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## Visions of Cadiz: The Constitution of 1812 in Historical and Constitutional Thought

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# VISIONS OF CÁDIZ: THE CONSTITUTION OF 1812 IN HISTORICAL AND CONSTITUTIONAL THOUGHT

M. C. Mirow

## ABSTRACT

*This chapter examines ways the Spanish Constitution of 1812, also known as the Constitution of Cádiz, has been viewed in historical and constitutional thought. The document is a liberal constitution establishing constitutional rights, a representative government, and a parliamentary monarchy. It influenced ideas of American equality within the Spanish Empire, and its traces are observed in the process of Latin American independence. To these accepted views, one must add that the Constitution was a lost moment in Latin American constitutional development. By the immediate politicization of constitutionalism after 1812, the document marks the beginning of constitutional difficulties in the region.*

The Spanish Constitution of Cádiz of 1812 stands uncomfortably at the crossroads of various worlds. The Constitution sought to perpetuate monarchy just as monarchical absolutism and imperial structures were

revealing pressure factors from enlightenment political thought and sweeping political changes around the Atlantic. It advanced notions of popular representation and national sovereignty in the name of a king. While establishing a perpetual confessional Roman Catholic state, the Constitution espoused liberal ideas and institutions including representative electoral bodies at various levels of government, restrictions on the power of the king, rights for the criminally accused, freedom of contract, and individual property rights. It abolished the inquisition, seigniorial structures, Indian tribute, and forced Indian labor in America and personal services in Spain (Rodríguez, 1998). It sought the creation of national codes of law that would be applied equally to all in courts of general jurisdiction without regard to individual status (Estrada, 2006). Thus, the Constitution was an early and important text in the age of democratic revolutions when absolutism was replaced with constitutionalism, when the king's sovereignty was replaced with the people's sovereignty. In fact, in describing the Spanish nation in terms of a population within geographic boundaries, the Constitution of Cádiz has been viewed as the first formulation of the nation-state (Artola, 2008).

The Constitution is neither wholly European nor wholly American. As scholars unearthed the substantial American contribution to the drafting of the document in Spain, they also revealed that American deputies developed new sensitivities to constitutional thought and governmental structure that were transferred to independence movements and early republics in former colonies (Rodríguez 1978; Rodríguez, 1998). The Constitution had an important influence on American equality within the Spanish Empire, and its traces are observed in the process of independence in Latin America. Recent scholarship has emphasized the global and Atlantic aspects of the Constitution: "one cannot explain Cádiz without America, nor America without Cádiz," writes Ivana Frasquet (Frasquet, 2008, p. 21). Another scholar writes, "judging from the Central American experience, the Spanish liberalism that was forged at Cádiz provided key ideological guidelines for a program of modernization and independent existence" (Rodríguez, 1978, p. 75).

With interesting content and demonstrated influence on the history of constitutionalism in Spain and in the world, the Constitution has been the subject of many studies and analyses, including polemical studies by liberals and antiliberals alike (Rodríguez, 1978). The historiography of the Constitution in the past 50 years has been summarized well by Estrada who sees in these works at least three "Cadices." The first group of works addressing the Constitution, antiliberal in their tone, seeks to undermine the

legitimacy of Cádiz by underscoring its inconsistency with Spain's ancient constitution. A second group of works emphasizes the Constitution's Spanish and national characters without fully appreciating the geographical scope reflected in its creation, text, and institutions. The third group discovers special relevance in Cádiz in light of the Spanish Constitution of 1976. This group finds inspiration in Cádiz's apparent ability to combine various territories within a single nation, an enduring constitutional and political question in Spain (Estrada, 2006).

The liminal quality of the document and its place in the history of political ideas make it a fascinating object of study. This chapter provides some background on the Constitution and the ways it has contributed to historical and constitutional thought. These general themes are (1) national sovereignty and popular representation, (2) historical justification in the Cádiz process, (3) liberal constitutionalism and constitutional rights, and (4) American equality and independence. To these established visions of the Constitution of Cádiz, I add a fifth perspective. The Constitution of Cádiz was a lost moment in Latin American constitutional development. By its immediate politicization in history, the stage was set for the future politicization of constitutionalism in the region. The ways the Constitution of Cádiz was viewed in historical and constitutional thought help explain the path, the successes, and the challenges of Latin American constitutionalism.

## **NATIONAL SOVEREIGNTY AND POPULAR REPRESENTATION**

The Constitution of Cádiz was drafted during a revolution resulting from a dynastic crisis that befell Spain. Late in 1807, Carlos IV squabbled with his son Fernando VII over succession to the throne just as Napoleonic pressures were bearing down on Spain. Spaniards on the peninsula and in America considered Manuel Godoy, chief minister in Spain from 1793 to 1808, an inexperienced upstart who expanded executive power beyond its traditional scope. The popular perception of Godoy created further instability as his detractors supported Fernando VII's bid for the throne and forced Carlos IV to abdicate. The interfamily feud was more or less insignificant in the face of Napoleon and the presence of French forces in Spain, presumably on their way to Portugal. France took control, and both the Spanish kings abdicated (Rodríguez, 1978; Rodríguez, 1998). In 1808 in Bayonne, Fernando VII passed the crown to Carlos IV who had already agreed to

Napoleon's demands. Napoleon, in turn, designated his brother, José, as king of Spain (Artola, 2008). Most, but not all, Spaniards were against the French. Some, known as *los afrancesados*, thought that José and Paris offered the path to a modern and secular state (Artola, 1989; Rodríguez, 1998).

Regional juntas formed in areas on the peninsula that were not occupied and in the Americas. These juntas rejected the abdication of Fernando VII, decided to govern in his name, and resisted France. Some provinces in Spain summoned their consultative bodies, or the Cortes (Rodríguez, 1998). Various proposals for a united central authority to supplement or to supplant the regional juntas followed. The thirteenth-century collection of laws, the *Siete Partidas*, which carried particular authority in setting out Spain's unwritten constitution, provided for a regency during the incapacity of the king. Thus, some saw the goal of the regional juntas and any central junta as the declaration of a regent or the Council of Regency that would govern in the name of Fernando VII. Without universal agreement on how to proceed, the proposals of Floridablanca, head of the junta for Murcia, carried the day, and representatives for Asturias, Aragón, Cataluña, and Valencia, and northern parts met in Madrid while others met about 50 kilometers to the south in Aranjuez. Representatives from eight provinces, five cities, and Mallorca participated to create the Junta Central of the Kingdom (*Junta Central, Suprema, Gubernativa del Reino*). Some representatives were excluded on the basis of their locations' historical status. Representatives of other localities joined later, but the Junta Central's actions in excluding some representatives and not waiting for others left some hard feelings. The Council of Castile (the Royal Council aligned with France) objected to the creation of the regional juntas and the Junta Central but with little effect (Artola, 2008).

The Junta Central called for the convocation of the Cortes (representative body) that eventually drafted and promulgated of the Constitution of Cádiz. By the end of 1808, the Junta Central had relocated to Seville and later to Puerto de Santa María, on the Bay of Cádiz, as French troops advanced elsewhere in Spain. The Junta Central planned the gathering of the Cortes, which would have the power to pass sovereignty to a Council of Regency. Nonetheless, the revolutionary possibilities of the Junta Central and the Cortes itself, once assembled, were not lost on many of the participants, including one of Spain's great liberal thinkers, Gaspar Melchor de Jovellanos, whose efforts often steered the activities of the Junta Central and the resultant Cortes. In light of the Junta Central's regulations favorable to religious institutions and property, recent scholars have

debated the degree of the Junta's revolutionary activity (Artola, 2008). Nonetheless, the overall sense for the Junta and the Cortes that Artola conveys for Jovellanos is correct: "[t]he object of Jovellanos was to obtain the revolution without violence, the old enlightenment notion of using royal power to change society" (Artola, 2008, p. 27).

By the middle of 1809, various methods and goals for the convocation of the Cortes were being proposed. Some thought the only permissible action by the Cortes was to establish a council of regency. Their view was that the Junta Central existed only to continue the unwritten constitution that existed before the French invasion. In other words, the Junta and the Cortes existed only to perpetuate the current state of affairs, and not to reform legislation and, even less so, to propose a new constitution. Others sought the Cortes to ratify projects and proposals already well advanced by the Junta Central in the broad areas of defense, government, revenue, and education. Still others saw the convocation of the Cortes as the moment to draft a new constitution establishing national sovereignty and subjecting the power of the king to the popular will. They not only saw the possibilities of improving legislation but also of completely reforming substantive and procedural law into new codes that were consistent with new enlightenment principles. The goals of the Cortes were not clear even before the first deputy arrived (Artola, 2008).

