

# Custom Today: Temporality, Customary Law, and Indigenous Enlightenment

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“Today, there is a different custom.”<sup>1</sup> So stated the native officials of the Zapotec pueblo of Santa María Yaviche, Oaxaca, in 1760. What they meant will become clearer at the end of this article; for now, their words invite us to ask: How can there be a *different* legal custom *today*? Isn’t custom supposed to be invariable over time? Isn’t the point that it is not new, but old? Indeed, whether revealing that a tradition was invented or tracing a practice’s perdurance, historians have told us that the power of customary law is precisely that it is above time, that it can defy obsolescence and, as such, resist modernity.<sup>2</sup> Custom is distinguished not so much by its historical nature as by its ahistoricity.<sup>3</sup>

This article examines three exemplary instances of intracommunity civil disputes in eighteenth-century Spanish America to spotlight a turning point within native invocations of legal custom. Indigenous litigants living in the Spanish empire embedded multiple temporal schemata in their conceptions of *costumbre* (custom). Two of these temporal frames, which we might gloss as

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1. “Juan López principal del pueblo de Santa María Yaviche se queja de que los naturales de su pueblo lo quieren despojar de las garantías de las que gozan los principales,” 1760, Archivo del Poder Judicial de Oaxaca (hereafter cited as APJO), Villa Alta, Civil, leg. 17, no. 16, fol. 28v.

2. J. G. A. Pocock, in *Ancient Constitution*, 14, argues that customary (common) law’s power hinged on the fact that it can “never become obsolete” because it can always harken to a vague origin in “immemorial” time—a well-worn phrase familiar to any historian using Spanish legal documents.

3. By this, I mean in the conceptualization of historical actors and, to a degree, in scholarly renderings of non-Western and/or past legal systems as static and different than more historicized, “modern” systems. As Sally Falk Moore puts it, “The very concept of ‘customary law’ has legitimating implications.” Moore, “History and the Redefinition,” 277. On the historiographical split between those who historicize legal systems and those who portray them as possessed of an essential identity, see Parker, “Repetition in History.”

“antiquity” and “remembered practice,” were versions of custom with roots in medieval civil legal thought, developed and debated from the earliest days of Spanish rule. But another custom emerged in the second half of the eighteenth century. This version contained elements we almost never associate with colonial indigenous lawsuits: immediacy, historicity, and precedent.

The power of this other custom was not in its allusion to antiquity or even in its repetition. Rather, its force derived from its “nowness,” or the eighteenth-century temporal construct of “*Neuzeit*.”<sup>4</sup> Historical philosopher Reinhart Koselleck explains that this modern version of time contains several important features, which include a perception that time is accelerating and a belief in the subjectivity and temporalization of history, “in the sense that, by virtue of the passing of time, [history] changes at each given present.”<sup>5</sup> Or, for those who prefer their theorists Latin American rather than German, Elías Palti describes the creation of modern time in the eighteenth century as a “new awareness of time based on the idea of ‘succession,’” the idea that “the present results from the past and contains, germinally, the future.” If God still had anything to do with time, it was in serving a sentence of hard labor at divine intervention, endlessly creating and recreating a new present, and hence a new past, “from instant to instant.”<sup>6</sup> It is this nowness that makes modern time unique and that is the central component of modern historicism.<sup>7</sup>

Close analysis of three Indian lawsuits shows that the emerging custom of the late eighteenth century—the “custom today” that Yaviche’s officials referred to—contained this instant-to-instant version of temporal thought. By demonstrating this, I wish to make the larger suggestion that natives did not always construe custom as opposed to “modernity” or the “Enlightenment.”<sup>8</sup>

4. Koselleck, “Eighteenth Century.”

5. *Ibid.*, 167. Koselleck also attributes to *Neuzeit* the sense of an open future and epochal beginning, as well as the “*nonsimultaneity* of diverse but, in a chronological sense, *simultaneous histories*.” *Ibid.*, 166.

6. Palti, “Time, Modernity,” 35.

7. This definition is consistent with Michel-Rolph Trouillot’s description of historicism as “the ways in which what happened and that which is [later] said to have happened are and are not the same” and of how the variation between the two is itself potentially historical. Trouillot, *Silencing the Past*, 4. Also see Chakrabarty, *Provincializing Europe*, 22–23.

8. The pairing of the Enlightenment with modernity is at once obvious and problematic. As Koselleck and Palti outline, there is certainly a case for arguing that the late eighteenth century was a turning point in thinking about turning points. Of course, what “modern” time entails has also undergone change. In “Time, Modernity,” Palti identifies four discrete epochs in modern temporal thought, of which the eighteenth-century “instant” examined here is only one. And the contours of modernity (as distinguished from, say, modernism or

Rather, it could also be the vehicle through which Indian litigants made modern time.

The three cases spotlighted here—from the north coast of Peru, the Spanish viceregal capital city of Lima, and a Zapotec village in Oaxaca—showcase several trends increasingly identifiable in the hundreds of natives' lawsuits brought before Spanish judges during the 1700s. Arguments in the suits rested on contingent notions of the past, promoted new methods for ascertaining its validity, and displayed a preference for recent precedent over historical precedence.<sup>9</sup> But before getting to the cases, some caveats and historiographical contextualization are in order. First, it should be made clear that this argument does not rest on the assertion that indigenous people engaged in entirely new social practices within their communities in the late eighteenth century. Native litigants had long sued one another over four broad issues of contention in Spanish colonial native communities: the possession of lands, successions to *cacicazgos* (native lordship), ritual practice, and economic or work contributions to communities. Custom often was an issue in each of these kinds of suits, even if it was never a static concept. Elsewhere I join other scholars in showing that clashes between indigenous subjects, especially over political authority, intensified or became more frequent at the close of the eighteenth century.<sup>10</sup> But here my interest is not in indigenous peoples' practices outside the law but rather in how they articulated new concepts of custom and time within it.

In addition, this article is regionally broad and its method comparative in a strict sense of the word. Since the creation of novel concepts of custom was not confined to one part of the Spanish empire, contrasts between regions are set aside to highlight commonalities. As a result, issues related to temporality, and specifically the place of the past and the present, are privileged over issues related to geographical or regional particularism. Undoubtedly, time and space were braided together in important and complex ways in indigenous thought

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modernization) are still vexing to historians. See "AHR Roundtable." For the importance of time and history to the question of modernity, see *ibid.*, 632.

9. Readers can find references to similar cases from each area, and a few other regions such as the Valley of Oaxaca, in the notes corresponding to key ancillary issues below.

