

A Dream Deferred: The Emergence and Fitful Enforcement of the *Quilombo* Law in Brazil

*Edward Shore**

In 1988, Brazil ratified Article 68, a constitutional provision that recognizes the collective property rights of quilombolas, who are the descendants of formerly enslaved Africans, many of whom had escaped slavery. Article 68 ushered a dramatic transformation in the racial politics of Brazil, one of the most unequal societies in the world. Brazil—the last country in the Western Hemisphere to abolish slavery, in 1888—became the first country to constitutionally guarantee the land rights of the descendants of enslaved people, in 1988. In so doing, the framers of the Quilombo Law undertook to redress profound, longstanding inequities in the ownership of real property—the byproducts of more than three centuries of enslavement, land concentration, and racial capitalism in Brazil—through the prism of race, redistribution, and reparative justice. However, while more than 6,000 quilombo communities have petitioned the Brazilian government for land rights as quilombo-descendants (remanescentes de quilombos in Portuguese), only two dozen have obtained full title to their territories.

This Note traces the historical emergence and repercussions of the Quilombo Law in Brazil. It argues that Article 68 and its fitful enforcement reflect longstanding battles over land, citizenship, and racial entitlement in Brazilian society that began under slavery and acquired new forms during the twentieth and twenty-first centuries. This analysis divides into two parts. Part One traces the introduction of Article 68 at the 1987–1988 Constituent Assembly, explaining how rural Afro-Brazilians—who had historically advanced civil law claims of adverse possession to defend ancestral territories—came to reframe their historical grievances in a language of constitutional rights and

* Ph.D., The University of Texas at Austin, 2018; Associate Editor, Volume 101, *Texas Law Review*; J.D. Candidate, Class of 2023, The University of Texas School of Law. This Note represents the culmination of more than a decade of research and advocacy in support of Brazil's *quilombo* communities. Thank you to Professors Seth Garfield, Ginny Garrard, Karen Engle, Victor Ferreres, and the Rapoport Center. My heartfelt gratitude to friends and collaborators in the Vale do Ribeira, Alcântara, and beyond. A special thank you to Cristina Cigarroa, and our children, Analisa and Nicolás Francisco. Finally, thank you to the Volume 101 Notes editors for their thoughtful revisions and encouragement.

reparations during a period of democratic transition from military rule. Part Two addresses the intertwined legal, political, and ideological battles that have clouded Article 68's enforcement for more than thirty years. Specifically, it explains how the longstanding denial of the existence of racism in Brazilian society, and the requirement of indemnification for the expropriation of private property to grant collective title to quilombola communities, jointly conspire to deprive Afro-Brazilians of their constitutional rights. This legal history contributes to scholarship of constitutional multiculturalism in Latin America, democratic transition, and the centuries-long struggle for land, civil rights, and autonomy in Brazil and across the African diaspora.

INTRODUCTION.....	709
I. THE HISTORICAL EMERGENCE OF ARTICLE 68 IN BRAZIL	712
A. Brief History of <i>Quilombos</i> and <i>Quilombolas</i> in Brazil (1500–1888).....	714
B. <i>Quilombolas</i> & Post Emancipation: The Unfulfilled Promise of Abolition	718
C. <i>Quilombos</i> versus the Myth of “Racial Democracy”: Afro-Brazilian Activists and Intellectuals Invoke <i>Quilombos</i> to Challenge Racial Exclusion in Brazilian Society	721
D. The <i>Movimento Negro</i> and <i>Quilombola</i> Land Rights: Afro-Brazilian Activists Demand Constitutional Recognition of “Black Lands” on the Eve of Democratization in Brazil.....	725
E. Article 68 and the 1987–1988 National Constituent Assembly: A “Trojan Horse” for Reparations?	727
II. THE FITFUL ENFORCEMENT OF THE <i>QUILOMBO</i> LAW IN BRAZIL (1988–2022)	732
A. Early Efforts to Implement Article 68: Legislative Debates and Executive Actions, 1988–2003	733
B. Who Are <i>Quilombo</i> Descendants?.....	736
C. The Originalists Strike Back: Conservative Opponents Challenge the Constitutionality of Decree 4.887 (2003–2018).....	740
D. The “Expropriation” Debate: Must Private Landowners Be Indemnified?	744
CONCLUSION	746

Introduction

Aurico Dias is a farmer and activist from São Pedro, Brazil, one of eighty-eight *quilombos* that occupy São Paulo's Atlantic Forest.¹ *Quilombos* are communities comprised of *quilombolas*, who are the descendants of formerly enslaved Africans, many of whom had escaped slavery.² During the 1830s, Dias's ancestors escaped the gold mines and rice plantations that dotted the emerald landscape of the Ribeira Valley (*Vale do Ribeira*) in southeastern São Paulo state.³ They established a village along the shores of the Ribeira de Iguape River and survived due to their knowledge of tropical ecosystems, mastery of subsistence farming, and formation of trade and kinship networks with neighboring *quilombos* and society at large.⁴ After the abolition of slavery in Brazil in 1888, Dias's ancestors remained on the land, but they lacked formal title deeds.⁵ Consequently, they confronted threats of eviction from banana farmers, cattle ranchers, land speculators, and the State of São Paulo.⁶

For the past thirty-four years, Aurico Dias and the people of São Pedro have pressed for land rights under Article 68, a Brazilian constitutional provision that guarantees legal recognition and collective land titles to “*quilombo* descendants” (*remanescentes de quilombos*).⁷ Of an estimated 6,000 *quilombos* in Brazil today, fewer than 250 have received collective title

1. Interview with Aurico Dias, in Quilombo São Pedro, São Paulo, Braz. (Mar. 12, 2015).

2. Maria Helena P.T. Machado, Flávio dos S. Gomes & Marília B.A. Ariza, *Quilombos*, OXFORD BIBLIOGRAPHIES (May 29, 2019), <https://www.oxfordbibliographies.com/view/document/obo-9780199730414/obo-9780199730414-0314.xml> [<https://perma.cc/YZ6X-3B2Z>].

3. See INSTITUTO SOCIOAMBIENTAL, AGENDA SOCIOAMBIENTAL DE COMUNIDADES QUILOMBOLAS DO VALE DO RIBEIRA 8–9 (Kátia Pacheco dos Santos & Nilto Tatto eds., 2008) (discussing the history and geography of *quilombos* in the Ribeira Valley region). As a disclaimer, parts of this Note rely on the author's translation of Portuguese sources.

4. See Edward Shore, “*We Will Never Surrender!*”: *Quilombos, Their Descendants, and the Struggle for Land and Rights in Brazil's Ribeira*, in MAROONS AND THE MAROONED: RUNAWAYS AND CASTAWAYS IN THE AMERICAS 55, 64–65 (Richard Bodek & Joseph Kelly eds., 2020) [hereinafter Shore, *Never Surrender*] (discussing the development and endurance of a similar *quilombo* in the 19th century).

5. See FUNDAÇÃO INSTITUTO DE TERRAS DO ESTADO DE SÃO PAULO “JOSÉ GOMES DA SILVA,” NEGROS DO RIBEIRA: RECONHECIMENTO ÉTNICO E CONQUISTA DO TERRITÓRIO 78 (Tânia Andrade, Carlos Alberto Claro Pereira & Marcia Regina de Oliveira Andrade eds., 2000) (discussing the absence of formal land deeds held by the occupants of São Pedro).

6. Shore, *Never Surrender*, *supra* note 4, at 55; Edward Flaviano Shore, *Avengers of Zumbi: The Nature of Fugitive Slave Communities and Their Descendants in Brazil* 5, 185, 192, 199 (July 24, 2018) (Ph.D. dissertation, The University of Texas at Austin) (on file with Texas ScholarWorks) [hereinafter Shore, *Avengers of Zumbi*].

7. In Portuguese, the provision reads: “*Aos remanescentes das comunidades dos quilombos que estejam ocupando suas terras é reconhecida a propriedade definitiva, devendo o Estado emitir-lhes os títulos respectivos.*” CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 68 (Braz.).

for any part of their land.⁸ Only two dozen *quilombos* have obtained title for the full territory they claim.⁹ São Pedro is one of more than 1,800 communities awaiting resolution of the federal titling process.¹⁰ Like their ancestors, the residents of São Pedro face threats to their lands and livelihoods, this time from the intrusion of hydroelectric projects and mining companies.¹¹ “Brazil waited almost 500 years to recognize *quilombos*,” Dias told me, “[n]ow it feels like we will have to wait another 500 years for our government to enforce its own laws.”¹²

This Note explores the historical emergence and repercussions of Article 68, the first constitutional provision in Brazil that accorded race-based rights to Afro-descendants, who represent more than half of the country’s 215 million people.¹³ Drawing from archival research, oral histories, and secondary sources, I argue that Article 68 and its fitful enforcement reflect longstanding battles over land, citizenship, and racial entitlement in Brazilian society that began under slavery and acquired new forms during the twentieth and twenty-first centuries.

This analysis proceeds in two parts. Part I traces the introduction of Article 68 at the 1987–1988 Constituent Assembly, explaining how Black peasants—who had historically advanced civil law claims of adverse possession to defend ancestral territories—came to reframe their historical grievances in a language of “constitutional rights” and “reparations” during a period of democratic transition from military rule in Brazil. This Part revisits the historical experiences of *quilombolas* before and after emancipation to contextualize their descendants’ struggles for land, civil

8. See Débora Brito, *Menos de 7% das Áreas Quilombolas no Brasil Foram Tituladas*, AGÊNCIA BRASIL (May 29, 2018, 1:35 PM), <https://agenciabrasil.ebc.com.br/direitos-humanos/noticia/2018-05/menos-de-7-das-areas-quilombolas-no-brasil-foram-tituladas> [https://perma.cc/4URU-ZH3W] (elaborating on the small number of successful land titlings of *quilombo* communities); Karen Engle & Lucas Lixinski, *Quilombo Land Rights, Brazilian Constitutionalism, and Racial Capitalism*, 54 VAND. J. TRANSNAT’L L. 831, 833 (2021); Jimin Kang & Amanda Perobelli, *Black Brazilians in Remote ‘Quilombo’ Hamlets Stand Up to Be Counted*, REUTERS (Sept. 20, 2022, 3:04 PM), <https://www.reuters.com/world/americas/black-brazilians-remote-quilombo-hamlets-stand-up-be-counted-2022-09-20/> [https://perma.cc/N2A5-T2US]; Karla Mendes, *Slaves’ Descendants in Brazil Braced for Land Titles’ Fight*, REUTERS (Mar. 6, 2018, 8:12 AM), <https://www.reuters.com/article/us-brazil-landrights-slaves/slaves-descendants-in-brazil-braced-for-land-titles-fight-idUSKCN1GI204> [https://perma.cc/9N9Q-Z8WS].

9. Engle & Lixinski, *supra* note 8, at 833.

10. See *Observatório Terras Quilombolas*, COMISSÃO PRÓ-ÍNDIO DE SÃO PAULO (Apr. 11, 2022), <https://cpisp.org.br/> [https://perma.cc/WSA4-YW4Y] (noting 1,803 current processes of regularization of *quilombola* land as of September 5, 2022).

11. Shore, *Never Surrender*, *supra* note 4, at 55; Shore, *Avengers of Zumbi*, *supra* note 6, at 200.

12. Interview with Aurico Dias, *supra* note 1.

13. Eunice Prudente, *Dados do IBGE Mostram que 54% da População Brasileira é Negra*, JORNAL DA USP (July 31, 2020), <https://jornal.usp.br/radio-usp/dados-do-ibge-mostram-que-54-da-populacao-brasileira-e-negra/> [https://perma.cc/T8EF-8NGB].

rights, and racial equality today. In Brazil, the tardy proclamation of emancipation in 1888 failed to substantively improve socioeconomic opportunities for many freed Blacks, including *quilombolas*. Although Brazil did not establish a formal regime of legal segregation during the post-emancipation period, as in the United States, Afro-Brazilians confronted de facto barriers to civil rights and inclusion in Brazilian society. Meanwhile, throughout the twentieth century, Afro-Brazilians confronted the pernicious “myth of racial democracy”—the notion that widespread biological and cultural intermixture between Africans, Europeans, and Indigenous peoples during the colonization of Brazil had diluted racial distinctions and engendered a unitary, *mestiço* Brazilian race. Proponents of the myth of racial democracy—from the U.S.-trained sociologist Gilberto Freyre to the military regime that ruled Brazil from 1964 to 1985—cited high degrees of racial mixture and the historical absence of Jim Crow segregation in Brazil to argue that Brazilians, unlike Americans, did not discriminate based on race. Conveniently, such dogmatism managed to squelch demands for reparations and territorial rights for Afro-Brazilians and Indigenous peoples.

Part I revisits how a broad coalition of Afro-Brazilian activists and intellectuals brandished the historical example and symbolism of the *quilombo*, and above all, the famed Quilombo dos Palmares (Palmares) (which existed from approximately 1600 until its suppression in 1694), to debunk the myth of racial democracy in Brazilian society. Antiracist activism flourished in Brazil during the 1970s and 1980s, amid the rise of international Black power, Third World decolonization, and Brazil’s burgeoning pro-democracy movement. Efforts to unmask the myth of racial democracy culminated with the convocation of the 1987–1988 National Constituent Assembly, where Afro-Brazilian activists and intellectuals pressed for the establishment of constitutional rights for the descendants of *quilombos*.

Part II addresses the intertwined legal, political, and ideological battles that have clouded Article 68’s enforcement for more than thirty years. In 1995, seven years after the Constituent Assembly ratified Article 68, not a single *quilombo* in Brazil had obtained legal recognition and collective title to land. Until 2003, the Brazilian government refused to expropriate private lands to grant collective title to eligible communities. Although the causes of Article 68’s uneven enforcement are manifold, this Note highlights three legal issues that have plagued the realization of *quilombola* rights for thirty-four years. First, is Article 68 self-executing, or does it require implementing legislation? Second, who qualifies as a *remanescente de quilombo* or *quilombo* descendant under the Brazilian Constitution? Third, does expropriation of private property to grant collective title to *quilombola* communities require the indemnification of third parties?

Part II revisits the contentious efforts of *quilombola* activists, legislators, judges, and presidents to resolve these lingering debates. For

instance, in 2003, President Luiz Inácio Lula da Silva promulgated an executive decree that defined the category of *quilombo* descendants broadly, established an ambitious seventeen-step federal program for the titling of *quilombola* lands, and ordered indemnification for expropriation of private lands. Yet opponents of Article 68 swiftly filed a complaint challenging the decree's constitutionality that took fifteen years for Brazil's Federal Supreme Court to adjudicate. Although the Court ultimately upheld the decree in 2018, the challengers succeeded in grinding the federal titling of *quilombola* lands to a halt. Former President Jair Bolsonaro (2018-2022), elected mere months after the decision, vowed never to title "another centimeter of land" to *quilombolas* and Indigenous communities. Part II contends that the longstanding denial of the existence of racism in Brazilian society, as well as the requirement of indemnification for the expropriation of private property to grant collective title to *quilombola* communities, jointly conspire to deprive Afro-Brazilians of their hard-won constitutional rights.

