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# Pre-constitutional Law and Constitutions: Spanish Colonial Law and the Constitution of Cádiz

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## Pre-constitutional Law and Constitutions:

### Spanish Colonial Law and the Constitution of Cádiz

M.C. Mirow\*

The Spanish Constitution of Cádiz of 1812 has recently gained the attention of constitutionalists and legal historians as an essential step in the development of world constitutionalism generally and Latin American constitutionalism more specifically. This interest in the Constitution of Cádiz, or the Spanish Constitution of 1812, has increased due to its bicentennial in 2012 and by the rolling bicentennials of independence of Latin American republics. The events leading to the Constitution of Cádiz and its implementation throughout the Spanish Empire are closely related to both initial independence movements in Latin America and to their subsequent constitutional practices and texts.<sup>1</sup> There are fewer studies concerning the pivotal role the extant Spanish colonial law (*derecho indiano*) played in these events.<sup>2</sup>

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<sup>1</sup> See, e.g., M. CHUST, *LA CUESTIÓN NACIONAL AMERICANA EN LAS CORTES DE CÁDIZ* (1999); RAFAEL ESTRADA MICHEL, *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* (2006); Rafael Estrada Michel, *Los Reinos de Indias y la Nueva Nación Española*, 22 ANUARIO MEXICANO DE HISTORIA DEL DERECHO 209-236 (2010); IVANA FRASQUET, *LAS CARAS DEL ÁGUILA; DEL LIBERALISMO GADITANO A LA REPÚBLICA FEDERAL MEXICANA (1820-1824)* (2008); Eduardo Herrera, *Los Orígenes del constitucionalismo en Iberoamérica*, in *AMÉRICA Y LA HISPANIDAD: HISTORIA DE UN FENÓMENO CUTURAL* (Antonio Cañellas, coord., 2011); Abelardo Levaggi, *Constitución de 1812: Presencia Latinoamericana*, in *LA CONSTITUCIÓN DE 1812: REFLEXIONES JURÍDICAS EN LA VÍSERA DEL BICENTENARIO* 57-81 (coord. Juan María Terradillos Basoco, 2006). MARTA LORENTE SARIÑENA, *LA NACIÓN Y LAS ESPAÑAS* (2010); JAIME E. RODRÍGUEZ O., *THE INDEPENDENCE OF SPANISH AMERICA* (1998). A recent volumes of the ANUARIO MEXICANO DE HISTORIA DEL DERECHO and RECHTSGESCHICHTE are dedicated to

Instead of exploring the effect produced by the Constitution of Cádiz in subsequent constitutional developments, this study examines the way existing law was used and informed the constitutional process in Cádiz and in the resulting text of the Constitution itself. More specifically, this article examines the role and function of Spanish colonial law (*derecho indiano*) in the Constitution of Cádiz and the debates that led to its definitive text.<sup>3</sup> It seeks to explore the important place Spanish colonial law had in the construction of the Constitution, the way it limited the scope of the Constitution, and the way the Constitution, in turn, shaped Spanish colonial law.

The function and the use of Spanish colonial law in the Constitution and in the Cortes have three distinct aspects. First, Spanish colonial law served as a common base of knowledge concerning the status and the nature of the Americas, their institutions, and their relation to peninsular Spain. Second, Spanish colonial law was a source in resolving questions of law in the process of drafting the Constitution. Third, Spanish colonial law was brought into a broader debate concerning the historicity of the Constitution, in other words, the debate concerning the

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this topic. See 22 ANUARIO MEXICANO DE HISTORIA DEL DERECHO (2010) and 16 RECHTSGESCHICHTE (2010) both with numerous contributions by experts in the field. The Constitution of Cádiz has also reached the recent attention of legal scholars in the United States. José Antonio Cheibub, Zachary Elkins & Tom Ginsburg, *Latin American Presidentialism in Comparative and Historical Perspective*, 89 TEX. L. REV. 1707, 1710, 1716 (2011); Miguel Schor, *Constitutionalism through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 24 n.153 (2006).

<sup>2</sup> See, e.g., Andrés Botero Bernal, *La visión del Derecho y los Rastros del Derecho Indiano en las Constituciones Independistas Neogranadinas de entre 1811 y 1815*, in 2 ACTAS DEL DECIMOSEXTO CONGRESO DEL INSTITUTO INTERNACIONAL DE HISTORIA DEL DERECHO INDIANO (Alejandro Guzmán Brito, ed., 2010); Alfonso García Gallo, *El Derecho Indiano y la Independencia de América*, MUNDO HISPÁNICO, 157-180.

<sup>3</sup> The term “*derecho indiano*” is a particularly difficult term to render into English. Although there are strong arguments for leaving it as an untranslatable word in Spanish, I have used “Spanish colonial law” as a way of opening up this vast source of Spanish law to a broader readership. The difficulty with translating “*derecho indiano*” can even be observed in the Library of Congress subject matter classification system which erroneously ascribes books on *derecho indiano* to “Indians of South America --Legal status, laws, etc. --History,” and “Indians of Central America --Legal status, laws, etc. --History.” See, e.g. the catalog entry for ANTONIO DOUGNAC RODRÍGUEZ, *MANUAL DE HISTORIA DEL DERECHO INDIANO* (1994) at <http://catalog.loc.gov/cgi-bin/Pwebrecon.cgi?v3=1&ti=1,1&SEQ=20120213153837&Search%5FArg=antonio%20dougnaac%20derecho%20indiano&Search%5FCODE=GKEY%5E%2A&CNT=100&PID=6RM5GKxo6kvCPE8WaUVBeyYE0-X5&SID=1> (last visited Feb. 13, 2012). Although some aspects of *derecho indiano* have to do with native populations (*indios*), there is a great deal of it that has nothing to do with “*indios*.” Viviana Kluger, “Spanish Colonial Law,” in 5 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 290-291 (2009); M.C. Mirow, “South and Central America: Overview,” in 5 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 284-285 (2009).

extent to which the text of the Constitution merely affirmed pre-existing institutions, rights, concepts, and structures into a new written text.<sup>4</sup>

Before examining these aspects in greater depth, a moment should be spent to introduce both the Constitution of Cádiz and Spanish colonial law (*derecho indiano*). The Constitution of Cádiz is well-known in the history of political thought, constitutional law, and nineteenth-century liberalism.<sup>5</sup> It is often considered one of the first liberal constitutions in Europe and in America. Like the United States Constitution, the Constitution of Cádiz had great influence during the drafting of the first constitutions of the Americas in the independence period.<sup>6</sup> This document, consisting of 384 articles in about forty pages of text, established sovereignty in the nation and not in the king. The Roman Catholic religion received substantial preference under the Constitution, and the practice of other religions was prohibited.<sup>7</sup> The text includes provisions that evince a liberal bias: representative elections at various levels of government, restrictions on the power of the king, rights for the criminally accused, and rights to property.<sup>8</sup> Because the Constitution was drafted by deputies representing not only peninsular Spain but also the provinces in the Americas, the Constitution of Cádiz was the first truly transatlantic or

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<sup>4</sup> See, MARTA LORENTE SARIÑENA, LA NACIÓN Y LAS ESPAÑAS: REPRESENTACIÓN Y TERRITORIO EN EL CONSTITUCIONALISMO GADITANO 12-20 (2010); M.C. Mirow, *Visions of Cádiz: The Constitution of 1812 in Historical and Constitutional Thought*, in 53 STUDIES IN LAW, POLITICS, AND SOCIETY 66-67 (ed. Austin Sarat, 2010).

<sup>5</sup> Mirow, *Visions*, supra note \_\_\_\_, at 59-81. For an English translation of the Constitution see M.C. MIROW, FLORIDA'S FIRST CONSTITUTION: THE CONSTITUTION OF CÁDIZ (forthcoming 2012).

<sup>6</sup> See supra note \_\_ (2).

<sup>7</sup> SPAIN CONST. (1812), art. 12.