10. Frequency is easier to measure than intensity. Taking only Oaxaca as an example, specifically the Zapotec area known as the Rincón, in Villa Alta, there was a clustering of legal conflicts over communal labor at the end of the eighteenth century. See Chance, *Conquest*, 140 (table 17). As a representative example of scholars who view conflicts as intensifying without necessarily providing statistical counts, see Ward Stavig's comments on the "exacerbat[ion]" of community conflict over land and cacique status in *World of Túpac Amaru*, 126.

and hence in the documents Indians left behind, especially lawsuits and other legal instruments that narrated a people's origins and relationship to land.<sup>11</sup> However, a narrower focus on legal custom, with its emphasis on the past and on justice, entails shifting our view away from indigenous cosmological notions of time, which could defy the strict sequence of past, present, and future, and from the temporal and regional complex known as "origin."<sup>12</sup>

There is good reason for this comparative focus on legal custom as a temporal construct. As we will see in a moment, custom was a very specific concept with nodes of reference that linked historical epistemology to legal practice in the so-called Western world. While indigenous peoples may have left evidence of ethnically specific renderings of temporality in their lawsuits, they also employed the term *custom* in a way consonant with this broader Western usage.<sup>13</sup> Indeed, even in the progressively rare instances in which native litigants presented legal documents in native languages such as Zapotec, the term *custom* was rendered in Spanish since there was no obvious indigenous equivalent.<sup>14</sup>

11. See Herzog, "Colonial Law." For particularism in earlier periods in Andean history, see Espinosa Fernández de Córdoba, "Fabrication." There is still more to be written about the connection of historical time and geographical place in Spanish American indigenous litigation and their possible relationship to the Enlightenment development of staged world history of the type Hegel was known for. See Buck-Morss, "Hegel and Haiti."

12. Matthew O'Hara is engaged in fascinating work on "futuremaking" in Mexico that addresses these very points. See O'Hara, "History of Time." Yet note that "futuremaking" was not only an indigenous practice. For the pervasiveness of European thought on time among the Maya, see Restall and Solari, 2012. On origin, see Urton, *History of a Myth*.

13. Much like our knowledge about native litigants, our understanding of changes in articulations of custom among nonnative inhabitants of the Spanish empire remains somewhat locked into paradigms focused on resistance to the Bourbon state. But in creole thinking there too seems to have developed historicist, precedent-based custom. On *costumbre criollo*, or creole customary law, see Levene, "El derecho consuetudinario"; Tomás y Valiente, *Manual de historia*, esp. 328 (which directly refers to the growth of "derecho criollo" during the eighteenth century); Dognac Rodríguez, *Manual de historia*, esp. 259; Albi, "Contested Legalities"; Premo, "Equity against the Law."

14. See, for example, the appearance of "*costumbre [sic]*" in the interrogation of witnesses in Zapotec, in "Las justicias del pueblo San Juan Tanetze contra Joseph de Illescas por faltas cometidas a la autoridad," 1690, APJO, Villa Alta, Civil, leg. 3, exp. 2, fols. 4-5. While such linguistic evidence does not necessarily settle the long-standing difficulty legal anthropologists face in translating folk law into the language of Western legal systems, it does indicate that the interpenetration between the two was significant, challenging the usefulness of the categories themselves. See several of the essays in Nader, *Law in Culture*; Chanock, *Law, Custom, and Social Order*. Even native-language land titles adopted for presumably internal pueblo purposes were useful in Spanish courts. See Wood, *Transcending Conquest*, esp. 133.

Finally, there is a risk of placing in the mouths of Indians the words that appear in lawsuits filed in their names. To accept that native peoples imbued custom with a modern sense of time is not to believe that most indigenous people, or even the statistical sliver of subjects involved in lawsuits, were philosophes. As will become obvious, educated city lawyers in colonial Spanish America and high-level legal officials in Madrid articulated some of the clearest expressions of what I have termed “custom today.” It will have to suffice to say that the analysis here is premised on the conviction that indigenous people were the authors of their lawsuits even if not always their writers, and we should not presume that their “true” history lies somewhere beyond the legal petitions they often themselves signed.<sup>15</sup>

So much for the caveats; now for the historiography. To embark on a study of the meaning of custom in eighteenth-century native legal practice is to crash a party attended by very distinguished guests. Because custom was of such importance in Spanish America, where colonizers respected indigenous *usos y costumbres* as long as they did not conflict with Spanish law, it has been a key topic in colonial Spanish American ethnohistory.<sup>16</sup>

An ever-evolving legal concept, custom had bifurcated by the time of Spanish conquest to contain two principal meanings, dubbed by Paola Miceli as “romantic” and “primordial.”<sup>17</sup> The first gestured toward the spontaneous popular will of the community; the second harkened to a tradition dating from the distant (often Roman) past. These two conceptual renderings of custom served indigenous populations well throughout the colonial period, as natives bent them to meet their legal needs. Scarlett O’Phelan Godoy uncovers what I believe is the Andean legacy of this duality in legal thought in the eighteenth century. In Peruvian natives’ lawsuits, custom could gesture either toward remembered practice (which is to say a practice that people recalled as being widespread in the community) or toward tradition (that is, a repeated practice

15. The distinction between author and writer is drawn from Foucault, “What is an Author?” The crucial role of the scribe, including indigenous notaries, is a topic I treat in more depth in chapter 1, “Agents and Powers,” of a manuscript in progress titled “The Enlightenment on Trial: Ordinary Litigants, Colonialism, and Modernity in the Eighteenth-Century Spanish Empire.” Also see Herzog, *Mediación, archivo y ejercicio*; Burns, *Into the Archive*; Villalba Pérez and Torné, *El nervio*.

16. The historiography is too vast to list here, but see historiographical discussions in Herzog, “Colonial Law”; Espinosa Fernández de Córdoba, “Fabrication”; Yannakakis, “*Costumbre*.” For the importance of law in general to native peoples, see Owensby, *Empire of Law*.

17. Miceli, “El derecho consuetudinario.” Also see Miceli, “Entre memoria y olvido”; Yannakakis, *Art*, 119, 123.

with a definable origin). But tradition, in the case of the eighteenth-century Andes, was far from ancient. Rather, it originated only one or two generations before, during Hapsburg rule.<sup>18</sup>

In dating the references indigenous Bourbon subjects made to tradition to actual Hapsburg practice, O'Phelan signals that if the two kinds of custom—remembered practice and antiquity—were old, the context for their enunciation was new.<sup>19</sup> Other scholars share the instinct that, in the second half of the 1700s, Enlightenment absolutist governance prompted Indians to intensify legal references to custom and to ground current local practice in discourses of the past. In many historians' narratives, the centralizing, systematizing impulse of the Bourbon reforms met, and often clashed, with native practices related to autonomy in elections, inherited leadership, collective labor and tribute, and the politics of using indigenous languages.<sup>20</sup> The result was that Indians invoked the past constantly in order to protect their communities and culture; they entrenched as tradition what might have been more recent practice in order to resist an encroaching modern state.

The narrative clash of custom and enlightened reform follows a larger arc of legal history, one that Víctor Tau Anzoátegui traces for Spanish America. For this canonical legal scholar of *derecho indiano*, the late colonial period was marked by the shift from casuist methods of ascertaining justice to a method derived from the notion that law was a predictable system.<sup>21</sup> The new legal

18. O'Phelan Godoy, "Tiempo inmemorial."

19. Ibid., 16: "Es posible que la defensa de las costumbres y tradiciones recreadas desde tiempo inmemorial se activaran en la segunda mitad del siglo XVIII, como respuesta a las alteraciones y cambios emprendidos por las Reformas Borbónicas."