In the latter part of 1809, the Junta Central created a commission on the Cortes. An important question for the Junta Central and the commission was the general structure of the Cortes. To rein in the more revolutionary ideas that might be brought by popularly elected representatives to a single house, Jovellanos and others suggested that the Cortes should have two houses, one composed of nobles and ecclesiastics who would serve to check the potentially more radical popular sentiment. A bicameral structure, however, was inconsistent with the historical unicameral structure of the historical Cortes in Spain. The issue was debated until the moment the Cortes sat as a unicameral body (Artola, 2008).

A second issue concerned suffrage. The Junta Central decided to include ecclesiastical, military, and popular participation. For the popular segment, the Junta Central selected universal male suffrage, with some notable exceptions when viewed from today. It refrained from imposing a property requirement, generally found in the early nineteenth century. These decisions led to Spain's first elections law, and the Junta Central used the Census of 1797 to include one deputy for every 50,000 individuals (Artola, 2008). The process established by the Junta Central was copied and adapted by regional Juntas in Latin America and served as a model of representative

elections even in the areas that chose not to align themselves with the Junta Central. Autonomous governments in Caracas, Rio de la Plata (Argentina), Chile, New Granada (Colombia), and New Spain (Mexico) found these provisions useful in setting up their own elections (Rodríguez, 1998).

On January 1, 1810, letters of convocation for the Cortes were sent from Seville. At the end of the same month, the Junta Central established the Council of Regency to assume power pending the meeting of the Cortes and provided for several transitional laws to expedite the functioning of the Cortes. The Council of Spain and the Indies published a document requiring all to recognize the sovereignty of the new Council (Artola, 2008).

Two large questions concerning representation had been brewing for some time: what to do about deputies for America and what to do about deputies for the occupied areas of Spain. After consultation with the Council for Spain and the Indies, the Junta Central decided to include American participation but had not announced procedures or the nature of the participation. The Council of Regency took up these questions and decided that the Americas and the occupied areas of Spain ought to be represented. A system of selecting alternate deputies was created for areas that were unable to conduct elections or to send deputies (Artola, 2008).

On September 24, 1810, the General and Extraordinary Cortes (*Cortes Generales y Extraordinarias*) met in the Regent's Palace in Cádiz. Twenty-eight of the 102 deputies represented American interests. From the palace, the deputies went to a nearby church where they were administered an oath. The deputies began their sessions in a theater converted for the Cortes's use in the Isla de León. By then, there was little doubt that the purpose of their sessions was to draft a constitution for Spain in Europe and America and that the Cortes was in fact a constituent congress (Artola, 2008). From the standpoint of legal historians, it is important not to forget that the activities of the Cortes were not exclusively focused on drafting a new constitution. Running a war in Spain and maintaining control of increasingly fractured American possessions took pride of place (Rodríguez, 1998).

A commission on the constitution established by the Cortes drafted the Constitution of Cádiz. The commission prepared a draft of the text and an explanatory document (*Discurso preliminar*). This text was debated by the Cortes, approved by the deputies, and eventually promulgated and published by the Council of Regency on March 19, 1812 (Artola, 2008).

The Constitution established two new representative structures for provincial and local governments, the provincial deputation and the constitutional *ayuntamiento*. The gist of these two institutions was to replace royal representatives, councils, and hereditary positions in locally



and provincially elected bodies. The viceroalties were abolished and their *audiencias*, governing councils with broad powers, were transformed into exclusively judicial tribunals. The provisions for the constitutional *ayuntamiento* greatly increased the number of cities that could have governing bodies incorporated into the system of national representative institutions (Rodríguez, 1998). This change alone “revolutionized America by dramatically expanding political participation” (Rodríguez, 1998, p. 89). In the context of American political instability, such representative institutions were used by insurgents and others pushing for autonomy in the Americas (Rodríguez, 1998). Although never fully establishing active representative participation in national government at the highest level as contemplated by the Constitution, the successes of local-level participation and the relative successes of provincial-level participation gave Americans a direct experience of elective representation (Rodríguez, 1998).

Notions of popular sovereignty were well established by this time both on the peninsula and in the Americas. Although the intellectual origins of the Constitution are not addressed here, politicians and thinkers of the period grew up alongside the American and French revolutions, their documents, and the writings of thinkers who inspired these acts (De la Torre, 1976; Estrada, 2006). They knew the US Constitution, the Declaration of the Rights of Man, the French constitutions, and the works of Montesquieu, Rousseau, Bentham, and the like (De la Torre & García, 1976; Estrada, 2006). The deputies from the Americas shared in these sources and perspectives (Rodríguez, 1978). Spanish sources and history also played a part. The seeds of “popular sovereignty and representative government” can be found not only in enlightenment thinkers but also in Hispanic thought familiar to the deputies (Rodríguez, 1998, p. 3). These ideas were everywhere at the time. For example, one Mexican lawyer arguing for autonomy shortly after the creation of the Junta Central wrote:

Nowadays no one can ignore the fact that, in the present circumstances, sovereignty resides in the people. That is what an infinite number of publications that arrive from the Peninsula teach us. It is a well known and recognized truth. (Rodríguez, 1998, p. 72)

The exact extent of national sovereignty was still undefined, and national sovereignty in the context of a new constitution was a particularly difficult question. For example, the Chilean deputy Leyva argued that the provision of the Constitution of Cádiz that prohibited the Constitution’s amendment for a period of eight years after its promulgation was, in itself, a violation of national sovereignty because the exercise of sovereignty was always in the nation and could not be alienated or limited. Others disagreed by noting the

exceptional quality of a constituent congress and the political need for constitutional stability (Estrada, 2006).

In light of the succession battles for the Spanish crown, Napoleon's invasion, and the transfer of the kingdom to José Napoleon, Spaniards on the peninsula and in the Americas asserted notions of national sovereignty that were ultimately reflected in the Constitution of Cádiz itself. The Junta Central, the Cortes, and the text of the Constitution of Cádiz established representative institutions to exercise this sovereignty.

## HISTORICAL JUSTIFICATION IN THE CÁDIZ PROCESS

A minor detour in our trajectory of visions is called for. In keeping with the theme of this volume, it is notable that in paving the road to a new constitution, those involved in establishing regional and central juntas, the Council of Regency, and the Cortes repeatedly sought to ground their actions in past practices and legal authorities. This, of course, is not a new trope in revolution or reform (Reid, 1993). The Constitution of Cádiz and its reforms were, in the eyes of its drafters, justified by established legal texts, past practice, and the historical path of Spain. These sources had been used to construct an unwritten constitution that delineates accepted compromises in the allocation of political power and agency for the Spanish monarchy (Rodríguez, 1998). In the context of drafting the Constitution of Cádiz, the use of such sources as justifications was often little more than historical fictions, but this process of justification was seen as important. The notion of an unwritten constitution was expanded to include particular rights associated with America through that body of Spanish law directly applicable to the Indies known as *derecho indiano* (Rodríguez, 1998).

Many individual projects and draft proposals for new constitutions made reference to the “historical constitution of the monarchy” as a basis for their texts (Artola, 2008, pp. 40–41). The invocation of the *Siete Partidas* as a source for justifying the creation of a regency has already been mentioned. Indeed, during the debates on drafting the constitution, one deputy proposed that to maintain the historicity of the new document, each article carry with it a citation to the established Spanish law it proposed to modify. Fearing the restraint this would put on the process and substance of the constitution, the assembly voted the proposition down, but this proposal underscores the importance of the issue of historical justification in the

process. Although specific citations to sources setting out the ancient constitution were inconvenient, general statements concerning the historical continuity of the Cortes, its activities, and the new constitution were a required part of justifying such radical changes (Artola, 2008).