<sup>8</sup> SPAIN CONST. (1812), arts. 27-103 (elections), art. 172 (restrictions on the king), art. 4 (“The Nation is obliged to preserve and protect by wise and just laws, civil liberty, property, and the other legitimate rights of all the individuals who make up the Nation.”). For the rights of the accused see M.C. Mirow, *The Legality Principle and the Constitution of Cádiz*, in FROM THE JUDGE’S ARBITRIUM TO THE LEGALITY PRINCIPLE: LEGISLATION AS A SOURCE OF LAW IN CRIMINAL TRIALS (eds. Georges Martyn & Heikki Pihlajamäki, forthcoming 2012).

bicontinental constitution, and the American influences in Cádiz and Cádiz's effect in the Americas has been a subject of substantial speculation, historical scholarship, and debate.<sup>9</sup>

Just as the Americas were perceived as completely apart from the peninsula, as incorporated provinces of the empire, and a variety of positions between these extremes, Spanish colonial law during its history vacillated between being imperial law and special local legislation. The peculiarities of government and legislation in the Americas were highlighted in the eighteenth century in the works of Manuel Joseph de Ayala and Benito de la Mata Linares, for example.<sup>10</sup> In Spanish colonial law, we find a ship anchored in the *ius commune* tradition, fitted with the two grand sails of the *Recopilación* of 1680 and Juan Solórzano Pereira's *Política Indiana*, with a myriad of local orders and rules expedited by *audiencias*, viceroys, and other local authorities all fitted out for the unique situations and challenges of the Americas and their administration.<sup>11</sup> The *Recopilación* of 1680, referred to throughout this study, was divided into nine books roughly treating the following areas: (1) the church and clergy; (2) the Council of the Indies and courts; (3) the viceroy and military matters; (4) discovering and populating new lands; (5) royal officials and their jurisdiction; (6) indigenous populations and their labor; (7) moral and criminal offences; (8) finances; and (9) the Board of Trade and American commerce.<sup>12</sup> Provincial provisions and application, local customs, and the plurality and diversity of sources and rules examined by historians of Spanish colonial law, prompts us to perhaps think in the

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<sup>9</sup> See, e.g. CHUST, *supra* note \_\_\_\_; ESTRADA MICHEL, *supra* note \_\_\_\_; FRASQUET, *supra* note \_\_\_\_; LORENTE SARIÑENA, *supra* note \_\_\_\_; M.C. MIROW, *The Constitution of Cádiz in Florida*, 24 FLA. J. INT'L L. (forthcoming 2012); MARIE LAURE RIEU-MILLAN, *LOS DIPUTADOS AMERICANOS EN LAS CORTES DE CÁDIZ* (1990); MARIO RODRIGUEZ, *THE CÁDIZ EXPERIMENT IN CENTRAL AMERICA, 1808 TO 1826* (1978).

<sup>10</sup> VICTOR TAU ANZOÁTEQUI, *¿QUÉ FUE EL DERECHO INDIANO?* 25 (3d ed, 2005).

<sup>11</sup> For the relationship of the *ius commune* to Spanish and Spanish colonial law, see JAVIER BARRIENTOS GRANDÓN, *LA CULTURA JURÍDICA EN LA NUEVA ESPAÑA* (1993); ANICETO MASFERRER, *SPANISH LEGAL TRADITION* 162-181; 224-231; 241-255 (2009); M.C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* 34-53 (2004). For a description of this *Recopilación de Leyes de los Reinos de las Indias* of 1680 and Solórzano's *Política Indiana* see MIROW, *LATIN AMERICAN LAW*, *supra* note \_\_\_\_, at 47-48, 50.

<sup>12</sup> MIROW, *LATIN AMERICAN LAW*, *supra* note \_\_\_\_, at 48.

plural, in various systems of Spanish colonial laws.<sup>13</sup> Despite the greater force of centralization within the Spanish Empire as the century of the Cortes of Cádiz approached, local variations continued and the laws and customs of indigenous communities also continued to be expressed as applicable legal norms.<sup>14</sup>

#### I. Spanish colonial law as a common base of legal knowledge.

One does not need to read much of the Constitution of Cádiz to realize that the Constitution has a lot to do with America, or *Ultramar*, as it was then called by Spaniards. The first twelve words of the Constitution are enough: Article I famously states “The Spanish Nation is the reunion of all Spaniards of both hemispheres.”<sup>15</sup> A little further in the text one finds in Article 10 that the territory of Spain explicitly includes, in this order: New Spain, New Galicia, the Yucatan, Guatemala, the Provinces of the West, Cuba, the Floridas, Puerto Rico, Santo Domingo, New Granada, Venezuela, Peru, Chile, and Rio de la Plata.<sup>16</sup> Other articles make it clear that the Cortes in Cádiz never stopped thinking about America within the Spanish Empire and within the text of the Constitution. The idea of “both hemispheres,” America, or *Ultramar*, are found in articles dealing with citizenship,<sup>17</sup> the way to form the Cortes,<sup>18</sup> elections at the city (*parroquia*), district (*partido*) and province (*provincia*) levels,<sup>19</sup> the composition of the Permanent Deputation of the Cortes, a kind of standing committee when the Cortes were not in

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<sup>13</sup> TAU, *supra* note \_\_\_\_, at 20-38.

<sup>14</sup> TAU, *supra* note \_\_\_\_, at 38-44.

<sup>15</sup> “*La Nación española es la reunión de todos los españoles de ambos hemisferios.*” SPAIN CONST. (1812), art. 1.

<sup>16</sup> SPAIN CONST. (1812), art. 10.

<sup>17</sup> SPAIN CONST. (1812), arts. 18-25.

<sup>18</sup> SPAIN CONST. (1812), arts. 28-33.

<sup>19</sup> SPAIN CONST. (1812), arts. 37, 61, 80.

session,<sup>20</sup> the creation of an Office of Overseas,<sup>21</sup> the composition of the Council of State,<sup>22</sup> the jurisdiction of the tribunals to hear appeals in the region,<sup>23</sup> and the power of the deputations to oversee public works.<sup>24</sup>

Americans had a significant representation in various political and representative bodies created during the period including memberships in the Regency, as Presidents, Secretaries, and Vice-Presidents of the Cortes, in the Permanent Deputations, and in the committee that prepared the draft Constitution.<sup>25</sup> The Constitution was signed by no fewer than 47 deputies representing overseas interests of a total of 183 deputies.<sup>26</sup> Of 86 deputies from the Americas, approximately one third (28) were lawyers or judicial officers.<sup>27</sup> They fought every minute to increase the influence and the power of the Americas in the Cortes, in the government, and in the text of the Constitution. Agustín de Argüelles, a key liberal figure in the Cortes and deputy for Asturias, proposed an early solution concerning American demands. He suggested that the decision of representation of America be suspended until the Constitution itself was finished while advancing a decree assuring the equality of peninsular Spaniards and American Spaniards.<sup>28</sup> There were speeches and debates concerning the indigenous communities (*indios*), various kinds of legal institutions to extract their wealth or labor (*mitas* and *repartimientos*), and a committee focused on the pacification of America.<sup>29</sup>

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<sup>20</sup> SPAIN CONST. (1812), arts. 157-158.

<sup>21</sup> SPAIN CONST. (1812), art. 222.

<sup>22</sup> SPAIN CONST. (1812), art. 232.

<sup>23</sup> SPAIN CONST. (1812), arts. 261(9), 268.

<sup>24</sup> SPAIN CONST. (1812), art. 335(4).

<sup>25</sup> RAFAEL MARÍA DE LABRA, *AMÉRICA Y LA CONSTITUCIÓN ESPAÑOLA DE 1812*, at 61-63 (1914).

<sup>26</sup> DE LABRA, *supra* note \_\_\_\_, at 64.

<sup>27</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 58.

<sup>28</sup> DE LABRA, *supra* note \_\_\_\_, 68-74. The decree was issued on October 15, 1810. The language may be found at ACTAS DE LAS SESIONES SECRETAS DE LAS CORTES GENERALES EXTRAORDINARIAS DE LA NACION ESPAÑOLA 19 (1874).

<sup>29</sup> DE LABRA, *supra* note \_\_\_\_, at 74-84.