20. For example, *ibid.*; Taylor, *Magistrates of the Sacred*; Guardino, *Time of Liberty*; Yannakakis, *Art*. Not all historians view the Bourbon reforms or the general political atmosphere of the late eighteenth century as hostile to Indian traditions or politics. Scholars of the southern Andes in fact tend to regard the reforms and the Age of Revolution to have been an opportunity for Indians to reshape custom, envision an alternative to Spanish colonialism itself, or institute more democratic processes. Some have attempted to explain why in this region community power increased while cacical power waned, usually by contrast to the Cuzco region, where Bourbon measures strengthened caciques. See Garrett, *Shadows of Empire*, 148–80, esp. 150; Serulnikov, *Subverting*, 218. Sinclair Thomson places the democratization of indigenous communities outside the reforms altogether and within an Age of Revolution paradigm. Thomson, *We Alone Will Rule*. Also see Penry, "Rey Común."

21. Tau Anzoátegui, *Casuismo*. In Tau Anzoátegui, *El poder*, he attempts to establish a rising juridical hostility to custom, principally by examining four important published works of Spanish jurisprudence in the late 1700s. But a close reading of his argument shows that these thinkers were not necessarily in the majority and that "en otros autores no se hallan juicios tan severos contra la costumbre." *Ibid.*, 253. Some of these "other authors," including

regime imposed by the Bourbon monarchy—universalistic, rational, state-centered—stood in contrast to traditional, case-based, and custom-centered civil law. Some historians hasten to point out that the Spanish Bourbons encountered severe limits in their plans to universalize legal standards (and some doubt that such grand plans ever really existed for the Spanish empire and, by association, the Spanish Enlightenment).<sup>22</sup> Nonetheless, scholars equate the reforms with the Enlightenment and portray them as corrosive to what is elided as a complex of local customs, American practice, and Indian traditions.

We should be aware that the narrative structure of Bourbon universalism versus Indian custom, however solid its overall architecture, houses mythic conceptions of the power of the state and modern notions of law that are themselves the bequest of the Enlightenment. Italian legal scholar Paolo Grossi pulls back the curtain on what he calls a “juridical mythology” created in the eighteenth century, which holds that law emanates only from the “head of the prince.” It was precisely during the Enlightenment that regalist jurists and legal thinkers channeled the multiple streams of justice in the earlier, casuistic, civil law tradition into the state as a single source of law.<sup>23</sup>

What happens if we look at things Grossi’s way and regard the state as a development in indigenous legal and intellectual history rather than strictly as a historical agent? While not denying the importance of institutions, including royal ones, we nevertheless still might consider native invocations of custom as more than local resistance to metropolitan measures. Rather than viewing the Bourbon reforms or even colonialism as the instigator in a dialectic, we might place native articulations of custom within a broader unfolding of jurisprudential philosophy and practice.<sup>24</sup> In other words, we might consider custom not just as defense against modernity but also as constitutive of it.

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Francisco Antonio de Elizondo or Antonio Javier Pérez y López, can be considered far more influential than the four enemies of custom he analyzes. What is more, as the works I cited in note 13 of this article suggest, there is an argument to be made that eighteenth-century Spanish American jurists were more favorable to custom than were their metropolitan counterparts, advancing a more complex notion of it given the autonomy the metropole had traditionally provided the colonies.

22. See, for example, Guardino, *Time of Liberty*, 116–21.

23. Grossi, *Mitología jurídica*, 27. Note that this argument for Europe, including the discussion of the erasure of legal pluralism, is illustrated in the case of colonial cultures by Benton, *Law and Colonial Cultures*.

24. On the debate about colonialism as a concept in Latin American history, see Lempérière, “La ‘cuestion colonial’”; as well as the responses in “Debate en torno al colonialismo,” *Nuevo Mundo/Mundos Nuevos*, last modified 8 Feb. 2005, accessed 27 Jan. 2014, <http://nuevomundo.revues.org/430>.

Tracing custom back through Spain's history provides a way around, if not through, the Leviathan by permitting us to situate native invocations of custom within a longer history of time and law. Though we have come to imagine custom as a political practice involving the state and "the people," *costumbre* was never reducible to the spontaneous practice of a people repeated over time. As Miceli shows, during the late medieval and early modern period in Spain, it also came to refer specifically to a method of using and conceiving of Roman law. Medieval thinkers became highly concerned with measuring classical time as a means to judge legal practice, and their concern turned into a near obsession among European humanist civil law jurists in the early modern period.<sup>25</sup> In the eighteenth century, some jurists in the European civil law tradition retreated from this hyperhistorical method into a more ahistorical concept of custom as outside time. As a result, by the eighteenth century *derecho consuetudinario* (customary law) promiscuously mixed invocations of popular practices, a juridical method fixated on the classical past, and newer notions of custom as transcending history.<sup>26</sup>

References to custom, then, could be far more than the simple invocation of old ways against new reforms or modern state regimes. Certainly, there were numerous instances in which indigenous communities saw advantages in using discourses of custom as a bulwark against new state policy or to rein in Spanish colonial officials. But by the eighteenth century, what custom meant among even natives of the same community was often a free-for-all.<sup>27</sup> Native litigants and their lawyers could use it to draw parallels between natives and Romans or signal a retreat from historical temporalization fixed on linear, eschatological models of natural law. They could promote notions of custom rooted in ancient events—some located in the pre-Spanish past, others in the actions of native ancestors at the time of conquest.<sup>28</sup> Native litigants and state officials could continue ascertaining custom by quizzing community elders and weighing their recollections of practices and personal histories, as they had in centuries prior.

25. For more on the movement to measure Roman time, see Miceli, "Medir y clasificar," 211. On the importance of Rome, history, and eschatology in the Andes, see MacCormack, *On the Wings*.

26. Miceli, "Entre memoria y olvido," 3.

27. This is in line with Tau Anzoátegui's reminder that "pese a la enorme fuerza intelectual que arrastraba la nueva idea . . . el reinado absoluto del sistema es solo una figura retórica, pues acaso nunca alcanzó a envolver la compleja riqueza y pluralidad de la esfera jurídica." Tau Anzoátegui, *Casuismo*, 142.

28. For the shift in native Andeans' arguments about land rights from the Inca to the conquest era as the cradle of "antiquity," a shift that occurred between the sixteenth and the eighteenth century, see Herzog, "Colonial Law," 307–9.

But they might now ironically place these memories under the rubric of “tiempo inmemorial.”

It was out of this *mélange* of meanings and methods that native litigants created another temporal version of custom in the eighteenth century: “custom today.” “Custom today” was based on legal precedent of a more recent vintage, sometimes but not always undergirded by contemporary royal legislation or recent court rulings, always focused on the present. This new custom was created instant to instant, in an endless string of *nows*.