I. The Historical Emergence of Article 68 in Brazil

Between 1987 and 1988, delegates of the National Constituent Assembly convened in Brasília to write a new democratic constitution after two decades of military rule. The 1988 Constitution—the seventh enacted since Brazil achieved independence in 1822—preserved federalism, established a complex system of judicial review, and sought to guarantee individual rights through the "promotion of wellbeing for all without prejudice as to origin, race, sex, color, age, and any other forms of discrimination."¹⁴ It was also the first in a wave of democratic, multicultural constitutions enacted across Latin America at the twilight of the Cold War.¹⁵

Not only did the 1988 Constitution usher the return of democracy, but it was also the first Brazilian constitution to expressly prohibit racial discrimination and to specifically recognize the collective rights of Indigenous peoples and Afro-Brazilians to land and culture.¹⁶ Article 68 of

14. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 3 (Braz.).

15. For literature on the emergence of constitutional multiculturalism and legal recognition of the territorial claims of ethnic minorities in Latin America since the 1980s, see generally Charles R. Hale, *Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala*, 34 J. LATIN AM. STUD. 485 (2002); Juliet Hooker, *Indigenous Inclusion/Black Exclusion: Race, Ethnicity and Multicultural Citizenship in Latin America*, 37 J. LATIN AM. STUD. 285 (2005); KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* (2010).

16. Engle & Lixinski, *supra* note 8, at 836–37; see also Sygla Rejane Magalhães Lopes, *A Constituição Federal de 1988 e o Multiculturalismo: Garantia ao Território como Direito Fundamental Coletivo dos Povos e das Comunidades Tradicionais*, 21 NOVOS ESTUDOS JURÍDICOS 541 (2016) (discussing how the 1988 Constitution's guarantee of collective rights also protects traditional peoples and communities). On the prohibition of racial discrimination and providing that "all persons are equal before the law, without any distinction whatsoever," see CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.).

the Constitution's transitory dispositions provides that "final ownership shall be recognized for the remaining members of the *quilombo* communities who are occupying their lands and the state shall grant them the respective title deeds."¹⁷

Article 68 ushered a dramatic transformation in the racial politics of Brazil—one of the most unequal societies in the world.¹⁸ Brazil, the last country in the Americas to abolish slavery (in 1888) became the first country to constitutionally guarantee the collective land rights of the descendants of enslaved people (in 1988).¹⁹ In so doing, the framers of Article 68 undertook to redress profound, longstanding inequities in the ownership of real property—the byproducts of more than three centuries of enslavement, land concentration, and racial capitalism in Brazil—through the prism of race, redistribution, and reparative justice. Indeed, Article 68 heralded the advancement of affirmative action, race-based public policies, and racial quotas in Brazilian universities and public institutions.²⁰

What explains this stunning transformation in a country that long denied the existence of racism?²¹ This Part revisits how Afro-Brazilian activists and their allies—long repressed by the Brazilian military regime (1964–1985)—lobbied the National Constituent Assembly to establish special protections for rural Black communities. On the centenary of abolition, a coalition of Black peasants, anthropologists, progressive clergy, and urban Black intellectuals forced the Constituent Assembly to grapple with Brazil's sordid past and, in so doing, succeeded in unmasking the nation's vaunted reputation as a "racial democracy."²²

17. In Portuguese, the provision reads: "*Aos remanescentes das comunidades dos quilombos que estejam ocupando suas terras é reconhecida a propriedade definitiva, devendo o Estado emitir-lhes os títulos respectivos.*" CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 68 (Braz.).

18. See EDWARD E. TELLES, *RACE IN ANOTHER AMERICA: THE SIGNIFICANCE OF SKIN COLOR IN BRAZIL* 107 (2004) (citing the World Bank's 2000 report showing Brazil as having the third-highest Gini index of income inequality among 150 countries, preceded only by Swaziland and Sierra Leone); see also Gini Index - Brazil, WORLD BANK GRP., https://data.worldbank.org/indicator/SI.POV.GINI?locations=BR&most_recent_value_desc=false [<https://perma.cc/J8V4-4GMC>] (ranking Brazil, with a Gini index of 48.9, as the seventeenth-most unequal country in the world in 2020); Marcelo Paixão, *Desigualdade nas Questões Racial e Social*, in *A COR DA CULTURA - SABERES E FAZERES - MODOS DE VER* 21–22 (2006) (arguing that racism and racial discrimination "constitute the foundation of Brazil's grossly unequal social structure").

19. ALFREDO WAGNER BERNO DE ALMEIDA, *QUILOMBOS E AS NOVAS ETNIAS* 41–42 (Alfredo Wagner Berno de Almeida ed., 2011).

20. TELLES, *supra* note 18, at 47.

21. See generally MARCELO PAIXÃO, *500 ANOS DE SOLIDÃO: ESTUDOS SOBRE DESIGUALDADES RACIAS NO BRASIL* (Vanderlei Cruz ed., 2013) (mentioning several transformations in Brazil, including ones regarding ethnic-racial relations).

22. Shore, *Avengers of Zumbi*, *supra* note 6, at 4–5, 10–12.

A. *Brief History of Quilombos and Quilombolas in Brazil (1500–1888)*

To understand the historical emergence and significance of Article 68, we must revisit the lived experiences and historical legacies of *quilombos* in Brazil. Between 1570 and 1857, traders trafficked 4.5 million enslaved Africans through Brazilian ports, ten times the number of enslaved Africans sold into slavery in the United States.²³ Slavery permeated every aspect of Brazilian life. Enslaved Africans and Afro-Brazilians toiled in sugar mills, plantations, mines, farms, factories, shipyards, kitchens, households, and beyond, powerfully shaping material, cultural, and spiritual life in Brazil.²⁴ Wherever there was slavery, there was also resistance—which assumed many forms.²⁵ One such form of resistance was the formation of communities of runaway slaves, known in Brazil as *mocambos* and *quilombos*, demonyms of Kimbundu (Angolan) origin that signified “hideouts” and “encampments.”²⁶

Hundreds, perhaps thousands, of *quilombos* dotted the vast landscape of Brazil—from the southern pampas of Rio Grande do Sul, to the jungles of the Northern Amazon—during the colonial period (1500–1822) and the nineteenth century.²⁷ Communities were varied in size and location.²⁸ The twenty-thousand-strong Quilombo dos Palmares (1600–1694)—originally known as *Angola Janga* (Little Angola) by its Bantu founders—was Brazil’s most famous *quilombo*, hidden in the arid hinterlands of the Brazilian Northeast.²⁹ Led by the warrior-king Zumbi dos Palmares, the Quilombo dos Palmares withstood the repeated assaults of European forces for nearly a century until its demise in 1694.³⁰ Yet Palmares was the exception, not the

23. WALTER FRAGA, *CROSSROADS OF FREEDOM: SLAVES AND FREED PEOPLE IN BAHIA, BRAZIL, 1870–1910* xi (Mary Ann Mahony trans., 2016).

24. *FREEDOM BY A THREAD: THE HISTORY OF QUILOMBOS IN BRAZIL* 3–5 (João José Reis & Flávio dos Santos Gomes eds., 2016) [hereinafter *FREEDOM BY A THREAD*].

25. *Id.* at 3.

26. FLÁVIO DOS SANTOS GOMES, *MOCAMBOS E QUILOMBOS: UMA HISTÓRIA DO CAMPESINATO NEGRO NO BRASIL* 10 (2015); see also *MAROON SOCIETIES: REBEL SLAVE COMMUNITIES IN THE AMERICAS* 1–3 (Richard Price ed., Johns Hopkins Univ. Press 2d. ed. 1979) (1973) (noting that throughout the Americas, these communities of runaway slaves were known by many distinct names: in English, maroons, in French, *marronage*, and in Spanish America, *palenques*, *cimarrones*, and *cumbias*).

27. See CLÓVIS MOURA, *REBELIÕES DA SENZALA: QUILOMBOS, INSURREIÇÕES, E GUERRILHAS* 87 (Rio de Janeiro: Conquista 1972) (describing the existence of various *quilombos* across Brazil).

28. *Id.*

29. R.K. Kent, *Palmares: An African State in Brazil*, 6 J. AFR. STUD. 161, 173 (1965); MARCELO D’SALETE, *ANGOLA JANGA: UMA HISTÓRIA DE PALMARES* 1 (2017).

30. Kent, *supra* note 29, at 162, 174.

rule. Most *quilombos* in Brazil were quite small. And many were occupied not only by runaway slaves, but also legally free persons as well.³¹

Today, the more than 6,000 communities in Brazil that assert legal identities as *remanescentes de quilombos* (*quilombo* descendants) under the Brazilian Constitution exhibit varied historical origins. For instance, the *quilombo* of Frechal, in the northeastern state of Maranhão, emerged on the grounds of a sugar plantation that was seized by rebel slaves during the 1790s.³² Other communities, such as Ivaporunduva, in São Paulo's Atlantic Forest, acquired their lands as gifts from former masters and religious orders during the early 1800s.³³ Many more, including Pedro Cubas, also located in São Paulo's Atlantic Forest, occupied vacant lands (*terras devolutas*) and asserted dominion by adverse possession (*usucapião*).³⁴ On the Atlantic peninsula of Alcântara, where Brazil's arid Northeast meets the Amazon, *quilombolas* occupied large plantations abandoned by slaveowners after the collapse of Brazilian cotton at the conclusion of the U.S. Civil War.³⁵ *Quilombos* even formed in major cities.³⁶ Perched atop the luscious green hillside of Rio de Janeiro's exclusive Lagoa neighborhood, under the watchful gaze of the art deco Christ the Redeemer, the *quilombolas* of Sacopã struggle to defend their community against the forces of gentrification and urban renewal.³⁷

Although *quilombos* paint a rich mosaic of Afro-Brazilian histories, family-based farming, agroecological mastery, and the generational struggle for autonomy and territorial dominion predominate the features of many *quilombola* communities. The association of *quilombolas* with farming dates to the colonial period. In 1740, the Portuguese Overseas Council, the governing body that administered the Portuguese Empire, defined a *quilombo* as "every dwelling, occupied by five or more fugitive blacks [sic], located in

31. Flávio dos Santos Gomes, *Quilombos of Rio de Janeiro in the Nineteenth Century*, in FREEDOM BY A THREAD, *supra* note 24, at 222, 232, 234–37; *see also* FUNDAÇÃO INSTITUTO DE TERRAS DO ESTADO DE SÃO PAULO "JOSÉ GOMES DA SILVA," *supra* note 5, at 67 (noting that the founders of Ivaporunduva were the emancipated slaves of Joana Maria, who devised the land to her former bondsmen).

32. ALMEIDA, *supra* note 19, at 43, 64–65 (describing Frechal and its history).

33. FUNDAÇÃO INSTITUTO DE TERRAS DO ESTADO DE SÃO PAULO "JOSÉ GOMES DA SILVA," *supra* note 5, at 67.

34. *Id.* at 79–80 (noting that runaways from the Caiacanga plantation and members of neighboring *quilombos* settled the lands that became Quilombo Pedro Cubas).

35. SEAN T. MITCHELL, CONSTELLATIONS OF INEQUALITY: SPACE, RACE, AND UTOPIA IN BRAZIL 55, 59 (2017).

36. ALFREDO WAGNER BERNO DE ALMEIDA, TRADITIONALLY OCCUPIED LANDS IN BRAZIL 83 (Mason Mathews trans., 2011).

37. Roque Planas, *Brazil's 'Quilombo' Movement May Be the World's Largest Slavery Reparations Program*, HUFFINGTON POST, https://www.huffpost.com/entry/brazil-quilombos_n_5572236 [<https://perma.cc/NWT9-MC8P>] (Dec. 6, 2017).

sparsely populated areas, which may or may not contain huts or pestles.”³⁸ The references to “huts” (*ranchos*) and “pestles” (*pilões*)—used to grind corn and cassava flour—underscore the prevalence of subsistence and informal practices of land tenure within these communities.³⁹ Likewise, contemporary Brazilian law recognizes *quilombo* descendants’ cultural, economic, and agroecological ties to their territory as the foundation of *quilombola* identity.⁴⁰ Of course, such identities developed alongside, and in opposition to, *latifundia*, coercive labor, and racial capitalism.⁴¹

Nothing alarmed slaveowners in Brazil quite like the formation of *quilombos*. The ubiquity of newspaper advertisements for fugitive slaves and the regular deployment of militias and punitive expeditions against runaway communities reveal how slaveholders viewed *quilombos* as inducements for other enslaved persons and threats to the “seigneurial order.”⁴² “Authorities vilified *quilombos* not merely because they resisted slavery, but also because they controlled the landscape in ways that challenged the plantations, mines, and ranches central to Brazil’s economy.”⁴³ For instance, in the northeastern state of Maranhão, the governor revealed in 1853 that a significant motive for attacking *quilombos* was “to open a fertile, underdeveloped territory to new agricultural settlement.”⁴⁴ He wrote:

I will not take time to demonstrate the need that existed to free [the district of Tury-assú] from the yoke of the *quilombos*; it is sufficient to point out that they kept it constantly under the threat of an uprising which would inevitably have spread to the Alcântara and Viana districts; that they placed both property and the personal safety of its inhabitants in danger; and that they rendered inaccessible a territory

38. ALMEIDA, *supra* note 19, at 38. In Portuguese, the 1740 Overseas Council decree stated, “*toda habitação de negros fugidos que passem de cinco, em parte despovoada, ainda que não tenham ranchos levantados nem se achem pilões neles.*” *Id.*

39. *Id.* at 60; GOMES, *supra* note 26, at 10.

40. See S.T.F.J., Ação Direta de Inconstitucionalidade No. 3239 Distrito Federal, Relator: Min. Cezar Peluso, 02.08.2018, 3443, 3652 (opinion of Min. Edson Fachin) (establishing that the “defining element of [*quilombola* identity] is the traditional relationship of Black communities with their land . . . the nexus of land, identity, and the preservation of culture”); ELIANE CANTARINO O’DWYER, QUILOMBOS: IDENTIDADE ÉTNICA E TERRITORIALIDADE 18–19 (2002) (explaining how the Brazilian anthropological community came to describe *quilombola* identity as the byproduct of “everyday struggles of resistance to maintain and reproduce their characteristic ways of life, which are consolidated vis-à-vis the occupation of their territories”).

41. See Engle & Lixinski, *supra* note 8, at 836 (arguing that resistance, expropriation, and heritage—as well as critiques of racial capitalism—are key concepts in *quilombola* identity and related legal decisions).