American deputies at the Cortes were important contributors to the drafting of the Constitution. Cádiz was a city filled with economic activities and political institutions tied to foreign trade, and above all, trade with the Americas, a city filled with ships and businesses, sailors and merchants, cafés and traders.<sup>30</sup> Apart from the political and economic activities that tied America to Cádiz, American financial contributions were essential in continuing the Spanish fight against the French. As Rieu-Millan has written, “[t]here was in Andalucía and especially in Cádiz an accentuated ‘presence’ of American Spaniards perfectly integrated into local life.”<sup>31</sup> Nonetheless, the quality of debate and overall consideration of the Americas in Cádiz suffered in important details from a lack of knowledge and understanding about the current state of affairs in America.<sup>32</sup> American voices were loud and important, but not always victorious, in the process of drafting and promulgating the Constitution.

About a hundred years ago, Rafael María de Labra began his study of America and the Constitution of Cádiz with a detailed description of the content of the *Recopilación* de 1680.<sup>33</sup> He was correct to begin with this source because the sources of Spanish colonial law, and especially the *Recopilación*, defined the shared thinking about America and its status. De Labra noted the traditional topics related to America, the conversion of the indigenous inhabitants, transatlantic trade, and the Crown’s guidance of the Roman Catholic Church in the Americas,

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<sup>30</sup> RAMÓN SOLÍS, *EL CÁDIZ DE LAS CORTES: LA VIDA EN LA CIUDAD EN LOS AÑOS DE 1810 A 1813* (2000).

<sup>31</sup> RIEU-MILLAN, *supra* note \_\_\_, at 66.

<sup>32</sup> RIEU-MILLAN, *supra* note \_\_\_, at 69-74. There may even have been jealousy of the perceived easiness of life in the Americas. For example, Agustín Argüelles during the debates on the Constitution spoke of the favorable climate of the Americas that leads to an increase in population where food grows with little cost or effort in comparison to the peninsula. AGUSTÍN DE ARGÜELLES, *DISCURSOS* 176 (1995). In this way, a comparison may be made between the population of Cádiz and the French-aligned Spaniards of Bayonne who had an even greater intellectual distance from America. Víctor Tau Anzoátegui, *Las observaciones de Benito de la Mata Linares a la Constitución de Bayona*, 178 *BOLETÍN DE LA REAL ACADEMIA DE LA HISTORIA* 243-266 (1981).

<sup>33</sup> RAFAEL MARÍA DE LABRA, *AMÉRICA Y LA CONSTITUCIÓN ESPAÑOLA DE 1812: LAS CORTES DE CÁDIZ 1810-1813* (1914).

called the *Real Patronato*. Despite these distinctive features, there was also a juridical uniformity between the Spain of Europe and the Spain of the Americas.<sup>34</sup> De Labra wrote:

[i]t is quite certain that the fundamental bases of the totality of judicial life in the Spain of Europe and of America were the same: that there were considerable differences in the overseas legislation, in second place, determined by local and historical circumstances and that deprived in the entire colonial order an accentuated tendency of progressive assimilation of the colonial life to the metropolitan life, maintaining the unity of law in the entire Empire and the identity of the European Spaniard and the American Spaniard.<sup>35</sup>

The broad theme is one of legislative and cultural similarity, despite some differences, between both hemispheres of the Spanish empire. Spanish colonial law provided connective legal tissue between the parts of the empire. More specifically, Spanish colonial law provided a base of law concerning America for all the deputies in the Cortes during their deliberations and actions. Although at times the deputies wanted to change, and in fact changed, much related to the Americas thought the Constitution, the fundamental base, in the sense of the first source to consult on the relationship between the monarchy and the American territories, was Spanish colonial law, as De Labra's use of the *Recopilación* illustrates.

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<sup>34</sup> DE LABRA, *supra* note \_\_\_\_, at 2- 37.

<sup>35</sup> “Y no es menos cierto que las bases fundamentales de la vida total jurídica de la España de Europa y de América eran lo mismo: que existían [sic] en la legislación ultramarina diferencias considerables, de segundo orden, determinadas por circunstancias históricas y locales y que privaba en todo el orden colonial una acentuada tendencia de asimilación progresiva de la vida colonial a la Metropolitana, manteniendo la unidad del derecho en todo el Imperio y la identidad de español de Europa y de América.” DE LABRA, *supra* note \_\_\_\_, at 37.

The proposals of the Cortes or of groups of deputies often required an entire change in the governing legislation. For example, on one hand, the proposals of the American deputies to modify restrictions on trade, agriculture, and mining were essentially a rejection of the established system under Spanish colonial law.<sup>36</sup> On the other hand, the territorial organization of America under the Constitution maintained its structure from the pre-Constitutional epoch as modified by the innovations of the Constitution touching institutional representatives.<sup>37</sup> Additionally, other fundamental institutional topics, such as the American highest courts of appeal (*audiencias*) and ecclesiastical administration, were informed by Spanish colonial law and its sources.<sup>38</sup> For the liberals in the Cortes, any difference in organization, laws, or representation might imply an intolerable inequality between parts of the empire and the *appearance* of modification or change was to be avoided in furthering their agenda.<sup>39</sup>

Spanish colonial law might provide a rule that continued without change during and after the Constitution. For example, considering the problem created by disperse indigenous populations across the American territories, the Overseas Commission presented a rule on April 22, 1813, that simply copied the rule already established as order 159 on populations found in book six of the *Recopilación* of 1680:

It is prohibited that individuals live away from towns and separated by the mountains and hills, depriving themselves of all spiritual and bodily benefit, as the aid of a helper and of which human necessity requires that men ought to give to each other.<sup>40</sup>

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<sup>36</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 175-218.

<sup>37</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 219-253.

<sup>38</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 253-262, 269.

<sup>39</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 266-267.

<sup>40</sup> “Se prohíbe que los individuos vivan fuera del poblado y separados por las sierras y montes, privándose de todo beneficio espiritual y corporal, si socorro de ministro y del que obligan las necesidades humanas que deben dar unos hombres a otros.” RIEU-MILLAN, *supra* note \_\_\_\_, at 141. Living apart and especially in mountains was not only an

According to Rieu-Millan, “[t]he Commission only proposed that the existing laws be enforced.”<sup>41</sup> Even after the first decades of the nineteenth century, Spanish colonial law in the form of the *Recopilación* of 1680 shaped peninsular ideas of the Americas within Spanish constitutionalism.<sup>42</sup> As a fundamental source of rules, ideas, structures, and institutions related to the Americas, Spanish colonial law served the Cortes and the drafters of the Constitution of Cádiz to re-assert general propositions about law and the unwritten constitution as a common base of knowledge. Spanish colonial law was the first source deputies in Cádiz thought of when considering the Americas and their relationship to the metropole.

## II. Spanish colonial law as a solution to a specific question of law.

Returning to Article 1 of the Constitution and its idea of “Spaniards of both hemispheres,” one observes that this text was, of course, a constitutional solution to a large and difficult problem. Noted Spanish legal historian García Gallo in his study entitled “Spanish colonial law and American independence” stated that at the moment Fernando VII renounced the throne in favor of Napoleonic occupation of the peninsula, the American colonies did not know what to do. There were caught on one hand being provinces incorporated in the Kingdom of Castile,

and the Castilian laws were common to them; and on the other hand, the Americas were considered themselves as an entity in which existed without prominence their differences of every kind. .

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administrative difficulty for colonial rule but also challenged core aspects of assertions of sovereignty. LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900*, at 222-236 (2010).

<sup>41</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 141.

<sup>42</sup> LORENTE, *LA NACIÓN*, *supra* note \_\_\_\_, at 217-260.

. . . Despite the clear tendency of the Bourbons to unity, it was not clear what was the true juridical and political condition of the different territories.<sup>43</sup>

Despite three centuries of daily practice and an equal number of years of laws, decrees, and legal works, the precise status of the Americas remained a mystery which was only now, with the occupation of Spain by France, called into question.

In the process of coming to a political solution concerning this question, Spanish colonial law played an important role. The juridical base for assertions of equality between both hemispheres can be found in the legislation touching the Americas in Spanish colonial law.

