just and not undue, because there is no law prohibiting

The defense of custom was no mere self-serving and cynical strategy because even the councilors of the Indies accepted the importance of customs to a point. For example, the Council meted out fairly lenient punishments to those officials charged with overcharging their clients. The officials stated in their defense that these excessive fees were customary to remedy their low income. The Council ordered these lower functionaries to pay their share of *visita* (special investigation) costs and perhaps minor penalties, and the officials then returned to their posts. Nonetheless, the doctrine on the tacit consent also slowly dissolved in the eighteenth century. This explains, in part, why Francisco Garzarón had tacked a harder line in suspending these officials.[41]

Next to the doctrine on tacit consent, the full legal plurality and perhaps many aspects of diversity declined when strands of the Enlightenment dawned on the empire in the late seventeenth century. As a consequence, the royal law gained strength over other normative sources in the courts and the colleges. Many professors shifted their focus to the royal law and their interpreters, and even academic chairs were renamed. They dropped references to Justinian's *Institutes*, for example, replacing them with sections of the royal law.[42] In part for these reasons, judges who based their defense on the *Law of the Indies* during Garzarón's *visita* usually fared better. A criminal judge, for instance,

them … and these presentations are not expressly prohibited," although the *Law of the Indies*, book 2, title 23, law 44; title 30, laws 1–6, only allowed ushers and notaries to charge presentation fees for documents. On the doctrine of the *consensus universorum* (universal consent), see Vallejo, "El cáliz de plata," 11; on the tacit consent, Duve, "Global Legal History: A Methodological Approach," in *Max Planck Institute for European Legal History Research Paper Series* 4 (2016): 14, http://ssrn.com/abstract=2781104; Meder, *Rechtsgeschichte*, 255; Agüero, "Local Law," 108–110. According to Jean Bodin, *The Six Books of the Commonwealth*, trans. M. J. Tooley (New York: Barnes & Noble, 1967), book 1, chap. 10, "Custom only has binding force by the sufferance and good pleasure of the sovereign prince, and as far as he is willing to authorize it." According to Garriga, "Concepción," 31, Francisco Carrasco del Saz argued in his 1630 treatise that certain judicial rights of the prince also extended to the Senate/high court.

[41] Vallejo, "El cáliz de plata," 7–13; Meder, *Rechtsgeschichte*, 255. For a full discussion of the verdicts against officials, see Chapter six.

[42] Tau Anzoátegui, *El Jurista en el Nuevo Mundo*, 8–13. Scholars now contest the nature of the Enlightenment. Jorge Cañizares-Esguerra, *How to Write the History of the New World. Histories, Epistemologies, and Identities in the Eighteenth-Century Atlantic World* (Stanford, CA: Stanford University Press, 2001), 7, 9, separates this current from the "aggressively modern movement" called Baroque. While this is a good point, we also need to clarify further how to distinguish the two periods from one another. See also Matthew C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (University of Texas Press, 2004), 36–37.

acknowledged that he and his colleagues had to sign off jointly on prisoner release. Nevertheless, the criminal judge admitted that he had single-handedly set free a handful of inmates who owed small amounts of money, because the *Law of the Indies* forbade litigation under twenty pesos. Therefore he did not have to seek his colleagues' consent in these cases. It is likely that the judge's defense held, because Garzarón charged three other criminal judges with the same offense and acquitted them.[43]

Royal agents often legitimized this shift toward the royal law as a return to the good old order, because innovation was harder to justify. An exchange from 1721 illustrates this matter. The king deplored the general disregard for the royal law, and the civil judge José Joaquín Uribe seconded this point. He emphasized that the "due observance of the law" would restore the *audiencia* "to its ancient luster and dignity."[44] Rather than returning to the splendor of the past, however, the crown demanded from the ministers "the exact compliance with the law and ordinances" as a way of asserting royal control. The crown increasingly demanded obedience from its ministers.[45]

As the royal law grew in stature, jurists called for a new systematic code encapsulating all doctrines. A growing number of legal practitioners discarded the vast multitude of rules from the past. Instead, they distilled general principles of justice and derived from them subordinate clauses. Jurists also envisioned a precise language that lay people could understand without falling prey to pettifoggers. Consequently, they demanded curbing the *arbitrio* of judges to obtain more predictable rulings determined by the new code. The judge was to be no other than "the mouth that pronounced the words of the law."[46] Despite these innovations, many still recognized that the judge

[43] Defense of Juan Francisco de la Peña, AGI, México 670 B, fol. 492–492v, referring to *law of Castile,* book 2, title 6, law 6, and *law of the Indies,* book 5, title 10, law 1. De la Peña lost his post, but Garzarón absolved Nicolás Chirino Vandeval, Juan de la Beguellina y Sandoval, and Francisco Barbadillo Victoria (see table 6 in the Appendix). According to *Law of Castile*, book 3, title 9, laws 14, 18, and 19, judges could not delay punishing convicts and had to curb paperwork in small-claims trials.

[44] Vote of José Joaquín Uribe, AGN, Historia 102, exp. 10, fol. 134; Garzarón to king, Mexico City, 16 May 1717, AGI, México 670 A, also favored restoring "the practice of the royal ordinances and forgotten laws." See also Marquis of Casafuerte to king, Mexico City, 15 May 1724, referenced in *consulta* of the Council of the Indies, Madrid, 18 Jan. 1726, AGI, México 381.

[45] King to president and civil judges of the *audiencia*, Lerma, 13 Dec. 1721, AGN, Historia 102, fol. 82–82v; Rodrigo de Zepeda to king, n. d., attached to the *consulta* of the Council of the Indies, 5 Dec. 1721, AGI, México 670 A. Note that Garriga, "Concepción," 60, argues that Bourbon Reforms primarily aimed at restoring good justice, while I maintain that this was in part a rhetorical trope to legitimize reforms.

[46] Montesquieu, cited in Schlosser, *Neuere europäische,* 182.

had an important role to play in unforeseen conflicts. Legal experts also appreciated the wisdom of existing doctrines, which they incorporated into the developing codes. As a result, ministers in Prussia (Germany) began drafting a Civil Code in 1746. The French Civil Code followed soon, pioneering a lasting foundation for the emerging bourgeois society, which also influenced many other regions in a lasting way. A revised form of that code remains in force today in the state of Louisiana, for instance.[47]

The reformers in the early eighteenth-century Spanish empire jumped on the bandwagon. They began to distance themselves from the ancient compilations and lambasted wily and obfuscating jurists. The jurist Melchor de Macanaz stated in 1722 that "the multitude of our laws confound more than they guide equity and justice." For him, the Roman law "twists the process of justice, stupefying the understanding of the judges, who perhaps choose among the infinity of legal opinions the one that is least reconcilable with reason." Macanaz instead suggested one "code as pattern and rule for judges and lawyers."[48] About twenty-five years later, another jurist labeled even the *Law of Castile* as a bewildering source of litigation and derided the "compilation of laws and vague conclusions."[49]

Not everyone agreed. In New Spain, many stood by the *Law of the Indies* that guaranteed the autonomies of the kingdom. In addition, a late seventeenth-century Spanish judge maintained that "changing old process of government upsets the vassals, and one should always avoid innovations."[50] In 1700, the aristocrat Pedro de Portocarrero y Guzmán

[47] Bravo Lira, *El juez*, 325–328, 334–340; Franz Wieacker, *A History of Private Law in Europe with Particular Reference to Germany*, trans. Tony Weir (Oxford: Clarendon Press, 1995), 249–255; Meder, *Rechtsgeschichte*, 270–280; Schlosser, *Neuere europäische*, 175–184, 212–214.

[48] Melchor de Macanaz, *Los veinte y dos auxilios para el buen gobierno*, Paris, 29 Aug. 1722, Biblioteca Nacional de España (hereinafter cited as BNE), Ms. 5671, fol. 21–21v.

[49] Antonio Valero, "Ciencia de Estado y Politica exterior de España," n. d., about 1748, BNE, Ms. 10512, fols. 16, 239. According to José Antonio Escudero, *Los orígenes del consejo de ministros en España* (Madrid: Editorial Complutense, 2001), 1: 256, Pablo de Mora y Jaraba (ca. 1716–1790) wrote during the reign of Ferdinand VI under the pseudonym Valero. See also I. A. A. Thompson, "Absolutism, Legalism, and the Law in Castile, 1500–1700," in *Der Absolutismus – ein Mythos? Strukturwandel monarchischer Herrschaft in West- und Mitteleuropa (ca. 1550–1700)*, eds. Ronald G. Asch and Heinz Duchhardt (Cologne: Böhlau, 1996), 224–226; Bravo Lira, *El juez*, 325–344; María Paz Alonso Romero, *Orden procesal y garantías entre Antiguo Régimen y constitucionalismo gaditano* (Madrid: Centro de Estudios Políticos y Constitucionales, 2008), 160–168.