Once the Cortes had established a text of the constitution, it appointed two important individuals in the drafting process, Argüelles and Espiga, to prepare the Introduction (*Discurso preliminar*). The purpose of the Introduction was to provide a historical justification of the text by establishing the conformity of the new text to the established laws of Spain (Artola, 2008). The text finished, now the only thing required was to find some justification for it. With several telling examples, Artola has observed that the drafters were not sensitive to the historical nature or context of their proving texts. He writes, “To legitimate political novelties, the author of the Introduction went to propositions taken from texts from whatever past time, without worrying himself about the changes brought over an interval of centuries. The election of Gothic kings is the argument to justify national sovereignty” (Artola, 2008, pp. 59, 60). How could anything but wildly construed historical precedent in Spain be used to justify things like representative elections with nearly universal male suffrage, natural rights of liberty and property, the call for uniform codes of general application, the abolition of *fueros*, or the suggestion that juries be used in trials? (Artola, 2008). Although not responsible for such wide-ranging changes on a point-by-point basis, Hispanic thought had a part to play in the development of the revolution that occurred in Spain after the French invasion (Rodríguez, 1998). Furthermore, Estrada notes that the use of history was used “more as a unifying myth than an effective guide,” and that some deputies were willing to cast away history in favor of practical approaches within a rationalist tradition (Estrada, 2006, pp. 401, 402). Nonetheless, historical justification played an important role in the construction of a new constitutional text that would be acceptable to the Cortes. It was one way the drafters of the constitution sought to use and to make sense of the past.

## LIBERAL CONSTITUTIONALISM AND CONSTITUTIONAL RIGHTS

The path toward a new liberal constitution was well established by the time of the first meeting of the Cortes in 1810. The documents submitted to the Junta Central and the work of the Junta Central itself demonstrate that a new

constitution was in the offing. Some asserted that a new constitution was the natural product of obtaining independence from France. Those fighting to rid the country of the occupying force wanted to know where independence would lead. For them, the answer was a constitution reforming laws and institutions (Artola, 2008). Jovellanos drafted and presented instructions to the legislative junta under the Junta Central in 1809. These instructions, in Artola's words, "included the first explicit declaration of a program that contradicted point by point the historical constitution the author invoked: equality of laws, political and legislative unity of the Monarchy, unity of codes, and the abolition of personal and territorial *fueros*" (Artola, 2008, p. 47). Also in 1809, others asserted that the project implicated a modern separation of powers among legislative, executive, and judicial functions. Indeed, separation of powers was already reflected in the creation of the Cortes when it assumed legislative power and expressed the idea that executive power was in the king or the Council of Regency (Artola, 2008).

The process of drafting the constitution in earnest was undertaken by the Commission on the Constitution under the Cortes. In 1811, the Commission elected Diego Muñoz Torrero as president. A central figure in drafting the constitution, he proposed a plan of six areas for work of the Commission. This program included the protection of individual rights, which were construed in liberal terms to include security, liberty, and property. The nation was to have the obligation of protecting these essential rights (Artola, 2008). He viewed liberty as "the power to do everything that is neither prejudicial to society nor offensive to the rights of others" (Artola, 2008, p. 53). Property included "the fruits of one's talents, work, and industry" (Artola, 2008, p. 53). The right to equality meant that the nation would treat all equally both in the distribution of benefits and in the application of the law (Artola, 2008). These rights were conferred on Spaniards, defined here as "all free men born and resident in the dominions of Spain and their sons" (Artola, 2008, p. 53).

Although many of his suggestions were not followed by the Commission on the Constitution or by the Cortes, Jovellanos's suggestions set the tone. He asserted that sovereignty first resided in the association of all men. Monarchy was not inconsistent with this because a king could serve as the delegated agent of the people's sovereignty. Thus, the people had supreme power; the king had sovereign power. The people could constitutionally limit sovereign power. In this sense, Jovellanos was an early practitioner of the idea of constitutional monarchy (Artola, 2008).

These ideas were reflected in the final text of the Constitution as well. For example, royal power was prohibited from impeding the convocation of the

general Cortes established under the Constitution and the king could not suspend, dissolve, or hinder the Cortes's sessions and deliberations. Because the Constitution was written in hopes of the return of a king, it also contemplated that the king might want to suppress it on his return. The Constitution created a mechanism for its enforcement under such circumstances. A permanent disputation of the Cortes would guard its enforcement when the Cortes was not in session and would call an extraordinary session of the Cortes when the king hindered the government. Thus, the Constitution of Cádiz is an early example of the legislative check on the executive, even when the executive is the king (Artola, 2008). Similarly, a positive obligation was placed on the nation to guarantee the individual rights in Article 5 of the Constitution: "The Nation is obligated to conserve and to protect by wise and just laws civil liberty, property, and the other legitimate rights of all the individuals who make up the Nation" (Artola, 2008, pp. 57–58).

Artola has observed that once the constitutional process in Spain was underway, the country received an entirely new political vocabulary, not only through reports of what was going on in the Cortes but also through the active circulation of public pamphlets and small publications. These new terms in public discourse included such important words as "national sovereignty, individual rights, liberty, equality, division of powers, constitution, legislative, [and] executive" (Artola, 2008, p. 39). Such pamphlets were part of a broader intellectual transformation in the Spanish peninsular and American world. In addition to pamphlets and newspapers, cafes, *tertulias* (salons), learned societies, and universities provided new avenues for new enlightenment thought and discussion (Rodríguez, 1998).

There appears to have been a comfortable majority of deputies with liberal sentiments so that many novel propositions went through the Cortes with little or no debate (Artola, 2008). Artola has noted, "[t]he most surprising is that a selection of articles that today we consider most significant for their political consequences were not the object of debate or debate was very brief [on these articles]" (Artola, 2008, p. 64). For example, the provisions for the convocation of the Cortes and the political guarantees of the Constitution were passed by the Cortes with little or no debate (Artola, 2008).

The provisions establishing courts of general application for all Spaniards, and in effect abolishing a system of separate tribunals based on individual status (*fueros*), were also passed with little or no debate. Indeed, substituting tribunals established by the king with tribunals whose authority and jurisdiction were defined by a constitution was a significant

change in the administration of justice and in recognizing separation of powers (Artola, 2008). Rodríguez summarizes the liberal achievements of the Constitution of Cádiz well:

The Constitution of 1812 abolished seigniorial institutions, Indian tribute, and forced labor such as the *mita* in South America and personal services in Spain; ended the Inquisition, and established firm control over the Church. Freedom of the press, although already a fact, was formally proclaimed. . . . The new charter created a unitary state with equal laws for all parts of the Spanish world. It substantially restricted the king and entrusted the Cortes with decisive power. (Rodríguez, 1998, p. 91)

Liberal sentiments, however, might go too far and be checked by more moderate elements; a proposed constitutional article that would have given the Cortes the power to adopt “the most convenient form of government” was rejected because of the implicit power to reject monarchy and to adopt a republic (Artola, 2008, p. 65). Similarly, although all Spaniards were to be treated equally in tribunals, two articles of the Constitution dealing with the administration of justice continued the *fueros* for ecclesiastics and the military. Thus, the liberal goal of equality in the administration of justice was tempered by the political realities of privileged status for the church and the military (Artola, 2008).

Also lying side by side with liberal constitutionalism were provisions maintaining a privileged status for Roman Catholicism (Artola, 2008). In fact, the original draft of the provisions providing for Roman Catholicism did not go far enough in the views of the Cortes, which required further drafting to include the second sentence of the following provision:

The religion of the Spanish Nation is and always will be the Catholic, apostolic, Roman, single true [religion]. The Nation protects it with wise and just laws, and prohibits the exercise of any other [religion]. (Art. 12. Artola, 2008, p. 80)

Thus, liberal reforms in the Spanish monarchy were not necessarily linked to anticlericalism or freedom of religious belief. This was to be expected, as was the continuation of the ecclesiastical *fuero*, once we are reminded that “the largest group of deputies at Cádiz consisted of clergymen” (Rodríguez, 1978, p. 76). The preference for clergy as elected deputies continued in the Cortes under the Constitution (Rodríguez, 1978).

Women suffered a setback through the Constitution of Cádiz. Under some earlier Spanish practices, when a woman served as the head of a household, she was entitled to cast a vote. The Constitution’s clear statement of exclusively male suffrage removed this traditional right. Regular, but not secular, clerics were also deprived a vote (Rodríguez, 1998). Thus, the liberalism expressed in the Constitution of Cádiz was a

form of liberalism unique to Spain at the time, a liberalism that was Catholic, monarchic, and nationalistic in flavor (Estrada, 2006).