### Case 1: The History of the (Non-)Incas in Ferreñafe, 1781

When the local Spanish *corregidor* showed up in the pueblo of Ferreñafe in 1751 to install Juan Nicolas Fayso Farrochumbi as *cacique principal* (native lord), the women of the village greeted the announcement with a hail of rocks and, after the official took shelter in one of the villagers’ homes, a roof torching.<sup>29</sup> This episode was only one in a series of conflicts that pitted the Fayso Farrochumbi lineage against the Temoches, a family that had risen to colonial prominence in the northern Peruvian coast through a combination of wealth and royal service. Despite a general decline in the position of caciques throughout Spanish America after conquest, on the north coast *cacicazgos*—generally monopolized by one family—continued to command power and prestige, land and labor.<sup>30</sup> The battle between these two families for recognition as caciques began in the seventeenth century and lasted into the nineteenth, generating thousands of pages of litigation aired at every level of jurisdiction, from the local *corregidor* to the Council of the Indies in Madrid.

One way to read this litigation is to note how, in the eighteenth century, the legal arguments advanced by the two families instantiated two different temporal sources of political authority, one ancient and one contemporary. The Fayso Farrochumbi line rooted in antiquity their claim to legitimacy, which they dated to their support for the Spanish during the conquest. Pablo Fayso Farrochumbi described how one of his ancestors had sided with the

29. “Autos sobre lo acaecido en el pueblo de Ferreñafe el día 31 de enero de este año a tiempo de dar posesión del *cacicazgo* principal de dho pueblo a don Juan Nicolas Fayso Farrochumbi,” 1751, Biblioteca Nacional del Perú, Lima (hereafter cited as BNP), cuaderno 2374.

30. The general decline of inherited native lordship was first argued by Gibson, *Aztecs under Spanish Rule*. Also see O’Phelan Godoy, *Kurakas sin sucesiones*. For a more recent appraisal of the continued, if varied, importance of native leadership in Mexico, see Menegus Bornemann and Aguirre Salvador, *El cacicazgo*.

conquistadores and for this had been set on fire by his enemies, his martyred ashes scattered in a gutter.<sup>31</sup> The Temoche clan, on the other hand, based its legitimacy on merit, recent service in village governance, and popular acclaim.<sup>32</sup> Juan Damaso Temoche, for example, testified in 1794 that “I am a man of honorable conduct, Christian, gentleman, of good judgment, application, and work, very faithful and obedient to our Sovereign and [my] superiors, his subalterns of both *fueros* [church and state], rejecting vices and predisposed to peace and inclined to the good treatment and benefit of my nation.”<sup>33</sup>

In conventional narratives of European history, discourses of merit are viewed as hallmarks of the enlightened age. In the late eighteenth century the bourgeoisie celebrated achievement while the aristocracy laid its heralds and titles in the ground.<sup>34</sup> As the Fayso Farrochumbi/Temoche conflict revealed, the battle of inheritance versus merit, common among Europeans, occurred in Ferreñafe among native Spanish imperial subjects as well. But something else, even more historical, was afoot in the case. Juan Damaso Temoche’s reference to his fidelity to the crown was not rote. In the early 1780s, most of Indian Peru was rocked by a chain of bloody uprisings touched off by a local cacique from the Cuzco region, José Condorcanqui, who claimed Inca descent and christened himself Tupac Amaru II. In swift reaction to the uprising, José Antonio de Areche, visitor general of Peru, obtained a royal *cédula* that placed a moratorium on the ability of colonial authorities to appoint and confirm caciques, with special emphasis on halting the confirmation of any Indian who claimed Inca lineage.

31. Pablo Fayso Farrochumbi to Audiencia of Lima, 1790, “Sobre el pleito seguido en Lima entre Dn Eugenio Victorio Temoche Farrochumbi Puy Consoli y Dn Pedro Fayso Farrochumbi, sobre pertenencia del Cacicazgo de Lambayque y Ferrañafe; y dudas ocurridas a la Audiencia con motivo de la concesión de Cacicazgos—Se expidió Cédula general el 9 de Mayo de 1790 participando reservadamente a las Audiencias lo resuelto sobre nombramiento de Caciques y declaración de Nobleza a los naturales de Yndias,” 1790, Archivo General de Indias, Seville (hereafter cited as AGI), Gobierno, Lima 932, leg. 2, fol. 7. Susan E. Ramírez suggests that merit was always a defining feature of cacique status on the north coast. Ramírez, “*Dueño de Indios*.”

32. See O’Phelan Godoy, *Kurakas sin sucesiones*, 46.

33. “Soy hombre de honrosa conducta, y christiana hombría de bien, juicio aplicación al trabajo, mui fiel y obediente a nro Soberano y a los superiores y subalternos de ambos fueros negando a vicios propesa a la paz e inclinado al buen tratamiento y veneficio de mi nación.” “D. José Damaso Temoche sobre el cacicazgo de Lambayeque,” 1794, BNP, cuaderno 4419, fol. 1.

34. Though note Jay Smith’s astute comments on the implicit rather than evidentiary nature of this assertion and its roots in French revolutionary discourse: Smith, *Culture of Merit*, 3.

But soon officials in Lima realized that cases like the Ferreñafe leadership dispute made the moratorium problematic. Although unrest spread like wildfire throughout the Andes, along Peru's north coast loyalty to the crown doused any sparks of rebellion. The region claimed by the Fayso Farrochumbis and Temoches had remained resolutely royalist through the uprisings. So Areche's 1781 ban on confirming caciques risked alienating loyal natives, and the decision about the rightful possession of the cacicazgo was being delayed despite the fact that neither family had anything to do with the uprising or claimed Inca descent. The depth of the dilemma dawned on Areche a year after placing the moratorium. He tried to backtrack by conceding that "Indians who had shown themselves to be faithful and resisted the rebels" were "deserving of reward." Their "right" to the cacicazgos was "acquired" and thus valid.<sup>35</sup> While fidelity to the Spanish still served as a source of legitimacy, the visitor general's ruling shifted the temporal moment of fidelity from the Spanish conquest to the present.<sup>36</sup>

The Audiencia of Lima, which traditionally confirmed cacicazgos, refused to proceed in the dispute any further without clarification from Madrid about its authority over native leadership. The Peruvian ministers sent a request to the Council of the Indies. This court convened both of its *salas*, or benches, and asked for an audience of a third in a display underscoring the momentous nature of the issue. After doing so, the council rendered an opinion unfavorable to traditions of cacical succession and to the Spanish confirmation of native authority. The entire practice of recognizing caciques was, it proclaimed, a "detestable custom" that drew from a recognition of the nobility of "Gentile

35. "Los Caciques e hijos de ellos que se mostraron fieles, y resistieron a los reveldes pues estos son dignos de premio, y podría ocasionar el que se retragesen de hacer el servicio en otras ocasiones; que tampoco lo es el que comprenda la privación a los caziques que lo son por derecho de sangre, y autoridad de las Leyes en las Provincias en que no se experimentaron alborotos, pues a mas de que sin causas se les privaría de un derecho adquirido." José Antonio de Areche to crown, 1782, "Sobre el pleito," 1790, AGI, Gobierno, Lima 932, leg. 2.