[50] Lancina, *Commentarios*, 19.

thundered against the "multiplicity of laws which is evident proof of the corruption of customs." Portocarrero y Guzmán directed his ire not against the *ius commune*, but against the pragmatics, the broad legal innovations of kings that undermined justice of the past. From his perspective, he had a point. As the privileges of the old order crumbled, new types of judges ascended to the courts. They downplayed the old judicial plurality and concentrated on royal compilations, their interpreters, and recent mandates from above. For Portocarrero y Guzmán, these innovations violated justice as he knew it. For others, they heralded a new epoch of justice.[51]

1.2 JUDGES, VISITAS, AND SOCIAL NETWORKS

Commoners and nobles had relatively easy access to legal representation and the courts in the sixteenth and seventeenth centuries. Civil and criminal trials were on the rise in most Atlantic empires, and this "popular legalism" marked New Spain too.[52] In addition, social networks pervaded the empire and local intermediaries played a crucial role in exchanging resources and making decisions. Yet when networks skewed the judicial and political deliberations excessively or when a revolt threatened the established order, the king appointed *visitadores*. These investigative judges sidestepped the cumbersome course of justice, suggested remedies, and often punished malefactors more quickly and harshly.

Judges assured that accusers, defendants, and witnesses had their say in lawsuits. For this reason, Natives, slaves, widows, and the elderly frequently turned to the courts for redress. The judges sometimes bemoaned litigious Indians who caused heavy workloads but often ruled in favor of the Natives and against the *alcaldes mayores* or other social superiors. The king or the

[51] Pedro Portocarrero y Guzmán, *Theatro monarchico de España: Que contiene las mas puras, como catholicas, maximas de estado, por las quales, assi los principes, como las republicas* … (Madrid: Juan Garcia Infançon, 1700), 172–73. According to Rafael Diego-Fernández Sotelo, *El proyecto de José de Gálvez de 1774 en las ordenanzas de intendentes de Río de la Plata y Nueva España* (Zamora: El Colegio de Michoacán, 2016), 22, 137–143; and Moreno Gamboa, "La imprenta y los autores novohispanos. La transformación de una cultura impresa colonial bajo el régimen borbónico (1701–1821)" (PhD diss., UNAM, 2013), 200–201, Charles III ordered the gathering of recent *reales cédulas* to design a new law book for the entire empire. This may well have been an attempt to draft a systematic code. In response, a client of José de Gálvez's family, Eusebio Bentura Beleña, published a collection of Mexican *audiencia* verdicts, the *Recopilación sumaria de todos los autos acordados de la Real Audiencia y Sala del Crimen de esta Nueva España*. The king ultimately abandoned the law book, while Bentura Beleña crafted a new foundation for *novohispano* justice.

[52] Steven Hindle's term "popular legalism," is cited in Holenstein, "Introduction," 23.

queen upheld this system. They heard the appeals coming from the Americas, acted as the supreme arbiters, and showed good care for their vassals by listening to their concerns. In fact, the words for *audiencia* and *oidor* (civil judge) were both derived from hearing. Consequently, most *novohispanos* stated their viewpoint in the courts of justice when called upon, and most believed that the justice system of the Spanish empire sentenced appropriately.[53]

Even some "miserable widowed *Indias* [Native women]" successfully appealed to the courts for help against their *alcalde mayor*. In the early eighteenth century, the *Indias* sued Pedro Hernández, the Native governor of Santa María Nativitas Atlacomulco (state of Mexico). They alleged that Hernández had charged them three pesos tribute every year to release them from the labor draft for the silver mines of Tlalpujahua (Michoacan), although only men went to work there. When they took the case to the special Indian court, Hernández "attempted to cheat the widows with soft words offering compensation." He also asked a public notary to certify that the widows had paid three pesos in tribute every ten years instead of every year.[54] The *Indias*, however, complained to the *audiencia* in 1712 that the governor set a bad example. He had allegedly lived with a woman, "pretending that he would marry her . . . and then the governor deceived and left her and married another." In addition, the "pregnant widows went to the mountains to give birth and leave their offspring to the cruelty of the animals that eat them, and they die without baptism," because Hernández threatened to imprison the widows.[55] The *audiencia* also noted that Hernández had hidden over 500 Indians from the tribute rolls and the labor draft. On August 14, 1713, the *audiencia* prosecutor recommended arresting the governor for holding the Indian widows "in notable slavery."[56] The *audiencia* imprisoned Hernández until the special Indian court released him on August 9, 1715. The widows obtained relief from the courts of justice in this case.[57]

[53] Brendecke, *Imperio*, 87, 92; Cutter, "The Legal System," 57–70; Cutter, "Community and the Law in Northern New Spain," *The Americas* 50, no. 4 (April 1994): 477–480; Scardaville, "Justice," 979–989; Owensby, *Empire of Law*; Yannakakis, *The Art of Being*; McKinley, *Fractional Freedoms*, 2–4; Borah, *Justice by Insurance*; Kagan, *Lawsuits and Litigants*.

[54] Widows to Viceroy Duke of Linares, n. d. (1712), no place, and *parecer* of prosecutor Espinosa, Mexico City, 4 May 1713, AGI, Escribanía 280 A, *Quaderno de comprovasiones*, fols. 171–173.

[55] Widows to Linares, n. d., ibid., fol. 174–174v.

[56] *Parecer* of prosecutor, Mexico City, 20 Nov. 1714; ibid., fol. 179.

[57] Decree of Linares, 23 Nov. 1712; decree of *real acuerdo*, 9 Feb. 1712, petition of governor, n. d.; reply of prosecutor, 4 May 1713; decree of [probably] *real acuerdo*, 3 Nov. 1713; *parecer* of prosecutor, 14 Aug.; *parecer* of prosecutor, Mexico City, 20

Various judges offered redress to commoners such as the *Indias*. The indigenous *pueblos* (polities) elected *alcaldes* (magistrates) for one-year terms to resolve conflicts within their communities. The *alcaldes* meted out six to eight lashes or a day in jail for missing mass, public drunkenness, or other minor offenses. They could not mutilate or execute culprits, however. The *alcaldes ordinarios* (magistrates) of the Spanish-speaking towns were also selected annually by the municipal council. Most of these magistrates had little formal education in the law and ruled by drawing on local customs. Separate from them were the district judges, usually called *alcaldes mayores* in New Spain. They heard trials of the first instance and the appeals against the sentences of the lower magistrates. Natives could also sue their *alcaldes mayores* and other Spaniards in the special Indian court in Mexico City, while all others turned for relief to the *audiencia*, composed of civil and criminal judges and prosecutors.[58]

Nov. 1714; sentences of viceroy, 9 Aug. 1715 and 7 Feb. 1717, all documents copied by *visita* notary José de los Ríos, Mexico City, 25 June 1718, AGI, Escribanía 280 A, *Quaderno de comprovasiones*, fols. 175–180v. On communal labor, James Lockhart, *The Nahuas after the Conquest: A Social and Cultural History of the Indians of Central Mexico, Sixteenth through Eighteenth Centuries* (Stanford, CA: Stanford University Press, 1992), 431.

[58] *Law of the Indies*, book 6, title 3, law 16 and title 7, law 13; Murillo Velarde, *Cursus Iuris Canonici*, book 1, title 32, para. 343. See also Lockhart, *Nahuas*, 38–40; Herzog, *Upholding Justice,* 22–23; Susan Schroeder, introduction to *The Conquest All Over Again: Nahuas and Zapotecs Thinking, Writing, and Painting Spanish Colonialism*, ed. Susan Schroeder (Brighton, UK: Sussex Academic Press, 2010), 2; Matthew Restall, *The Maya World. Yucatec Culture and Society, 1550–1850* (Stanford, CA: Stanford University Press, 1997), 53–55; Alonso Romero, *Orden procesal*, 63; John F. Schwaller, "*Alcalde* vs. Mayor: Translating the Colonial World," *The Americas* 69, no. 3 (2013): 391–400; Jeremy Mumford, "Litigation as Ethnography in Sixteenth-Century Peru," *HAHR* 88, no. 1 (2008): 12; Borah, *Justice by Insurance*, 91–97. According to Jeremy Baskes, *Indians, Merchants, and Markets: A Reinterpretation of the Repartimiento and Spanish-Indian Economic Relations in Colonial Oaxaca, 1750–1821* (Stanford, CA: Stanford University Press, 2000), 1, 37–38; Celina G. Becerra Jiménez, "Redes sociales y oficios de justicia en Indias. Los vínculos de dos alcaldes mayores neogallegos," *Relaciones* 132 bis (2012): 110; and Peter Gerhard, *México en 1742* (Mexico City: Porrúa, 1962), 19, the distinction between *alcaldes mayores* and *corregidores* faded after mid-sixteenth-century reforms, and *novohispanos* began to use the words interchangeably. William F. Connell, *After Moctezuma: Indigenous Politics and Self-Government in Mexico City, 1524–1730* (University of Oklahoma Press, 2011), 18–19, argues that Native annual elections were pre-contact customs, while Joseph Plescia, "Judicial Accountability and Immunity in Roman Law," *American Journal of Legal History* 45, no. 1 (2001): 51, shows that this was also Roman heritage.