## AMERICAN EQUALITY AND INDEPENDENCE

American representation at the Cortes presented many issues. Americans challenged the composition of the assembly and often set the agenda for the activities of the Cortes. In determining proper methods of representation of the Americas, numerous fundamental questions were presented to the Junta Central, its Commission on the Cortes, and the Council of Regency. These included the status of individuals of Spanish ancestry born in the Americas, the status of indigenous populations for the purpose of popular representation, and the status of people of African descent, particularly slaves who had been forced into labor in America. The resolution of these issues had tremendous political consequences for the Cortes, for the representative quality of the assembly, and for its final product, the Constitution of Cádiz.

When the Cortes met, republican revolutions had already been successful in the United States and Haiti, and the French Revolution was in recent memory. Several nascent autonomous and independence movements had sprouted up in Spanish America. In light of these events, America could not be ignored. Even José Bonapart and the Constitution of Bayonne were careful to take account of American interests in efforts to gain their support (Estrada, 2006). America also provided significant financial backing for the war against France (Rodríguez, 1978). Looking from Europe to America, the Cortes and the Constitution had to work with and consider well American demands.

Looking from America to Europe, we find similar influences. In an important work addressing Latin American independence, Jaime E. Rodríguez emphasizes the centrality of peninsular events in American independence. He writes, “the independence of Spanish America did not constitute an anti-colonial movement, as many assert, but formed part of both the *revolution* within the Spanish world and the *dissolution* of the Spanish Monarchy” (Rodríguez, 1998, p. 1). This dissolution provided some Americans the opportunity to press for local control and autonomy, often in the name of the Spanish king. Former interpretations that peninsular instability provided an easy excuse for independence in America have been replaced with a more complex narrative of interaction and reciprocal influences (Estrada, 2006).

A viceroy in New Spain, initially appointed by the king, for example, might seek the approval of local institutions, such as a city's town council (*ayuntamiento*), to continue in power. When local bodies pressed for greater autonomy, they were countered by peninsular representative and neighboring viceroys who continued to assert the royal authority of an absent king. There were also some individuals around with truly revolutionary spirits, such as Francisco de Miranda in Venezuela, who twice attempted to establish an independent country with British help in 1806. Although these efforts failed, as the Spanish crown was being placed in French hands, perhaps the moment for independence was ripe. Similarly, the eventual success of Buenos Aires repelling British forces in 1806 and 1807 added to its regional sense of self-sufficiency and de facto autonomy (Rodríguez, 1998).

Considering the question of American representation in Spanish institutions of the period, it is important to remember that the issue arose in distinct phases during the period from 1808, when Fernando VII abdicated, to 1814, when Fernando VII abolished the Cortes of Cádiz, its acts, and the Constitution of Cádiz (Rodríguez, 1998). First, there is the question of American representation in the Junta Central. Second, there is the question of American representation in the Cortes General and Extraordinary of Cádiz. Third, there is the question of American representation in the General Cortes as convened under the provisions of the Constitution of Cádiz. To these, we may add a fourth phase when American interests unsuccessfully attempted to renegotiate their representative allotment as the Cortes were established again in Madrid in 1821. Although these issues were similar and related, the results at each stage reflected particular political compromises and accomplishments of various competing political factions.

Once the Junta Central was established on the peninsula, American representation in the Junta Central was an issue for debate and compromise. Americans gained, but were disappointed. The Junta Central was aware that French authorities were soliciting American support and could not ignore the Americas. The junta also knew of American financial support of the war effort. Thus, in the beginning of 1809, the Junta Central requested representatives from the viceroyalties and captaincies general, through an intricate electoral process. In total, 10 slots on the Junta Central were allotted to the Americas and Philippines. The American allotment of deputies to the Junta Central was smaller than what Americans would have wanted and some important cities were excluded in the process, but calling for American deputies to the Junta Central made an important step in their representation. Indeed, it appears that lack of knowledge on the part of the



Junta Central led to greater representation than peninsulars had contemplated (Rodríguez, 1998). Nonetheless, the significance of the moment should not be lost; as Rodríguez writes, “[t]he 1809 elections constituted a profound step forward in the formation of modern representative government for the entire Spanish Nation” (Rodríguez, 1998, p. 61). The effect was felt in the Americas, where, for example, in Central America, this process provided a “rewarding electoral experience” (Rodríguez, 1978, p. 42).

After these elections, the spectre of autonomy continued. Indeed, regions that were somewhat neglected in the process of sending deputies to the Junta Central, like Upper Peru and Quito, responded with bids for greater autonomy. Chuquisaca (today Sucre), La Paz, Quito, Santa Fé (today Bogotá), and several cities in Mexico, notably Valladolid, made varying attempts at splitting from peninsular control, although still in the name of Fernando VII. Similar home rule movements also continued in 1810 in various regions of the Americas, and civil wars began to sprout in the region (Rodríguez, 1998).

For the General and Extraordinary Cortes, 30 slots were allocated to the Americas, with the greatest representation given to the important administrative and commercial centers of Mexico, with seven deputies, and Lima, with five deputies. A desire to get things underway led to the election of substitute deputies from Americans in Cádiz pending the arrival of the elected deputies from the Americas. These substitute deputies were challenged by some American institutions because they were not elected in the required manner. As proprietary deputies arrived from the Americas, some substitute deputies shifted to other substitute slots that were still not filled. Despite the political instability and insurgencies in some areas of the Americas, most areas were able to elect deputies (Rodríguez, 1998).

Americans in the General and Extraordinary Cortes pushed for greater representation in the body. Deputies sought additional representatives in accordance with peninsular representatives, a formula of one deputy per 50,000 inhabitants. Americans claimed inhabitants included both *castas* and Indians (Rodríguez, 1998). “In the Cádiz context, a *Casta* was anyone with an African trace in his background” (Rodríguez, 1978, p. 54). Debate on the topic was moved to a secret session with the result that Indians, but not *castas*, would be counted. Nonetheless, in this context, the result was moot: the proposal for American representation based on population was voted down by the assembly (Rodríguez, 1998).

Although the status of indigenous populations did not come up in the selection of representatives in the Junta Central and proved to be of no

consequence in the push for American representation by population in the General and Extraordinary Cortes, it did come up in the context of electing deputies to the General and Extraordinary Cortes. The electoral decree required that deputies be natives of the province, and this provision, if read literally, would exclude peninsular Spaniards living in the Americas from consideration. A modification of the decree in 1810 included not only Spaniards born in America, “but also those domiciled and resident in those countries as well as Indians and the sons of Spaniards and Indians” as eligible for election (Rodríguez, 1998, pp. 81–82). As Rodríguez points out, “Indians and mestizos could vote and were eligible to be selected as deputies” (Rodríguez, 1998, p. 82). Indeed, this status was carried through to the Constitution of Cádiz itself, which made Indians and mestizos citizens of the Spanish nation. There are some reports that this characterization produced difficulties in implementation in the Americas where some officials were skeptical of the new status for indigenous people who worked as domestics or who lived in indigenous settings and conditions. It also provided Indians, now citizens, with solid legal authority to attack levies of money and work or social constraints imposed on indigenous individuals (Rodríguez, 1998). In fact, these provisions were successfully used by indigenous populations in the 1820s to assert that personal contributions of labor were against to the Constitution (Frasquet, 2008).

The inclusion of America also led to the Cortes establishing racial categories that perhaps ran contrary to some of its liberal aspirations. In 1810, as a product of declaring that Spaniards “originating from the said European dominions or beyond the seas are equal in rights to those of this peninsula” for the purpose of national representation, the Cortes, by implication, excluded everyone else who might have been considered to have equal rights (Artola, 2008).

Just as European Spaniards saw the necessity of developing a system of popular representation that did not lead to an American majority at the Cortes, the Commission on the Constitution was faced with the same problem in drafting the provisions for the permanent Cortes under the Constitution of Cádiz. In their view, the key was to omit *castas* from the general male suffrage and from population counts for representation established under liberal constitutional principles. In keeping with earlier proposals, the population for the purpose of representation was limited to naturals who have their origins in both branches of their families in the Spanish dominions (Artola, 2008). Thus, in addition to determining eligibility for voting, the status of the American population surfaced again in the constitutional text describing the method for calculating population

for proportional representation. The Constitution made a distinction between citizens and natural-born individuals. Article 29 states that for the purpose of proportional representation in the general Cortes contemplated by the Constitution, the base is “[t]he population made up of natural-born individuals who by both branches take their origin from the Spanish dominions” (Artola, 2008, p. 67). In Europe, “naturals” included women and children who were not entitled to vote. In America, did “naturals” include those of Spanish origins with some African lineage, *castas*? And might this include slaves? (Artola, 2008; Estrada, 2006).