36. Suits in which indigenous litigants cleverly accused their native opponents of *lesa majestad* or of blocking Bourbon royal financial interests include "Autos que sigue Bartola Bayona contra su marido Cipriano Dias por malos tratamientos y amancebamiento," 1788, Archivo Regional del Departamento de La Libertad, Trujillo (hereafter cited as ARL), Intendente, Causas Criminales, leg. 35, cuaderno 1347; "Bernardo de las Casas y Luis de la Cruz, naturales, principales y caciques del pueblo de Yanhuitlan, ante el juez comisionado por su majestad . . . pidieron se mande notificar Pedro Sánchez, actual gobernador del pueblo, no les moleste ni a ellos ni a sus familias cobrándoles, los cuatros tercios de la real tributo," 1790, APJO, Teposcolula, Civil, leg. 48, exp. 11. On this strategy as a specifically eighteenth-century development, see Serulnikov, *Subverting*, 109–13.

Kings” rather than Spanish royal sanction. The result was that rulers like Condorcanqui exercised a “quasi-despotic dominion” over the Indian population.<sup>37</sup> The king heard the council’s reservations and, as he usually did in such cases, kicked the case to his crown’s attorney.

That crown’s attorney for Peru, José de Cistué y Coll, the *fiscal* of the Council of the Indies, was forced to confront the council’s hostility to cacical succession and to pinpoint the temporal origin of legitimate cacique status. His response is a fascinating tour of late eighteenth-century Spanish historical epistemology and jurisprudence. In one sense, he reaffirmed the legitimacy of the inherited nature of cacicazgos. Areche’s moratorium, he said, was essentially illegal—that is, devoid of reference to any source of written law—except in cases in which caciques were proven to be traitors to the king. Citing the *Recopilación de leyes de las Indias* and the writings of Spanish American jurist Juan de Solórzano Pereira, the fiscal pointed out that caciques could not be deprived of office even if they mistreated their own native subjects, and he further argued that it was in the interest of “Your Majesty, equity, and the Laws” that his vassals be able to bequeath royal acknowledgment onto their descendants.<sup>38</sup>

Beyond pinning cacicazgos almost exclusively to royal favor—a move that, while not completely novel, should nonetheless remind us of Grossi’s description of the prince as the sole source of law—the fiscal also made a series of arguments of even more interest here about how to read the history of the New World.<sup>39</sup> There should be, he surmised, few heirs to the Incas left in the Andes, and thus any new claims to Inca status would be, ipso facto, false. But how could he know this? What was his source for Inca history? Here the fiscal, a typical peninsular bureaucrat with some experience in Mexico and Guatemala but none in the region for which he was currently serving, faced a lack of

37. Council to king, 1787, “Sobre el pleito,” 1790, AGI, Gobierno, Lima 932, leg. 2.

38. “Con conocimiento de este relebante mérito incluye injusticia y es opuesto a la voluntad de SM, a la equidad, y a las Leyes, pues por estas se previene que se premien en los hijos los servicios de los padres.” Fiscal’s statement, 9 Sept. 1789, “Sobre el pleito,” 1790, AGI, Gobierno, Lima 932, leg. 2. It might be noted that this offers a twist on Euro-centered theorizing about inheritance and history offered by the likes of J. G. A. Pocock and Slavoj Žižek. Baucom, *Specters of the Atlantic*, 65, summarizes how the Enlightenment moment involved for Žižek overthrowing virtue as allegiance in exchange for award and for Pocock the replacement of heritable property by abstract property. In the Spanish native cases here, we see a variant of inheritance as heritable property whose value must be constantly reaffirmed by the state.

39. This phrasing alludes, of course, to Jorge Cañizares-Esguerra’s revalorization of native American and Spanish patriotic historiography in the development of modern history: Cañizares-Esguerra, *How to Write the History*.

familiarity with the Andes (indeed, he consistently misspelled the name “Ferreafe” throughout his opinion).<sup>40</sup> Still, he forged ahead, locating his logic in written texts rather than ethnographic mastery. But he did so backward: instead of citing the written histories of the Incas as authoritative, he challenged the historical accuracy of what was then arguably the most popular work of indigenous history.<sup>41</sup>

The sixteenth-century *Comentarios reales de los Incas* had become so identified with Andean history that its author, noble mestizo chronicler Garcilaso de la Vega, was known simply as “El Inca.” Garcilaso’s claim that there were not one but several branches in the Inca line troubled Cistué y Coll. But, by applying emergent standards of objectivity and internal consistency in judging the legitimacy of historical texts, the crown’s attorney claimed that El Inca was overly impassioned and biased in his reasons for exaggerating the number of royal lineages, and that the *Comentarios reales* was itself internally contradictory on the matter. Using a “new art of reading history” to dispense with the sole written source he had for Andean practice, the fiscal briefly alluded to other (unnamed) historians and pronounced that they were “uniform” in their agreement that the Incas should be mostly gone.<sup>42</sup>

The fiscal’s historical strategy, therefore, was to argue that the Incas were the only true nobility in the Andes, and then to move them into a distant past. All remaining cacicazgos were emptied of their antiquity; all Indian nobles essentially derived their status from an ongoing grant from royal authority.<sup>43</sup> Although native leadership could be inherited, its legitimacy took place in a kind of perpetual now in which heirs would be constantly judged on their merit and

40. González Crespo, *Juristas*, 232–34. Thanks to Ann Twinam for sharing the portrait of this fiscal with me as well as her vast knowledge of council fiscales in general.

41. On the eighteenth-century edition of the *Comentarios reales* and its place in Spanish imperial thought, see Macchi, *Incas ilustrados*, esp. 19–84.

42. “Y aunque el Ynga Garcilaso de la Beyga en su Ystoria Gral del Perú, intenda persuadir que quedaron varias ramas, bien notoria es su pasión y también interés que tenía en ello para persuadir ser el uno de los légitimos descendientes de los Yngas, contradiciéndose el mismo, a lo que sienta en el Capo 37 del libro 9 de los Comentarios.” Fiscal’s statement, 9 Sept. 1789, “Sobre el pleito,” 1790, AGI, Gobierno, Lima 932, leg. 2.

43. See Smith, *Culture of Merit*, on how merit depended on the gaze of the absolutist state. Not that the colonial state always functioned as a single unit, especially when it came to native customs and questions of merit. In a protracted dispute over native elections in the Oaxacan village of Tabaá in the 1780s, the district magistrate scrambled to pin down the pueblo’s customs by asking elders for their recollections, while the audiencia in Mexico City ignored the issue of local traditions and asked for an accounting of the candidates’ various merits. “Sobre elecciones de principales en el pueblo de Tabaá,” 1789, APJO, Villa Alta, Civil, leg. 27, exp. 4.

utility to the crown. The Temoches, with their presentist claims to meritorious lineage, won the day with the fiscal: his final recommendation was to award them the cacicazgo.