Litigants could also request the Council of the Indies in Madrid to reexamine rulings. The Council usually read up on a petition or an appeal and then issued a *consulta* (consultation). The king, queen, or their senior ministers saw the *consulta* and agreed or ordered changes. Their notaries scribbled a royal decree on the margins of the *consulta* and passed them back to the Council. The Council then issued a *real cédula* (royal provision) to the litigants, communicating the decree and attaching the king's name and seal. Sometimes the Council or the king confirmed the request of one party, and the notaries merely copied the original petition into the *real cédula*. The Native city of Tlaxcala, for example, complained about two lackadaisical attorneys at the Indian court and asked for a greater role for its procurators. The *real cédula* from 1685 cited the complaint and settled the issue.[59]

Novohispanos generally expected to a point that these councilors and judges acted as impartial public persons. They should maintain their independence in court and ideally behave "without personal interests and zealous in the service of God, king, and the public."[60] For this reason, the crown prohibited *audiencia* judges from marrying local women or owning property in their districts. At the same time, the boundaries of good conduct depended on the perspective, and most people knew that royal ministers also served their own interests and those of their powerful social networks.[61]

[59] Borah, *Justice by Insurance*, 284; Brendecke, *Imperio*, 87, 349. Hevia Bolaños, *Curia Filipica*, vol. 1, part 5, paras. 1–5, provides a detailed analysis of appeals; Alonso de la Lama y Noriega on behalf of Sánchez Morcillo to king, Madrid, 1 Apr. 1727, AGI, Escribanía 287 B, *pieza* 38, fols. 30–43, argues for allowing his client's appeal.

[60] *Parecer* of prosecutor of the Council of the Indies, cited in *consulta*, Madrid, 29 May 1748, AGI, México 440; the *consulta* of the Council of the Indies, Madrid, 18 Jan. 1726, AGI, México 670 A, demanded that judges be "independent and freer."

[61] Gayol, *Laberintos de justicia*, 1: 204, refers to the eighteenth-century jurist Francisco de Alfaro, who cited Bartolus's dictum that "office is what man owes others in kind." According to Parry, *Sale of Public Office*, 3; Robert Descimon, "La venalité des offices et la construction de l'État dans la France moderne: Des problèmes de la représentation symbolique aux problèmes du coût social du pouvoir," in Descimon, Schaub, and Vincent, *Les figures,* 78; and Roland Mousnier, *La venalité des offices sous Henri IV et Louis XIII*, 2nd ed. (Paris: Presses Universitaires de France, 1971), 7, the French jurist Charles Loyseau emphasized in 1609 that an office was a "dignity with public function," serving both the people and the owner. The *Institutes* 1.1.4. separated private from public law; Aquinas, *Summa*, IIa–IIae, Q. 67, art. 2, co. separated private persons from public authority; see also Antunez Portugal, *Tractatus*, book 2, chap. 14, para. 1. According to Miguel de Cervantes Saavedra, *Licenciado Vidriera* (Barcelona: Imprenta de A. Bergnes y Comp., 1832), 57, "the notary is a public person." Antonio Valero, "Ciencia de Estado," fol. 7, separated the "public good" from the "private jurisdiction." Jerónimo Moreno, *Reglas ciertas y precisamente necessarias para juezes, y ministros de justicia de las Indias y para su confesores* (Puebla: Viuda de Miguel Ortega y Bonilla, 1732. Facsimile, Mexico City: Suprema Corte de Justicia de la Nación, 2005), 34, argued

The networks composed of intermediaries negotiated power and stitched together the empire. They also often skewed trials and shaped the information flowing to Madrid.[62] Analyzing these actors in Oaxaca, Yanna Yannakakis maintains that "the Bourbons harbored significant antagonism toward Native intermediary figures (and intermediary figures of all sorts) whom they perceived as corrupt and inimical to the efficient functioning of Empire."[63] This may well be the case in the largely Native region of Oaxaca, yet such a claim will be more difficult to prove for the whole empire. The first Bourbon king arrived in Spain in 1701 and his descendants ruled New Spain until its independence in 1821. The dynasty and their changing ministers seldom pursued a consistent policy toward any social group during this long century, and instead altered their aims according to expediency and convictions.[64]

In fact, the royal governments usually leaned heavily on local and regional power brokers. Loyal service usually mattered more than ethnic identity, although some minorities often faced harsher treatment. In fact, the Bourbons frequently preferred Basque and Navarrese intermediaries over Castilians from central Spain. In the eighteenth century, the crown

that any *alcalde mayor* who "assigned work for his own estate" had to pay the Indians appropriately. See also William Doyle, *Venality: The Sale of Offices in Eighteenth-Century France* (Oxford: Clarendon Press, 1996), 322; Paolo Prodi, *Settimo non rubare. Furto e mercato nella storia dell'Occidente* (Bologna: Società editrice Il Mulino, 2009), 243; Bravo Lira, *El Juez*, 133–134, 146; Garriga, "Sobre el gobierno," 81. Michel Bertrand, *Grandeur et misères de l'office: Les officiers de finances de Nouvelle-Espagne, XVIIe–XVIIIe siècles* (Paris: Publications de la Sorbonne, 1999), 31, points to the actual practices when claiming that the notion of public service was absent in the early eighteenth century; Herzog, *Upholding Justice*, 8, argues that "[o]fficers made no distinction between private and public behavior or between private and public ends."

[62] On the foundational literature on networks, see Mark S. Granovetter, "The Strength of Weak Ties," *American Journal of Sociology* 78, no. 6 (1973): 1360–1380; John F. Padgett and Christopher K. Ansell, "Robust Action and the Rise of the Medici," *American Journal of Sociology* 98, no. 6 (1993): 1259–1319; Stanley Wasserman and Katheryne Faust, *Social Network Analysis: Methods and Applications* (Cambridge, New York: Cambridge University Press, 1994); Dorothea Jansen, *Einführung in die Netzwerkanalyse. Grundlagen, Methoden, Forschungsbeispiele*, 2nd ed. (Opladen: Leske and Budrich, 2003).

[63] Yannakakis, *The Art of Being*, 165. Yannakakis wrote an excellent book, although I differ somewhat on this point.

[64] Bourbons also ruled France, Naples, and other principalities, see, for example, Allan J. Kuethe and Kenneth J. Andrien, *The Spanish Atlantic World in the Eighteenth Century: War and the Bourbon Reforms, 1713–1796* (Cambridge: Cambridge University Press, 2014), 3, 143.

also needed indigenous partners to wrest away parishes from the regular orders or relied on elites in provincial cities to bypass the powerful social bodies in Mexico City.[65] For these reasons, ministers forged alliances with suitable patrons, brokers, and clients to advance or to stall reforms. Historians have chiseled out the importance of these go-betweens during the historiographical turn toward social networks starting in the early 1970s. The local connections played a key role in achieving political goals, and both reformers and the opposition used them.[66]

[65] I have tried to show Native collaboration in Rosenmüller, "'The Indians … long for change:' The Secularization of Regular Parishes in New Spain, 1749–1755," in *Early Bourbon Spanish America. Politics and Society in a Forgotten Era*, eds. Francisco A. Eissa-Barroso and Ainara Vázquez Varela (Leiden: Brill, 2013), 143–163; Pietschmann, "Antecedentes políticos," 50–62.

[66] Among the first in Latin American history was Stuart Schwartz, *Sovereignty and Society*; see also Sharon Kettering, *Patrons, Brokers, and Clients in Seventeenth-Century France* (Oxford: Oxford University Press, 1986); Wolfgang Reinhard, *Freunde und Kreaturen. "Verflechtung" als Konzept zur Erforschung historischer Führungsgruppen. Römische Oligarchie um 1600* (Munich: Ernst Vögel, 1979), based on his 1973 *Habilitation*. Path breaking are Bertrand, *Grandeur et misères*; and Herzog, *Upholding Justice*, 8–11. Michael Harsgor noted loyalty to two patrons, cited in Kettering, *Patrons, Brokers*, 21. On the outpouring of scholarship on network, François-Xavier Guerra, "Pour une nouvelle histoire politique: Acteurs sociaux et acteurs politiques," in *Structures et Cultures des Sociétés Ibéro-Américaines. Au-delà du Modèle-Économique: Coloque international en hommage au professeur Francois Chevalier, 29–30 avril 1988*, Maison des Pays Ibériques, Groupe Interdisciplinaire de Recherche et de Documentation sur l'Amérique Latine (Paris: CNRS, 1990), 250–258; Zacarias Moutoukias, "Negocios y redes sociales: modelo interpretativo a partir de un caso rioplatense (siglo XVIII)," *Caravelle* 67 (1997): 37–55; Christian Windler, "Bureaucracy and Patronage in Bourbon Spain," in *Observation and Communication: The Construction of Realities in the Hispanic World*, eds. Johannes-Michael Scholz, and Tamar Herzog (Frankfurt: Vittorio Klostermann, 1997), 299–320; Renate Pieper and Philipp Lesiak, "Redes mercantiles entre el Atlántico y el Mediterráneo en los inicios de la guerra de los treinta años," in *El Crédito en Nueva España*, eds. María del Pilar Martínez López-Cano, and Guillermina del Valle Pavón (Mexico City: Instituto Mora, 1998), 19–39; Michel Bertrand, "Del actor a la red: análisis de redes e interdisciplinariedad," in *Los actores locales de la nación en la América Latina: Análisis estratégicos*, ed. Evelyne Sanchez (Puebla: Benemérita Universidad Autónoma de Puebla; Tlaxcala: El Colegio de Tlaxcala, 2011), 39, see also 23–41; Jean Pierre Dedieu, "Procesos y redes. La historia de las instituciones administrativas de la época moderna, hoy," in *La pluma, la mitra y la espada: estudios de historia institucional en la Edad Moderna*, eds. Jean-Pierre Dedieu, Juan Luis Castellano, and María Victoria López-Cordón Cortezo (Madrid: Marcial Pons, 2000), 13–30. Juan Luis Castellano and Jean-Pierre Dedieu, eds., *Réseaux, familles et pouvoirs dans le monde ibérique à la fin de l'Ancien Régime* (Paris: CNRS, D. L. 1998); Dedieu, Castellano, and López-Cordón Cortezo and others collaborated in the group *Personal administrativo y político de España* (*PAPE*) at the CNRS to produce the massive *FICHOZ* database on social relations in the imperial bureaucracy. See also Alfredo Moreno Cebrián and Núria Sala i Vila, *El "Premio" de Ser Virrey. Los intereses públicos y privados del gobierno virreinal en el Perú de Felipe V* (Madrid: CSIC, 2004);