One document circulated by the Consulate of Mexico vehemently opposed including Indians and *castas* by asserting contemporary racist arguments of their inferiority when compared to Europeans. The reading of the document prompted American deputies to depart the assembly as a whole, but they were forced to stay by the president and guards of the Cortes (Rodríguez, 1998). The political compromises concerning the status of individuals of African descent were eventually reflected in the Constitution. Article 18, addressing citizenship, states:

Citizens are Spaniards who by both branches take their origin from the Spanish dominions of both hemispheres, and are resident in any city of the same dominions. (Art. 18, Artola, 2008, p. 80.)

By a negative inference created in the text of Article 22, slaves and others of African descent were excluded from citizenship:

Spaniards who by whichever branch are in fact and reputedly by origin of Africa, the door remains open to them to the virtue and benefits to be citizens . . . (Artola, 2008, p. 81)

Slaves and *castas*, then, were Spaniards, but not citizens. It was in this context that Chilean deputy Leyva questioned the wisdom of the prohibition on amending the Constitution for eight years (Estrada, 2006). To him, an unjust provision was made even worse by fixing it into the constitutional structure for eight years.

How did the institution of slavery in itself survive the liberal aspirations of the Cortes? Did not the broader constitutional notions of “liberty” reflect in the thought of the deputies and the text of the Constitution extend to the abolition of slavery? Some regional Juntas, like the Junta of Caracas, had voted to abolish the slave trade (Rodríguez, 1998). For the Spanish nation, slavery continued. Proposals were made for the immediate or for the gradual abolition of slavery or the slave trade, but American deputies who represented areas highly dependent on slave labor were successful in arguing

against them. To maintain union within the Spanish monarchy, even those opposed to slavery on moral grounds voted in favor of slavery to keep the Americas within the nation. In the end, Indians were citizens, but *castas* had to go through an extraordinary process to obtain this right (Rodríguez, 1998). Slavery continued. Furthermore, *castas* were excluded from participation in local government as well (Rodríguez, 1978). Note, however, that in the concomitant battles for independence and autonomous rule in the regions of Latin America, mixed-race individuals, free blacks, and slaves were often decidedly in favor of the monarchy, precisely because of the perceived gains under Spain or promises made by Spain in return for support. Furthermore, despite the serious flaws of racism and slavery, it must be remembered that with regard to suffrage, the Constitution of Cádiz, as it did not limit the franchise to only literate or only propertied males, was more progressive than any other constitutional scheme in existence at that time (Rodríguez, 1998).

The Cortes had other effects in America. Even in areas of the Americas that established their own juntas and exercised sovereignty apart from the Junta Central, the proceedings of the Cortes and the text of the Constitution of Cádiz served as models. The use of the electoral provisions called by the Junta Central as a model for regional American congresses has already been noted. The influence of the Cortes also can be found in the substantive provisions of new governments in the Americas. For example, such a regime in Rio de la Plata (today Argentina) “expanded education, restricted the slave trade, abolished tribute, and recognized the political rights of the Indians” (Rodríguez, 1998, p. 128). A subsequent general assembly in the region undertook similar reforms. Similar influences are observed in the reforms in Chile in the same period. Likewise, the autonomous Solemn Pact of Association of Quito had many similarities to the Constitution of Cádiz. Mexico’s Constitution of Apatzingán, promulgated on October 22, 1814, too shares much in common with the provisions of the Constitution of Cádiz (Rodríguez, 1998).

The structure created by the Constitution of Cádiz did not last long. A general Cortes under the provisions of the Constitution was called and held in 1813 with deputies (and substitute deputies) representing much of the nation. A second regular session was started on March 1, 1814, and the French forces had been beaten. In April, 1814, Fernando VII received word from the army that it would support his abolition of the Constitution. Military support, coupled with some popular support for his absolute and unconditioned rule without being bound by the Constitution, led Fernando VII to abolish the Cortes and all its acts on May 4, 1814. Some Spaniards

voluntarily destroyed symbols and monuments to the Constitution. With a royal word, the work of the Cortes and the Constitution was swept away and those involved were implicated in treason against the king (Rodríguez, 1998).

In America, there was little difficulty dismantling constitutional structures that had only been in effect for less than two years. Indeed, factional civil wars had already begun to divide portions of America. Bolívar decreed a war of independence until death on June 15, 1813. Chile experienced its *Patria Vieja* from 1810 to 1814 with an autonomous government, until by treaty, it recognized the Council of Regency and the Constitution of Cádiz in May, 1814, the same month the Constitution was abolished. New Granada (today Colombia) experienced its *Patria Boba* from 1810 to 1816, when it was subdued by Spanish forces. New Spain (today Mexico) had several movements for autonomous rule in their period as well, including the Hidalgo and Morelos insurgencies. These autonomous movements were effectively crushed by Spain after the restoration of Fernando VII and the abolition of the Cortes and the Constitution of Cádiz (Rodríguez, 1998).

Nonetheless, calls for the restoration of the Constitution formed an important part of independence discourse in America (Rodríguez, 1998). For example, its spirit and provisions were an important part of Iturbide's Plan of Iguala of 1821 for the independence of Mexico (Rodríguez, 1998; Frasset, 2008). Although in some aspects, such as counting *castas* as citizens, the Plan went significantly farther than the Constitution (Frasset, 2008).

As quickly as the Constitution of Cádiz popped out of existence in 1814, it popped back into force in Spain and in royally controlled parts of America on January 1, 1820, when peninsular liberals joined with the Spanish army to insist on its restoration (Rodríguez, 1998). Several important urban centers quickly followed the call, and Fernando VII created a provisional junta to carry out the reconstitutionalization of the monarchy (Frasset, 2008). The procedures of electing deputies to the Cortes under the Constitution were reestablished, and supplemental deputies were appointed for the parts of America under royal control, pending the arrival of the elected deputies, who arrived in the first part of 1821 (Rodríguez, 1998). By this time, "Rio de la Plata, Chile, and parts of Venezuela and New Granada" were already effectively independent and did not participate (Rodríguez, 1998, p. 197). Other areas like New Spain (Mexico), Guatemala, Cuba, and Puerto Rico had significant participation in elections under the Constitution. The provisions of the Constitution were imposed on

Peru by royal authorities after militarily retaking control in 1820. Similarly, areas of Colombia under royal control were subject to the Constitution of Cádiz in 1820 (Rodríguez, 1998).

As in the Cortes of Cádiz, a main issue of the Cortes of Madrid, held under the Constitution of Cádiz in the early 1820s, was the representation of America. Only 30 substitute deputies were permitted to represent America, and American deputies pushed for popular representation under the Constitution that provided for a deputy for every 70,000 individuals, a formula that would have given American deputies the majority in the Cortes of Madrid. Frasquet has noted that these issues were not only heatedly debated in Madrid but also in New Spain through the popular press. Thus, the issue was not just a question for the Cortes itself but for the entire population of the Spanish nation. Other issues of similar import, such as the expansion of the number of provincial disputations and the specifics of American administration and government, were also closely followed and discussed in America (Frasquet, 2008).

Royalist areas of America participating in the Cortes generally hoped for some form of constitutional reconciliation and the construction of independent kingdoms with more autonomy under the king or his appointee, but the various proposals were rejected by the peninsular Spaniards (Frasquet, 2008; Rodríguez, 1998). These proposals would have meant relative autonomy for the areas of Mexico (governed from Mexico City), New Granada-Venezuela (governed from Santa Fe), and Peru-Río Plata-Chile (governed from Lima) (Estrada, 2006). Importantly, several proposals presented the spectre of federalism to the Cortes (Frasquet, 2008). American participation in the Cortes in 1822 faded because the hopes of radically restructuring the relationship between the Americas and the peninsula were not fulfilled by the Cortes because it was dominated by peninsulars. The legitimacy of supplemental deputies from the Americas and deputies representing areas that had declared independence was called into question, and by the beginning of the ordinary session in 1823, only Cuba, the Philippines, and Puerto Rico continued to have deputies present (Frasquet, 2008). Again, there was little hope for a lasting constitutional regime, even on the peninsula. In April 1823, France invaded Spain and supported the absolute rule of Fernando VII, who, yet again, abolished the Cortes and the Constitution of Cádiz and pursued the liberals who had supported them (Rodríguez, 1998).