As Rieu-Millan states,

On declaring that the overseas territories were “an integral part of the Spanish Monarchy,” the Cortes and before the Junta Central did nothing more than return to the first legislation on the Americas. . . . On asserting America’s non-colonial status, [the deputies] appeared to turn back to the letter of the Spanish colonial law and to renew the foundational period with the glorious past.<sup>44</sup>

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<sup>43</sup> “. . . y las leyes castellanas era comunes; y, por otra parte, se consideraban las Indias como una unidad en que quedaban sin relieve sus diferencias de toda clase. . . . no obstante la manifiesta tendencia de los Borbones a la unidad, no resultaba claro cuál fuese la verdadera condición jurídico-política de los distintos territorios.” Alfonso García Gallo, *El derecho indiano y la independencia de América*, MUNDO HISPÁNICO, 170. A philological and historical study of the divisions and regions of America in this period may be found in Rafael Estrada Michel, *Regnicolas contra provincialistas. Un nuevo acercamiento a Cádiz con especial referencia al caso de la Nueva España*, 6 REVISTA ELECTRÓNICA DE HISTORIA CONSTITUCIONAL (Sept. 2005).

<sup>44</sup> “Al declarar que los territorios de Ultramar eran ‘parte integrante de la Monarquía española’ las Cortes y antes la Junta central no hicieron más que volver a la primer legislación indiana. . . . Al reclamar para América un estatuto no colonial, pretendían volver a la letra de la legislación indiana, y reanudar con el pasado glorioso del período fundacional.” RIEU-MILLAN, *supra* note \_\_\_\_, at 96-97. For the role of the Junta Central before the gathering of the Cortes see, Mirow, *Visions*, *supra* note \_\_\_\_, at 62. The classic study of *derecho indiano* leading to the conclusion that the Americas were not colonies is RICARDO LEVENE, *LAS INDIAS NO ERAN COLONIAS* (1951). An important recent economic analysis of the same question is Regina Grafe & Maria Alejandra Irigoin, *The Spanish Empire and its Legacy: Fiscal Redistribution and Political Conflict in Colonial and Post-colonial Spanish*

This was, of course, only one vision of the status of the Americas complicated by the precarious military and economic situation of the entire Spanish Empire. Similarly, in his debates on the Constitution, Argüelles would argue that the equal treatment the Americas received under the Constitution was inconsistent with labeling them “colonies.”<sup>45</sup>

Even one deputy found a specific legal answer to the entirely political question of the status of the America through the application of Spanish colonial law. On January 11, 1811, numerous deputies continued debates from January 9, 1811, concerning a proposition requiring equality of representation of the Americas at the Cortes as a result of the decree of October 15, 1810. Although most deputies kept to the purely political argument of the moment, Deputy Morales Duárez of Lima found the solution in the Spanish colonial law:

America, since the conquest, and its indigenous peoples have enjoyed the special privileges of Castile. Listen to the words that finish the chapter of the laws from the year 1542, where the emperor Charles say this, “We want and order that the indians be treated as our vassals of Castile, *as they are.*” With respect to this decision, there was made years prior in Barcelona a declaration in September 1529 (that resulted in law 1, title 1 of book 3 of the Recopilation of the Indies), where it says that the Americas are incorporated and united to the Crown of Castile, according to the

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*America*, 1 J. GLOBAL HIST. 241-267 (2006). For a discussion of recent literature concerning this question see Estrada Michel, *Los Reinos*, *supra* note \_\_\_\_.

<sup>45</sup> “*En cuanto al otro punto de subsistir las Américas gobernadas según el sistema colonial, solo apelo à la justificación del Congreso. Una Constitución que concede iguales derechos à todos los españoles libres; que establece una representación nacional; que ha de juntarse todos los años à sancionar leyes, decretar contribuciones y levantar tropas; que erige un Consejo de Estado compuesto de europeos y americanos, y que fija la administración de justicia de tal modo, que bajo de ningún pretexto tenga que venir estos à litigar en la Península; una Constitución, digo, que reposa sobre estas bases ¿es compatible con un régimen colonial?*” ARGÜELLES, DISCURSOS, *supra* note \_\_\_\_, at 245.

intentions of Pope Alexander VI, whose title recounts, as the most opportune of those considered for the legal sovereignty over those dominions.

We ought to say aloud these words “incorporated and united” to understand that the provinces of America are not the slave or vassals of the provinces of Spain; they have been and are provinces of Castile, with the same special privileges and honors.<sup>46</sup>

This is the kind of argument one might expect from a doctor of both civil and canon laws and chair of the University of San Marcos in Lima.<sup>47</sup> Thus, Spanish colonial law provided important evidence concerning the immediate political question of the status of the Americas. It was the first place thinkers and politicians in both hemispheres turned to for an answer.

Shortly after establishing the equality of the Americas under the Cortes’s decree of October 15, 1810, it ironically had to consider an administrative system for the overseas territories (*Ultramar*). In the demands of creating administrative structure, all the differences between the Americas and the peninsula came out. In the end, the Secretary of the Office of the Government of the Kingdom for Overseas became the government organ charged with commerce, the geographic extension, the fiscal and tax regime, and the rules, laws, and other

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<sup>46</sup> “*La América desde la conquista, y sus indígenas, han gozado los fueros de Castilla. Oiganse las palabras con que termina un capítulo de las leyes tituladas de año de 1542, donde el emperador Cárlos así habla: “Queremos y mandamos que sean tratados los indios como vasallos nuestros de Castilla, pues lo son.” Con respecto à esta justicia, habia hecho años antes en Barcelona una declaracion en Setiembre de 1529 (que dió mérito à la leyIa, título I del libro 3o de la Recopilacion de Indias), donde dice que las Américas son incorporadas y unidas à la Corona de Castilla, conforme à las intenciones del Papa Alejandro VI, cuyo título allí recuerda, como el más oportuno de cuantos sea legal para la soberanía sobre aquellos dominios.”* 1 DIARIO DE SESIONES DE LAS CORTES GENERALES Y EXTRAORDINARIAS 353 (1870).

<sup>47</sup> Morales Duarez, Vicente, <http://www.cadiz2012.es/diputados.asp?id=16> (Last visited Feb. 25, 2012).

complex aspects touching the American territories. Despite the equality of the Americas, their exceptional quality was also a reality.<sup>48</sup>

In the course of setting out the fundamental differences of the Americas from the peninsula, one of the largest debates centered on the exclusion of people of African descent and the inclusion of indigenous Americans as Spaniards receiving representation under the Constitution. Spanish colonial law was drawn into these determinations. To be a Spaniard, one had to have free status, and Spanish colonial law as expressed in the *Leyes Nuevas* of 1526 to 1549 as found in Book 6 of the *Recopilación* of 1680 prohibited servitudes of indigenous peoples.<sup>49</sup> On January 11, 1811, the Cortes debated these provision. The jurist Morales Duárez of Lima again used various Spanish authors and sources of Spanish colonial law to refute deputies who denied that indigenous peoples had the legal capacity to be Spaniards. In addition to the well-known literature of Las Casas and Palafox, Morales Duárez cited Solórzano to underscore the role and importance that indigenous people had in the monarchy as a whole.<sup>50</sup> Morales Duárez added that according to the *Recopilación* of 1680 and a decree of September, 1529, “the Americas are ‘incorporated and united to the Crown of Castile’ and their primitive natural people are subjects of the Crown of Castile.”<sup>51</sup> Furthermore, the requirements of legal residence (being a *vecino*) to have the status of citizen were defined by provisions in the Spanish sources as varied as the *Siete Partidas* from the thirteenth century and *Novísima Recopilación* of the early nineteenth century.<sup>52</sup> Similarly, Agustín Argüelles turned to Spanish colonial law to set out the legal status of America’s indigenous people by citing provisions of the *Recopilación* of

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<sup>48</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 295-299.

<sup>49</sup> DE LABRA, *supra* note \_\_\_\_, at 110-116. This was, of course, contrary to a standard practice of exploitation in the Americas. MIROW, *LATIN AMERICAN LAW*, *supra* note \_\_\_\_, 84-91.

<sup>50</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 114-115.

<sup>51</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 114-115.

<sup>52</sup> DE LABRA, *supra* note \_\_\_\_, at 145-146. For the *Siete Partidas* and the *Novísima Recopilación* see MIROW, *LATIN AMERICAN LAW*, *supra* note \_\_\_\_, at 49-53.