Audiencia judges frequently belonged to differing networks, and their varied interests and perspectives often defied a direct translation of a social desire into a sentence. Tamar Herzog maintains in this regard that any "distinction between institution and society was virtually inexistent" in Quito.[67] Some *audiencia* judges undeniably married or befriended locals and carried the conflicts riddling the communities into the courts. Yet the law, opposing allegiances, the need to forge compromises, and the threat of informants mattered too in New Spain. The crown knew of the antagonisms among ministers and packed the *audiencia* with several judges and prosecutors. These ministers could well belong to opposing camps and happily reported the failings of their adversaries to Madrid. In addition, the *audiencia* judges distinguished themselves from the rest of society. Their legal knowledge gave them great prestige, and they insisted on their elevated role at public events. In addition, men of "cloak and sword," that is, people of non-judicial training, often governed the courts, assisted by a slew of notaries and other officials. They frequently brought differing perspectives to the table. Madrid acted as an arbiter among the competing interests, reducing the ability of small groups to hijack the courts.[68]

As conflicts unfolded, notaries, judges, and other vassals readily gave the crown important information about the far-flung realms. For example, court notaries occasionally wrote down the prosecutor's legal opinions, the majority vote of the judges, and the dissenting viewpoints in lawsuits. Vassals also sent streams of petitions to Madrid. By doing so, they provided the kings with the best available information about local circumstances. "Knowledge is power," the English jurist Francis Bacon

Bernd Hausberger, "La conquista del empleo público en la Nueva España. El comerciante gaditano Tomás Ruiz de Apodaca y sus amigos, siglo xviii," *Historia Mexicana* 56, no. 3 (2007): 725–778; Bartolomé Yun Casalilla, ed., *Las redes del imperio. Élites sociales en la articulación de la Monarquía Hispánica, 1492–1714* (Madrid, Seville: Marcial Pons, Universidad Pablo Olavide, 2009); Becerra Jiménez, "Redes sociales y oficios."

[67] Herzog, *Upholding Justice*, 160.

[68] See, for example, Revillagigedo to Ensenada, Mexico City, 24 Oct. 1753, AGI, México 1350; Wim Blockmans, Jean-Philippe Genert, and Christoph Mühlberg, "Annexe 1: The Origin of the Modern State (Activité additionelle de la European Science Foundation)," in *L'état moderne: genèse. Bilans et perspective. Actes du colloque tenu au CNRS à Paris les 19–20 septembre 1989*, ed. Jean-Philippe Genet (Paris: CNRS, 1990), 295; Brendecke, *Imperio*, 35, 486–489. On officials *de capa y espada*, Francisco Andújar Castillo, "Prólogo," in Guillermo Burgos Lejonagoitia, *Gobernar las Indias: Venalidad y méritos en la provisión de cargos americanos, 1701–1746* (Almería: Universidad de Almería, 2014), 17.

(1561–1626) argued earlier, and the Spanish queens and kings relied on competing stories rising up from below to discern loyal from disloyal servants. Far from having absolute control, the kings and queens used their knowledge to curb powerful elites, rein in abuse, advance their clients, and implement reforms that slowly transformed the empire.[69]

In addition, "soft steering" promoted a sense of duty among the ministers. This cultural manipulation consisted of discursive methods, symbols, and rational arguments. The crown exhorted ministers to comply with the norms of good conduct, and these exhortations reverberated among the public. Over time, social values changed and the talk about the ministers' usefulness to the public good sank in. This does not mean that all functionaries followed suit right away or that the crown expected them to do so. Yet soft steering incrementally altered the behavior of ministers, because a broad audience in New Spain agreed with these changes.[70]

The kings claimed absolute power to pursue such policies. *Absolute* power, in this sense, meant that the kings could change or ignore the law of the kingdom when necessary, which was not the same as controlling the minutiae of everyday lives. The cities of the empire, for example, continued to issue their own statutes and live by their own customs. Nonetheless, the Roman *Digest* posited that any decision of the emperor became law. The *Siete Partidas* incorporated this rule, assigning absolute power to the kings of Castile who served akin to the emperor in their realm.[71] The cities of

[69] Brendecke, *Imperio*, 21, 481–487, quote of Bacon on p. 35, note 29. See also Mumford, "Litigation as Ethnography," 6–8.

[70] Gerhard Göhler, Ulrike Höppner, Sybille de la Rosa, and Stefan Skupien, "Steuerung jenseits von Hierarchie. Wie diskursive Praktiken, Argumente und Symbole steuern können," *Politische Vierteljahresschrift* 51, no. 4 (2010): 691–693; Holenstein, "'Gute Policey' und lokale Gesellschaft. Erfahrung als Kategorie im Verwaltungshandeln des 18. Jahrhunderts," *Historische Zeitschrift*, New Series 31 (2001): 433, 444–450.

[71] For example, *Digest* 1.3.31 stated that "the prince is absolved from the laws," and *Digest* 1.4.1 claimed that "[w]hatever pleases the prince has the force of law." Domingo de Soto, *De iustitia et iure, libri decem: De la justicia y del derecho, en diez libros* (Madrid: Instituto de Estudios Políticos, 1968), 2: 269, cited *Digest* 1.4.1. See also the late eighteenth-century *Discurso en que se demostra que o Poder dos Reys nao depende dos Povos e mormente o dos Senhores Reys de Portugal*, Biblioteca de Ajuda, 54-XI-16, although Rodríguez O., "*We Are Now,*" 19, argues that the "concept of absolute royal power … was never accepted in the Hispanic world," see also 20, 24–33. Ernst-Wolfgang Böckenförde, *Geschichte der Rechts- und Staatsphilosophie. Antike und Mittelalter* (Tübingen: Mohr Siebeck, 2002), 294, shows that William of Ockham (1280/85–1347/49) already used *Digest* 1.3.31 in the conflict between emperor and pope. For François-Xavier Guerra, "De la política antigua a la política moderna. La revolución de la soberanía," in Guerra and Lempérière, *Los espacios públicos en Iberoamérica,* 124–131, Jean Bodin (1529/30–1596) reinterpreted the *Digest*'s law as

Castile agreed, at least sometimes. A representative of the *Cortes* (parliament of estates) of 1523 held that "laws and customs are subject to the kings who can make and unmake them at their will."[72] In practice, the kings issued edicts without the consent of the *Cortes*, and for this reason, an attorney in Mexico City agreed that the king was "prince and legislator" of the empire.[73]

In addition, the idea of jurisprudence differed from today and included royal governance. The Spanish kings were the senior judges of the empire. They issued laws, levied taxes, defended the realm, and wielded "the force of the sword to punish evil-doing people."[74] Other kings claimed similar authority. The Portuguese jurist Antonio Sousa de Macedo ably summed up this point in 1651. For him, jurisprudence consisted not only of adjudicating complaints "as the incompetent believe," but referred to the entire political organization of the empire.[75]

The expanding royal authority, meanwhile, often encountered robust resistance from the great Councils, power elites, or popular groups. In 1693, during a period of bitter feuding, the Council of the Indies reminded King Charles II that "absolute power does not reside in the Catholic character, only ordinary justice governed by reason."[76] The Council at that point attempted to protect its own prerogatives by demanding that the king end the sale of office appointments. Earlier, the theologian Francisco Suárez (1548–1617) had devised a contract theory according to which the kings depended on the will of the people. Other scholars praised the mixed sovereignty shared among the people, the nobility, and the crown, which also countered the idea of absolute royal power.[77]

the "highest power over citizens and subjects that is unfettered by the laws." According to Lempérière, *Entre Dieu et le roi, la république: México, XVIe–XIXe siècle* (Paris: Belles lettres, 2004), 63, King Jean II of Castile (1406–1452) and his jurists at the latest insisted on the absolute power of the king; see also Gil, "Spain and Portugal," 432–433; Reinhard, *Geschichte der Staatsgewalt*, 37; Agüero, "Local Law," 104–105.