In broader aspects, several areas of the Americas were profoundly influenced by the Constitution, the Cortes, and their political legacy. For example, Central America was closely tied to the activities in Cádiz and

Madrid and the implementation of their provisions in America. Guatemala's early independence is impressed with the stamp of Cádiz, and the influence of Cádiz directly, or indirectly through Mexican pressures and, at times, control, has been well documented (Rodríguez, 1978). Nonetheless, this chapter examines the Mexican experience as perhaps the best example of continuity of the ideas of and, at times, the text of the Constitution of Cádiz into a newly independent country of Latin America. Mexican independence is, in fact, tied to the Cortes of Cádiz and Cortes of Madrid held under the Constitution of Cádiz (Frasquet, 2008).

Mexico under the Cortes of Cádiz in the early years did not experience significant implementation of the Cortes' orders. The Council of Regency appointed Francisco Xavier Venegas viceroy of New Spain in 1810. Although Venegas published the decrees of the Cortes, he did little to implement them and governed according to the older notions of a viceroy, rather than being guided by Cortes and the Constitution. Liberty of the press was suspended shortly after the Constitution was promulgated, and Venegas was sanctioned by a body of the Cortes (Estrada, 2006). Estrada characterizes Venegas's compliance with the election provisions of the Constitution as having been "considerably lax," and when criollos were elected instead of peninsulars, Venegas invalidated the election. After Venegas's replacement in 1813, Félix María Calleja y del Rey sought to enforce the Constitution on a broader basis to control the region. New elections produced criollos winners, but claiming lack of funds, Calleja sent only two to Cádiz. He also sought to limit the liberty of the press and was supported by Cádiz in these efforts. He assumed the traditional powers of a viceroy, as the king's representative, and would not be bound by the Constitution. The *audiencia* complained of Calleja's breach of the Constitution, but the question was mooted by the return of Fernando VII to Spain and the revocation of the Constitution. This was not a promising start to constitutional monarchy under a new constitution and, in some circles, led to greater independence sentiment (Estrada, 2006).

The return of the Constitution in 1820 provided a moment of substantial popular participation in constitutional government for Mexico and practical experience in running representative institutions within a nation-state (Frasquet, 2008). The activities of the Cortes of Cádiz and Cortes of Madrid coupled with the text of the Constitution of Cádiz formed central reference points for Mexican independence under Agustín Iturbide, and Frasquet supports her claim well that "[t]he Constitution of 1812 and its laws were the legislative and liberal reference for the Mexican deputies in the construction of their own nation state" (Frasquet, 2008, p. 199).

Individuals who participated in peninsular activities brought their knowledge to the Mexican government. Under Agustín Iturbide's Plan of Iguala, Mexico would have the three guaranties of Catholicism, national union, and a constitution promulgated under Mexican Cortes. By treaty, subsequently rejected by the Cortes, however, Iturbide was permitted to rule with the Constitution of Cádiz in effect until a new constitution was promulgated (Estrada, 2006). The Plan also contemplated a junta created in Mexico, pending the creation of the Cortes in Mexico, which was charged with the same duties as the Cortes under the Constitution of Cádiz. Independent Mexico contemplated following the legislation of the peninsular Cortes, and Mexican electoral process, although quite different in the end, was guided by the Cádiz experience (Frasquet, 2008). Early contentious issues for the newly established Mexican Cortes included the status of regular clerics, the Jesuits, the ecclesiastical *fuero*, and the establishment of courts and appointment of judges in the country (Estrada, 2006; Frasquet, 2008). Questions of sovereignty, taxation, the abolition of entails (*mayorazgos*), the election and powers of the Council of State, and the power of the emperor were all debated in light of the Constitution and were often settled by the Constitution and the laws of the Cortes of Cádiz and Cortes of Madrid. Deputies even debated what to do when recent Mexican legislation conflicted with a provision in the Constitution of Cádiz, a constitution they had sworn to uphold (Frasquet, 2008).

This question came to a head with the pending appointment of judges of the Supreme Court of Justice in 1822. The Constitution made it clear that the king, or here Iturbide as emperor, was to appoint the judges. A committee of the Mexican Congress, asserting that it was not necessary to "submit itself slavishly to . . . the constitution," claimed the power of appointment for itself (Frasquet, 2008, p. 205). Mexicans debated the supremacy of the Constitution of Cádiz in relation to the national sovereignty held by Congress. Many argued that because the Congress was a constituent congress charged with drafting a new constitution, it also had the power to abrogate a provision of the Constitution of Cádiz. The more liberal elements sought this power because it would provide Congress with greater powers to reform government, while, in an odd twist, more moderate deputies maintained that the Constitution of Cádiz was unalterable until a new constitution was promulgated. Politics won the day, and in the end, the Congress voted to make the appointment (Frasquet, 2008).

Subjecting the constitution to modification by a congress (although a constituent congress) was bad historical precedent for the supremacy of constitutional law over general legislative acts. It was also, at the time, bad



politics. On the heels of this congressional action, Iturbide began a process of dissolving Congress. His actions included the imprisonment of deputies, bringing congressional action to a near standstill. Iturbide then acquiesced in Congress's assertion of the power to appoint judges but added a provision that from then on the Constitution of Cádiz was to control without variation. Iturbide, through his Council of State, created a new military tribunal for conspiracy against the state, where the protection of Constitution of Cádiz did not apply. The Congress was then dissolved on October 1, 1822 (Frasquet, 2008).

In the following year, General Santa Anna pressed for a republic and notions of federalism challenged Iturbide and the Junta Nacional he created to replace Congress. The Constitution of Cádiz continued to serve as a constitutional reference point both for Santa Anna and states asserting greater autonomy. Iturbide abdicated in March 1823 (Frasquet, 2008).

The Constitution continued to shape the debate about government structure and function in Mexico until 1824. A reconvened Congress now set its task as creating a provisional ruling document (*Reglamento provisional político*). With Iturbide gone, the treaty that led to his and the country's oath to uphold the Constitution of Cádiz was also gone. Although most deputies in 1822 continued to view the Constitution of Cádiz as Mexico's fundamental law, others began to distinguish the Mexican situation and characterized the Constitution as "foreign" (Frasquet, 2008, pp. 234, 237). This criticism continued under the reconvened Congress. The official recognition of the Constitution of Cádiz as the constitution of Mexico was implicitly revoked in the Reglamento, which asserted complete Mexican independence and liberty from other laws. The Constitution, however, continued to be a useful reference point; it was now part of Mexico's constitutional legal culture. For example, its provisions and laws from the Cortes of Cádiz and Cortes of Madrid informed appropriate procedures in electing a new Congress, for creating new tribunals, and for abolishing entails (*mayorazgos*). It was argued that these provisions continued to have force in 1823 while the federalist constitution of 1824 was being drafted (Frasquet, 2008). Again, the Constitution of Cádiz was one of the primary sources for the drafters of the Constitution of 1824 (De la Torre & García, 1976). For example, important American deputies in the Spanish Cortes, Guridi y Alcocer and Ramos Arizpe of Mexico, were later to be instrumental in incorporating provisions from their peninsular drafting into the Mexican Constitution of 1824 (Rodríguez, 1998). Even the federalism of Mexico expressed in its Constitution of 1824 found its roots in the petitions of Mexican deputies in Spain (Frasquet, 2008).

## POLITICIZATION OF CONSTITUTIONAL TEXTS AND PROCESSES

The path of Latin American constitutionalism has had more than its fair share of difficulties. Many recent events demonstrate promise for the development of meaningful democratic constitutionalism. The region has seen more peaceful transitions of democratically elected presidents. The region has witnessed an increase in the creation of constitutional tribunals that are accorded respect and enforcement. And in some countries, for example, Argentina, Colombia, and Mexico, supreme courts or constitutional courts have become important political actors (Sagüés, 2009; Schor, 2009). There has also been changing popular conceptions of human and constitutional rights with an increased involvement of regional international institutions and legal provisions (McKinley, 2006; Oquendo, 2008; Sagüés, 2009). There is promise in the region.