42. Shore, *Avengers of Zumbi*, *supra* note 6, at 9.

43. *Id.*

44. ROBERT EDGAR CONRAD, CHILDREN OF GOD’S FIRE: A DOCUMENTARY HISTORY OF BLACK SLAVERY IN BRAZIL 386 (2006).

that was otherwise extremely fertile and suitable for various types of agriculture.⁴⁵

In other words, Brazilian authorities reviled *quilombos* due to their territorial dominion, just as the Bolsonaro government dismissed their descendants' claims as impediments to agribusiness and rural development today.⁴⁶

Quilombos further provided sanctuary to other refugees from Brazil's system of land concentration and coercive labor, attracting freed Blacks (*libertos*), squatters (*posseiros*), mutineers, draft dodgers, and other outlaws. Indeed, recent scholarship has debunked the conception of *quilombos* as "cultural isolates frozen in an African past." Alfredo Wagner Berno de Almeida, Flávio dos Santos Gomes, and Mundinha de Araújo have demonstrated how *quilombos* forged dynamic links with mainstream society and other marginalized groups.⁴⁷ As this Note will explain, the descendants of *quilombos* have also nurtured strategic alliances with powerful outsiders to ensure their survival, "revealing their fundamentally adaptive capacities as historical actors."⁴⁸ In return, they have provided political and existential refuge—if not necessarily territorial refuge—to contemporary critics of Brazil's dominant model of capital accumulation and agrarian development.

45. *Id.* at 386–87.

46. See Ernesto Londoño, *Right-Wing Presidential Contender in Brazil Is Charged with Inciting Hatred*, N.Y. TIMES (Apr. 14, 2018), <https://www.nytimes.com/2018/04/14/world/americas/brazil-president-candidate-hate.html> [<https://perma.cc/FJL8-3ZRA>] ("Residents of one quilombola he had visited recently 'did nothing,' Mr. Bolsonaro said. He added: 'I think they don't even manage to procreate anymore.' He also spoke dismissively about indigenous territories.")

47. See ALMEIDA, *supra* note 19, at 65 (noting that the *quilombo* of Frechal, in the tropical lowlands of northwestern Maranhão, was located approximately 100 meters from the *casa grande* (a Portuguese term denoting the mansion estates of Brazilian slaveowners)); FREEDOM BY A THREAD, *supra* note 24, at 14 (summarizing scholarship arguing that in nineteenth-century Rio de Janeiro, "the relation of quilombos with society, and not its isolation, explains its formation and survival"); MUNDINHA ARAÚJO, *INSURREIÇÃO DE ESCRAVOS EM VIANA 1867 80–81* (2d. ed. 2006) (noting that the *quilombolas* of São Benedito do Céu forged commercial networks with dominant society, exchanging raw cotton for gunpowder with planters, and selling textiles to merchants for cash).

48. Shore, *Avengers of Zumbi*, *supra* note 6, at 10–11.

B. *Quilombolas & Post Emancipation: The Unfulfilled Promise of Abolition*

What happened to *quilombos* after slavery ended in 1888? The *quilombo* no longer existed as a legal category in the aftermath of emancipation.⁴⁹ For more than three centuries, *quilombos* had filled newspapers, police reports, and government correspondence. During the post-emancipation period, however, traces of their existence vanished from archives, maps, and census data.⁵⁰ The erasure of *quilombos* coincided with efforts to whitewash Brazilian history.⁵¹ For instance, in 1890, finance minister Rui Barbosa ordered the federal treasury to burn all records pertaining to slavery, in part to thwart former slaveowners' demands for indemnification of "lost property," but also to lift the "black stain" of Brazil's past.⁵²

The "invisibility" of ex-*quilombolas* reflected the marginalization of Afro-Brazilians during the First Brazilian Republic (1889–1930).⁵³ Despite obtaining freedom, socioeconomic opportunities did not substantively improve for many freed Blacks (*libertos*). There was no financial restitution or government assistance to ease the transition of formerly enslaved persons into the wage labor economy in Brazil.⁵⁴ Nor were there government programs that resembled the Freedmen's Bureau in the Reconstruction-era United States, which offered formerly enslaved persons basic education and job training.⁵⁵ Significantly, proposals to redistribute land to *libertos* were

49. See GOMES, *supra* note 26, at 120 (noting the invisibility that resulted from lack of public policies and the discounting of villages from the population and agricultural censuses).

50. *Id.*; see also MELISSA NOBLES, SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS 98–101 (2000) (explaining how, in 1940, the Brazilian National Census Commission eliminated the intermediary racial category of *pardo* ("brown/mixed race") to inflate the proportion of Brazilians who identified as "white," thereby confirming that racial mixture would lead, inexorably, to the "whitening" of Brazil).

51. See KIM D. BUTLER, FREEDOMS GIVEN, FREEDOMS WON: AFRO-BRAZILIANS IN POST-ABOLITION SÃO PAULO AND SALVADOR 9–10, 36 (2000) (observing the erasure of race from population data in government records and the concomitant rise of popularity of European ideals and state-sponsored European immigration); TELLES, *supra* note 18, at 26–32 (noting the nature of Brazilian eugenicist ideologies, including the idea that state sponsorship of European immigration would act as a "civilizing agent" by whitening the Brazilian gene pool").

52. For more on Barbosa's order, see BUTLER, *supra* note 51, at 7, and Shore, *Avengers of Zumbi*, *supra* note 6, at 79.

53. See BUTLER, *supra* note 51, at 10 ("[I]n many ways [Afro-Brazilians] remain invisible . . .").

54. *Id.* at 28; see also GEORGE REID ANDREWS, BLACKS AND WHITES IN SÃO PAULO, BRAZIL, 1888–1988, at 58–59 (1991) (explaining how the government of São Paulo enacted policies to recruit European immigrant laborers, rather than to invest in Brazil's newly freed population, revealing the racial prejudices of Brazilian elites).

55. BUTLER, *supra* note 51, at 28. For a study on U.S. Reconstruction and the Freedmen's Bureau, see generally STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION (2003).

defeated by a national legislature dominated by powerful landowners.⁵⁶ In 1889, sectors of the elite, based largely in the coffee-growing regions of western São Paulo, supported the overthrow of the Brazilian monarchy in the aftermath of Princess Isabel's proclamation of the *Lei Áurea* (Golden Law) abolishing slavery on May 13, 1888.⁵⁷

Although Brazil did not establish a formal regime of legal segregation during the post-emancipation period—as did the United States—Afro-Brazilians, including *ex-quilombolas*, confronted de facto barriers to civil rights and inclusion in Brazilian society.⁵⁸ To revitalize large-scale commercial agriculture and to ensure a labor pool to supplant chattel slavery after the cessation of the transatlantic trade, Brazilian elites established the *Lei de Terras* (Land Law) in 1850.⁵⁹ This law prohibited the acquisition of land through occupation (e.g., squatting), requiring that land be purchased and titled through the government.⁶⁰ Virtually anyone who did not possess title to land before 1850 assumed, or was ascribed, the socio-legal identity of a *posseiro* (squatter).⁶¹ As *posseiros*, many Afro-Brazilians—whether freed or enslaved—were subjected to eviction and criminal penalties under Brazil's harsh anti-vagrancy laws.⁶² In the countryside, former bondsmen confronted few options: either work as seasonal laborers on large plantations they once toiled as slaves, migrate to cities, or seek refuge in the former *quilombos*, which were vulnerable to land grabbing (*grilagem*) and eviction in the absence of legal title.⁶³

56. See generally Richard Graham, *Landowners and the Overthrow of the Empire*, 7 LUSO-BRAZILIAN REV. 44 (1970) (depicting the influence and actions of Brazilian landowners).

57. *Id.* at 44, 47; LILIA MORITZ SCHWARCZ & HELOISA MURGEL STARLING, BRASIL: UMA BIOGRAFIA 310 (Huendel Viana & Jane Pessoa eds., 2015). On the republican coalition that overthrew Emperor Dom Pedro II in 1889, see EMILIA VIOTTI DA COSTA, THE BRAZILIAN EMPIRE: MYTHS & HISTORIES 233 (Univ. of N.C. Press rev. ed. 2000) (1985).

58. See TELLES, *supra* note 18, at 105, 107–38 (noting the absence of legal segregation in Brazil, but analyzing various sources of racial inequality, including historical, geographical, residential, and educational).

59. COSTA, *supra* note 57, at 82.

60. JAMES HOLSTON, INSURGENT CITIZENSHIP: DISJUNCTIONS OF DEMOCRACY AND MODERNITY IN BRAZIL 131 (2008).

61. COSTA, *supra* note 57, at 82–85; see also HOLSTON, *supra* note 60, at 130–31 (discussing the threat of losing lands to *posseiros*, who claimed to be legitimate land holders); Keisha-Khan Y. Perry, *Social Memory and Black Resistance: Black Women and Neighborhood Struggles in Salvador, Bahia, Brazil*, LAT. AMERICANIST, Fall 2005, at 7, 28–29 (relating the struggles of urban Black communities, such as Gamboa de Baixo, in Salvador, Bahia, which have emphasized their ancestral histories of residence on the land to claim ownership in the absence of legal title).

62. BRODWYN FISCHER, A POVERTY OF RIGHTS: CITIZENSHIP AND INEQUALITY IN TWENTIETH-CENTURY RIO DE JANEIRO 101, 161 (2008).

63. BERNARD & AUDRE RAPOPORT CTR. FOR HUM. RTS. & JUST., BETWEEN THE LAW AND THEIR LAND: AFRO-BRAZILIAN QUILOMBO COMMUNITIES' STRUGGLE FOR LAND RIGHTS 13 (2008). Although squatters could still advance territorial claims based on adverse possession (*usucapião*), historically, the possibility of formalizing dominion eluded many poor rural Afro-

Meanwhile, the Brazilian government—heavily influenced by eugenics and Social Darwinism—embraced “whitening” vis-à-vis European immigration to bring an end to what they called the “*problema do negro*” (“the problem of the [B]lack race”) in Brazil.⁶⁴ The subsidized arrival of between two and three million immigrants from Europe, Japan, and the Middle East between 1870 and 1930 contributed to the displacement of Afro-Brazilian workers in the countryside, as well as in Brazil’s emerging industrial centers: São Paulo, Rio de Janeiro, and Belo Horizonte.⁶⁵ Still other policies contributed to their marginalization. Through poor execution in some decades, and failure to record the census altogether in others, the Brazilian Institute of Geography and Statistics (IBGE) effectively omitted race from census data between 1910 and 1940.⁶⁶ Meanwhile, agricultural censuses failed to survey “communities” (*comunidades*), “neighborhoods” (*bairros*), “villages” (*vilas*), and “small rural properties” (*sítios*) occupied predominately by Afro-descendant, indigenous, and mixed-race persons.⁶⁷ As Flávio dos Santos Gomes explains, the “invisibility” of rural Afro-Brazilians contributed to their exclusion from the social rights of citizenship, such as access to education, health care, welfare, transportation, electricity, communication, and clean water.⁶⁸

Of course, *quilombos* never actually disappeared. Their descendants eked out a living, reintegrating into peasant communities and urban populations during the twentieth century.⁶⁹ *Quilombos* would also achieve charged symbolism in Brazilian society, notwithstanding, or perhaps because of, elite efforts to whitewash the enslaved past.

Brazilians who relied on family-based agriculture for their subsistence and income, and who wished to minimize their interactions with the state. See ALMEIDA, *supra* note 19, at 42–43, 45 (observing the formation and expansion of a free, autonomous, Afro-Brazilian peasantry that squatted on large plantations that were abandoned by white planters during the mid-nineteenth century, but that lacked formal title deeds); Shore, *Avengers of Zumbi*, *supra* note 6, at 125–29 (observing historical barriers to rural Afro-Brazilian land ownership and the rise of Black peasant activism during the 1970s).

64. BUTLER, *supra* note 51, at 16, 35.

65. *Id.* at 67, 68–73 (describing displacement of Afro-Brazilian workers in São Paulo, European and Japanese immigration to Brazil, and poor working conditions in the countryside). On state-sponsorship of European immigration to Brazil, see JEFFREY LESSER, IMMIGRATION, ETHNICITY, AND NATIONAL IDENTITY IN BRAZIL, 1808 TO THE PRESENT 34–35 (2013).

66. See NOBLES, *supra* note 50, at 93 (explaining that the 1910 census was not taken, the 1920 census did not ask a “color question,” and the 1930 census was not taken due to a military coup d’état).

67. GOMES, *supra* note 26, at 120.

68. *Id.* at 123.

69. See BERNARD & AUDRE RAPOPORT CTR. FOR HUM. RTS. & JUST., *supra* note 63, at 7–8 (discussing the resiliency of *quilombo* communities, which have survived hundreds of years).

C. *Quilombos versus the Myth of “Racial Democracy”: Afro-Brazilian Activists and Intellectuals Invoke Quilombos to Challenge Racial Exclusion in Brazilian Society*

The constitutional recognition of territorial rights for *quilombo* descendants in 1988 on the centenary of abolition cannot be understood without consideration of the myth of “racial democracy” in Brazil and the longstanding efforts of Afro-Brazilian activists and intellectuals to unmask it.⁷⁰ The myth of “racial democracy” contends that widespread biological and cultural intermixture between Africans, Europeans, and Indigenous peoples during the colonization of Brazil diluted racial distinctions and engendered a unitary, *mestiço* Brazilian race.⁷¹ Although discourses of racial harmony and cultural hybridity have a long history in Brazil and Latin America, scholars associate Brazilian racial democracy with Gilberto Freyre, a U.S.-trained sociologist from Recife who wrote *The Masters and the Slaves* (1933), a landmark—if controversial—treatise on Brazilian history and race relations.⁷² Freyre cited high degrees of racial mixture and the historical absence of legal segregation in Brazil to argue that Brazilians—unlike Americans—did not discriminate based on race.⁷³ In fact, Freyre and other proponents of racial democracy falsely claimed that the experience of slavery was more benign in Brazil than anywhere else in the Americas and, in particular, the United States.⁷⁴

As scholars have noted, such theories gained traction during the 1930s, when Getúlio Vargas’s Estado Novo dictatorship (1937–1945) embraced *mestiçagem* (racial mixture) as the hallmark of Brazilian nationhood, appealing to Brazil’s ostensibly smooth race relations to temper the political divisions and social tensions that accompanied modernization.⁷⁵ Under the Vargas regime, racial mixture came to signify—and dignify—*brasilidade* (Brazilianness), the collection of qualities that purportedly distinguished

70. For the myth of racial democracy in Brazilian society, see generally THALES DE AZEVEDO, *DEMOCRACIA RACIAL: IDEOLOGIA E REALIDADE* (1975); PAULINA L. ALBERTO, *TERMS OF INCLUSION: BLACK INTELLECTUALS IN TWENTIETH-CENTURY BRAZIL* (2011).

71. ALBERTO, *supra* note 70, at 10–12.

72. See generally GILBERTO FREYRE, *THE MASTERS AND THE SLAVES: A STUDY IN THE DEVELOPMENT OF BRAZILIAN CIVILIZATION* 278 (Samuel Putnam trans., 2d English-language ed., rev. 1986) (1933).

73. *Id.* at 278.

74. See CARL DEGLER, *NEITHER BLACK, NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* 67–69 (1971) (disagreeing with Freyre by contending that the “physical treatment of slaves in Brazil may well have been harsher than that in the United States”). For more on Freyre’s characterization of Brazilian slavery, see TELLES, *supra* note 18, at 33.

75. See ALBERTO, *supra* note 70, at 114 (identifying the Vargas regime’s “ongoing project of promoting a national culture capable of overarching the country’s class, racial, and regional divisions”); see also ANADELIA A. ROMO, *BRAZIL’S LIVING MUSEUM: RACE, REFORM, AND TRADITION IN BAHIA* 48 (2010) (stating “the Vargas era brought new state interest in Brazilian identity and culture”).