[72] I. A. A. Thompson, "Absolutism, Legalism," 219–220.

[73] Print *por Don Miguel Truxillo*, AGI, México 670 A, fol. 17v. See also Murillo Velarde, *Cursus Iuris Canonici*, book 1, title 32, paras. 343–344; according to Tau Anzoátegui, *El Jurista en el Nuevo Mundo*, 24, the eighteenth-century state was widely accepted as the exclusive legislator.

[74] *Digest* 2.1.3.

[75] Hespanha, "Paradigmes de légitimation," 20–22; for Reinhard, *Geschichte der Staatsgewalt,* 139, jurisprudence excluded warfare. See also Stolleis, *Histoire du droit public*, 66–67, 108;

[76] *Consulta* of the Council of the Indies, Madrid, 9 Nov. 1693, in Richard Konetzke, *Colección de documentos para la historia de la formación social de Hispanoamérica, 1493–1810* (Madrid: CSIC, 1953–1962), vol. 3, tome 1, p. 36.

[77] Rodríguez O., "*We Are Now,*" 9–10; Reinhard, *Geschichte der Staatsgewalt,* 112.

Trust among ministers buttressed resistance against undesirable reforms or punishments, but it could also be betrayed. Judges and notaries, for example, had rehearsed passing on bribes and other favors for generations. They confided that all participating parties continued the profitable practices. Trust ran deep and it glued together the ministers, often encumbering meaningful prosecutions of malfeasance. Nonetheless, Francisco Garzarón obtained valuable testimony by threatening effective punishments for recalcitrant ministers. When the suspects saw that Garzarón succeeded, at least some changed their tune to save their skin. Garzarón, for example, charged a criminal judge with seizing confiscated assets from jailed suspects. The criminal judge blamed his notary for the malpractice, giving Garzarón's *visita* the necessary testimony to discipline the wayward official.[78]

In many cases, the crown tried to compromise with groups that disregarded royal rules or expressed their dissatisfaction, instead of penalizing them. When the moral economy of communities was violated and the channels of communications with the authorities blocked, for example, anger could boil over into revolts. Natives on these occasions threatened, evicted, or even killed their *alcaldes mayores* and their assistants. The state typically sought to appease the involved parties during these conflicts. The crown sent ministers to hear the Native complaints, and they pardoned most participants. They also sternly warned the Indians to return to peace and harmony or face the rigor of justice.[79]

[78] Defense of Pedro Sánchez Morcillo, AGI, México 670 B, *Relación*, fol. 731v. Notary Pedro Robledo to Garzarón, Mexico City, 2 June 1719, AGI, Escribanía 280 C, fol. 451, rejected the testimonies of his superiors as "biased." Speaking with Niklas Luhmann, the stimulus of Garzarón's *visita* irritated the *audiencia* and it adapted to survive, although not as king or society had desired. Niklas Luhmann, "Familiarity, Confidence, Trust: Problems and Alternatives," in *Trust: Making and Breaking Cooperative Relations*, ed. Diego Gambetta (Department of Sociology, University of Oxford), 97–103, distinguishes between trust and confidence. On structural coupling and *autopoiesis*, Luhmann, *Introduction to Systems Theory*, ed. Dirk Baecker (Cambridge: Polity, 2013), 7, 63, 70–90, 183,187; Luhmann, "Operational Closure and Structural Coupling: The Differentiation of the Legal System," *Cardozo Law Review* 13, no. 5 (1992): 72–78, 86–90; Anders La Cour and Holger Højlund, "Organizations, Institutions and Semantics: Systems Theory Meets Institutionalism," in *Luhmann Observed: Radical Theoretical Encounters*, eds. Anders La Cour and Andreas Philippopoulos-Mihalopoulos (Basingstoke: Palgrave Macmillan, 2013), 188–202; Reinhard, *Geschichte der Staatsgewalt*, 131; Armin Nassehi, *Wie weiter mit Niklas Luhmann?* (Hamburg: Hamburger Edition, 2008).

[79] Based on Stefan Brakensiek, "Ergebene Diener ihrer Herren? Herrschaftsvermittlung im alten Europa. Praktiken lokaler Justiz, Politik und Verwaltung im internationalen Vergleich," in *Ergebene Diener ihrer Herren? Herrschaftsvermittlung im alten Europa*, eds. Stefan Brakensiek and Heide Wunder (Cologne: Böhlau, 2005), 1–12;

Yet the crown could also call on *visitadores* to hand down harsh punishments, and these *visitadores* often drew on significant political support for their aims. The early modern state relied on collaboration to some extent, and the *visitadores* succeeded mostly when they counted on imperial and local acquiescence or agreement.[80] A *visitador* adjudicated the Indians of Tehuantepec who rebelled in 1660, for instance. The *visitador* denied the appeals and executed five death sentences. The scholarship has decried this process as a "mockery of justice."[81] Similarly, culprits later impugned the verdicts of Garzarón's *visita*, because his "rigor and harshness," was "exorbitant and opposed to the dispositions of the law."[82] Yet many early modern Spaniards saw these *visitas* as the king's duty to correct wrongs. An entire genre of literature affirmed that the king served as the spouse of the republic and "shepherd and father" of his vassals. These works described the republic as a body and the king as its head who closely observed any disorder. According to the Jesuit Andrés Mendo, for instance, the "most noble sense of the head are the eyes, and the prince has to be all eyes, vigilantly watching the appropriate behavior of his subjects. Nothing can flee from his gaze." The king named *visitadores* – whose title referred to seeing – to "defend the law and the flock." Many *novohispanos* agreed.[83]

The king wielded the economic power to appoint the *visitadores* who bypassed the courts of justice. In the early modern view, the term

E. P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," *Past and Present* 50 (1971): 76–136.

[80] Holenstein, "Introduction," 5, 25–27; Herzog, "Ritos de control," 11–12

[81] Owensby, *Empire of Law*, 284, see also 268–285, argues in his solid book that the *visita* sentences were "in direct contravention of recognized legal principle." Garriga, "Sobre el gobierno," 88, maintains that *visita* verdicts always needed royal approval.

[82] Defense of Juan Díaz de Bracamonte, AGI, México 670 B, *Relación*, fol. 128; Alonso de la Lama y Noriega on behalf of Pedro Sánchez Morcillo to king, Madrid, 1 Apr. 1727, AGI, Escribanía 287 B, *pieza* 38, fol. 32. The civil judge Félix Suárez de Figueroa, for example, denied the *visita's* jurisdiction to review his land grant commission. The *parecer* of prosecutor of the Council of the Indies, José de Laysequilla, Madrid, 14 Aug. 1724, AGI, Escribanía 287 B, *pieza* 39, fol. 133v, found that "this intent alone … justifies the imposed punishment."

[83] Andrés Mendo, *Príncipe perfecto y Ministros Aiustados, Documentos Políticos y Morales. En Emblemas* (Lyon: Horacio Boissat y George Remeus, 1662), 54, 48, 61. The law justified frequent *visitas*. According to *Law of Castile*, book 3, title 8, laws 1–2, a *visita* could occur every year in every province, while for the *Law of the Indies*, book 2, title 34, laws 1 and 7, a *visita* should occur "when it is appropriate." The Latin word *visito* (I visit) derives from both *viso* and *video* (I see), and therefore *visitadores* were also called *veedores* or *visidores;* see, e.g., *consulta* of the Council of the Indies, Madrid, 18 Jan. 1726, AGI, México 670 A.

economic frequently referred to matters of the home. The king had the duty to keep his house in order, and this task extended to the entire kingdom. The *visitadores* served this end. A *real cédula* from 1750, for example, underlined the necessity of the "economic and political power . . . for the public tranquility of my vassals."[84] This authority was separate from the ordinary course of justice, and the *visitadores* usually operated on their own to mend disorders. They resembled the king's favorite ministers and the *juntas* (committees) that convened for special purposes. They resolved challenges quickly, because they did not wait out the lengthy deliberations of the courts or Councils. For this reason, historians have traditionally interpreted the *visitas* as tools of reforming the nascent states.[85]

Next to the economic power and justice, the king's grace was the third domain of power. The king assuaged harsh judicial rulings and modified human fate by his acts of grace. He awarded vassals for loyal conduct and elevated commoners into the nobility. The king also voided the illegitimacy of birth of others and pardoned culprits. Early modern people mostly considered grace a necessary complement to justice and not as an arbitrary abuse of royal power. Andrés Mendo, for instance, praised the king of Portugal for commuting death sentences into banishments to overseas realms. The king, in this way, combined the utility of settlers in the territories with the grace of easing tough punishments.[86]

[84] *Real cédula*, San Lorenzo, 18 Oct. 1750, AGN, Indiferente Virreinal 3263, exp. 28.