1680 that removed indigenous populations from the supervision of the Inquisition.<sup>53</sup> Spanish colonial law did not contain much to elevate the status of free blacks or slaves.<sup>54</sup> This argument that slavery only existed for blacks and mulatos was used to support the free status of indigenous people.<sup>55</sup>

American deputies at the Cortes served to recount how the institutions of Spanish colonial law functioned in the Americas. Rieu-Millan provides a telling example from the debates on March 30, 1811.<sup>56</sup> When the Viceroy of Mexico abolished tribute for indigenous people, he wanted to re-introduce the institution of the *repartimiento*, a system of forced labor quotas and economic extraction placed on indigenous populations, as a manner of compensating those who had previously benefited from the payment of tribute. When some deputies stated that they knew nothing about what a *repartimiento* was or did, other American deputies spoke to explain the institution, and the Peruvian deputy Feliú provided a short discourse on the topic. *Repartimientos* were not re-introduced.<sup>57</sup> Similarly, on another occasion, during a debate concerning the abolition of the *mita*, another form of forced indigenous labor, José Joaquín

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<sup>53</sup> AGUSTÍN ARGÜELLES, LA REFORMA CONSTITUCIONAL DE CÁDIZ 336-337 (1970).

<sup>54</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 147, 157.

<sup>55</sup> DE LABRA, *supra* note \_\_\_\_, at 110-116. Nonetheless, this does not mean that the slavery was not an issue debated at the Cortes. José Miguel Guridi Alcócer and Agustín Argüelles spoke about slavery and the slave trade. DE LABRA, *supra* note \_\_\_\_, at 127-133. Some scholars in the United States oddly associate the Constitution of Cádiz with the abolition of legal and social racism. Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, Inter/national Labor Rights and the Evolution of Latcrit Theory and Community*, 53 MIAMI L. REV. 575, 619 n.99 (1999) (stating that Martha Menchaca, *Chicano Indianism: A Historical Account of Racial Representation in the United States*, as reprinted in THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefanie eds., 1998) “recount[s] how racial caste system was dismantled in Mexico by the 1812 Spanish Constitution of Cadiz.”); Taunya Lovell Banks, *Mestizaje and the Mexican Mestizo Self: No hay Sangre Negra, So there is no Blackness*, 15 S. CAL. INTERDISC. L.J. 119, 214 (2006) (“The 1812 Spanish Constitution of Cadiz abolished the caste system and accompanying racial laws” citing Martha Menchaca, *Chicano Indianism: A Historical Account of Racial Representation in the United States*, 20 AM. ETHNOLOGIST 583, 586 (1993)). A more accurate reading of the articles of the Constitution of Cádiz as they relate to race is found in Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 16-17 (2000).

<sup>56</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 80.

<sup>57</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 80.

Olmedo, the deputy from Guayaquil, cited passages from the classic work on Spanish colonial law, Solórzano's *Política Indiana* to explain the institution.<sup>58</sup>

A final example may be drawn again from Morales Duárez who debated to defend the decision to “pay priests with the nine-tenths [taxes] of the king and additionally with the treasury of Lima.”<sup>59</sup> In defending this fiscal position, Morales Duárez lectured the Cortes on the applicable provisions of the *Recopilación*, his personal experiences with the topic, and the practices of Viceroy Toledo in Peru during the sixteenth century.<sup>60</sup>

There are surely other examples. In resolving questions as diverse as the status of indigenous peoples, the imposition of forms of forced labor in the Americas, and fiscal considerations in the empire, the Cortes turn to Spanish colonial law as a source of particular rules and guides that had been established. The pervasive influence of the Spanish colonial law in the Cortes on topics touching the Americas is noteworthy. Spanish colonial law also played into the broader questions of exactly how to draft a constitution and how closely did the text of the Constitution reflect existing legislation and practices from before the gathering of the Cortes.

### III. Spanish colonial law in the debates on the historicity of the Constitution.

Another aspect of the application of Spanish colonial law was the use of past historical practices and texts to guide and to justify the process of the writing the Constitution. This process often accompanied assertion that the Constitution itself contained or proposed nothing new. The search for the historicity of the Constitution was much more than an after the fact

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<sup>58</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 124 (debate of Oct. 21, 1812).

<sup>59</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at 80.

<sup>60</sup> RIEU-MILLAN, *supra* note \_\_\_\_, at. 80 (Toledo en Perú 1569, debate de 20 de junio de 1811).

attempt to justify the text.<sup>61</sup> Of course, the search for historicity was part of the self-deception engaged in by the deputies in the Cortes. Historicity was important to them, and it was important to them in a way that was more than just a simple manner to introduce unexpected new ideas into the Constitution.

Because the actions of individuals forming governing juntas, bodies asserting royal authority through a regency, and Cortes purporting to act on behalf of an absent king could easily be subject to charges of treason and revolution, political actors sought to justify their course by relying on established legal authorities and past practices. This was not a new way to justify one's actions in the midst of political change.<sup>62</sup> The reforms brought by the Cortes and the Constitution of Cádiz were grounded in, or at least asserted to be grounded in, past practices, accepted legal texts, and Spain's historical and political experiences. From these sources, the Cortes sought to construct an unwritten constitution for the Spanish Monarchy that would set out the compromises reached in allocating political power and its exercise. Jaime Rodríguez has expressed the view that using such sources as justification in the drafting of the Constitution was little more than a historical fiction.<sup>63</sup> Nonetheless, this process of justification was important because it provided the intellectual or rhetorical basis upon which sweeping changes were permitted. This was particularly the case as such changes related to the Americas, where, for example, Spain's unwritten constitution was seen as including American rights established by Spanish colonial law.<sup>64</sup>

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<sup>61</sup> By "historicity," I mean that a text or action is consistent with and based on genuine antecedents in a true existing tradition that has not been fabricated at the moment. This and the following three paragraphs are based on Mirow, *Visions*, *supra* note \_\_\_\_, 66-67.

<sup>62</sup> See, e.g., JOHN P. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW* (1993).

<sup>63</sup> JAIME E. RODRÍGUEZ O., *THE INDEPENDENCE OF SPANISH AMERICA* 22, 25, 46-48 (1998).

<sup>64</sup> RODRÍGUEZ, *supra* note \_\_\_\_, at 46.

Proponents of draft proposals and new constitutional provisions grounded their ideas in the “historical constitution of the Monarchy.”<sup>65</sup> To support the creation of a Regency during the absence of the king, those forming the institution turned to the *Siete Partidas*. In a move most likely calculated to stymie innovation in the Constitution, the Sevillian lawyer and deputy Francisco Gómez Fernández suggested that to ensure the historicity of the text, each article should cite the established Spanish law that justified it or that it modified. This proposition was voted down, but it illustrates the importance of historical justification and its political use in the drafting process.<sup>66</sup> The specific linking of constitutional provision or change was rejected, but as a general principle, statements tying the activity of the Cortes and the text of the Constitution to Spain’s ancient constitution were part of having radical changes accepted by the Cortes as a whole.<sup>67</sup>

Historical justification had an important function after the text of the Constitution was completed. To explain the text, the Cortes appointed Agustín Argüelles and José Espigay Gadea to draft an Introduction (*Discurso preliminar*) most likely written principally by Agustín Argüelles.<sup>68</sup> The main reason for this Introduction was to show that the Constitution was in conformity with the established laws of Spain.<sup>69</sup> Artola exposes well the polemical use of history evoked to justify novelties within the text. He writes,

[t]o legitimate political novelties, the author of the Introduction went to propositions taken from texts from whatever past time,

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<sup>65</sup> Miguel Artola, *Estudio Preliminar*, in II LA CONSTITUCIÓN DE 1812, at 40-41 (Miguel Artola and Rafael Flaquer Montequi eds., 2008).

<sup>66</sup> Artola, *supra* note \_\_\_\_, at 64-65. Gómez Fernández, Francisco, <http://www.cadiz2012.es/diputados.asp?id=189&letra=g> (last visited Feb. 24, 2012).

<sup>67</sup> Artola, *supra* note \_\_\_\_, at 42.

<sup>68</sup> DE LABRA, *supra* note \_\_\_\_, at 89, 91. Concerning the joint authorship of the Introduction and, in fact, its nature as a collective work of a committee see Francisco Tomás y Valiente, *Estudio Preliminar*, in AGUSTÍN DE ARGÜELLES, DISCURSOS xvii (1995).