Brazilians from citizens of the United States, Portugal, and Argentina, three populations whom Brazilian intellectuals sought to define their compatriots against.⁷⁶ Fifty years after the publication of *The Masters and the Slaves*, conservative lawmakers at the 1987–1988 National Constituent Assembly continued to invoke the myth of racial democracy to argue that constitutional recognition of distinct Black (*negro*) and Indigenous (*indígena*) identities would stoke U.S.-style racial tensions.⁷⁷ Conveniently, such “dogmatism” also “squelch[ed] demands for the enactment of compensatory policies as reparations for slavery and discrimination on the centenary of abolition.”⁷⁸

Not all Brazilians of color, of course, subscribed to such sanguine depictions of Brazilian race relations. During the 1930s, the *Frente Negra Brasileira* (Black Brazilian Front), Brazil’s first Black nationalist political party rejected racial dilution as the bedrock of *brasilidade*.⁷⁹ In the 1940s and 1950s, Afro-Brazilian activists and intellectuals appealed to racial democracy to advance their agenda of Black uplift and social inclusion.⁸⁰ However, during the 1960s, antiracist activism in Brazil radicalized in response to worsening gaps in wealth, education, and political representation in a putative racial paradise.⁸¹

In 1964, the Brazilian military overthrew the civilian government of President João Goulart with the covert backing of the United States.⁸² The right-wing military junta that presided over Brazil for the next twenty years suspended habeas corpus, censored the media, and dissolved parliament. It also perpetrated mass detentions, torture, and forced “disappearances” of leftists, syndicalists, journalists, students, academics, and other opponents of the regime.⁸³ Although Afro-Brazilian intellectuals and activists were not the primary targets of state repression, the regime in Brasília branded critics of race relations as “Black racists” anathema to Brazilian racial democracy.⁸⁴ Touting folkloric depictions of Brazil’s African heritage and its racial harmony, the military opposed race-based political organizing and attempted

76. ROMO, *supra* note 75, at 48; BRYAN MCCANN, HELLO, HELLO BRAZIL: POPULAR MUSIC IN THE MAKING OF MODERN BRAZIL 2 (2004).

77. Shore, *Avengers of Zumbi*, *supra* note 6, at 119.

78. *Id.*

79. See ALBERTO, *supra* note 70, at 138 (“The Frente Negra’s official racial vocabulary [included a] proud and insistent repetition of the term *negro* as the proper category of racial identification for people of African descent.”).

80. *Id.* at 170–71.

81. TELLES, *supra* note 18, at 42, 44, 121–32; see ALBERTO, *supra* note 70, at 245–47 (discussing how ideals of decolonization and liberation replaced aspirations toward racial democracy as Afro-Brazilian intellectuals rebranded themselves during the post-coup 1960s and 1970s).

82. See ALBERTO, *supra* note 70, at 245; JAMES N. GREEN, WE CANNOT REMAIN SILENT: OPPOSITION TO THE BRAZILIAN MILITARY DICTATORSHIP IN THE UNITED STATES 7 (2010).

83. ALBERTO, *supra* note 70, at 249.

84. *Id.* at 245.

to discredit evidence of racial inequality and discrimination in Brazilian society.⁸⁵ In this context, Afro-Brazilian activists and intellectuals showcased *quilombos*—and the Quilombo dos Palmares, in particular—to debunk the myth of racial democracy.

Perhaps no intellectual was more responsible for the recuperation of *quilombos* as popular symbols of Black power, resistance, and antiracism than the Afro-Brazilian scholar, playwright, artist, and politician, Abdias do Nascimento (1914–2011). Nascimento, founder of the Rio de Janeiro-based *Teatro Experimental do Negro* (Black Experimental Theatre), long cited the formation and endurance of *quilombos* as historical evidence that Afro-descendants had resisted enslavement and domination in Brazil. “The *negro* conquered. He did not submit. He was never passive nor peaceful,” Nascimento wrote in 1950, fourteen years before the military junta seized control of Brazil.⁸⁶ “The quilombos, the slave rebellions, and other Black uprisings prove that, throughout history, the *negro* had a sense of his human dignity and that he always worked to fulfill his dream of freedom.”⁸⁷ Nascimento’s outspokenness about racism in Brazil rankled the dictatorship. In 1968, amid a wave of self-exile by Brazilian academics, Nascimento accepted a professorship in the Black Studies Department at SUNY-Buffalo.⁸⁸ In exile, he supported the U.S. Black Power Movement and decolonization struggles in Africa, particularly in the former Portuguese colonies of Guinea-Bissau, Mozambique, and Angola.⁸⁹

In this international climate of Black radicalism, Nascimento articulated a radical alternative to racial democracy, known as *quilombismo*, which promoted the “African” values of cooperation, creativity, collective labor, collective landownership, and cultural resistance.⁹⁰ Nascimento refashioned Zumbi and the Quilombo dos Palmares as icons of Black resistance to white supremacy, capitalism, and military rule. He wrote in 1980:

For the institutionalization of Black power, whose foundation is the self-determination of the Afro-Brazilian masses, we have the inspiring example of the Quilombo dos Palmares: this signifies for us the adoption of a progressive social structure based on the traditional communitarianism of Africa, whose long experience demonstrated

85. *Id.*

86. ABDIAS DO NASCIMENTO, *O NEGRO REVOLTADO: ORGANIZAÇÃO E APRESENTAÇÃO DE ABDIAS DO NASCIMENTO 76* (Luiz Augusto Mesquita, Umberto Figueiredo Pinto & Nildon Ferreira eds., 1968).

87. *Id.*

88. ALBERTO, *supra* note 70, at 250; Bruce Weber, *Abdias do Nascimento, Rights Voice, Dies at 97*, N.Y. TIMES (May 30, 2011), <https://www.nytimes.com/2011/05/31/world/americas/31nascimento.html> [<https://perma.cc/62YM-35QZ>].

89. ALBERTO, *supra* note 70, at 251–65; ABDIAS DO NASCIMENTO, *O QUILOMBISMO: DOCUMENTOS DE UMA MILITÂNCIA PAN-AFRICANISTA* 164–166, 168 (1980).

90. NASCIMENTO, *supra* note 89, at 275–77.

that in its breast, there was no space for the exploiters and the exploited.⁹¹

Quilombos not only demonstrated historical evidence of Black resistance to oppression; they also stood as inspiration for Afro-Brazilian activists in their contemporary struggle for racial equality. Nascimento explained, “Quilombo does not simply refer to runaway slaves. Quilombo stands for free and fraternal union, solidarity, coexistence, and community. A quilombola society is a stage of human and socio-political progress.”⁹²

As Black antiracist activism swelled in response to dictatorship, the cause of *quilombismo* only gained in political prominence. In fact, Nascimento’s embrace of *quilombos* as symbols of Black power coincided with the proliferation of tributes to *quilombos* in Brazilian popular culture. In 1976, Clara Nunes, a popular samba singer, released the single *O Canto das Três Raças* (The Song of the Three Races).⁹³ An allegory of Brazilian slavery and race relations, the chorus paid tribute to Palmares with the verse, “The negro sang a song of revolt/from the Quilombo of Palmares/where he found refuge.”⁹⁴ In 1976, Jorge Ben Jor released *África Brasil*, an LP that mixed funk, *música popular brasileira* (MPB), and Afrobeat styles with a message of Black liberation.⁹⁵ The closing track, *Zumbi*, pined for the return of the fabled maroon leader: “I want to know what happens when Zumbi returns!”⁹⁶ Ben Jor shouted over a crescendo of horns, drums, and the high-pitched timbre of the *cuica*. And in 1984, Brazilian filmmaker Carlos Diegues directed *Quilombo*, a film about Palmares starring Zezé Motta and featuring a soundtrack by Brazilian pop star Gilberto Gil.⁹⁷

In this context, Abdias do Nascimento and other Afro-Brazilian intellectuals like Maria Beatriz do Nascimento and the ethnographer Guilherme dos Santos Barboza advanced the possibility that the descendants of *quilombos* continued to wage resistance against white supremacy and land concentration in the Brazilian hinterlands.⁹⁸ As Abdias do Nascimento conjectured in 1980:

Our Brazil is so vast . . . that we can suppose, without a margin of error, that there are still Black communities living in isolation, without firm ties to small cities and villages in our country’s interior. They would be small rural localities, cut off from the lifelines of our country and that maintain traditions and cultural practices that resemble

91. *Id.* at 26–27.

92. *Id.* at 263.

93. CLARA NUNES, *Canto das Três Raças*, on CANTO DAS TRÊS RAÇAS (EMI-Odeon 1976).

94. *Id.*

95. JORGE BEN JOR, *África Brasil (Zumbi)*, on ÁFRICA BRASIL (Phillips 1976).

96. *Id.*

97. QUILOMBO (Embrafilme 1984).

98. Shore, *Avengers of Zumbi*, *supra* note 6, at 104, 106–08, 111–12.

African life, under a system of communitarian subsistence agriculture and survival.⁹⁹

The revival of *quilombos* as popular symbols of antiracism soon collided with the political demands of rural Afro-Brazilians for land on the eve of democratization.

D. *The Movimento Negro and Quilombola Land Rights: Afro-Brazilian Activists Demand Constitutional Recognition of “Black Lands” on the Eve of Democratization in Brazil*

In 1985, a groundswell of popular protest and pro-democracy activism forced President José Sarney to call for a constituent assembly to convene within two years to write a new charter for democratic rule.¹⁰⁰ The return to democracy in 1985 furnished Afro-Brazilians with a language of “rights” and “reparations” to lobby for redistributive justice. Indeed, debates about the nature of race relations and the social conditions of Afro-Brazilians coincided with a wave of multicultural citizenship reforms and reparations claims throughout Latin America, in which ethnic groups in democratizing nations demanded respect for the rights of ethnic groups rather than the suppression of their differences.¹⁰¹

In August 1986, the *Movimento Negro Unificado* (Unified Black Movement, MNU, or *Movimento Negro*), a São Paulo-based antiracist coalition encompassing numerous Black social movement organizations throughout Brazil, called organizers to Brasília to draft a “Black Movement Platform” in advance of the Constituent Assembly.¹⁰² The Black National Convention for the Constituent Assembly convened at the University of Brasília, assembling 185 representatives from 63 different organizations representing 16 Brazilian states.¹⁰³ Attendees included leftists, union leaders, feminists, university professors and students, *favela* community activists, religious leaders, capoeira practitioners, and samba schools.¹⁰⁴ They supported myriad causes but advanced several core demands: ratification of anti-discrimination legislation, criminal prosecution of police brutality, government-mandated teaching of Afro-Brazilian history and culture in public schools, creation of a national monument to Zumbi dos Palmares, and

99. NASCIMENTO, *supra* note 89, at 258.

100. SCHWARCZ & STARLING, *supra* note 57, at 482–84, 487–88.

101. See ENGLE, *supra* note 15, at 101 (“Indigenous rights advocates simultaneously softened their stance on self-determination and attempted to broaden the general, liberal model of human rights, to incorporate a collective right to culture and to allow for difference within an equality model.”).

102. On the formation of the *Movimento Negro Unificado*, see MICHAEL GEORGE HANCHARD, *ORPHEUS AND POWER: THE MOVIMENTO NEGRO OF RIO DE JANEIRO AND SÃO PAULO, 1945–1988* 119–29 (1994).

103. *Convenção Nacional do Negro pela Constituinte, Manifesto* (Aug. 26–27, 1986).

104. See *id.* (listing various social, religious, and political groups that attended the Convention).

annual commemoration of his death on November 20, 1695, to be known as “Black Consciousness Day.”¹⁰⁵

Notably, the 1986 Black National Convention for the Constituent Assembly also featured the historic participation of rural Afro-Brazilians in an antiracist forum that had long been dominated by urban and college-educated intellectuals from Salvador, São Paulo, and Rio de Janeiro.¹⁰⁶ Representatives from the Center for Black Studies and Advocacy of Pará (CEDENPA) and the Black Cultural Center of Maranhão (CCN-MA) arrived in Brasília to lobby for the neologistic *terras de preto* (Black lands).¹⁰⁷ Alfredo Wagner Berno de Almeida, a Brazilian anthropologist, introduced the term *terras de preto* to describe Black communities in the Amazon who lived on a subsistence level and whose cultural practices exhibited strong ties with the ancestral past.¹⁰⁸ Almeida affirmed in 1987 that:

The so-called *terras de preto* comprise those areas that were either given, exchanged, occupied, or acquired by ex-slaves after the breakup of large properties in the monoculture sector. The descendants of those families have remained on these lands for generations without legal means of formalizing their collective dominion and have resisted pressures to claim these plots individually.¹⁰⁹

Terras de preto was a precursor to the term *remanescentes de quilombos* that later appeared in the 1988 Constitution.¹¹⁰ Traditionally, Afro-Brazilian communities had relied on civil claims of adverse possession to obtain title.¹¹¹ Yet during the 1970s and 1980s, anthropologists like Almeida—inspired by the successes of Brazil’s Indigenous movement—worked with Black communities to reframe their historical grievances in a language of race- and ethnicity-based rights during a period of transition from authoritarianism.¹¹²

105. *Id.*

106. Shore, *Avengers of Zumbi*, *supra* note 6, at 146.

107. *Id.*

108. ALMEIDA, *supra* note 36, at 134–35.

109. ALFREDO WAGNER BERNO DE ALMEIDA, *TERRAS DE PRETO, TERRAS DE SANTO, E TERRAS DE ÍNDIO: POSSE COMUM E CONFLITO* 41 (1989).

110. See JOSÉ MAURÍCIO ARRUTI, *MOCAMBO: ANTROPOLOGIA E HISTÓRIA DO PROCESSO DE FORMAÇÃO QUILOMBOLA* 89 (2006) (discussing the association between *remanescentes de quilombos* and *terras de preto*).

111. OSCAR DE LA TORRE, *THE PEOPLE OF THE RIVER: NATURE AND IDENTITY IN BLACK AMAZONIA, 1835–1945* 112 (2018).

112. See ARRUTI, *supra* note 110, at 39 (describing the mobilization of indigenous communities sharing a common identity in pursuit of land rights); Jan Hoffman French, *A Tale of Two Priests and Two Struggles: Liberation Theology from Dictatorship to Democracy in the Brazilian Northeast*, 63 *AMERICAS* 409, 425–26 (2007) (discussing the coincidence of military-sponsored development and the reshaping of Brazil as an indigenous nation).

Subsequently, small farmers and landless workers, displaced by military-sponsored projects to develop the Amazonian region through agribusiness, mining, highway expansion, and hydroelectric dams, articulated Black and Indigenous identities rooted in a collective past to assert dominion over disputed territories.¹¹³ In so doing, they challenged the conventional wisdom that the descendants of enslaved people in Brazil had somehow assimilated into a rural peasantry wracked by poverty but devoid of historical memory and racial consciousness. Gilberto Freyre himself understood Brazil's freed rural population as "mulatto in composition, or a mixture . . . of three races," that had endured *worse* living conditions than it had experienced under slavery because it was "deprived of the patriarchal assistance of their former masters and of the diet of the slave quarters."¹¹⁴

Contrary to Freyre's understanding, however, many rural Afro-Brazilians had transformed a historical memory of collective resistance to slavery into a moral appeal and legal claim to pressure the government to recognize their dominion over ancestral lands.¹¹⁵ Subsequently, Black peasant-activists representing besieged rural communities in the northern states of Maranhão and Pará arrived in Brasília in August 1986 to persuade the *Movimento Negro* to support a constitutional provision guaranteeing the collective territorial rights of the *terras de preto*.