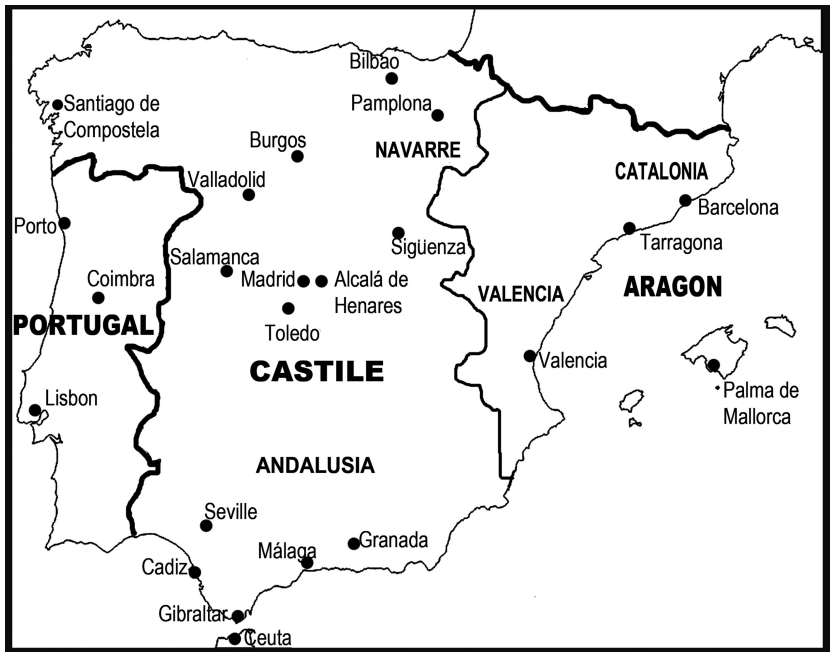
[85] See Feros, *Kingship and Favoritism*, 4–5, 128–132; Hespanha, "Paradigmes de légitimation," 23–25; Andújar Castillo, "Prólogo," 15; Bertrand, *Grandeur et misères*, 34–40. According to Richard Bonney, "France, 1494–1815," in *Rise of the Fiscal State in Europe, c. 1200–1815*, ed. Richard Bonney (Oxford: Oxford University Press, 1999), 130, the French crown reintroduced the intendants in 1653 as "commissioners sent to execute the orders of His Majesty." Murillo Velarde, *Cursus Iuris Canonici*, book 1, title 32, para. 342, argues that the authority "which the father has over the son, the lord over the servant, and the husband over his wife … is not public but private power, and it is called economic." Still readable, Otto Hintze, "Der Commissarius und seine Bedeutung in der allgemeinen Verwaltungsgeschichte," in *Staat und Verfassung. Gesammelte Abhandlungen zur allgemeinen Verfassungsgeschichte*, ed. Gerhard Oestreich (Göttingen: Vandenhoek und Rupprecht, 1962), 242–274.

[86] Mendo, *Príncipe Perfecto*, 165. See also Hespanha, "Porque que é existe," 32–35; Reinhard, *Geschichte der Staatsgewalt*, 139. Herzog, *Upholding Justice*, 41, argues that banishments were utilitarian and not part of Antonio Manuel Hespanha's economy of grace, according to which the king alternated between his roles as justiciary and father, but Mendo suggests otherwise.

1.3 EMPIRE IN TRANSITION

The Spanish empire comprised a string of kingdoms, principalities, and provinces. While the court in Madrid was the ultimate arbiter of conflicts, the empire did not merely consist of one great center from where political and social importance cascaded toward the fringes. In fact, several core kingdoms, among them New Spain and Peru, rivaled Castile in economics, population, and patronage in varying degrees. These core kingdoms also mattered, because other realms or territories attached to them in different ways. These realms or territories tended to be less densely settled and they often depended economically or politically on the core kingdom. Nevertheless, even these realms cherished their own rights and customs and preserved their local governance.

In the period 1650–1755, the crown tightened supervision over these kingdoms and territories with varying degrees of success. This process



MAP 3 The Iberian Peninsula in 1700.
Map adapted by Gabriela Chávez from William D. Phillips, and Carla Rahn Phillips, *A Concise History of Spain*, 2nd. ed. (Cambridge: Cambridge University Press, 2016), 178.

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advanced in part, because Spain had to fend off the other great powers, including England, France, Habsburg Austria, and the Netherlands. These rivals tried to seize territories, fortresses, or trade from the empire. The crown mobilized ever larger resources to counter the threat. Madrid attempted to increase tax revenue from privileged groups or social bodies and channel more funds to the military. The queens and kings intensified their rule by incrementally curbing the autonomies of the kingdoms and limiting the jurisdictions of the social bodies. By and large, the process defined the boundaries of the provinces more clearly and advanced universal principles that applied to all individuals. These changes did not occur on a linear trajectory and many reforms remained piecemeal. Rulers rarely followed a master plan, and, instead, they usually responded to particular challenges with specific solutions.

New Spain traveled on a similar pathway. Colonial Mexico originally integrated into the polycentric Spanish empire after the conquest of the Aztec (Mexica) empire in 1521. Agriculture and silver mining expanded, and New Spain grew into an economic power house. The regions north of the old Aztec empire gravitated into the *novohispano* orbit. The viceroys in Mexico City, for example, monitored the military and the finances in New Galicia and its capital Guadalajara, located north of the Mexico City *audiencia* limits. In addition, the viceroys sent funds to the Caribbean isles and the Philippines to sustain fortresses and the missions of the religious orders. These regions did not formally belong to the viceroyalty – despite what textbook maps show – because the viceroy, the *audiencia*, or the tax collectors had no formal say there. Yet social networks, personal communications, and trade thrived. By sending money, merchants, mercenaries, and mendicants, New Spain gained informal leverage in these regions.[87]

[87] On the cascading structure, Heribert Münkler, *Empires. The Logic of World Domination from Ancient Rome to the United States*, trans. Patrick Camiller (Cambridge: Polity, 2007), viii, 4–11. Jane Burbank and Frederick Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton: Princeton University Press, 2010), 16–17, suggest a nuanced relation of overlapping and shared sovereignty with the periphery. On the "fiscal submetropolis," Carlos Marichal, *Bankruptcy of Empire: Mexican Silver and the Wars between Spain, Britain, and France, 1760–1810* (New York: Cambridge University Press, 2007), 5, see also 1–12. Oscar Mazín Gómez, "Introducción," in *México en el mundo hispánico*, ed. Oscar Mazín Gómez (Zamora: El Colegio de Michoacán, 2000), 1: 15, see also 16–18, envisions a "political nucleus." On "informal empire," Pietschmann, "Diego García Panés y Joaquín Antonio de Rivadeneira Barrientos, pasajeros en un mismo barco: Reflexiones en torno al México 'imperial' entre 1755 y 1808," in *Un hombre de libros: homenaje a Ernesto de la Torre Villar*, eds. Alicia Mayer and Amaya Garritz (Mexico City: UNAM, 2012), 207. See also

In addition, New Spain consisted of social bodies that enjoyed great autonomy, lived by their own rules, and mediated royal power. These social bodies comprised the guilds of shoemakers and goldsmiths, African confraternities associated with churches, or municipal councils, for instance. These social bodies shaped the lives of their members, who were usually born into a hierarchical group and rarely left their community without severing most ties to other members. The social bodies frequently had jurisdiction over their members, who tended to have a "porous" identity, because they usually made decisions in conjunction with their social bodies.[88]

The social bodies competed to some degree with the ordinary justice system represented by *alcaldes mayores* and *audiencias*. The judges of the various social bodies applied norms of different provenance and therefore a "jurisdictional pluralism" reigned at that time. Ecclesiastical courts, for instance, offered conflict resolution on a broad swath of issues to clergy

Francisco Comín Comín and Bartolomé Yun-Casalilla, "Spain: From Composite Monarchy to Nation-State, 1492–1914. An Exceptional State?" in *The Rise of Fiscal States: A* Global History *1500–1914*, eds. Francisco Comín Comín, Bartolomé Yun-Casalilla, and Patrick K. O'Brien (Cambridge: Cambridge University Press, 2012), 234; Marichal and Matilde Souto Mantecón, "La Nueva España y el financiamiento del imperio español en América: Los situados para el Caribe en el siglo XVIII," in *El secreto del imperio español: Los situados coloniales en el siglo XVIIII*, eds. Carlos Marichal and Johanna von Grafenstein (Mexico City: El Colegio de México, Instituto Mora, 2012), 61–93; Pedro Cardim, Tamar Herzog, José Javier Ruis Ibáñez, and Gaetano Sabatini, Introduction to *Polycentric Monarchies: How did Early Modern Spain and Portugal Achieve and Maintain a Global Hegemony?* (Brighton, UK: Sussex Academic Press, 2012), 5. Francisco Eissa-Barroso, *The Spanish Monarchy and the Creation of the Viceroyalty of New Granada (1717–1739): The Politics of Early Bourbon Reform in Spain and Spanish America* (Leiden: Brill, 2016), 13–14, argues for multi-layered yet hierarchical connections. John J. TePaske and Herbert S. Klein, *Ingresos y egresos de la Real Hacienda de Nueva España* (Mexico City: Instituto Nacional de Antropología e Historia, 1986–1988), vol. 2, p. 14, note 5, maintain that Florida and Louisiana and other regions belonged to the viceroyalty, yet this was only true in the sense that two secretariats labored at the Council of the Indies, one for a region called New Spain and one for Peru. According to Concepción de Castro Monsalve, "Las secretarías de los consejos, las de estado y del despacho y sus oficiales durante la primera mitad del siglo xviii" *Hispania* 59, no. 201 (1999): 203, each secretariat consisted in 1717 of six or seven officials. All incoming correspondence was divided between the secretariat of New Spain or Peru. According to *Law of the Indies*, book 5, title 2, law 1, Yucatan did not appeal lawsuits to the *audiencia* of Mexico City, but to the Council of the Indies, while the viceroy served as superior governor. Over the years, however, the governors of Yucatan claimed superior status themselves, attaining more autonomy from the viceroy.