## Case 2: Now and Then in Lima, 1782

In 1781, three brothers named Felipe, Ygnacio, and Marcelo Raymi Cochacín took it upon themselves to call a spontaneous “junta and assembly” in the “voice of the pueblo.”<sup>44</sup> The “pueblo” in question was the Indian community of the viceregal capital city, Lima. Nine representatives from various corners of the metropolitan area gathered in the Beaterio de Copacabana, a female spiritual house originally founded for elite Indian girls.<sup>45</sup> “Voluntarily and with urbanity,” these Indians filed along walls adorned with murals portraying abbesses descended from Inca nobility, and each deposited money into a community treasury to be used to fund a lawsuit against the elected officials of the city’s Indian cabildo.<sup>46</sup>

The brothers’ dispute with native officials centered on the position of *procurador de naturales*, the legal representative for Indians. Normally, two procuradores de naturales handled the work of filing lawsuits for the city’s native litigants when the suits were between Indians, and in 1735 a royal cédula confirmed that indigenous candidates should be preferred over all others for the posts.<sup>47</sup> In 1781, the elected officials of the Indian cabildo appointed Toribio Ramos to fill a vacancy. But the junta objected, claiming that Ramos was a “chino” or “sambaigo,” both caste designations implying he was of mixed blood. Even beyond violating the 1735 royal order, they said, the cabildo’s

44. “Traslado de los autos que d. Mateo y Martínez, como apoderado del Cabildo de Naturales de la ciudad de los Reyes, promovió en la Corte de Madrid, sobre que se separese del Cargo de Procurador de los Naturales a Toribio Ramos, por no ser indio entero, sino sambaigo: y sobre se le acordase a los naturales,” 1782, Archivo General de la Nación del Perú, Lima (hereafter cited as AGNP), Derecho Indígena (hereafter cited as DI), leg. 23, cuaderno 402, fol. 22.

45. Espinoza Soriano and Baltasar Olmeda, “Los beaterios.”

46. “Traslado de los autos,” 1782, AGNP, DI, leg. 23, cuaderno 402. Note that this case also involved the cabildo’s power to name employees to the hospital of the Indian district, Santa Ana.

47. The cédula is summarized in “Memorial que el Cabildo de la ciudad de los naturales de los Reyes presente . . . acompañando un traslado de la real Cédula . . . de 1735, habilitando a los indios para ejercer en las audiencias el cargo de Procuradores en los asuntos concernientes a los de su nación,” 1762, AGNP, DI, leg. 17, cuaderno 302. The reach and meaning of the cédula would have to be revisited periodically, as they were in this case. See Charney, *Indian Society*, 99.

appointment of Ramos contravened the “will” (*voluntad*) of the native community of Lima.<sup>48</sup> It is almost as if, when they called their assembly, the brothers purposely decided to stage a scene illustrating what Miceli describes as the romantic connotation of custom, conceived as the “spontaneous will of the people.”

In contrast, the native *cabildo*’s reaction to the insurgency offers a view of the version of custom emergent in the late eighteenth century, “custom today.” The members of the *cabildo* argued that the dissenters had misunderstood what royal law did: it did not confer on the community the power to decide custom, and it did not establish “rules of will” (*reglas de voluntad*). The rebels had come to mistakenly “believe that the Royal Law ends with them having the ability [*arbitrio*] to decide who gets to be procuradores.” Such an interpretation, their argument went, was not a custom but a “cizaña,” a vice or “bad habit” that could nestle inside good custom.<sup>49</sup>

In addition to attacking the political legitimacy of the native *pueblo* as a “people,” the elected officials also claimed that no indigenous candidates offered up by the community were qualified for the office. Thus it was the *pueblo*’s own fault that a more acceptable Indian was not named: “Their scant training has led to this lack [of acceptable native candidates]. The very applicants are so devoid of Enlightenment in issues related to lawsuits that they are entirely ignorant of basic principles and barely know how to write.”<sup>50</sup> The

48. “Traslado de los autos,” 1782, AGNP, DI, leg. 23, cuaderno 402, fol. 22.

49. “El RI Ordn de SM se terminaba a haserlos arbitrio en los nombramtos de Procurador[e]s. No se han de gobernar los asuntos por las Reglas de la boluntariedad, ni se han de dar interpretación violenta a las determinaciones mas claras, sembrando sisaña [*sic*] en gente de poca adbertencia para que se conbierta en su daño lo que se ha proveido a su beneficio.” “Traslado de los autos,” 1782, AGNP, DI, leg. 17, cuaderno 302, fol. 13. *Cizaña* is defined by Real Academia Española, *Diccionario de la lengua espanola*, as “vicio que se mezcla entre las buenas acciones o costumbres.” Also note the use of the expression “costumbre mal puesta,” or “misused custom,” in “Los alcaldes Juan Gregorio y Joaquín Lucas de la Cabecera de Santa María Asumpción Tontontepeque y demás principales del común . . . sobre el cobro de aranceles por el parroco,” 1807, Archivo General del Poder Ejecutivo del Estado de Oaxaca (hereafter cited as AGPEEO), Intendencia, Villa Alta, leg. 1, doc. 30; as well as a cacique’s reference to “antiguos disórdenes” and a clever alteration of the phrase “uso y costumbre” to “abuso o costumbre” to refer to a pernicious land sale practice among his subject people in “Autos que sigue Juan Manuel Céspedes Tito, en nombre del Juez Territorial en el partido de Guancabamba (Piura), contra Vicente Culquicondor, indio, por calumnias sobre el desempeño de su función,” 1787, ARL, Intendente, Causas Criminales, leg. 353, cuaderno 1327, fols. 5–6.

50. “Su poca apliczn ha motivado este defecto. Los mismos pretendientes se hallan tan escasos de Luzes en materias de Pleitos que enteramente ignoran los principales pa que

officials went on to divert discussion of Ramos's lineage and native ancestry to more contemporary and achievement-oriented criteria. "To be a procurador requires no *bidalguía*," or nobility, they claimed. Instead of proving his inherited status, the officials accumulated various examples of clever arguments Ramos had made on behalf of his native clientele.<sup>51</sup>

By disparaging the pueblo as unenlightened, referring to their custom as a bad habit, and rejecting the community's "voluntad," the cabildo was, of course, underscoring its own sovereignty in deciding who could legally represent natives. But denying the insurgents' romantic connotation of custom as the community's spontaneous will did not mean asserting its own "primordial" claims to authority or its legitimacy through antiquity. In fact, the elected body eschewed locating its own authority in any past at all. Instead, in a move that might strike us as highly unusual in the civil law tradition, the cabildo expressed the belief that the ability to choose a procurador, with the help of a trained Spanish lawyer, derived directly from recent court rulings. As a corporate body, the officials claimed, the cabildo possessed sufficient "representation to speak for the Indians and deduce what is fitting to their Right [*Derecho*]. . . . Having sought the counsel of a *Letrado*, it conducted itself in the terms that precedent in similar cases dictates."<sup>52</sup>

A discrete development in the history of precedent-based common law and custom-based civil law, according to legal scholar Kunal Parker, is that inasmuch as it reflected the world, which was constantly in flux, common law was eventually understood as having no ahistorical foundation. Common law became, in a sense, "nothing but history," a hyperpoliticized practice.<sup>53</sup> Read in this light, the cabildo's explicit reference to precedent in their argument is of

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mucho quando se hallan pocos sepan escribir y de estos que promueven la ostilidad contra Ramos ignoran aun el idioma Castellano, cuyo hecho se hace de mostrable con solo el que se le haga comparecer pa el efecto." "Traslado de los autos," 1782, AGNP, DI, leg. 17, cuaderno 302, fol. 23v.