Nonetheless, the region still claims a litany of challenges in the realm of constitutions, constitutional law, and the protection of constitutional rights. These include a history of short-lived constitutions and rapid turnover of constitutional texts, periods of autocratic authoritarianism in the executive, and armed intervention in the political and constitutional process (Nogueira Alcalá, 2009c). The region continues to experience related and resulting challenges with political instability, corruption, abuse of power, and a perceived disregard for the rule of law (Carpizo, 2009). Political parties are often viewed as prime actors in these activities (Reinaldo, 2009; Rivera, 2009).

These challenges are not new to the region, but rather are the product of each nation's constitutional and legal development. While regional generalizations are subject to dangerous inaccuracies, some broader trends can be noted. Tracing the historiography of Latin American constitutionalism is beyond the scope of this chapter, and indeed scholars have observed that no full study has been undertaken. Bravo Lira suggests that the region's constitutional history may be divided into three stages: (1) a parliamentary stage from approximately 1810 to 1850 during which countries attempted to establish representative legislatures under characteristically strong presidents, (2) a political party stage from approximately 1850 to 1920 during which parliaments were subject to the control of party politics, and (3) a parliamentary crisis and monocratic stage beginning in 1920 during which parliaments fall into decadence and the executive governs through decree (Bravo, 1992). This is, of course, only one scholar's approach and it has its conceptual difficulties, among them how to overlay military

governments, a topic addressed more or less separately by Bravo Lira at the end of his work on this topic (Bravo, 1992).

Despite a consensus on the history of Latin American constitutionalism, concern about the region's constitutional order and the promotion of democracy is not new (González, 2003). By 1952, Jesús de Galindez was able to trace constitutional instability in the region from the independence period to the date of his study. Noting a brief respite from new constitutions in Chile, Argentina, Uruguay, and Mexico during the second half of the nineteenth century as exceptions to a continuous state of flux, De Galindez found that most countries in the region during the twentieth century began again repeatedly to enact new constitutions (De Galindez, 1952). This, of course, was coupled with many forms of political instability, autocratic or military rule, and rapid turnover of governments (Bravo, 1992). By one estimate, Bolivia experienced 200 coups in 155 years as a republic by the year 1980 with concomitant constitutional flux (Rivera, 2009). Venezuela has had over 25 constitutional texts since 1811 (Ayala & Casal, 2009). Some countries had long periods of the same constitution in place, but most constitutions were short-lived, and even where constitutions had long lives, this fact alone reveals nothing of healthy functioning constitutional governments (Bravo, 1992).

Writing in the early 1990s, Bravo Lira assessed Latin American constitutionalism since 1920 as caught in an apparently endless cycle of constitutionalism, anarchy, and militarism in which constitutional and military governments shift back and forth (Bravo, 1992). "The fact is that for more than a century and a half, there is hardly a year in which a civil government is not replaced by a military one or vice versa in one of the twenty Iberoamerican countries" (Bravo, 1992, p. 167). Bravo Lira finds several causes for this "constant oscillation" (Bravo, 1992, p. 169). These include, in his view, the attempt to instill foreign institutions through constitutions that were not consistent with the region's historical development, the lack of a historical response to an oppressive metropol in the colonial context which failed to lead to a desire for self-government, and the rise of a new militarism seeking functioning governments in the face of civil governments' perceived failures. The results are extra-parliamentary laws, the subordination of the legislative to the executive, the shortening of legislative sessions, the suspension of legislatures, and a decline in the value of elections. Although Bravo Lira asserts the descriptive accuracy of this cycle and these factors, he believes that it is possible to break the cycle (Bravo, 1992).

A more recent survey of the constitutional condition of South America from 1975 to 2005 reveals that despite notable progress, difficulties remain

(Nogueira Alcalá, 2009a). The situation is well known, and few examples are sufficient. The successful and failed unconstitutional seizures of power by the military through *coups d'état* were common in that period (Ayala & Casal, 2009; Carrasco, 2009; García & Eguiguren, 2009; Ortiz, 2009; Rivera, 2009; Sagüés, 2009; Salgado, 2009). Legislatures were closed by authoritarian or military order (Bravo, 1992). Military governments or strong presidents used decree powers to enact laws often under the constitutional cover of emergency powers (Bravo, 1992; Ortiz, 2009; Sagüés, 2009). Decrees might even serve to enact constitutional texts (Nogueira Alcalá, 2009b). Authoritarian regimes operated with impunity, and sometimes with subsequent full or partial immunity (Nogueira Alcalá, 2009c; Sagüés, 2009). The judiciary and particularly members of the highest courts were subjected to summary removal, replacement, and public distrust (Miller, 2000; Sagüés, 2009). Constitutions continue to be subject to replacement or frequent amendment on a political level (Ortiz, 2009).

Indeed, some scholars now write of “deconstitutionalization” in the region meaning that unconstitutional laws are not challenged or laws needed for the implementation or enforcement of constitutional norms simply do not exist (Reinaldo, 2009, pp. 64–74; Sagüés, 2009, p. 59). Others have even used the term “failed states” or the idea that constitutions may have lost their significance at certain points in recent history (Ortiz, 2009, p. 215; Salgado, 2009, pp. 418–419).

Can we really blame the Constitution of Cádiz for all this? Other students of the region’s constitutional history see countries’ attempts to establish more meaningful constitutional regimes as challenged by their constitutional past (Rivera, 2009). For example, concerning the back and forth swings between civil and military rules in the region, Bravo Lira writes, “[t]he point of departure for the coming and going in Iberoamerica, and also in the Iberian peninsula, of civil government to military government, is the political vacuum created by the collapse of the enlightened monarchy at the beginning of the nineteenth century” (Bravo, 1992, p. 195). The resulting constitutionalism was, in Bravo Lira’s view, “foreign [and] difficult to adapt to these countries” (Bravo, 1992, p. 195). Thus, “historically, militarism is born in Iberoamerica in conjunction with constitutionalism as a result of its failures” (Bravo, 1992, p. 221).

The origins of present-day challenges to Latin American constitutionalism can be seen in the Constitution of Cádiz and its subsequent history in the region. The Constitution of Cádiz failed to take root in any meaningful way because of its immediate repeal by Fernando VII in 1814, and because by 1820, Latin American countries were already well on the road to

independence. The pattern for Latin American constitutionalism was initiated.

Following the work of Schor, the Latin American experience with the Constitution of Cádiz provides, perhaps, the first important regional experience of a lack of “constitutional entrenchment” (Schor, 2006, pp. 27–34). The inability of the Constitution of Cádiz to attain any manner of entrenchment led to the constitutionally debilitating conclusion that constitutional politics were coextensive with ordinary politics, a lasting characteristic of Latin American constitutionalism (Schor, 2006). The Constitution of Cádiz also served to establish the idea of the malleability of constitutions in the face of political change: as Schor writes “[t]here was little reason for citizens to become wedded to rules that could be readily changed at the behest of their rulers” (Schor, 2006, p. 7). Fernando VII said a few words, and the document his defenders so ardently created to support him disappeared. A few years later, with the shift of political tides, it was back again. After less than two years, repealed. This social understanding of constitutionalism has been matched with the frequent replacement of constitutions on the level of regular politics in the region (Schor, 2006). Fernando VII taught his American subjects all they would need to know about constitutions for centuries to come.

The Constitution of Cádiz was not the only Latin American constitution to go into and out of effect due to political shifts. On November 27, 1811, the congress of New Granada (Colombia) enacted the Act of Federation of the United Provinces of New Granada, and the federal provinces also drafted their own constitutions over the next couple of years. The autonomous Venezuelan Congress drafted a constitution on December 21, 1811. The autonomous congress of Quito enacted a Solemn Pact of Association on February 12, 1812, that shared much in spirit with the Constitution of Cádiz (Rodríguez, 1998). These constitutions of early independence movements in Latin America suffered similar fates as Spain regained control and the nascent constitutional republics dissolved. Again, the lesson was learned that constitutions were subject to political power and the ordinary course of political and military actions. The Mexican Congress’s decision in 1822 that its determination concerning the appointment of judges would govern despite the inconsistency with the Constitution of Cádiz is another example of failing to establish constitutional law above politics.