[88] Brian Larkin, *The Very Nature of God. Baroque Catholicism and Religious Reform in Bourbon Mexico City* (Albuquerque, NM: University of New Mexico Press, 2010), 13, 222; on the term "social bodies," Meccarelli, "Dimensions of Justice," 50.

and even non-clergy, while soldiers, postal clerks, and merchants often litigated in their own separate courts. Similarly, the indigenous *pueblo* (polity) exemplified a social body. The *pueblo* largely lived by its own unwritten customs, and the indigenous *alcaldes* settled the conflicts of their community according to their values. Most social bodies had also forged their own explicit or implicit contracts with the king, and these agreements safeguarded privileges and internal organization. The central government in Madrid had limited say in their affairs and often cared less about the details.[89]

The variety of arrangements and competing jurisdictions declined, as the cycles of reforms accelerated in the seventeenth century. Some royal governments attempted to intensify – not necessarily centralize – authority. They often viewed the autonomy of the social bodies with some suspicion and preferred ruling individuals instead of negotiating with the social bodies. In addition, the kings and their reformist ministers aimed at undercutting the role of the core kingdoms and integrating them more fully into the state. While this was not a predictable process,

[89] Lauren Benton and Richard Ross, "Empires and Legal Pluralism. Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World," in *Legal Pluralism and Empires, 1500–1850*, eds. Lauren Benton and Richard Ross (New York: New York University Press, 2013), 5–6; Guerra, "De la política antigua" 110–129. I use the term social bodies instead of corporations, which encompasses *cabildos*, confraternities, and courts, while the sources often speak of *universidad/universitas* or *cuerpo*. Ethno-historians have discarded the word *corporation* and favor *altepetl* (ethnic polity) and *calpolli* (a sub-unit of an *altepetl*) when analyzing Native social structures. Perhaps we should reconsider the term, however, not in the definition of Eric Wolf but in the meaning of François-Xavier Guerra or other Atlantic historians, who use the term *corporation* to describe basic social organizations of the old regime. These scholars have aimed to flesh out differences and parallels of the early modern societies. They share that aim with the Nahua annalist Chimalpahin, who found the similarities between New Spain and Courland on the other side of the Atlantic striking. Chimalpahin apparently gathered some information from the professor of mathematics in Hamburg, Henrico Martínez (Heinrich Martin) who lived in Mexico City in the 1620s to design the water drainage system. Martínez and Chimalpahin knew that the Baltic-speaking Curonian majority lived by their own traditions in the countryside, while most people in the cities spoke Swedish and German and were governed by Hanseatic laws and the *ius commune*. Similarly, analyzing corporations, when carefully cleared from older notions, can provide insights within an Atlantic perspective; see Schroeder, introduction to *The Conquest All Over Again*, 2–3; and Schroeder, "Chimalpahin Rewrites the Conquest. Yet Another Epic History?," in ibid., 115–116; Walther L. Bernecker, Horst Pietschmann, and Hans Werner Tobler, *Eine kleine Geschichte Mexikos* (Frankfurt: Suhrkamp, 2007), 91. Nancy M. Farriss, *Maya Society under Colonial Rule. The Collective Enterprise of Survival* (Princeton: Princeton University Press, 1984), 138–139, views Yucatan as a "corporate and hierarchical society." Corporate forms of society have not disappeared in modern Mexico. Taxi drivers, trash collectors, or teachers have often negotiated their labor terms en bloc and their leaders have served as congresspersons.

the crown took a step into that direction between 1707 and 1716. The crown removed four viceroys from the Spanish peninsula, abolished most provincial institutions, and introduced Castilian public law in the kingdoms of the crown of Aragon.[90]

These changes could encourage economic initiatives, create wealth, and provide for greater individual self-determination. For this reason, the kingdoms even favored reform under circumstances. New Spain, Peru, and Catalonia, for example, had long called for opening up the sclerotic Atlantic trade system. The trade fleets left Seville in southern Spain every year and traveled to New Spain and Panama/Peru to deliver European merchandise. The commercial oligopoly allowed merchants in Seville to charge excessive mark ups from the Americans. In the early eighteenth century, several governing coalitions in Madrid confronted the commercial oligopoly and successively eased up trade restrictions. The fleets declined in importance, while nimble registered ships sailed from various peninsular ports directly to the Americas.[91]

Yet much remained a "stubbornly incomplete process" during which imperial patterns prevailed. Conservative governments and their alliances backtracked on reforms. For example, the king's first minister fell in 1754, and the commercial oligopoly flexed its muscles once more. In the following year, the new government suppressed the registered ships going to New Spain and restored the fleet on this route.[92] This shows

[90] Based on Eissa-Barroso, *The Spanish Monarchy*, 1–4; Guerra, *Modernidad e Independencias. Ensayos sobre las revoluciones hispánicas* (Mexico City: Fondo de Cultura Económica, MAPFRE, 1992), 13, 22–23.

[91] Kuethe and Andrien, *Spanish Atlantic World*, 4, 45, 145, 203–206, 213; Kuethe, "Imperativos militares en la política comercial de Carlos III," in *Soldados del Rey. El ejército borbónico en América colonial en vísperas de la Independencia*, eds. Alan Kuethe and Juan Marchena (Castelló de la Plana: Universitat Jaume Primer, 2005), 153–154. Recent discussions of oceanic trade and corruption include Catherine Tracy Goode, "Merchant-Bureaucrats, Unwritten Contracts, and Fraud in the Manila Galleon Trade," in Rosenmüller, *Corruption in the Iberian Empires*, 171–197; Fabricio Prado, "Addicted to Smuggling: Contraband Trade in Eighteenth-Century Brazil and Rio de la Plata," ibid., 197–214.

[92] Benton, *A Search for Sovereignty. Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2010), 1–31, 280; Benton and Ross, "Empires and Legal Pluralism," 1–7; Rodríguez O., "*We Are Now,*" 24, 33, see also 1–33, 335–345, argues that "Americans everywhere either objected to or opposed these innovations and modified many to suit their interests," while the "crown eventually would have reached accommodations with its American subjects who retained a significant degree of autonomy." Kuethe and Andrien, *Spanish Atlantic World*, 25, maintain that various social groups "attempted to shape the reform process," see also p. 213. On participation from below, see Eric Van Young, *The Other Rebellion: Popular*

that a king or his dynasty rarely pursued grand designs leading "inexorably from empire to nation-state" and the process was far from a smooth and steady process.[93] The king's ministers and their local allies considered their options when challenges arose, and they chose specific solutions rather than crafting a consistent policy. Sometimes, the kings even curbed the autonomy of one entrenched social body by creating competing institutions. In 1717, for example, the crown established a new viceroyalty in New Granada (modern Colombia, Venezuela, and Ecuador) to heighten control and dampen the influence of the powerful viceroy, *audiencia*, and oligarchy of Lima (Peru). In the second half of the eighteenth century, Manila in the Philippines, Guadalajara, and Veracruz also obtained *consulados* (merchant guilds) to rival the guild of Mexico City. Privileges and immunities of social bodies dissolved slowly and unevenly. Lasting change came only by enlisting local and imperial support, or at least acquiescence.[94]

At other times, the goals were oppressive, striking at indigenous self-administration, eradicating linguistic diversity, or raising taxation to new levels. Many historians of indigenous communities consider these changes as destructive to Native culture. Nancy Farriss, for example, argues that the Bourbon dynasty assaulted the traditional social order of Yucatan, and some scholars emphasize the exploitation of New Spain as a whole.[95]

Violence, Ideology, and the Mexican Struggle for Independence, 1810–1821 (Stanford, CA: Stanford University Press, 2001); see also Holenstein, "Introduction," 5, 11–31; Jon Mathieu, "Statebuilding from Below: Towards a Balanced View," in Blockmans, Holenstein, and Mathieu, *Empowering Interactions*, 305–311.

[93] Burbank and Cooper, *Empires in World History*, 2–3; Benton, *A Search for Sovereignty*, 10.

[94] Based largely on Guerra, "De la política antigua," 110–129; Kuethe and Andrien, *Spanish Atlantic World*, 25, 70; Bernecker, Pietschmann, and Tobler, *Kleine Geschichte*. According to del Valle Pavón, *Donativos, préstamos y privilegios: los mercaderes y mineros de la Ciudad de México durante la guerra anglo-española de 1779–1783* (Mexico City: Instituto Mora, 2016), 7, Buenos Aires and Guatemala also received *consulados*. See also Guerra, "Pour une nouvelle histoire politique," 250–258; Jorge Cañizares-Esguerra, *Puritan Conquistadors: Iberianizing the Atlantic, 1550–1700* (Stanford, CA: Stanford University Press, 2006), 5–9; Antonio Annino, "Soberanías en lucha," in *De los imperios a las naciones: Iberoamérica*, eds. Antonio Annino, Luis Castro Leiva, and François-Xavier Guerra (Zaragoza: Ibercaja, Obra cultural, 1994), 229–253. On the transition from the State of Associations to territorial state, Gerd Althoff, *Political and Social Bonds in Early Medieval Europe* (Cambridge: Cambridge University Press, 2004), 4–8.