<sup>69</sup> Artola, *supra* note \_\_\_\_, at 59.

without worrying himself about the changes brought over an interval of centuries. The election of Gothic kings is the argument to justify national sovereignty.<sup>70</sup>

Artola asks the reader to consider how anything but fancifully interpreted Spanish historical material could be put forth as justification for representative elections with nearly universal male suffrage, assertions of natural rights to liberty and property, the creation of uniform legal codes to be applied to all, the abolition of special privileges, and the suggestion that juries might be used in trials.<sup>71</sup> Historians have determined that in rare and attenuated instances some of the developments that came about after the French invasion were broadly based on existing Hispanic thought, but not with the kind of specificity and exactitude the drafters of the Constitution asserted.<sup>72</sup> History was used, in the words of Estrada, “more as a unifying myth than an effective guide,” and indeed deputies were willing to ground their reforms in practical approaches and rational decisions that had nothing to do with being bound by historical practice or text.<sup>73</sup> Nevertheless, such historical claims were viewed as essential to produce a text that would find the Cortes’s approval.<sup>74</sup> Gómez Fernández’s proposal to base every article of the Constitution on an established law or provision has already been noted.<sup>75</sup> The Introduction by Argüelles is a important document to examine this desire to base the text in historical antecedents, especially in light of Spanish colonial law.

This Introduction to the Constitution of Cádiz is a longer work than the Constitution itself. In the Introduction, the importance of the Americas and Spanish overseas territories abuts

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<sup>70</sup> “*Para legitimar las novedades políticas, el autor del Discurso acudió a proposiciones que tomaba de textos de cualquier tiempo pasado, sin preocuparse de los cambios producidos en el intervalo de los siglos. La elección de los reyes godos es el argumento para justificar la soberanía nacional.*” Artola, *supra* note \_\_\_\_, Artola 2008: 59-60.

<sup>71</sup> Artola, *supra* note \_\_\_\_, at 60-63, 67.

<sup>72</sup> RODRIGUEZ, *supra* note \_\_\_\_, at 3.

<sup>73</sup> ESTRADA, *supra* note \_\_\_\_, at 401, 402.

<sup>74</sup> Mirow, *Visions*, *supra* note \_\_\_\_, at 66-67.

<sup>75</sup> Debate on Art. I (Aug. 25, 1811), in II LA CONSTITUCIÓN DE 1812, *supra* note \_\_\_\_, at 317-318.

the justifications of the historicity of the Constitution. The Introduction attempts to present the Constitution as a simple manifestation of the existing Spanish juridical tradition.<sup>76</sup> The authors of the Introduction state that the Constitution followed the “fundamental laws of Aragón, of Navarra, and of Castile” and that it had only abandoned the *structure* of these classical works of public law.<sup>77</sup> In fact, the Introduction asserted that if one saw innovation or new things in the Constitution, this would only be the result of not knowing sufficiently “the history and ancient legislation of Spain.”<sup>78</sup> The Introduction continued this assertion by suggesting that one may find almost everything in the new Constitution in the older works of Blancas (author of a chronicle of Aragón), of Alonso Zorita (an important mention for the topic of this study), of Pedro Mártir de Anglería (a chronicler and member of the Council of the Indies) y Juan de Mariana (a Jesuit historian).<sup>79</sup>

For example, the Introduction notes that the Constitution limits the power of the king while making reference to the *Fuero Juzgo* and the laws of Aragón, Navarra, and Castile.<sup>80</sup> The entire Constitution is presented as a compilation of Spanish public law from the “immense collection of the body of the law that form Spanish jurisprudence” that are found in the Gothic codes and in the various sources of ancient Castilian and Spanish law including the “Fuero Juzgo, las Siete Partidas, Fuero Viejo, Ordenamiento de Alcalá, Ordenamiento Real y Nueva

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<sup>76</sup> *Discurso Preliminar*, in RAFAEL GARÓFANO SÁNCHEZ & JUAN RAMÓN DE PÁRAMO ARGÜELLES, LA CONSTITUCIÓN GADITANA DE 1812, at 59 (1987) (hereinafter “*Discurso Preliminar*”).

<sup>77</sup> *Discurso Preliminar*, *supra* note \_\_\_\_, at 59.

<sup>78</sup> *Discurso Preliminar*, *supra* note \_\_\_\_, at 60.

<sup>79</sup> *Discurso Preliminar*, *supra* note \_\_\_\_, at 61. Of those sources listed, Zorita had the closest ties to Spanish colonial law. Having studied law in Salamanca, he later worked in the highest courts of Santo Domingo, Guatemala, and Mexico. He compiled laws related to the Americas in his *Compilación para las Indias en general* (1574). MIROW, LATIN AMERICAN LAW, *supra* note \_\_\_\_, at 43, 46. See generally, RALPH VIGIL, ALONSO ZORITA: ROYAL JUDGE AND CHRISTIAN HUMANIST, 1512-1585 (1987). For a brief discussion of the *Fuero Juzgo*, known in various forms as the *Breviary of Alaric*, the *Lex Romana Visigothorum*, or the *Liber Judiciorum*, and its place in Spanish law see, MIROW, LATIN AMERICAN LAW, *supra* note \_\_\_\_, at 15-16.

<sup>80</sup> *Discurso Preliminar*, *supra* note \_\_\_\_, at 61-64.

Recopilación.”<sup>81</sup> The Introduction concludes that “[w]hen the Commission says that in its draft there is nothing new, it speaks an uncontested truth, because truly there is nothing new in substance.”<sup>82</sup> To assure the historicity of the Constitution, the Introduction speaks of another commission that compiled all the pertinent legislation and that the Cortes used as guides for their “nature and spirit, but those that still remain alive in some of them” that advance the common interest.<sup>83</sup>

The emphasis on the Americas is different between the text of the Constitution and the Introduction. Although there is an obvious parallelism in the discussion of the various themes of the two documents, the Introduction reveals with clarity the topics that elicited the most debate or disagreement within the Cortes. The Introduction also uses the incorporation of the Americas into the nation as an excuse or justification to introduce changes or novelties. For example, in discussing the theme of rejecting citizenship of slaves and people originating in Africa, the Introduction notes that this situation stems from the prevalence of slaves and Africans in the Americas. In fact, it is within this context that one finds for the first time in the Introduction the word “*ultramar*.”<sup>84</sup> The Introduction also noted the numerous vacant positions in the America and that the system of representation must consider the difficulties that American deputies face with an overriding policy of “narrowing more and more the ties of union with overseas Spaniards.”<sup>85</sup>

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<sup>81</sup> *Discurso Preliminar*, *supra* note \_\_\_, at 108, 65.

<sup>82</sup> “*Cuando la Comisión dice que en su proyecto no hay nada nuevo, dice una verdad incontrastable, porque realmente no lo hay en la sustancia.*” *Discurso Preliminar* GARÓFANO Y DE PÁRAMO, *supra* note \_\_\_, at 65.

<sup>83</sup> *Discurso Preliminar*, *supra* note \_\_\_, at 65, 66. This is probably the list of sources listed as *Reunión de las Leyes Fundamentales de la Monarquía Española, Clasificadas por el Método que Prescribe la Instrucción Formada por la Comisión de Cortes para Arreglar y Dirigir los Trabajos de la Junta de Legislación en los Párrafos 7 y 9*, ACTAS DE LA JUNTA DE LEGISLACION, Acuerdo 12 (Dec. 10, 1809), at <http://www.cervantesvirtual.com>.

<sup>84</sup> *Discurso Preliminar*, *supra* note \_\_\_, at 69.

<sup>85</sup> *Discurso Preliminar*, *supra* note \_\_\_, at 71, 74, 73 (quotation), 101.

Responding more fully to the question of the relationship between Spanish colonial law and the Constitution of Cádiz leads one to the writings and the thought of Agustín Argüelles beyond his comments in the Introduction to the Constitution. Argüelles was an important voice on these matters in the Cortes. He is not absolutely representative of the deputies in the Cortes, but any study of the topic must take note of his Introduction, his writings, and his activities within the Cortes and their subsequent history. Argüelles is the right place to start.