Their lobbying proved successful. Title IX of the Black National Convention Manifesto recognized the following demand: "Land titles will be guaranteed for Black Communities descended from quilombos, whether in urban or rural areas."¹¹⁶ How "*terras de preto*" later became "*remanescentes de quilombos*" remains unclear. It is likely that rural Black activists had appealed to the *Movimento Negro*'s consecration of *quilombos* as icons of Black pride and militancy. Moreover, by strategically invoking the *quilombo*, Afro-Brazilian peasants also furnished proof of long-term settlement that would guarantee land titles under the future law.

E. *Article 68 and the 1987–1988 National Constituent Assembly:
A "Trojan Horse" for Reparations?*

On February 1, 1987, the National Constituent Assembly convened in Brasília and deliberated for the next 583 days.¹¹⁷ Ten thousand people entered the halls of the national legislature each day and nine million Brazilians participated through public hearings, writing petitions, and organizing

113. ALMEIDA, *supra* note 109, at 10.

114. DE LA TORRE, *supra* note 111, at 9 (quoting Gilberto Freyre) (emphasis added).

115. Shore, *Never Surrender*, *supra* note 4, at 56.

116. Convenção Nacional do Negro pela Constituinte, *supra* note 103.

117. Natália Neris da Silva Santos, *Vozes Negras no Congresso Nacional: o Movimento Negro e a Assembleia Nacional Constituinte de 1987–1988*, at 3 (Associação Nacional de Pós-Graduação e Pesquisa em Ciências Sociais, Working Paper No. GT32, 2015).

demonstrations.¹¹⁸ Notably, President Sarney discarded a preliminary draft of the constitution proposed by the Afonso Arinos Commission on the eve of the assembly's inauguration.¹¹⁹ Therefore, unlike prior constitutional conventions in 1891, 1934, and 1946, the 1987–1988 National Constituent Assembly proceeded without preconditions (*roteiro prévio*).¹²⁰ The decision added critical weight to the outcome of subcommission hearings and created unprecedented opportunities for public input.¹²¹ Although only 11 of the 559 Constituent Assembly members identified as Black, the *Movimento Negro* testified at public hearings and introduced popular amendments for a vote in the subcommissions.¹²²

The subject of Afro-Brazilian rights was debated by the Subcommission on Blacks, Indigenous Populations, Persons with Disabilities, and Minorities (*Subcomissão dos Negros, Populações Indígenas, Pessoas Portadores Deficientes, e Minorias*, Subcommission), one of twenty-four thematic subcommissions created by the Internal Rules Committee. Ivo Lech served as president while Benedita da Silva, a *favela* rights activist from Rio de Janeiro and the only Black woman elected to the Constituent Assembly, played a crucial role in establishing the Subcommission's agenda.¹²³ After the ratification of the Constitution, Silva became a senator and then governor of the state of Rio de Janeiro, a post she held until 2003, when she was named a minister of President Luiz Inácio Lula da Silva's first administration.¹²⁴ The Subcommission devoted two hearings to the *questão negra* in Brazil that lasted twelve hours and featured the testimonies of twenty-one participants.¹²⁵ Participants seized the occasion to decry the unfulfilled promise of abolition.

118. *Id.*

119. Antônia Gay & Mariana Trotta Dallalana Quintans, *Movimento Negro e Luta pelos Direitos: A Participação na ANC e as Conquistas na Constituição Federal Brasileira*, 23 CONPEDI 90, 100 n.18 (2015).

120. JOSÉ GOMES DA SILVA, *BURACO NEGRO: A REFORMA AGARIA NA CONSTITUINTE DE 1987/88*, at 43 (1989).

121. See Sérgio Praça & Lincoln Noronha, *Políticas Públicas e a Decentralização Legislativa da Assembleia Constituinte Brasileira, 1987-1988*, 27 REVISTA BRASILEIRA DE CIÊNCIAS SOCIAIS 78, 131–33 (2012) (noting the “decentralization” of the National Constituent Assembly and the critical role played by the twenty-four thematic subcommissions in advancing progressive provisions); Gay & Quintans, *supra* note 119, at 15–16 (observing how the subcommissions provided a platform for social movements to propose popular amendments for inclusion in the Brazilian Constitution); SCHWARCZ & STARLING, *supra* note 57, at 488 (noting how the introduction of popular amendments boosted public participation in the drafting process).

122. Gay & Quintans, *supra* note 119, at 101.

123. See *id.* at 103 (describing Silva's role in reopening discussions about cutting diplomatic ties with racist countries).

124. JAN HOFFMAN FRENCH, *LEGALIZING IDENTITIES: BECOMING BLACK OR INDIAN IN BRAZIL'S NORTHEAST* 94 (2009).

125. da Silva Santos, *supra* note 117, at 10.

Indeed, the centennial celebrations of emancipation gave Afro-Brazilians the platform to broadcast their denunciation of the myth of racial democracy.¹²⁶ “Next year will mark the centenary of abolition and I ask myself, ‘What sort of abolition are we celebrating, exactly?’” asked Helena Teodoro, a Black feminist researcher from Rio de Janeiro, on April 27, 1987.¹²⁷ “Abolition did not give a place for Black people to go. It did not give Black people rights. It did not give them any sort of government assistance. Instead, abolition left the *negro* frozen in space.”¹²⁸ Activists joined Teodoro to demand reparations for slavery.¹²⁹

The Subcommittee debated a series of compensatory policies for promoting “something more than formal equality” for Afro-Brazilians in the new constitution.¹³⁰ For instance, Teodoro demanded that the country earmark one percent of the federal budget for the promotion of Afro-Brazilian culture.¹³¹ And Lélia Gonzales of the Research Institute for Black Culture (IPCN) in Rio de Janeiro¹³² introduced an amendment protecting the constitutionality of compensatory policies for historically disenfranchised groups.¹³³

Although the Unified Black Movement (MNU) had endorsed *quilombo* descendant communities’ rights to land in its 1986 Manifesto, the Constituent Assembly never once addressed the subject of land rights for rural Black communities during the hearings. Nor did the Subcommittee invite testimony from a single rural Afro-Brazilian. The exclusion of *terras de preto* activists exposed divisions between urban Black activists and rural Black activists from the Amazon and the Brazilian Northeast. When participants in the Subcommittee debates did invoke *quilombos*, they did so in purely bygone, symbolic, and metaphorical terms.¹³⁴ By glossing *marronage* as historical inspiration, rather than legal justification, the *Movimento Negro* sidelined the rural communities with ancestral histories and legal claims as descendants of enslaved persons.

126. ARRUTI, *supra* note 110, at 28, 68.

127. SUBCOMISSÃO DOS NEGROS, POPULAÇÕES INDÍGENAS, PESSOAS PORTADORES DEFICIENTES, E MINORIAS, DIÁRIO DA ASSEMBLÉIA NACIONAL CONSTITUINTE 130 (1987) [hereinafter SUBCOMISSÃO] (statement of Helena Teodoro).

128. *Id.*

129. *Id.* at 120, 122–24.

130. da Silva Santos, *supra* note 117, at 10–11.

131. SUBCOMISSÃO, *supra* note 127, at 128 (statement of Helena Teodoro).

132. ALBERTO, *supra* note 70, at 10–12.

133. SUBCOMISSÃO, *supra* note 127, at 128 (statement of Lélia Gonzales).

134. See SUBCOMISSÃO, *supra* note 127, at 140 (referencing João Jorge, an MNU activist from Salvador, who exclaimed, “We will continue to fight so that our new constitution bears our face. We will do what we have always done since we first arrived in Bahia in 1549: we will fight like the *quilombos*.”).

Each of the twenty-four subcommissions introduced provisions for inclusion in the federal constitution. Arcane procedural rules ensured that many proposals were defeated in committee. Following a preliminary vote in the Subcommittee, a proposal advanced to the Systematization Commission (*Comissão de Sistematização*), an oversight committee that determined whether to recommend the proposal for two additional rounds of votes in the Plenary. The Redaction Commission (*Comissão da Redação*) then attached revisions to the proposal before it reached the final “promulgation stage.”¹³⁵ The majority of compensatory measures endorsed by the Subcommittee—including racial quotas in universities and civil service jobs—either never advanced past the Systematization Commission or were defeated in the Redaction Commission.¹³⁶ Still, the *Movimento Negro* scored several victories. The Plenary ratified a nondiscrimination clause, Article 3 (“Fundamental Principles”) and a complementary clause, Article 5 (“Rights and Fundamental Guarantees”) that made racism a crime and imposed criminal penalties.¹³⁷

Although the bulk of redistributive proposals benefitting Afro-Brazilians were rejected by the Plenary, the Constituent Assembly voted to include a single compensatory provision in the “transitory section” (*Ato das Disposições Constitucionais Transitórias*, ADCT) of the 1988 Constitution: Article 68, the so-called “*Quilombo Law*.”¹³⁸ The clause was a single sentence: “Final ownership shall be recognized for the remaining members of the quilombo communities who are occupying their lands and the state shall grant them the respective title deeds.”¹³⁹

The purportedly incidental ratification of Article 68 can in part be explained by the approvals of Articles 215 and 216. Article 215 called upon the Brazilian government “to promote and protect” the cultural manifestations of minority groups.¹⁴⁰ Article 216 recognized *remanescentes*

135. da Silva Santos, *supra* note 117, at 6–7.

136. *Id.* at 21.

137. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], art. 3 (Braz.) (“*Constituem objetivos fundamentais da República Federativa do Brasil . . . promover o bem de todos, sem preconceitos de origem, raça, sexo, cor, idade e quaisquer outras formas de discriminação.*”); *id.* at art. 5.

138. FRENCH, *supra* note 124, at 77. According to French, the transitory section included constitutional provisions, such as the *Quilombo Law*, which were intended to be temporary in nature. *Id.* French argues that the law “was placed in the transitory section at the end of the Constitution because it was assumed there were very few quilombos and that all would be identified and granted land within just a few years.” *Id.*

139. In Portuguese, the provision reads: “*Aos remanescentes das comunidades dos quilombos que estejam ocupando suas terras é reconhecida a propriedade definitiva, devendo o Estado emitir-lhes os títulos respectivos.*” CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 68 (Braz.).

140. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], art. 215 (Braz.) (“*O Estado garantirá a todos o pleno exercício dos direitos culturais e acesso às fontes da cultura nacional, e apoiará e incentivará a valorização e a difusão das manifestações culturais.*”).

de quilombos as “national cultural patrimony.”¹⁴¹ According to Jan French, the enactment of Articles 215 and 216 reflected an ideological statement about the nature of the *quilombo* question, seen by assembly members and the *Movimento Negro* “as largely ethnic and cultural, not as a question of land reform or redistributive justice.”¹⁴² In other words, consensus had developed around the notion that the *remanescentes* represented critical linkages to Brazil’s “African past,” and consequently, merited special protection, in part because such attribution of Brazilian “exceptionalism” appealed to nationalists across the political spectrum.¹⁴³

Of course, the *Quilombo* Law encountered fierce political resistance from conservatives, nonetheless. The Rural Democratic Union (UDR), an ultraright agribusiness party, waged a campaign to block land redistribution and oppose territorial rights for Indigenous peoples and *quilombolas*.¹⁴⁴ Decrying Article 68 as a “Trojan horse” for land reform, conservative assemblymen raised objections related to jurisdictional competency, procedure, and separation of powers.¹⁴⁵

Opposition to *quilombola* rights was fiercest among representatives from regions dominated by mining and agribusiness, particularly the Amazon, Center West, and the Brazilian Northeast. Before Article 68’s passage, Acival Gomes, from the northeastern state of Sergipe, attempted to defeat the *quilombo* provision on the grounds that it had failed to outline a procedure for identifying, demarcating, and titling land.¹⁴⁶ Aluizio Campos, representing the northeastern state of Paraíba, tried unsuccessfully to attach modifications to narrow eligibility to only “Indian” and *quilombo* communities that had occupied their lands for hundreds of years.¹⁴⁷

Still, others lambasted Article 68 as a stake through the very heart of Brazilian nationhood: its “racial harmony.” Eliel Rodrigues, a representative from the Amazonian state of Pará, renounced the *Quilombo* Law as an act of “apartheid” that threatened to splinter Brazil into “Indian, Black, and white” territories:

[T]he proposed amendment to the Constitution will lead this country down the path of discrimination, creating veritable ghettos and

141. *Id.* at art. 216 (Braz.) (“*Constituem patrimônio cultural brasileiro os bens de natureza . . . tomados individualmente ou em conjunto, portadores de referência à identidade, à ação, à memória dos diferentes grupos formadores da sociedade brasileira, nos quais se incluem . . . [f]ficam tombados todos os documentos e os sítios detentores de reminiscências históricas dos antigos quilombos.*”).

142. FRENCH, *supra* note 124, at 199–200.

143. Shore, *Avengers of Zumbi*, *supra* note 6, at 153.

144. DA SILVA, *supra* note 120, at 139.

145. Shore, *Avengers of Zumbi*, *supra* note 6, at 153.

146. CÂMARA DOS DEPUTADOS, CENTRO DE DOCUMENTAÇÃO E INFORMAÇÃO, QUADRO HISTÓRICO DOS DISPOSITIVOS CONSTITUCIONAIS ART. 68 ADCT 9.

147. *Id.* at 12.

promoting the practice of apartheid in Brazil. What remains essential is the integration of different ethnic groups that together make up the Brazilian people, a people who do not discriminate based on race, color, religion, class, nor do they infringe upon the rights of individuals. To divide the nation into Indian lands, Black lands, and white lands would be to fragment the physical and political building blocks that define Brazilian nationhood. This suppressive amendment seeks to guarantee the preservation of our civilization and social identity.¹⁴⁸

In other words, enactment of compensatory policies for Afro-Brazilians violated the core tenets of racial democracy. The allegation that *quilombos* represented an existential threat to Brazilian society dates to the colonial period and featured prominently in Vargas-era conservative social thought as well.¹⁴⁹ Although Article 68 ultimately survived, the campaign to suppress the provision belies the conventional wisdom that assembly members did not expect Article 68 to “have much effect.”¹⁵⁰ On the contrary, the contentious ratification in the 1987–1988 Constituent Assembly foreshadowed the ideological battles, legal challenges, and bureaucratic resistance that have stonewalled Article 68’s enforcement for more than thirty years.

II. The Fitful Enforcement of the *Quilombo* Law in Brazil (1988–2022)

In 1995, seven years after the Constituent Assembly ratified Article 68, not a single *quilombo* in Brazil had obtained legal recognition and collective title to land.¹⁵¹ The Brazilian government’s failure to enforce the *Quilombo* Law stemmed from innumerable, interconnected legal, political, and historical barriers to the implementation of constitutional rights for Afro-Brazilians that persist today.¹⁵² Although the causes of Article 68’s fitful enforcement are manifold, this Note highlights three legal issues that have plagued the realization of *quilombola* rights for thirty-four years. First, is

148. *Id.* at 8.