51. "Para ser procurador no necesita ninguna ydalguia. Esta no es ninguna cruz que se va a poner a los pechos y vastaria solo el ser desendte de Yndios y haverse regulado sre por tal entre los de la nación sirviendo las ofizas destinadas." "Traslado de los autos," 1782, AGNP, DI, leg. 17, cuaderno 302, fol. 23.

52. "Por este Supro Tral se conceptua este Cavdo con representacion vastante para hablar por los Yndios y dedusir lo combeniente a su Dro. . . . El haver tomado consejo de Letrado, fue manejarse por los terminos que dicta la presidnza en iguales casos; En esto han procedido loablemente." "Traslado de los autos," 1782, AGNP, DI, leg. 17, cuaderno 302, fol. 12v.

53. Parker, *Common Law*, 6. Parker here is alluding to Oliver Wendell Holmes's antifoundational collapsing of law and politics in the "ground-clearing" sweep of history. *Ibid.*, 7.

temporal as well as jurisprudential significance. It placed the gravitational pull of Indian law not in the “spontaneous will of the people” or in time-honored codes but rather in recent rulings by the court. Discourses of antiquity or even the repetition of practice no longer sufficed to undergird custom. Instead custom was constituted in politics itself, in politics in the present tense.

As a final move to drain the past of its legal significance and to invest a politicized present with the power of custom, the *cabildo* went on to point out even its own historicity as an institution. Confronting the fact that the elected officials who formed the body the year before had themselves referred to the candidate Toribio Ramos as a “chino,” the *cabildo* dismissed the admission as mere politics. “At that time” (*en aquel tiempo*), their statement reads, “there were applicants for the post among the *cabildo* members.” The *cabildo* suggested that certain former elected officials who sought the position of procurador had an interest in undermining Ramos’s candidacy. “But today,” they assured the court, “the *Cabildo* proceed[s] impartially and with no particular interest.”<sup>54</sup>

As the fiscal of the Council of the Indies had implied when reflecting on the work of Garcilaso de la Vega, the past was not impartial, histories could be biased, and custom was open to “cizaña.” Only in the present moment could impartiality, legitimacy, and, ultimately, justice be assured. Put differently, the temporal juridical argument of both Lima’s indigenous *cabildo* and the fiscal in Madrid was that, as far as customs go, that was then and this is now.

### Case 3: Custom Today in Santa María Yaviche, 1760

The veneration of “today” in determining the legitimacy of native practice brings us back to where we began: to Santa María Yaviche, Oaxaca, in 1760, where community officials argued that “today, there is a different custom.” Juan López, a *principal* (indigenous notable) in the village of Yaviche, wanted out of what he considered demeaning communal service (*tequíos*) such as gathering firewood or sweeping the plaza. Communal labor was for ordinary Indians, known as *macebuales*, and Juan considered himself a *principal* both through descent and by marriage.

The elected members of Yaviche’s *cabildo*, however, saw it differently. In the relatively nonhierarchal ethnic communities of Villa Alta, Oaxaca, where Yaviche was located, villages teemed with *principales*, making it far from a special status. In some pueblos, a third to half of the community’s men considered

54. “El Cavdo que lo fue en aquel tiempo fueron pretendientes a este mismo empleo. Pero oy prosediendo el actual Cavdo imparcial y sin ningun interes.” “Traslado de los autos,” 1782, AGNP, DI, leg. 17, cuaderno 302, fol. 28.

themselves members of this elevated rank.<sup>55</sup> In order to ensure that there were enough men to perform labor, Yaviche's cabildo wanted to keep work exemptions rare. Only men who reached a certain rung on the ladder of ranked occupations in the civil hierarchy of town governance could be excused from communal labor. López, they claimed, was not one of them.<sup>56</sup>

For the Indian cabildo, achievement counted as much as, if not more than, inherited status.<sup>57</sup> What is more, they sought to limit those achievements to the claimant's lifetime and successfully dissuaded López from founding his argument for special status on the service his father and grandfather had performed for the community. At first, López clung to his hereditary argument. He went so far as to contend that the custom in his mother's village, Lachincha, was to exempt principales from service, implying that this local custom should be universally respected by all the villages in the area.<sup>58</sup> But finding this inheritance argument to be increasingly ineffective, he switched tactics and tried to claim that the service he had performed in his own lifetime, as a sacristan for the community priest, was a merit-based activity that permitted him exemption.<sup>59</sup>

55. The cabildo testified in this case that the community counted only 50 married men, the majority of whom were principales or caciques. "Juan López principal del pueblo," 1760, APJO, Villa Alta, Civil, leg. 17, no. 16, fol. 7. On the generally high population of principales in the region, see Chance, *Conquest*, 145 (table 18).

56. Among the many similar eighteenth-century clashes over the service responsibilities of indigenous commoners and more elite natives in which local custom is at issue, see "Petición que hace Jerónimo García, Juan Joseph y Lorenzo López, naturales y vecinos de San Pedro Apostól, de esta jurisdicción, para que ningun masahual deje asistir a los tequios," 1736, AGPEEO, Alcaldía Mayor, Oaxaca, leg. 42, exp. 761, fol. 1.

57. For a similar case, and one in which the litigants founded exemptions in the "Leyes de Reynos" and Christian behavior rather than heredity, see "Juan, Nicolas y Antonio Yescas, caciques del pueblo de San Juan Yaeé, piden se les exima de trabajos bajos que solo efectuan los macehuales," 1766, APJO, Villa Alta, Civil, leg. 19, exp. 14.

58. For this, he gathered priests as witnesses to provide a kind of legal document called a "certificación." The priests, in turn, said they received their information from "ancianos" of various villages, attempting to create a tangible legal text that would capture and freeze generalized Zapotec custom. The geographic slippage is obvious when one priest testified that "en dho Pueblo de Yabichi como en los demás de los dos Curatos del rincón es muy antigua constumbre." "Juan López principal del pueblo," 1760, APJO, Villa Alta, Civil, leg. 17, no. 16, fol. 12v.