Argüelles was born in Ribadesella, Asturias, in 1776 and studied law at the University of Oviedo. By his mid-twenties, he benefitted from being under the protection of Gaspar Melchor de Jovellanos, an important Spanish enlightenment thinker and politician of the time.<sup>86</sup> He was a secretary to the Bishop of Barcelona, and by 1805, he had an official position with the Ministry of State. A year later, he was sent on a diplomatic mission to London, where he remained for about three years. This first period of residence in England was to be highly influential in Argüelles's understanding of political and constitutional function and structure.<sup>87</sup> He befriended Lord Holland, an important influence on the Cádiz process, and returned to Spain, now to Seville, in 1809.<sup>88</sup> In Seville, he served as secretary to the Commission of Legislation of the Cortes. This position acquainted him to all the political and structural aspects of the Central Junta's government of Spain and its resistance to French occupation.<sup>89</sup> Lessons learned in the Legislation Commission were directly applicable to his service on the Constitutional Commission from which the text of the Constitution issued.<sup>90</sup> His membership in the Cortes was

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<sup>86</sup> Francisco Tomás y Valiente, *Estudio Preliminar*, in AGUSTÍN DE ARGÜELLES, DISCURSOS xix (1995).

<sup>87</sup> Tomás y Valiente, *Estudio Preliminar*, *supra* note \_\_\_\_, at xix-xx.

<sup>88</sup> Tomás y Valiente, *Estudio Preliminar*, *supra* note \_\_\_\_, at xx.

<sup>89</sup> Tomás y Valiente, *Estudio Preliminar*, *supra* note \_\_\_\_, at xxi.

<sup>90</sup> Tomás y Valiente, *Estudio Preliminar*, *supra* note \_\_\_\_, at xxi.

as a deputy for Asturias.<sup>91</sup> After spending the period from 1823 to 1834 in London, he died in Madrid on March 23, 1844.<sup>92</sup>

Argüelles was very active in the process of writing the Constitution and was, as mentioned earlier, most likely the primary author of the Introduction discussed above as a foundational document in asserting the historicity of the Constitution. Despite being one of the most notable liberals among the deputies to the Cortes and therefore one of the deputies most anxious for great changes in the new Constitution, he was also a deputy who was very conscious of the historicism of the text of the Constitution and of the importance of history in the process before the Cortes.<sup>93</sup> At times, he was a historian *in* the Cortes and *of* the Cortes, but above all Argüelles was a politician, a deputy, and man of state.<sup>94</sup> Nonetheless, as Tomás y Valiente notes of him, “Argüelles never fought without turning to history.”<sup>95</sup> Using history and having a well-developed appreciation of historical distance are, of course, two different things. Argüelles’s evoking of history has been subject to scrutiny by historians who have questioned his sincerity in his use of past materials. For example, the noted Spanish legal historian Tomás y Valiente concluded that Argüelles was a convenient presentist in his use of these sources who lacked historical consciousness.<sup>96</sup> Tomás y Valiente viewed Argüelles as employing history in a political way to calm the fears of those facing change and to construct a mythic constitutional history of Spain that comported with his new constitutional goals.<sup>97</sup>

Argüelles was also cognizant of the American cause from a European perspective and participated in the secret sessions of the Cortes that produced the famous decree of equality

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<sup>91</sup> Tomás y Valiente, *Estudio Preliminar*, *supra* note \_\_\_\_, at xxi-xxii.

<sup>92</sup> Tomás y Valiente, *Estudio Preliminar*, *supra* note \_\_\_\_, at xxv, xxvi.

<sup>93</sup> Tomás y Valiente, *Estudio Preliminar*, *supra* note \_\_\_\_, at xxv.

<sup>94</sup> Tomás y Valiente, *Estudio Preliminar*, *supra* note \_\_\_\_, at xi, lxxvii, lxxix.

<sup>95</sup> “Argüelles nunca combate sin recurrir a la historia.” Tomás y Valiente, *Estudio Preliminar*, *supra* note \_\_\_\_, at xlvi.

<sup>96</sup> Tomás y Valiente, *Estudio Preliminar*, *supra* note \_\_\_\_, at lxxi.

<sup>97</sup> Tomás y Valiente, *Estudio Preliminar*, *supra* note \_\_\_\_, at lxxii-lxxiii.

between the hemispheres.<sup>98</sup> His close involvement with these central texts and questions make his works a useful point of entry into the question of Spanish colonial law and the Constitution.<sup>99</sup>

In his *Exámen Histórico de la Reforma Constitucional* (Historical Examination of the Constitutional Reform) written from London in 1835, Argüelles, as one always turning to history, noted that the posterior successes of independence in America complicated the analysis of what in truth had transpired about America before and during the Cortes.<sup>100</sup> In fact, Argüelles noted that the situation in the Americas and on the peninsular were “not foreseen by the code of the Indias and even less by the tribunals and councils that until then guided and governed them.”<sup>101</sup> Nonetheless, his analysis is based on his interpretation of Spanish colonial law and what it says about the relationship between the two hemispheres.

For Argüelles, Spanish colonial law demonstrates the equality of the Americas and the peninsula in the Spanish nation. He stated,

Spain gave to America everything it had, without the slightest holding back for itself. The same civil and criminal legislation, the same structure in the municipal order of the cities, in the administration of the provinces, the same structure of general education, the same rules for public instruction, the same participation in ecclesiastical dignities and offices of all levels, in

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<sup>98</sup> Secret Acts of the Cortes, Session of the night of Oct. 11, 1810; Tomás y Valiente, *Estudio Preliminar*, *supra* note \_\_\_\_, at xxiii. See also, Albert Dérozier, “Argüelles y la cuestión de América ante las Cortes de Cádiz de 1810-1814”, *HOMENAJE A NOËL SALOMON, ILUSTRACIÓN ESPAÑOLA E INDEPENDENCIA DE AMÉRICA* 159-164 (Alberto Gil Movales, 1979).

<sup>99</sup> Dérozier, *supra* note \_\_\_\_, does not mention the role of Spanish colonial law in Argüelles’s thought.

<sup>100</sup> I AGUSTÍN DE ARGÜELLES, *EXÁMEN HISTÓRICO DE LA REFORMA CONSTITUCIONAL* 332 (Londres, Imprenta de Carlos Wood, 1835).

<sup>101</sup> “. . . no previsto en el código de Indias, y ménos aun por los tribunales y consejos que hasta aquella éra la dirigieron y gobernaron.” I ARGÜELLES, *supra* note \_\_\_\_, at 333.

legal positions, the highest offices and positions of the state, in titles, honors, and commendations that were used in all times.<sup>102</sup>

Thus, Argüelles's starting point is one of absolute equality between the Americas and the peninsula.

Nonetheless, the region required legislative exceptions that took account of the unique population and situation of America. Despite these variations, Argüelles's summary of the institutions and law of the Americas led him to the conclusion that there was not "a premeditated design in the mother country to oppress the colonies."<sup>103</sup> On the contrary, the well being of America was always on the mind of the peninsula when reforming laws or imposing taxes.<sup>104</sup> For example, Argüelles tried to explain the reasons for prohibiting the cultivation of certain fruits in the Americas and for Spain's close control and monitoring of trade in the Americas. He stated, "[i]n sum, the Spanish Monarchy, in the peninsula and overseas, presented the same appearance, a system of, in theory, equal, uniform, and perfectly impartial government."<sup>105</sup>

To reach such a conclusion and for his analysis, Argüelles, as a skilled historian might, said that the moment to compare America and the peninsula must be 1808, not before or after. Argüelles depicted an America full of wonders attributable to its colonization by Spain: cities, fortifications, roads, civil establishments, churches, scientific and literary groups, agriculture, commerce, and mines. In so many ways, a society equal to that of the peninsula.<sup>106</sup> If in 1808,

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<sup>102</sup> "España dió á la América todo lo que le había quedado, sin hacer la menor reserva para sí. La misma legislación civil y criminal, la misma planta en el orden municipal de los pueblos, en el método administrativo de las provincias, el mismo plan de educación general, los mismos reglamentos de enseñanza pública, la misma participación en las dignidades y beneficios eclesiásticos de todas gerarquías, en las magistraturas, empleos y cargos supremos del estado, en los títulos, honores y condecoraciones que se usaron en todas épocas."