149. See, e.g., Renato P. S. Moraes, “*O mal do mocambo*”: o discurso de Agamenon Magalhães e a busca pela moral e cidadania no Recife (1937–1945), XXVII SIMPÓSIO NACIONAL DE HISTÓRIA 6–10, 13–14 (2013), https://anpuh.org.br/uploads/anais-simposios/pdf/2019-01/1548875180_7404b84ec0b0f5a34237715cad9a42e4.pdf [<https://perma.cc/5SMU-PZZV>] (observing the enactment of eugenicist policies to cleanse the *mocambos*, urban shantytowns occupied predominately by Afro-Brazilians in the city of Recife, where government officials used the term *mocambo* synonymously with *quilombo* to describe urban black communities during the Vargas dictatorship); Endrica Geraldo, *O combate contra os “quistos étnicos”: identidade, assimilação, e política migratória no Estado Novo*, 15 LOCUS: REVISTA DE HISTÓRIA, no. 1, 2009, at 171, 174 (explaining that Vargas-era officials had branded Brazil’s immigrant enclaves as “ethnic cysts,” demonstrating that the regime’s preoccupation with “racial and cultural isolation” was not limited to marginalized Afro-Brazilian communities); Shore, *Avengers of Zumbi*, *supra* note 6, at 194–199.

150. FRENCH, *supra* note 124, at 77.

151. BERNARD & AUDRE RAPOPORT CTR. FOR HUM. RTS. & JUST., *supra* note 63, at 20–21.

152. See generally *id.* at 21–28 (enumerating various barriers to Article 68’s implementation).

Article 68 self-executing, or does it require implementing legislation? Second, who qualifies as a *remanescente de quilombo* under the Brazilian Constitution? And third, does expropriation of private property to grant collective title to *quilombola* communities require the indemnification of third parties?

A. *Early Efforts to Implement Article 68: Legislative Debates and Executive Actions, 1988–2003*

In the aftermath of the Constituent Assembly, uncertainty prevailed about whether the *Quilombo* Law was self-executing or if it required implementing legislation. Notably, such ambiguity was not limited to the recognition of collective land rights for *quilombolas*.¹⁵³ In Brazil, many of the social and economic rights established by the 1988 Constitution are not self-executing, but they require implementing legislation or regulations.¹⁵⁴ The inauspicious inclusion of Article 68 in the “Transitional Constitutional Provisions Act” of the 1988 Constitution led many to assume the provision was largely “symbolic” in nature and therefore required additional governmental action to give it effect.¹⁵⁵ Others insisted that Article 68—when interpreted alongside the cultural rights for *quilombos* established by Articles 215 and 216 of the Constitution—constituted a “fundamental right” and required no further enforcement measures.¹⁵⁶

The stakes were enormous for Afro-Brazilians embroiled in violent conflicts with powerful constituencies over the control of ancestral lands and resources. If, in the words of Brazilian Federal Supreme Court Minister Luís Roberto Barroso, the collective property right of *quilombolas* “flows directly from the Constitution,” then Article 68 would not require the enumeration of procedures for expropriation and payment of compensation to private parties who claimed dominion over *quilombola* lands.¹⁵⁷ On the other hand, if Article 68 was not self-executing, enforcement would demand legislation and administrative guidelines to title *quilombola* territories and to indemnify interested third parties, undertakings that would stir political backlash and incur significant monetary costs for the cash-strapped federal government.¹⁵⁸ Anxious *quilombolas* and their allies therefore confronted two options: either

153. Keith S. Rosenn, *Procedural Protection of Constitutional Rights in Brazil*, 59 AM. J. COMP. L. 1009, 1010 (2011).

154. Keith S. Rosenn, *Brazil’s New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 778 (1990).

155. Engle & Lixinski, *supra* note 8, at 837.

156. Shore, *Avengers of Zumbi*, *supra* note 6, 155–60.

157. S.T.F.J., *Ação Direta de Inconstitucionalidade No. 3239 Distrito Federal*, Relator: Min. Cezar Peluso, 02.08.2018, 3443, 3660–61 (opinion of Min. Luis Roberto Barroso).

158. *See* Engle & Lixinski, *supra* note 8, 858–59 (describing the need to indemnify third parties).

pursue a wide array of newly established procedural devices to ensure the protection of constitutional guarantees or lobby Congress and the President to implement legislation and administrative regulations.¹⁵⁹ As this Note explains, *quilombolas* have pursued both avenues for the enforcement of Article 68 with limited success.

Today, *quilombola* activists still affirm that Article 68 constitutes a self-executing fundamental right and should not require further governmental action. Yet they have also historically pressed to implement legislation and undertaken a range of constitutional actions in response to ongoing dispossession and the Brazilian State's complicity. In November 1995, *quilombolas* "seized" upon the 300th anniversary of the execution of Zumbi dos Palmares to "pressure the federal government" to resolve enforcement delays.¹⁶⁰ The "first *Encontro Nacional de Comunidades Negras Rurais Quilombolas* (National Meeting of Rural Black Quilombo Communities)" convened in Brasília and published a manifesto of the political and territorial demands of more than 400 *quilombo* communities.¹⁶¹ *Quilombola* leaders delivered the manifesto—the first official, "collective statement" made by *quilombo* communities—to President Fernando Henrique Cardoso, the Brazilian legislature, and various federal agencies.¹⁶² More than 30,000 *quilombolas* rallied in the capitol mall to demand the creation of new public policies that would deliver upon the promises made by Article 68.¹⁶³

That same month, a federal agency—the *Instituto Nacional de Colonização e Reforma Agraria* (National Institute of Colonization and Agrarian Reform, INCRA)—issued Regulation (*Portaria*) No. 307, an "administrative rule that laid out a legal framework upon which regulations for the titling of *quilombo* lands" could develop.¹⁶⁴ The hopes of many *quilombolas* were dashed, however, when INCRA's regulation applied narrowly to communities that occupied federal public lands.¹⁶⁵ Even among such communities, only six managed to obtain collective titles from INCRA between 1996 and 1998, and all of them were located in the Amazonian state of Pará.¹⁶⁶ *Quilombos* located on state-owned public lands achieved greater—albeit modest—success.¹⁶⁷ *Quilombolas* in Pará, Maranhão, and

159. See Rosenn, *supra* note 153, at 1010–11 (explaining that the most recent Brazilian Constitution contains procedures designed to safeguard citizens' rights).

160. Shore, *Avengers of Zumbi*, *supra* note 6, at 156.

161. BERNARD & AUDRE RAPOPORT CTR. FOR HUM. RTS. & JUST., *supra* note 63, at 21.

162. *Id.*

163. *Id.*

164. *Id.*; SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO, O DIREITO À TERRA DAS COMUNIDADES QUILOMBOLAS 12 (2002), https://sbdp.org.br/wp/wp-content/uploads/2018/01/01-comunidades_quilombolas_direito_a_terra.pdf [<https://perma.cc/HSH4-EYLV>].

165. BERNARD & AUDRE RAPOPORT CTR. FOR HUM. RTS. & JUST., *supra* note 63, at 21–22.

166. *Id.* at 22.

167. *Id.* at 26–27.

São Paulo, successfully lobbied state-level land and agrarian agencies to establish procedures for the titling of *quilombo* lands in the absence of federal action.¹⁶⁸ For *quilombolas* that asserted dominion over privately held lands, however, Article 68 remained a “dead-letter law.”¹⁶⁹

In 1999, the Brazilian government transferred competence for the titling procedure to the *Fundação Cultural Palmares* (Palmares Cultural Foundation, FCP), a branch of the Ministry of Culture tasked with promoting Afro-Brazilian culture.¹⁷⁰ Like INCRA, FCP lacked the discretionary funding and technical expertise to identify, demarcate, and title *quilombola* territories.¹⁷¹ In fact, during FCP’s four-year control of the titling process (1999–2003), “the Foundation was involved in the titling of only 14 communities, thirteen of which were titled in 1999 and 2000.”¹⁷² Seeing little hope for the realization of their rights, the newly formed *Coordenação Nacional de Comunidades Quilombolas* (National Coordination of *Quilombola* Communities, CONAQ) began lobbying the executive branch directly.¹⁷³

In September 2001, President Fernando Henrique Cardoso enacted Decree 3.912, the first presidential decree in Brazil to establish regulations for the titling of *quilombola* land.¹⁷⁴ Again, *quilombolas* were dismayed. President Cardoso’s decree merely recognized land that had been occupied by *quilombos* in 1888, the year slavery was abolished, and that was still occupied by their descendants a century later—October 5, 1988, the date the Constituent Assembly ratified the Constitution.¹⁷⁵ Moreover, the decree imposed burdensome evidentiary standards upon *quilombolas* to prove their historical occupation, requirements that eluded many communities who lacked formal documentation, financial resources, and legal assistance to substantiate long-term dominion.¹⁷⁶ Jan French explains that President Cardoso’s decision to reduce eligibility reacted to “problems that arose after the first titles were granted by the [FCP] in July 2000, without first expropriating or compensating the existing private landowners,” which

168. *Id.* at 27; see also Shore, Avengers of Zumbi, *supra* note 6, at 196–97 (detailing how, in 1996, *quilombola* activists in São Paulo’s Vale do Ribeira, who were supported by progressive sectors of the Catholic Archdiocese of São Paulo, successfully lobbied then-Governor Mario Covas to confer collective title deeds on communities occupying “vacant” state lands (*terras devolutas*)).

169. BERNARD & AUDRE RAPOPORT CTR. FOR HUM. RTS. & JUST., *supra* note 63, at 22.

170. FRENCH, *supra* note 124, at 77; Shore, Avengers of Zumbi, *supra* note 6, at 156.

171. Shore, Avengers of Zumbi, *supra* note 6, at 156.

172. BERNARD & AUDRE RAPOPORT CTR. FOR HUM. RTS. & JUST., *supra* note 63, at 23.

173. See *id.* at 22 (detailing the formation of CONAQ in 1996 and subsequent actions taken by the executive branch).

174. Decreto No. 3.912, de 10 de Setembro de 2001, Diário Oficial da União [D.O.U.] de 11.09.2001 (Braz.).

175. *Id.*

176. BERNARD & AUDRE RAPOPORT CTR. FOR HUM. RTS. & JUST., *supra* note 63, at 23.

provoked “a series of legal questions still being sorted out by government lawyers a full two years later.”¹⁷⁷

If Cardoso intended to constrain titling, he succeeded unambiguously: INCRA “only issued one title under this decree.”¹⁷⁸ President Cardoso’s left-wing successor, Luiz Inácio Lula da Silva, who served two consecutive terms as President of Brazil between 2002 and 2010, and who was again elected President in October 2022, substituted Cardoso’s edict with a proclamation of his own.¹⁷⁹ Decree 4.887, enacted in 2003, aimed to resolve a dilemma that had long vexed supporters and opponents of Article 68 alike: who qualifies for *quilombola* status under the 1988 Constitution?

B. *Who Are Quilombo Descendants?*

While uncertainty clouded the *Quilombo* Law’s enforceability, disagreement raged about the nature of its intended beneficiaries: the so-called *remanescentes de quilombos*, or *quilombo* descendants. Indeed, the Constituent Assembly failed to define *remanescentes de quilombos* or elaborate any criteria for identifying them.¹⁸⁰ As anthropologist Elizabeth Farfán-Santos explains, many Brazilians’ expectations of “authentic” *quilombo* descendants were shaped by perceptions of Palmares, whose profile had featured prominently in folklore and popular culture.¹⁸¹ Lawmakers therefore assumed that very few *quilombos* had survived in Brazil, and those that did would retain African vestiges. In fact, numerous communities—Rio da Rãs (Bahia), Mocambo (Sergipe), Kalunga (Goiás), Trombetas (Pará), and Ivaoporunduva (São Paulo)—demanded land rights as *quilombos* upon ratification of the Constitution.¹⁸² Few had manifested the “authentic” African traditions that lawmakers across the spectrum had come to expect. “Race-based mobilization for land rights” in Brazil had again “outstripped political expectations and administrative competence.”¹⁸³

As *quilombolas* waged a grassroots campaign to pressure the Brazilian government to implement Article 68 in 1995, two rival camps of supporters—*primordialistas* (primordialists) and *resemantizadoras* (re-semanticists), in the words of anthropologist José Arruti—proposed

177. Jan Hoffman French, *Dancing for Land: Law-Making and Cultural Performance in Northeastern Brazil*, 25 POL. & LEGAL ANTHROPOLOGY REV., May 2002, at 19, 28.

178. Engle & Lixinski, *supra* note 8, at 838–39.

179. *Id.* at 839.

180. Elizabeth Farfán-Santos, *Quilombolismo: Fighting and Dying for Rights*, 1 TRANSCRIPTS 131, 133 (2011).

181. *Id.* at 133, 136.

182. ARRUTI, *supra* note 110, at 106–07.

183. *Id.* at 107; Shore, *Avengers of Zumbi*, *supra* note 6, at 156.

dueling definitions of *remanescentes de quilombos*.¹⁸⁴ The primordialist camp included urban *Movimento Negro* activists who portrayed *quilombos* as “little Africas”—repositories of authentic “African cultural traditions” that crystallized in opposition to plantation slavery and white supremacy.¹⁸⁵ It was represented by Abdias do Nascimento, then a member of the Federal Chamber of Deputies, the lower house of the Brazilian Congress, who lobbied for the creation of the Palmares National Park in the state of Alagoas in 1984 and the recognition of November 20, the anniversary of Zumbi’s death, as a federal holiday: Black Consciousness Day.¹⁸⁶ For primordialists, the contemporary significance of *quilombo* descendants derived from their ongoing signifiers as authentic Afro-Brazilian identities rooted in resistance to the myth of racial democracy.

On the other side of the debate, the rival re-semanticists prioritized land over cultural transcendence and pressed for a broad definition of *remanescentes de quilombos* to secure territory for as many communities as possible.¹⁸⁷ Expanding the concept of *quilombo* beyond its nostalgic association with the paradigmatic Quilombo dos Palmares acquired new urgency after the legislative defeat of the National Plan for Agrarian Reform (PNRA), which had proposed the expropriation and redistribution of vacant public lands and “non-productive” private properties exceeding 500 hectares to 1.4 million poor families.¹⁸⁸ Re-semanticists included *quilombola* activists, anthropologists, and liberationist sectors of the Brazilian Catholic Church, whom Jan French argues were “less concerned with their ‘negritude’ [blackness] or history of slavery than with fulfilling the requirements of whichever law would give [Afro-Brazilians] respite and rights.”¹⁸⁹

Seeking to rescue the *quilombo* from the straitjacket of Brazilian folklore, re-semanticists defined *quilombolas* in terms of ethnicity rather than race, hence the semantic appellation.¹⁹⁰ Invoking Fredrik Barth, the influential Swedish anthropologist, the re-semanticists understood ethnicity as the product of “shifting social boundaries,” rather than as a set of primordial traits.¹⁹¹ In their view, ethnicity was dynamic, protean, and adaptable rather than essentialist, fixed, and static. Alfredo Wagner Berno de

184. See ARRUTI, *supra* note 110, at 79–97 (discussing the dueling definitions of *remanescentes de quilombos*).

185. *Id.* at 93.