59. The strategy of elevating recent service, particularly financial fidelity, to the crown over inheritance gained greater popularity over time. Thirty years later, a case from the northern Peruvian coastal pueblo of Moche operated in reverse: Jacinto Asavache first presented himself as an ordinary native and attempted to claim lands as his own by arguing that he recently had paid royal tribute from them; only when challenged did he resort to claiming they were his by right of inheritance and to beginning to refer to himself as a "don." He lost his case because the

In order to block López, the officials from the village contracted a distinguished Mexico City lawyer resident in Oaxaca City, the former chair of Primas Letras of Antequera, Dr. Joseph Alejandro de Miranda.<sup>60</sup> Miranda's argument on behalf of the cabildo emphasized the democratic foundations of labor and rank in the indigenous community. "Your Mercy knows," he stated to the magistrate, "that in the style, practice, and custom of Our Pueblo"<sup>61</sup> there are two ways of deriving the status of a *principal*—one through inheritance, one through merit.<sup>62</sup> The ascension to special status through achievement made the Indian pueblo an orderly organization no different from the clergy or the military. To skip rungs on the ladder up would be an "injurious inequality [meaning] that some work more than others in one single Republic."<sup>63</sup>

Aside from arguing that the indigenous community was a meritocratic republic of relative equals, Miranda helped the cabildo craft a questionnaire for witnesses that wrote historical variability directly into the very meaning of *costumbre*. One question asked witnesses to verify that, even if López could prove that a custom exempting him from labor existed in his mother's pueblo today, custom changed over time. "Today, there is a different custom," and at the time of his parents' marriage, the exemption did not exist. For the native cabildo, custom was not historically rooted; it was historically contingent.

For his part, López too eventually shifted away from past practice as a basis for his exemption from service, even going so far as to criticize one of the long-standing legal methods used in native communities to ascertain custom: the testimony of village elders.<sup>64</sup> The freshness of the memory of the witnesses who testified against him was suspicious, he said, given that his father had been

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magistrate determined that a poor commoner Indian currently occupying the lands had an impeccable record of paying tribute himself. "Autos que promueve Jasinto [*sic*] Asavache, indio principal del pueblo de Santa Lucía de Moche, contra el Alcalde Don Manuel Delgado, sobre despojo de tierras," 1797, ARL, Intendente, Causas Ordinarias, leg. 318, cuaderno 479.

60. For more on the career of Miranda, see "Méritos, José Alejandro de Miranda," 1751, AGI, Indiferente 253, no. 26.

61. On the employment of these various terms such as "style," "use," and "practice" for custom and their origins in the writings of the jurist Solórzano, see Yannakakis, *Art*, 123; Tau Anzoátegui, *El poder*, 318–22.

62. Guardino notes this case and believes that the lawyer's argument elided cacique and *principal* status. Guardino, *Time of Liberty*, 55.

63. "De aquí se siguiera la injuriosa desigualdad de que unos trabajaran mas que otros en una propria República." "Juan López principal del pueblo," 1760, APJO, Villa Alta, Civil, leg. 17, no. 16, fol. 14v.

64. For this method in action, see "Petición que hace Jerónimo García, Juan Joseph y Lorenzo López . . .," 1736, AGPEEO, Alcaldía Mayor, Oaxaca, leg. 42, exp. 761, fol. 11.

dead for eight years.<sup>65</sup> In the end, then, both parties to the suit were willing to cast doubt on custom as a practice or concept to be accepted as valid on its face and on the methods long used to ascertain its content. Yesterday there was one custom, today another. Custom was a partial, constructed, and politicized legal exercise.

But with all this ground shifting, on what would status rest? Ultimately, the officials argued that it was reputation—not identity inherited but rather identity achieved. In an elegant argument that conjured the intense nowness of the historical moment of custom in 1760 Yaviche, Miranda claimed that, aside from presenting documents that attested to one's status (which López never did), the only other way to be considered a *principal* was for the community to accept someone as a *principal*. The mere fact that community officials had challenged López's status meant that he was not a *principal*.<sup>66</sup>

In such an argument, custom collapses into the present instant completely—all that mattered was the moment. Custom was only custom as long as it served community equality; legal status was only status by virtue of merit, conferred by the opinion of elected representatives in a republic of equals. What could be more enlightened than that?

## Conclusion

In these three cases, as well as in the scores of similar suits indigenous litigants aired during the same period, there is a consistent temporal aspect to custom: the immediacy of the moment as the foundation on which its legitimacy rests. While such nowness might seem antithetical to custom as we have come to understand it, it is important to keep in mind that custom as an anthropological category—as a native practice that serves to limit a modern, homogenizing state—is only one of the concept's possible iterations.<sup>67</sup> This article has attempted to isolate a different permutation of custom in the late eighteenth century.

65. He claimed a “premeditado sermon [pattern] conque deponen, como la inverosimilitud de la fresca memoria que puedan tener de mi padre.” “Juan López principal del pueblo,” 1760, APJO, Villa Alta, Civil, leg. 17, no. 16, fol. 37.

66. Such arguments are redolent of the larger shift toward action and integration into the community as the basis for citizenship, or *vecindad*, among Spaniards in both the American colonies and the peninsula, according to Herzog, *Defining Nations*, esp. 61–62.

67. See Chanock, *Law, Custom, and Social Order*. Also note that for the Spanish world Paola Miceli views “anthropology”—and by this I believe she means native law or perhaps local law—as the arena that kept primordial connotations of custom alive in the nineteenth century and that continues to do so today. Miceli, *Derecho consuetudinario*, 257.

Not merely “invented” or reflexively repeated in some abstract anticolonial impulse, custom was turned by litigants and legal agents into a receptacle for recognizably modern temporal notions. This was as true in Lima as it was in Yaviche, and it was as evident in the initial petitions native litigants submitted as it was in the opinions of the fiscal of the Council of the Indies.

Identifying the temporal schemata at work in native lawsuits gives us a glimpse of the Enlightenment as something other than a modern state imposed on Indians. It shows us that it was an event in legal and intellectual history, one that indigenous people enacted. While this observation does not preclude the possibility that permutations of local culture deeply affected native peoples’ legal practices, invocations of custom, and time thinking, it does tell us that indigenous litigants from diverse regions of the empire also produced recognizably modern concepts related to politics and history. Some challenged time-honored notions of inherited status and subjected their own social position to the king’s constant reaffirmation, thus practicing rather than resisting the process of Bourbon statecraft.<sup>68</sup> Others advanced the notion of history as variable, as subject to change, as corruptible. Indeed, their assertions that custom can be corrupted and serve interests beyond those of the native communities themselves might serve as a caution as we seek to understand native legal culture. Custom’s linkage with the native past and its juxtaposition with modernity do not, eighteenth-century native litigants tell us, exhaust the range of its historical possibilities. To recognize this is to do no less than acknowledge the history of indigenous history.

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68. In this respect, I share Benton’s conviction that the colonial state emerged out of the legal interactions between colonizers and colonized. Benton, *Law and Colonial Cultures*, esp. 255–61.

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