The success of independence movements was the result of military might, and strong generals led to the rise of military leaders. Thus, according to Rodríguez, in northern South America, “men of arms dominated men of law” (Rodríguez, 1998, pp. 240, 243). The strong executive and lifetime

presidency created under the Bolívar's Constitution for Bolivia in 1826, for example, share little in common with the legislatively strong provisions of the Constitution of Cádiz (Rodríguez, 1998). In populations accustomed to the ordinary politics of constitutions through the Cádiz experience, the path toward caudillism, presidentialism, autocracy, and indeed military rule was already being cleared.

The Constitution of Cádiz of 1812 was never in force for more than three consecutive years in Spain or its colonies. The provisions of the Constitution of Cádiz never formed an effective, lasting constitutional order in Spain or Latin America. The constitution's immediate suspension and lack of long-standing force left fundamental fissures in Latin American constitutionalism from which the region still suffers. By linking constitutions to political change, the suspension of the Constitution of Cádiz politicized constitutional law and constitutionalism. In other words, constitutions became part of the tool bag employed by politicians to bring political change, reform, or restoration. This hindered the ability of constitutions to transcend the political sphere in Latin America and led to patterns and difficulties found in modern Latin American constitutionalism.

The Constitution of Cádiz heralded liberal constitutionalism in Europe and Latin America. Its provisions shaped constitutions that were to come after it. It served as a model for structuring elections not only for Spain but also for several countries in Latin America, even after their independence from Spain. Experience in Cádiz and at the Cortes contributed to the political and constitutional savvy of constitutional drafters in America. The Constitution of Cádiz can be properly viewed as an important document in the history of national sovereignty, popular representation, liberal constitutionalism, constitutional rights, and Latin American independence. The use of historical justification in the debates of its drafters is noteworthy.

The immediate repeal of the Constitution of Cádiz and its resultant lack of entrenchment established a pattern detrimental to effective and lasting constitutionalism in Latin America. The Constitution of Cádiz and its subsequent history can be seen as the origin of many of the constitutional challenges facing the region today. In abolishing the Constitution of Cádiz and the work of the Cortes, Fernando VII sent a message that had lasting constitutional implications. His actions demonstrated that there was nothing special about the Constitution of Cádiz, constitutions, or constitutional laws. It was, unfortunately, a lesson learned. Such practices and messages would be repeated over and over again in the region. To the detriment of constitutional stability and lasting effective constitutionalism, Latin America had made sense of this past.

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## REFERENCES

- Artola, M. (1989). *Los afrancesados*. Madrid: Alianza Editorial.
- Artola, M. (2008). Estudio preliminar. In: M. Artola & R. Flaquer Montequi (Eds), *II La Constitución de 1812* (pp. 15–74). Madrid: Iustel.
- Ayala Corao, C., Casal, J. M. (2009). La evolución político-institucional de Venezuela 1975–2005. In: Nogueira Alcalá, Humberto (Coordinador), *La evolución político-constitucional de América del Sur 1976–2005* (pp. 551–647). Santiago: Librotencnia.
- Bravo Lira, B. (1992). *El estado constitucional en Hispanoamérica 1811–1991: ventura y desventura de un ideal Europeo de gobierno en el Nuevo Mundo*. México: Escuela Libre de Derecho.
- Carpizo, J. (2009). Presentación. In: Nogueira Alcalá, Humberto (Coordinador), *La evolución político-constitucional de América del Sur 1976–2005* (pp. 15–19). Santiago: Librotencnia.
- Carrasco Delgado, S. (2009). La evolución político-constitucional de Chile. In: Nogueira Alcalá, Humberto (Coordinador), *La evolución político-constitucional de América del Sur 1976–2005* (pp. 303–336). Santiago: Librotencnia.
- De Galindez, J. (1952). La inestabilidad constitucional en el derecho comparado de Latinoamérica. *Boletín del Instituto de Derecho Comparado de México*, 5(14), 3–23.
- De la Torre Villar, E., & García Laguardia, J. M. (1976). Desarrollo histórico del constitucionalismo hispanoamericano. México: UNAM.
- Estrada Michel, R. (2006). *Monarquía y nación entre Cádiz y Nueva España: el problema de la articulación política de las Españas ante la revolución liberal y la emancipación americana*. México: Editorial Porrúa.
- Frasquet, I. (2008). *Las caras del águila: del liberalismo gaditano a la república federal mexicana (1820–1824)*. Castelló de la Plana: Publicacions de la Universitat Jaume I.
- García Belaunde, D., & Eguiguren Praeli, F. J. (2009). La evolución político-constitucional del Perú 1976–2005. In: Nogueira Alcalá, Humberto (Coordinador), *La evolución político-constitucional de América del Sur 1976–2005* (pp. 463–501). Santiago: Librotencnia.

- González Marcos, M. (2003). Comparative law at the service of democracy: A reading of Arosemena's constitutional studies of the Latin American governments. *Boston University International Law Journal*, 21, 259–323.
- McKinley, M. A. (2006). Emancipatory politics and rebellious practices: Incorporating global human rights in family violence laws in Peru. *New York University Journal of International Law and Politics*, 39, 75–139.
- Miller, J. M. (2000). Evaluating the Argentine Supreme Court under presidents Alfonsín and Menem (1983–1999). *Southwestern Journal of Law and Trade in the Americas*, 7, 369–433.
- Nogueira Alcalá, H. (2009a). *La evolución político-constitucional de América del Sur 1976–2005*. Santiago: Librotecnia.
- Nogueira Alcalá, H. (2009b). La evolución político-constitucional de Chile 1976–2005. In: Nogueira Alcalá, Humberto (Coordinador), *La evolución político-constitucional de América del Sur 1976–2005* (pp. 337–398). Santiago: Librotecnia.
- Nogueira Alcalá, H. (2009c). Preámbulo. In: Nogueira Alcalá, Humberto (Coordinador). *La evolución político-constitucional de América del Sur 1976–2005* (pp. 11–14). Santiago: Librotecnia.
- Oquendo, A. R. (2008). The solitude of Latin America: The struggle for rights south of the border. *Texas International Law Journal*, 43, 185–242.
- Ortiz Gutiérrez, J. C. (2009). La evolución político-constitucional de la República de Colombia 1976–2005. In: Nogueira Alcalá, Humberto (Coordinador). *La evolución político-constitucional de América del Sur 1976–2005* (pp. 205–280). Santiago: Librotecnia.
- Reid, J. P. (1993). *Constitutional history of the American revolution: The authority of law*. Madison: University of Wisconsin Press.
- Reinaldo Vanossi, J. (2009). La desconstitucionalización y la re-institucionalidad. In: Nogueira Alcalá, Humberto (Coordinador), *La evolución político-constitucional de América del Sur 1976–2005* (pp. 63–99). Santiago: Librotecnia.
- Rivera S. J. A. (2009). La evolución político-institucional en Bolivia entre 1975 a 2005. In: Nogueira Alcalá, Humberto (Coordinador), *La evolución político-constitucional de América del Sur 1976–2005* (pp. 101–150). Santiago: Librotecnia.
- Rodríguez, M. (1978). *The Cádiz experiment in Central America, 1808–1826*. Berkeley: University of California Press.
- Rodríguez, O. J. E. (1998). *The independence of Spanish America*. Cambridge: Cambridge University Press.
- Sagüés, N. P. (2009). Evolución institucional argentina: sistema de gobierno, poder judicial, derechos fundamentales (1975–2005). In: Nogueira Alcalá, Humberto, (Coordinador). *La evolución político-constitucional de América del Sur 1976–2005* (pp. 21–61). Santiago: Librotecnia.
- Salgado Pesantes, H. (2009). Treinta años de democracia formal en el Ecuador (1978–2008). In: Nogueira Alcalá, Humberto (Coordinador), *La evolución político-constitucional de América del Sur 1976–2005* (pp. 399–419). Santiago: Librotecnia.
- Schor, M. (2006). Constitutionalism through the looking glass of Latin America. *Texas International Law Journal*, 41, 1–27.
- Schor, M. (2009). An essay on the emergence of constitutional courts: The cases of Mexico and Colombia. *Indiana Journal of Global Legal Studies*, 16, 173–194.



**PART II**  
**GENERAL ARTICLES**