186. FRENCH, *supra* note 124, at 77–78.

187. *Id.* at 95, 99.

188. Wilder Robles, *Revisiting Agrarian Reform in Brazil, 1985–2016*, 34 J. DEVELOPING SOC’YS 5–7 (2018).

189. FRENCH, *supra* note 124, at 97.

190. ARRUTI, *supra* note 110, at 103.

191. See FREDRIK BARTH, *ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURAL DIFFERENCE* 9–10 (1969) (explaining how ethnic identity represents the byproduct of historical processes of social differentiation, e.g., “inclusion and exclusion”).

Almeida, the anthropologist who researched and advocated for the rights of the *terras de preto* during the 1980s, exhorted the State to unfreeze the *quilombo* from history.¹⁹²

The re-semanticists prevailed. In 1994, the Palmares Cultural Foundation convened a seminar, “The Concept of the Quilombo,” that defined *remanescente de quilombo*.¹⁹³ Glória Moura, an Afro-Brazilian intellectual and professor of education at the University of Brasília (UnB), introduced the term “contemporary *quilombo*” to describe Black communities inhabited by the descendants of enslaved persons that engaged in subsistence activities and retained ancestral traditions.¹⁹⁴ Culture remained an important element of the definition of *remanescente de quilombo*, but it was no longer tied to the notion of African “survivals.”¹⁹⁵ As Moura explained, contemporary *quilombola* identity should not be defined as purely racial but also as an *ethnic* category.¹⁹⁶ In 1995, the Brazilian Anthropological Association (ABA), the most prestigious academic anthropological society in the country, subsequently redefined *remanescente de quilombo* in ethnic terms by focusing on the communities’ distinct modes of land tenure, cultural adaptation, and quotidian practices of resistance.¹⁹⁷

When President Lula promulgated Decree 4.887 on Black Consciousness Day in 2003, *quilombolas* hoped that it would alleviate the bureaucratic morass and political minefield that had plagued the titling of their lands. Drafted by a new executive branch agency—the *Secretaria Especial para Políticas de Promoção de Igualdade Racial* (SEPPIR, or Special Secretariat for Policies Promoting Racial Equity)—Lula’s Executive Order shifted titling competence back to INCRA and defined *quilombo* broadly to permit expropriation of private property to grant collective title to *quilombola* communities.¹⁹⁸ Crucially, the Administration adopted the ABA’s broad definition of *remanescente de quilombo*. It defined *quilombo* descendants as “ethnic-racial groups, according to self-identification criteria, with their own historical trajectory, endowed with specific territorial relationships, presumed to be of Black ancestry related to resistance to suffered historical oppression.”¹⁹⁹ While INCRA oversaw titling, the executive order tasked the Palmares Cultural Foundation with reviewing

192. See ALMEIDA, *supra* note 19, at 68–72 (encouraging a broader, modern definition of *quilombo*).

193. Interview with Glória Moura, in Braz. (Aug. 6, 2015).

194. *Id.*

195. ELIANE CANTARINO O’DWYER, QUILOMBOS: IDENTIDADE ÉTNICA E TERRITORIALIDADE 18–19 (2002).

196. FRENCH, *supra* note 124, at 96.

197. *Id.* at 97–98.

198. Engle & Lixinski, *supra* note 8, at 839.

199. Decreto No. 4887, de 20 de Novembro de 2003, Diário Oficial da União [D.O.U.] de 11.21.2003 (Braz.).

anthropological reports establishing the authenticity of applicants' claims to *quilombola* land and identity.²⁰⁰

President Lula's order signaled a remarkable shift in the Brazilian government's constitutional interpretation of Article 68. First, it applied international treaties such as International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples (ILO 169), which Brazil ratified in 2002.²⁰¹ ILO 169 requires states to "take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession."²⁰² It mandates that "[a]dequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned."²⁰³ And it establishes that indigenous and tribal groups must be consulted about policies, programs, or other "legislative or administrative measures which may affect them directly," either through the use of land and natural resources, or otherwise.²⁰⁴

Significantly, Decree 4.887 incorporates Article 1(2) of the ILO Convention, which upholds the validity of *self-identification* for "indigenous and tribal" peoples.²⁰⁵ In other words, communities are *entitled* to assert *quilombola* identities on their own. As Karen Engle and Lucas Lixinski explain, Decree 4.887 makes "resistance" an important part of its definition of *quilombo*, such that self-identification "is not purely subjective."²⁰⁶ However, the executive order does not conceive of "resistance" in bygone terms—that is, as heroic acts of rebellion undertaken by exceptional rebel slaves who created runaway settlements in faraway regions to combat plantation slavery and white domination in Brazil.²⁰⁷ Rather, it construes "resistance" to describe the *ordinary, everyday* struggles of *quilombolas* to

200. *Id.*

201. BERNARD & AUDRE RAPOPORT CTR. FOR HUM. RTS. & JUST., *supra* note 63, at 16; INT'L LAB. ORG. [ILO], Indigenous and Tribal Peoples Convention, June 27, 1989, ILO No. 169 [hereinafter ILO 169].

202. ILO 169, *supra* note 201, at art. 14(2).

203. *Id.* at art. 14(3).

204. *Id.* at art. 6; *see also id.* at art. 15 (explaining indigenous groups should be consulted regarding land use issues that would affect them); *id.* at art. 22 (explaining indigenous and tribal groups should be consulted regarding training programs and economic strategies that would affect them).

205. *See id.* at art. 1(2) ("Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.").

206. Engle & Lixinski, *supra* note 8, at 839. Indeed, as part of the titling procedure, the Palmares Cultural Foundation must certify official anthropological reports commissioned by applicants attesting to their *quilombola* heritage and everyday resistance to ongoing oppression. *See generally* ELIZABETH FARFÁN-SANTOS, BLACK BODIES, BLACK RIGHTS: THE POLITICS OF QUILOMBOLISMO IN CONTEMPORARY BRAZIL 114–20 (2016).

207. Engle & Lixinski, *supra* note 8, at 847–48.

survive and to maintain their culture and agroecological traditions despite their “invisibility” and marginalization in contemporary society.²⁰⁸

Whereas Article 68 had appeared initially to apply narrowly to “maroon descendant communities,” President Lula’s decree empowered virtually all rural Black communities in Brazil to stake claim to collective land rights as *quilombolas*.²⁰⁹ Unsurprisingly, powerful constituencies that bitterly opposed agrarian reform and the recognition of territorial rights for ethnic minorities in Brazil fought to undermine Decree 4.887 on constitutional grounds.

C. *The Originalists Strike Back: Conservative Opponents Challenge the Constitutionality of Decree 4.887 (2003–2018)*

In June 2003, one of Brazil’s right-wing political parties—the *Partido de Frente Liberal* (PFL, or Liberal Front Party, which is the successor of the party of the prior military dictatorship, and which changed its name in 2007 to *Democratas*, or DEM)—filed a complaint challenging the decree’s constitutionality on several grounds. The challenge, known in Brazil as a “direct action of unconstitutionality” (*ação direta de inconstitucionalidade*, ADI),²¹⁰ urged the Brazilian constitutional court, or Federal Supreme Court (*Supremo Tribunal Federal*, STF), to strike down Decree 4.887 because it: (1) violated separation of powers because it was enacted by the executive, rather than the legislative, branch; (2) violated the constitutional right to property by creating an unconstitutional mode of expropriation of private land for *quilombo* communities; (3) improperly broadened the category of *quilombo* beyond that recognized in the Constitution by allowing for self-identification as a primary indicator of *quilombo* status; and (4) violated the due process rights of private property owners with competing title by subordinating their rights to those of *quilombos*.²¹¹

Had the Federal Supreme Court struck down Decree 4.887, it likely would have sounded the death knell for the federal titling of *quilombola* lands in Brazil.²¹² Instead, on February 8, 2018, the STF voted overwhelmingly to

208. See S.T.F.J, Ação Direta de Inconstitucionalidade No. 3239 Distrito Federal, Relator: Min Cezar Peluso, 02.08.2018, 3443, 3652 (opinion of Min. Edson Fachin) (Braz.) (arguing that “[t]he idea of resistance, by a community that, over the years, despite invisibility and the difficulties in relation to their environment, survives and maintains its traditions, is inseparable from the attribution of *quilombola* status”).

209. See DE LA TORRE, *supra* note 111, at 144 (noting that Article 68 “sparked a process of [B]lack ethnic reconfiguration”).

210. Rosenn, *supra* note 153, at 1039.

211. See Engle & Lixinski, *supra* note 8, at 834 (summarizing the individual constitutional complaints advanced by the PFL against Decree 4.887).

212. *Id.*

uphold President Lula's executive order.²¹³ Nevertheless, it took *fifteen years* for a majority of ministers to make their decisions.²¹⁴ The delay cast a pall over the Lula Administration's ambitious, seventeen-step procedure for recognizing, demarcating, and titling *quilombola* lands. Indeed, the constitutional challenge chilled the regulatory environment as INCRA officials were reluctant to expend significant federal resources to demarcate and confer collective titles to *quilombolas* that could someday be revoked at the stroke of a pen. The ADI arguably succeeded in practice, if not in law.

Two elements of DEM's challenge were especially damaging to the cause of *quilombola* territorial rights. The first concerned the issue of temporality. As noted, DEM objected to the Administration's expansion of the definition of *quilombo* to allow self-identification as a basis of eligibility.²¹⁵ In so doing, the challengers invoked the "timeframe thesis," or *tese do marco temporal*, as it is known in Brazil.

The timeframe thesis is a conservative jurisprudential interpretation of the Brazilian Constitution's Indigenous and Traditional Peoples' land rights provisions that restricts eligibility to those communities that had fully occupied their territories on October 5, 1988, when the Constitution was ratified.²¹⁶ The timeframe thesis is a hallmark of Brazilian originalism (*originalismo*).²¹⁷ The theory was formally introduced in 2005 when the congressional agribusiness caucus, the *Frente Parlamentar Agropecuária* (Agribusiness Parliamentary Front), filed a direct action of unconstitutionality challenging President Lula's demarcation of the Raposa Serra do Sol Indigenous Reserve in the Amazonian state of Roraima.²¹⁸ Among their objections to the titling process, the agribusiness lobby argued that because the Wapichana peoples had not fully occupied the Raposa Serra do Sol territory on the date the Constitution was ratified, they were ineligible

213. One minister (Peluso) voted to strike down the decree in its entirety, eight voted to uphold it in its entirety, and two (Dias Toffoli and Gilmar Mendes) voted to uphold it but with a narrowed interpretation of its scope. S.T.F.J., Ação Direta de Inconstitucionalidade No. 3239 Distrito Federal, Relator: Min Cezar Peluso, 02.08.2018, 3443, 3626–27 (opinion of Min. Edson Fachin) (Braz.).

214. Engle & Lixinski, *supra* note 8, at 834.

215. *Id.* at 848.

216. See generally Aianny Naiara Gomes Monteiro & Girolamo Domenico Treccani, *A Tese do Marco Temporal da Ocupação Quilombola à Luz da Teoria da Integridade de Dworkin: Análise dos Votos da Adin 3239*, 5 REVISTA DE DIREITO AGRÁRIO E AGROAMBIENTAL 18 (2019).

217. For the nature of "Brazilian originalism," see Elden Borges Souza & Victor Sales Pinheiro, *Uma Análise Sobre o Originalismo no Contexto do Ativismo Judicial Brasileiro*, 42 DIREITOS FUNDAMENTAIS & JUSTIÇA 535, 547 (2020).

218. Marcos Candido, *O que é o Marco Temporal e como ele Impacta os Povos Indígenas*, UNIVERSO ONLINE: ECOA, <https://www.uol.com.br/ecoa/ultimas-noticias/2020/06/02/o-que-e-o-marco-temporal-e-como-ela-impacta-indigenas-brasileiros.htm> [https://perma.cc/WPK2-QUQ7] (Sept. 9, 2021, 10:45 PM).

to receive its protections.²¹⁹ Notwithstanding that members of the Wapichana and Macuxi Tribes were expelled by ranchers during the 1980s,²²⁰ the legal precedent for the *marco temporal* was established four years prior in 2001, when the Cardoso Administration issued INCRA guidelines for the titling of *quilombola* lands that restricted eligibility to communities that occupied their lands between 1888, when slavery ended, and October 5, 1988.²²¹ Although ten of the eleven STF ministers ultimately rejected DEM's temporal objection to Decree 4.887, the STF's prolonged consideration of the timeframe thesis managed to perpetuate harmful stereotypes of *quilombos* that inhibit Article 68's enforcement today.

Cezar Peluso was the lone minister to accept DEM's timeframe argument. He rejected self-identification as a basis for *quilombola* status by invoking what he called a "historic definition [of *quilombo*] known by all,"²²² citing Portuguese language dictionaries that define a *quilombo* as a "hideout, settlement, city or cluster of villages where runaway slaves sought shelter," or as a "fortified settlement of Black people escaping captivity, endowed with social organization."²²³ By circumscribing "resistance" in this manner, Minister Peluso argued that, "to the extent that anyone is entitled to collective *quilombo* land title—only descendants of enslaved individuals who actually escaped and formed communities, and who continue to occupy the land that their ancestors occupied at abolition, would be eligible."²²⁴ Minister Peluso's reasoning both reflected and informed mainstream perceptions of *quilombos* to the detriment of Article 68 claimants.

In 2008, five years after DEM challenged the constitutionality of Decree 4.887, the *Jornal Nacional*—the prime-time news program of *Rede Globo*, a Brazilian television conglomerate with a daily audience of over one hundred million people—aired an investigative report, "Fraud in Fake Quilombo of Bahia."²²⁵ The *Jornal Nacional* investigated Grande Paraguaçu, a "recently recognized *quilombo* descendant community" in the Recôncavo region of Bahia.²²⁶ The reporter approached elderly residents, asking them

219. Gilberto Starck & Fernanda Frizzo Bragato, *O Impacto da Tese do Marco Temporal nos Processos Judiciais que Discutem Direitos Possessórios Indígenas*, 8 REVISTA DIREITOS SOCIAIS E POLÍTICAS PÚBLICAS 245, 253–55 (2020).

220. Jullie Pereira, *Juíza de Roraima Autoriza Reintegração em Terra Indígena para Ruralistas*, AMAZÔNIA REAL (Dec. 2, 2021, 3:10 PM), <https://amazoniareal.com.br/juiza-de-roraima-autoriza-reintegracao-em-terra-indigena-para-ruralistas/> [<https://perma.cc/ZD3H-W69U>].

221. Decreto No. 3.912, de 10 de Setembro de 2001, Diário Oficial da União [D.O.U.] de 11.19.2001 (Braz.).

222. See Engle & Lixinski, *supra* note 8, at 848 (paraphrasing Peluso's originalist decision).

223. *Id.*

224. *Id.*

225. Elizabeth Farfán-Santos, "Fraudulent" Identities: The Politics of Defining Quilombo Descendants in Brazil, 20 J. LATIN AM. & CARIBBEAN ANTHROPOLOGY 110, 111 (2015).