ARGÜELLES, *supra* note \_\_\_\_, at 335-336.

<sup>103</sup> "... designio premeditado en la madre patria de oprimir á las colonias." ARGÜELLES, *supra* note \_\_\_\_, at 338.

<sup>104</sup> ARGÜELLES, *supra* note \_\_\_\_, at 339.

<sup>105</sup> "En suma, la monarquía de España, en la península y Ultramar, presentaba el mismo aspecto, un sistema de gobierno igual, uniforme, perfectamente imparcial en su teoría." ARGÜELLES, *supra* note \_\_\_\_, at 340.

<sup>106</sup> ARGÜELLES, *supra* note \_\_\_\_, at 342-343.

America suffered from a lack of liberty and strangling oppression of a suffocating government, then the peninsula suffered the same horrible circumstances. The two parts suffered the same abuses and encountered the same worries. The blame was not the metropole in its actions against the colonies; this was simply a horrible time for all parts of Spain.<sup>107</sup> In fact, in his estimation, America escaped much hardship because of its geographic distance from the peninsula. For example, Argüelles stated that there was “deliberate oppression imposed upon the metropole with the end of justifying the conduct of America during the constitutional reform.”<sup>108</sup> America additionally had the luxury of being far away from the battles on the peninsula in the war of independence against the French.<sup>109</sup>

For Argüelles the decree of October 15, 1810, in which the Central Junta declared the equality of American and European Spaniards, was an extension of the political and historical relationship that had always existed between the two hemispheres of the Spains. It was an extension and expression that Argüelles observed in the Spanish colonial law and in colonial institutions. Although this relationship was not an innovation for Spain, Spain was the innovator in establishing this kind of equality across the ocean:

The equality of political rights given to America was in reality an innovation in the colonial system of the nations of Europe. The Cortes were unfortunately unable to have the benefit of any practical example to guide them in this experiment.<sup>110</sup>

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<sup>107</sup> ARGÜELLES, *supra* note \_\_\_\_, at 343-344.

<sup>108</sup> “. . . opresion deliberada hecho contra la metrópoli á fin de justificar la conducta de América durante la reforma constitucional.” ARGÜELLES, *supra* note \_\_\_\_, at 345-346.

<sup>109</sup> ARGÜELLES, *supra* note \_\_\_\_, at 346-350; AGUSTIN DE ARGÜELLES, LA REFORMA CONSTITUCIONAL DE CÁDIZ 224 (Comentada por Jesús Longares, 1970).

<sup>110</sup> “La igualdad de derechos políticos concedida á la América era en realidad una innovacion en el sistema colonial de las naciones de Europa. Por desgracia, las Córtes no podían aprovecharse de ningun ejemplo práctico que las guiase en su esperimento.” ARGÜELLES, *supra* note \_\_\_\_, at 356-357.

History, according to Argüelles, demonstrated that Spain was “constant in considering its colonies as all the provinces of the monarchy.”<sup>111</sup>

What annoyed Argüelles was that although the provinces of America received this equal status, in effect, they received special treatment “as if it had different interests from those of the metropole and ought to deserve greater care, more attention, and more consideration than the other provinces of the monarchy.”<sup>112</sup> Argüelles found an upsetting example of this in the communication of the deputy from Puebla de los Angeles who, without great political sense, requested the creation of a commission to begin the independence process for Mexico.<sup>113</sup>

Furthermore, the assertion that the decree of October 15, 1810, had application to the General and Extraordinary Cortes and not just the Constitutional Cortes was a rejection of the promise the Cortes had solemnly and publicly made and that resulted in a vote of 69 to 61 to change the composition of the General and Extraordinary Cortes.<sup>114</sup> Argüelles considered complaints about trade and taxes in relationship to the decree that established equality in profession between Americans, indigenous peoples (*indios*), and Spaniards as a grand example of ingratitude on the part of the American deputies.<sup>115</sup>

Of course, much of this talk that nothing had changed was false. A true understanding of events and ideas reveals that constitutional historicity and American equality were rhetorical tropes employed for concrete political purposes. Concerning the new regime of government in the provinces of America, García Gallo wrote that,

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<sup>111</sup> “. . . constante en considerar á sus colonias como á todas las provincias de la monarquía.” ARGÜELLES, *supra* note \_\_\_\_, at 359.

<sup>112</sup> “. . . si tuviese intereses distintos de los de la metrópoli y debiese merecer más cuidado, más atención y más esmero que las demás provincias de la monarquía.” AGUSTIN DE ARGÜELLES, *LA REFORMA CONSTITUCIONAL DE CÁDIZ* 243 (Comentada por Jesús Longares, 1970).

<sup>113</sup> ARGÜELLES, *LA REFORMA CONSTITUCIONAL DE CÁDIZ*, *supra* note \_\_\_\_, at 246-247.

<sup>114</sup> ARGÜELLES, *LA REFORMA CONSTITUCIONAL DE CÁDIZ*, *supra* note \_\_\_\_, at 253, 255.

<sup>115</sup> ARGÜELLES, *LA REFORMA CONSTITUCIONAL DE CÁDIZ*, *supra* note \_\_\_\_, at 257.

[t]he activities of these new organs of government were almost always revolutionary. The Central Junta, the Council of Regency or the Cortes of Cádiz legislated in respect to the New World in manifest disparity with the fundamental principles of the laws of the Indies. The decrees of the Cortes concerning America profoundly changed the system of the prior government, the same for those decreed for the peninsula, no less innovative than the laws of José Bonaparte. The revolution functioning in the subject of public law of the Americas was no less in the decrees of the Cortes of Cádiz than those of the American juntas.<sup>116</sup>

Depending on the moment and the argument to be made, Argüelles might concede that much had changed. Appearing to contradict the position asserted in his later historical examination of the Cortes and the Constitution, he stated during the debates:

Congress, on destroying the colonial system of the Americas has thrown away the basis of their prosperity. All legislation dealing with the Americas will be fundamentally altered by the bases of this Constitution.<sup>117</sup>

The rhetoric of historicism went back and forth depending on the political moment and the argument to be won.

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<sup>116</sup> “*También fué revolucionaria casi siempre la actuación de estos nuevos órganos de gobierno. La Junta Central, el Consejo de Regencia o las Cortes de Cádiz legislaron respecto del Nuevo Mundo en manifiesta disparidad con lo preceptuado en las leyes de Indias. Los decretos de las Cortes referentes a América alteraron profundamente el sistema de gobierno anterior, lo mismo que los dictados para la Península, no menos innovadores que los del rey José Bonaparte. La revolución operada en materias de Derecho público indiano no fué menor en los decretos de las Cortes de Cádiz que en los de las Juntas americanas.*” García Gallo, *supra* note \_\_\_\_, at 178.

<sup>117</sup> “*El Congreso, al destruir el sistema colonial de las Américas, ha echado los fundamentos de su prosperidad. Toda la legislación de Indias va à ser alterada por las bases de esta Constitución.*” ARGÜELLES, DISCURSOS, *supra* note \_\_\_\_, at 207.

In these ways, Spanish colonial law was brought into the broader debate of the way history and historical sources were used to justify the content of the Constitution. Although the general problem of the historicity of the Constitution went far beyond the place of the Americas within the empire, the intellectual and historical foundations of the legal and constitutional place of these territories were also subject to this scrutiny and framework. Argüelles explored this topic in relation to the Americas at various points in his work on the Constitution and its historicity. Providing extant structures and legal definitions, Spanish colonial law was widely deployed in debates asserting the historicity of the Constitution and the status of the Americas.

Constitutional drafting occurs in a political atmosphere that often draws on pre-constitutional law in the process. Change is shrouded in continuity, as pre-constitutional law is used to define relationships, rights, institutions, and the limits and statuses of members and actors. Spanish colonial law (*derecho indiano*) was employed in various modes in this process. Spanish colonial law provided a general backdrop of the legal and political world against which constitutional texts would be played. Spanish colonial law was also evoked to give specific answers to specific questions that arose in the context of constitutional debate and drafting. It was also appropriated in the battles over the historicity of the Constitution. In Cádiz, the Constitution was the product of pre-constitutional law in rhetoric, in fact, and in myth.