[95] Farriss, *Maya Society*, 375–378. Notable is Yannakakis, *The Art of Being*, 223, which argues that the "imperial objective of cultural and ethnic homogenization" sought to "flatten the native social hierarchy" and turn "native peoples into pale imitations of Spaniards" while maintaining the hierarchy between Natives and Spaniards "on which colonialism was based." Owensby, *Empire of Law*, 297, views the seventeenth century as "relentless disintegration in the face of self-centered individual action," marked by

These are all excellent contributions, but these changes also had a different meaning.

Dismantling social bodies and curbing the privileges of old noble families could well benefit other groups that vied for community influence. For example, the elections for Native *alcaldes* and governors continued from pre-contact times, although they became incrementally more competitive. Tenochtitlan, the leading indigenous *parcialidad* (neighborhood) in Mexico City, demonstrates this shift. Its governors traditionally grew up in the *parcialidad* and descended from the Aztec royal lineage. In 1573, however, a well-educated non-noble from out of town won the election for governor. Social origin as selection criteria weakened further and direct appeals to the constituency mattered more. Candidates offered "entertainments, banquets, gifts, and extravagant election promises" to gain the vote by the 1650s. By this time, commoners began serving the indigenous municipal offices in greater numbers.[96] Competitive elections could well be popular among some middling and popular sectors.

In addition, the Enlightenment increasingly frowned upon treating social groups differently. Consequently, the separate laws for Natives were more and more seen as discriminatory and withered in the eighteenth century. The position of the protector of Indians disappeared in 1735, for example, and the incumbent joined the *audiencia* as a criminal judge.

"*aprovechamiento*" or exploitation. John Tutino, *Making a New World. Founding Capitalism in the Bajío and Spanish North America* (Durham, NC: Duke University Press, 2011), argues that "entrepreneurs took rising profits by assaulting the ways and welfare of the producing majority. Deepening inequities were sustained for decades." See also Dorothy Tanck de Estrada and Carlos Marichal, "Reino o Colonia? Nueva España, 1750–1804," in Velásquez García, *Nueva Historia general*, 307–353; Marichal, *Bankruptcy of Empire*, 1–12. In "Rethinking Negotiation and Coercion in an Imperial State," *HAHR* 88, no. 2 (2008): 217, Marichal argues that the colonies had to "adhere to the rules of an absolutist government that severely limited political autonomy … despite the harshness of the regime … [there] existed a certain degree of consensus in New Spain with regard to the legitimacy and functionality of the colonial tax system." Felipe Castro Gutiérrez, *Nueva ley y nuevo rey. Reformas borbónicas y rebelión popular en Nueva España* (Zamora: El Colegio de Michoacán; Mexico City: UNAM, 1996), 96–97, 262–275, argues that the populace revolted against specific aspects of the late Bourbon recolonization project to control and tax matters that previously had not been regulated by the state.

[96] Connell, *After Moctezuma*, 138, see also 70–75, 119–120, 154–155, 181–187. On lineages until 1610, Lockhart, *Nahuas*, 30–35; or 1650s, Hausberger and Mazín, "Nueva España," 291. Wiebke von Deylen, *Ländliches Wirtschaftsleben im spätkolonialen Mexiko. Eine mikrohistorische Studie in einem multiethnischem Distrikt: Cholula 1750–1810* (Hamburg: Hamburg University Press, 2003), 250–261, shows pre-Conquest nobles lost to competing families, communal landholdings declined, and private ownership expanded.

The Indian court also dissolved in the 1790s. Defense lawyers for Indians obtained better salaries to improve judicial standards and moved their trials into the *audiencia*.[97]

Indigenous peoples did not necessarily resent these changes if they did not conflict with their own interests. They often assimilated elements of the prestigious Hispanic culture – just as Hispanic urban culture borrowed heavily from Indians. Even the state's aim of spreading the Spanish language and mores among all inhabitants of the empire could be attractive for many when also offering full citizenship. Although this change strikes us now as innocuous to cultural diversity, a similar process was at play throughout Europe. For these reasons, the assessment of eighteenth-century empire should not be too somber. While not denying that groups suffered, reforms also came about with prodding from below. The analysis of corruption in this book bears this out.[98]

CONCLUSION

The law and social practices both mattered and evolved in the Spanish empire. Six pillars of law contributed to the legal pluralism in broad strokes. These were the combined Roman and canon law and their evolving interpretations, known as the *ius commune*. Spanish legal practitioners directly or indirectly drew on the *ius commune* for many years until the eighteenth century. Notaries or attorneys, for example, sometimes cited *ius commune* doctrines such as the tacit consent to defend the

[97] Owensby, *Empire of Law*, 37, 301–302; Annino, "El primer constitucionalismo Mexicano," 152–154; see also William Taylor, *Drinking, Homicide, and Rebellion in Colonial Mexican Villages* (Stanford, CA: Stanford University Press, 1979), 76.

[98] According to Lockhart, *Nahuas*, 443, "the Nahuas had no doctrinal distaste for Spanish introductions as such but related to them pragmatically," see also 2–5, 427–436, 442–446. On the religious change as part of the same trend, see Larkin, *The Very Nature of God*; while for Pamela Voekel, *Alone before God. The Religious Origins of Modernity in Mexico* (Durham, NC: Duke University Press, 2002), 12, elite projects "floated like large reefs atop an indifferent or hostile ocean." See also Duve, *Sonderrecht*, 274. On negotiated absolutism comparable to the British model, Alejandra Irigoin and Regina Grafe, "Bargaining for Absolutism: A Spanish Path to Nation-State and Empire Building," *HAHR* 88, no. 2 (2008): 173–209; Grafe, *Distant Tyranny: Markets, Power, and Backwardness in Spain, 1650–1800* (Princeton, NJ: Princeton University Press, 2012). On colonialism, "Para seguir con el debate en torno al colonialismo," *Nuevo Mundo Mundos Nuevos*, February 8, 2005, http://nuevomundo.revues.org/430; Philippe Castejón, "Colonia, entre appropriation et rejet: La naissance d'un concept (de la fin des années 1750 aux révolutions hispaniques)," *Mélanges de la Casa de Velázquez*. Nouvelle série, vol. 43, no. 1 (2013): 268–269.

excessive fees they had charged from litigants. Judges reconciled these concepts with biblical tenets and natural law, understood as the reasonable principles of ordering justice. The local customs and the royal law also played major roles. In addition, the judicial plurality engendered legal populism. *Novohispano* commoners and elites had relatively easy access to the courts and representation. The courts heard the involved parties in conflicts and ideally meted out sentences following general principles of justice. The king reviewed the process as the supreme arbiter, and the justice system was generally believed to be legitimate.

In the sixteenth century, humanist lawyers began challenging that matrix. They critically assessed the history of the Roman collection and furthered the judges' *arbitrio* to adjudicate criminal trials. In the late seventeenth century, inklings of enlightened thinking appeared on the intellectual horizon and the royal law gained further influence in the courts. Proponents of natural law suggested abandoning the legal pluralism in favor of an entirely new code built on systematic and unequivocal principles. Some experts even proposed discarding the *ius commune* and the royal law collections. Yet writing a full-fledged code for the entire empire failed, and the royal *Law of Castile* and the *Law of the Indies* continued to enshrine justice until the independence of New Spain in 1821.

When the social networks excessively skewed decisions, the king sent *visitas* to restore the proper working of justice. The networks consisted of patron–client relationships that tied together the social and ethnic groups of the empire, and local intermediaries played a crucial role in exchanging resources. The kings and queens relied on power brokers to gain information and advance reforms. Sometimes, these networks became too influential and clogged communication. *Visitas* then reviewed the institutions, penalized miscreants, and helped reward meritorious vassals. The *visitas* usually handed down swifter verdicts, because they avoided the slow grind of the ordinary courts. The suspects in these investigations often deplored the harsh and extra-judicial rulings against them, and the *visitadores* could well abuse their vast powers for personal vendettas. Nonetheless, many *novohispanos* supported Francisco Garzarón's investigation, and he and other *visitadores* relied on local agreement or acquiescence for their advances.

In the period under consideration, the empire slowly segued toward a state organized around territorial principles and a stronger role for individuals rivaling the semi-autonomous social bodies. These social bodies, such as the indigenous *pueblo* and the municipal councils, had

sustained society and adjudicated the conflicts among their members. The social bodies fiercely defended their privileges and traditions, yet the crown sought to undermine their great autonomy and that of the realms as a whole. This process advanced piecemeal and was marked by ad hoc responses to specific challenges. Sometimes the social bodies or conservative elites imposed competing solutions or forced a return to old practices. Many facets of empire survived and change came only when significant sections of society agreed on reforms.