226. *Id.*

specific details about the written history and cultural traditions of their community.²²⁷ Strategically edited interviews portrayed residents that either denied, or were unable to explain, their *quilombola* heritage and enslaved ancestry.²²⁸ The investigative report “proved” that residents were not actually the descendants of runaway slaves and were “lying about their identity to steal land.”²²⁹

As Elizabeth Farfán-Santos details in her book, *Black Bodies, Black Rights*, private landowners subsequently brought public charges against Grande Paraguaçu that implicated the Palmares Cultural Foundation, which granted the community a certificate of cultural recognition as a *remanescente de quilombo*, and INCRA, which had overseen the land-titling process then in progress.²³⁰ Yet the impact of the *Jornal Nacional* story reverberated beyond Bahia.

Today, Afro-descendant communities across Brazil confront accusations of fraud leveled by outsiders who appeal to the myth of racial democracy and dominant historiography of slave-era *quilombos* to delegitimize their descendants’ grievances and claims.²³¹ As noted, the Quilombo dos Palmares came to epitomize African resistance in the history of Brazil.²³² Brazilian historiography portrayed *quilombos* as “isolated war camps politically and socially separated from society.”²³³ Although recent scholarship has emphasized the rich diversity of *quilombola* histories, DEM’s constitutional challenge and the *Jornal Nacional* controversy evidence how the consecration of Palmares as an avatar of Black resistance continues to dominate the social imagery of *quilombos*.

Such (mis)representations have created an impossible standard of comparison for many contemporary Black communities to achieve.²³⁴ Romanticized histories of Palmares—based on scant, biased documentation produced by Portuguese colonists seeking the *quilombo*’s destruction—obscure local histories of Black resistance.²³⁵ Meanwhile, the stubborn vitality of nationalist myths of racial harmony and cultural mixture empowers DEM and *Rede Globo* to deny the authenticity of Afro-Brazilians’ self-identification as *quilombo* descendants. Entrenched social ideologies of “Black authenticity” and “racial democracy”—not merely the political

227. *Id.*

228. *Id.*

229. *Id.*

230. FARFÁN-SANTOS, *supra* note 206, at 3, 25–26.

231. *Id.* at 3.

232. *Id.* at 9.

233. *Id.*

234. *Id.*

235. *Id.* at 5, 39.

headwinds of regulatory inertia—play central roles in suppressing Afro-Brazilians’ nascent constitutional rights as equal citizens.

D. The “Expropriation” Debate: Must Private Landowners Be Indemnified?

The second aspect of DEM’s challenge that was inimical to the cause of *quilombola* land rights relates to the problem of expropriation. DEM attacked Decree 4.887 on several constitutional grounds, but the thrust of its complaint centered on whether and how privately titled lands can be constitutionally expropriated to grant collective title to *quilombola* communities.²³⁶ Whereas President Cardoso’s Decree 3.291 had limited expropriation to vacant federal lands, President Lula’s Executive Order was the first to establish a process for the expropriation of privately held lands and payment of “just compensation” to current titleholders.²³⁷ Recall that expropriation remains a subject of intense debate between and among allies and opponents of the *Quilombo* Law. Many *quilombola* activists insist that Article 68 is a fundamental constitutional right—notwithstanding its inclusion in the ADCT—and its application therefore requires no further implementing legislation.²³⁸ On the other hand, critics of the *Quilombo* Law, represented by the petitioner *Democratas* Party, decry the violation of due process rights of those who currently hold title to disputed territory.²³⁹ President Lula’s 2003 Decree attempted to stake a middle ground. Bowing to pressure from *quilombolas*, the Administration clarified that INCRA could expropriate privately held real property to grant collective titles to eligible communities but maintained that such action also required the payment of prior compensation.²⁴⁰

Once again, the Federal Supreme Court voted overwhelmingly to uphold the constitutionality of President Lula’s expropriation policy. Predictably, Minister Peluso voted to strike down the procedure in its entirety, contending that it usurps the fundamental right to property, disturbs “social peace,” and provides “incitement to revolt.”²⁴¹ On the opposite end of the spectrum, Minister Barroso held that expropriation is not even necessary for titling *quilombola* territories. He reasoned that the Brazilian

236. See Engle & Lixinski, *supra* note 8, at 853 (discussing “questions that loom large in the court’s decision”).

237. *Id.*

238. See Shore, *Avengers of Zumbi*, *supra* note 6, at 150–52 (discussing the National Constituent Assembly and Article 68).

239. Engle & Lixinski, *supra* note 8, at 833–34.

240. *Id.* at 854.

241. S.T.F.J., *Ação Direta de Inconstitucionalidade No. 3239 Distrito Federal*, Relator: Min Cezar Peluso, 02.08.2018, 3443, 3475 (opinion of Min. Cezar Peluso); see also Engle & Lixinski, *supra* note 8, at 854 (summarizing Min. Peluso’s opposition to expropriation of private property whatsoever for purposes of titling *quilombola* territories).

Constitution's drafters "made a balancing judgment between the right to property of third parties and the cultural rights of *quilombola* communities and asserted that the latter would have priority over the former."²⁴² However, as Engle and Lixinski explain, Minister Barroso maintained that, "in contrast to the process for recognizing Indigenous land title, the state is permitted, if it chooses, to go through the expropriation process and compensate current titleholders of *quilombo* lands."²⁴³ The remaining ministers voted to uphold the Decree but found that current titleholders of *quilombola* lands are entitled to just compensation.²⁴⁴ The result of the STF's decision therefore was to preserve the status quo. Yet the status quo is untenable to thousands of *quilombolas* confronting dispossession.²⁴⁵

The STF failed to recognize the distributional consequences of its decision.²⁴⁶ Public compensation for expropriation of privately held lands requires government funding.²⁴⁷ The ministers did not consider where funding compensation would come from nor the impact it could have on other spending.²⁴⁸ Indeed, a lack of funding for expropriation represents a major obstacle to the enforcement of Article 68.

As Engle and Lixinski illustrate, the Brazilian legislature has significantly reduced funding to INCRA for payment of expropriation compensation over the past decade: "the funding allocated in 2021 was a mere one tenth of one percent of the amount allocated in 2012."²⁴⁹ INCRA's expropriation-compensation budget grew steadily after President Lula's Decree and "stabiliz[ed] in 2013–2015 at about 25 million reais a year (around 10 million US dollars at the time)."²⁵⁰ In 2016, amid an economic crisis, President Dilma Rousseff's impeachment, and Michel Temer's rise to the presidency (Rousseff's right-wing vice president), the expropriation budget was slashed to one-fifth of the previous year's amount.²⁵¹

During the Bolsonaro years (2018–2022), funding dropped to its lowest level since at least 2004, "significantly curtailing the titling of even those *quilombo* lands that are relatively uncontested."²⁵² What are the consequences? Strategically underfunded federal bureaucracies such as

241. S.T.F.J., Ação Direta de Inconstitucionalidade No. 3239 Distrito Federal, Relator: Min Cezar Peluso, 02.08.2018, 3443, 3689 (opinion of Min. Luís Roberto Barroso).

243. Engle & Lixinski, *supra* note 8, at 855.

244. *Id.* at 858.

245. BERNARD & AUDRE RAPOPORT CTR. FOR HUM. RTS., *supra* note 63, at 28–29; Planas, *supra* note 37.

246. Engle & Lixinski, *supra* note 8, at 858–59.

247. *See id.* at 859 (noting that "public compensation is not cost-free").

248. *Id.* at 858–59.

249. *Id.* at 859.

250. *Id.*

251. *Id.*

252. *Id.*

INCRA and the Palmares Cultural Foundation oversee far too many petitions for *quilombola* recognition and titling than they can timely adjudicate. *Quilombolas* are left in “a tenuous position . . . confront[ing] the enormous burden of the titling process, the uncertainty and lack of protection of those titles already granted, [and] direct threats from third parties, nearby landowners, and large development projects.”²⁵³ Meanwhile, large landowners with deep pockets and deeper political connections challenge expropriation through the courts at every turn.²⁵⁴ Jointly, these factors allowed President Bolsonaro to fulfill his campaign promise to ensure that “not one square centimeter of land will be demarcated for Indigenous reserves or quilombolas.”²⁵⁵

Conclusion

This Note has examined the unlikely emergence and uneven enforcement of Article 68, the first constitutional provision in Brazil to accord specific rights to Afro-descendants. It has argued that ratification of Article 68 responded to the longstanding struggles of the Black peasantry over land, resources, and autonomy that originated under slavery and took new forms during the twentieth and twenty-first centuries.

Part I traced the introduction of Article 68 at the 1987–1988 Constituent Assembly, detailing how rural Afro-Brazilians—who had historically advanced civil law claims of adverse possession to obtain land rights—came to reframe their historical grievances in a language of “constitutional rights” and “reparations” amid re-democratization and the hundredth anniversary of emancipation.

Part II explored the innumerable, interconnected legal, political, and ideological battles that have clouded Article 68’s enforcement for more than thirty years. As noted, of the more than 6,000 *quilombo* communities in Brazil today, fewer than 250 possess title to at least some part of their ancestral territories. Of those 250, less than two dozen possess full title.

While the causes of Brazil’s failure to fulfill its constitutional obligations to *quilombolas* are myriad, this Note analyzed three legal issues that have plagued the enforcement of Article 68 for more than thirty years. First, is Article 68 self-executing, or does it require implementing legislation? Second, who qualifies as a *quilombo* descendant under the Brazilian Constitution? Third, does expropriation of private property to grant

253. BERNARD & AUDRE RAPOPORT CTR. FOR HUM. RTS. & JUST., *supra* note 63, at 28–29.

254. Planas, *supra* note 37; see FARFÁN-SANTOS, *supra* note 206, at 113 (alluding to landowners with greater resources than *quilombola* communities).

255. Gabriel Hirabahasi, “Não demarcarei um centímetro quadrado a mais de terra indígena,” *diz Bolsonaro*, GLOBO.COM: ÉPOCA (Dec. 12, 2018, 7:03 PM), <https://oglobo.globo.com/epoca/expresso/nao-demarcarei-um-centimetro-quadrado-mais-de-terra-indigena-diz-bolsonaro-23300890> [https://perma.cc/2ELV-DKDZ].

collective title to *quilombola* communities require the indemnification of interested third parties?

In addressing these questions, this Note argued that entrenched social ideologies of “racial democracy” and “Black authenticity” in Brazil—not merely the political headwinds of regulatory inertia—suppress the realization of Afro-Brazilians’ constitutional rights. However, just as the conservative agribusiness party, DEM, filed a direct action of unconstitutionality to obstruct the implementation of President Lula’s Decree 4.887, so have *quilombolas* deployed an array of legal strategies and constitutional devices to challenge territorial dispossession and marginalization in Brazilian society.

In September 2020, CONAQ, the national network of *quilombola* activists, filed a complaint known as an “allegation of disobedience of a fundamental precept” (*arguição de descumprimento de direito fundamental*, ADPF), arguing that the Bolsonaro Administration’s disastrous response to the COVID-19 pandemic had violated the fundamental rights of *quilombola* communities under Articles 3 and 5 of the Brazilian Constitution.²⁵⁶ The complaint sought to compel the Bolsonaro Administration to adopt specific policies to combat the spread of the pandemic, which has disproportionately stricken Indigenous and *quilombola* communities in Brazil.²⁵⁷ “What the *quilombola* population demands is basic care. We do not ask for anything that others do not have. We have rights that are being ignored,” said Verline Dias, a *quilombola* attorney from Kalunga and special advisor to CONAQ.²⁵⁸ The STF accepted CONAQ’s complaint, and Minister Edson Fachin ordered the Bolsonaro government to suspend federal evictions of *quilombolas* without title and to ensure nutrition and food security, affirmative access to hospital beds and testing, and the distribution of masks and personal protective equipment for *quilombos*.²⁵⁹

In January 2022, the Inter-American Court of Human Rights (IACHR) agreed for the first time to adjudicate a case concerning Brazil’s failure to enforce Article 68. The case concerns Brazil’s Alcântara Peninsula, where the expansion of the Alcântara Space Launch Center (used to launch commercial satellites) threatens to displace thousands of *quilombola* farmers

256. Victor Pires, *Quilombolas vão ao STF Exigir Ações do Governo Federal contra a Covid-19*, INSTITUTO SOCIOAMBIENTAL (Sept. 10, 2020), <https://www.socioambiental.org/pt-br/noticias-socioambientais/quilombolas-vao-ao-stf-exigir-acoes-do-governo-federal-contra-a-covid-19> [<https://perma.cc/D9G8-BHPT>].

257. *Id.*

258. *Id.*

259. ADPF-742: *Covid-19 in Quilombola Communities*, CONECTAS (July 5, 2021), <https://www.conectas.org/en/litigiopt/adpf-742-covid-19-in-quilombola-communities/> [<https://perma.cc/V796-N9EY>].

and fishermen from their ancestral lands along the Atlantic Coast.²⁶⁰ In the Merits Report, the Inter-American Commission on Human Rights observed the Brazilian government's failure to comply with its domestic and international obligations to issue title deeds to 152 communities in Alcântara that petitioned the federal government for legal recognition and collective deeds pursuant to Decree 4.887 almost twenty years ago.²⁶¹ The IACHR also found that Brazil had violated ILO 169 by failing to seek prior consultation and consent from *quilombola* communities regarding the development of its national space program.²⁶² The outcome of the Alcântara case will be decided in 2023, with vast repercussions for *quilombola* communities awaiting titling across the country. For more than 1.1 million *quilombolas*, the struggle for land, dignity, and autonomy in Brazil continues.²⁶³

260. Press Release, Organization of American States, IACHR Takes to Inter-American Court of Human Rights Case Involving the Collective Property of Alcântara's Quilombola Communities, with Regard to Brazil (Jan. 12, 2022), https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2022/013.asp [<https://perma.cc/B8G8-EMH6>]; see also Karen Engle & Edward Shore, *U.S. Should Oppose Expansion of Space Launch Center in Brazil*, THE HILL (Oct. 2, 2019, 10:00 AM), <https://thehill.com/opinion/international/463972-us-should-oppose-expansion-of-space-launch-center-in-brazil/> [<https://perma.cc/A7NH-A6HV>] (explaining how a Technology Safeguards Agreement recognized by President Trump and President Bolsonaro in 2019 seeking the expansion of the Alcântara Space Launch Center threatens to displace thousands of *quilombolas* in the coastal region).

261. Press Release, Organization of American States, *supra* note 260.

262. *Id.*

263. See Ana Cristina Campos, *População Residente em Área Indígena e Quilombola Supera 2,2 Milhões*, AGÊNCIA BRASIL (Oct. 15, 2021, 12:46 PM), <https://agenciabrasil.ebc.com.br/geral/noticia/2021-10/populacao-residente-em-area-indigena-e-quilombola-supera-22-milhoes> [<https://perma.cc/A9TG-NPLS>] (describing how the unprecedented 2022 census results give visibility to *quilombola* communities).