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M. C. Mirow

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Introduction

The central historic square of Saint Augustine, Florida, is called the Plaza de la Constitución, but it is not named for the United States Constitution. Instead, it commemorates America's other first constitution, the Constitution of Cádiz of 1812. Near the center of the square, a monument records the Constitution's promulgation in October, 1812, in the province of East Florida, then part of the Spanish Empire.

This Spanish Constitution, however, did not last long as a document guiding the political structure of Spain and its many possessions around the world. The Constitution was the product of the power vacuum resulting from Napoleon's invasion of Spain in 1808 and the ouster of Fernando VII. European and American Spaniards did not know where to swear their allegiance. Many turned to a revitalized representative body, the Cortes, which met in Cádiz, Spain, and ultimately promulgated the Constitution in the name of Fernando VII. He was restored to the Spanish throne in 1814 and was not interested in ruling as the first constitutional monarch. On restoration, he repudiated the document but the city of Saint Augustine never took down its monument. The monument stands today as one of the only squares and monuments dedicated to the Constitution left in all the Americas.

This mostly forgotten monument to a mostly forgotten document fails to portray the importance of the Constitution of Cádiz in the development of constitutions and constitutional law in the world. The Constitution of Cádiz had a dramatic impact on constitutionalism throughout the Western world, particularly in the former Spanish colonies. It was not only transatlantic in its effect; it was born of a transatlantic effort. Deputies representing many areas of the New World with deputies of peninsular

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Spain debated, drafted, and promulgated a document that created equal Spanish subjects on both sides of the Atlantic Ocean. The Constitution moved into and out of effect three times before 1840 with the changing political dynamics of Spain and the king. Its provisions never fully took root in Latin America or Spain as an effective constitutional order, but the Spanish Empire experienced brief moments of constitutional life under its provisions in the Americas and on the peninsula.

The events and texts surrounding the promulgation and ultimate rejection of the Constitution of Cádiz will be one of the lenses through which this book examines Latin American constitutional development to the present day. In sum, this work views the Constitution not only as the first Latin American constitution and a liberal political turning point in American and European history, but also as a moment of lost opportunity and of lasting constitutional injury to the region. The Constitution of Cádiz heralded liberal constitutionalism in Europe and the Americas. Indeed, many newly independent nations looked to its provisions, as they did to the provisions of the United States Constitution, in drafting their own first constitutions. The document is about forty pages in length and provides for sovereignty in the nation, rather than in the king. Although maintaining Roman Catholicism as the official state religion, the Constitution incorporated various liberal ideas and institutions including representative electoral bodies at various levels of government, restrictions on the power of the king, codes of law applicable to everyone, rights for the criminally accused, freedom of contract, and individual property rights. 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 non-liberals alike.¹

The historiography of the Constitution in the past fifty years has been summarized well by Estrada, who sees in these works at least three “Cadices.” The first group of works addressing the Constitution, anti-liberal 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 character without fully appreciating the geographical diversity reflected in its creation, text, and institutions. The third group discovers special relevance in Cádiz in light of the creation of a modern Spanish

¹ Breña, *El imperio*, 147–175; García Laguardia, “Las Cortes,” 12–16; Rodríguez, *The Cádiz Experiment*, 75.

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constitutional monarchy under 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.²

As scholars unearthed the substantial Latin American contribution to the drafting of the document in Spain, they also revealed that Latin American deputies developed skills in constitutional thought and drafting that were transferred to independence movements in former colonies. Thus, the Constitution of Cádiz has been properly linked to the Age of Democratic Revolutions that flourished in Europe and the Americas.³ It has similarly been linked to both an Age of Constitutions and an Age of Codifications.⁴ It was a busy time for ages.

The relative newness of its electoral process and institutions has also been properly associated with the rise of modernity.⁵ Intellectual and legal historians have debated at length the way the Cortes and the Constitution signaled a shift from the world of the *ancien régime* to the modern age, noting the liminal quality of these events and documents.⁶ Indeed, some have linked the process of constitutionalization as a key component of modernization, defining modernity as “the process of constitutionalization of a society of individuals with a state power.”⁷ Related to this discussion, questions of the Constitution's incorporation or rejection of the *ancien régime*'s jurisdictional structures that served as a foundation of preconstitutional imperial government have been analyzed and debated.⁸

Despite the many liberal and modern aspects this early document in constitutional history brought to political thought, the almost immediate suspension and lack of long-standing force of the Constitution left fundamental fissures in Latin American constitutionalism from which the region still suffers. The suspension of the Constitution of Cádiz linked constitutions to political change and thus politicized constitutional law and constitutionalism. In other words, constitutions became part of the

² Estrada, *Monarquía y nación*, xviii–xix, xlv, xlvi. For the historiography of the Constitution see Breña; *El primer liberalismo*; Chust, “De rebeliones,” 465–491; and Estrada, “Los reinos,” 213–226 (addressing questions of territory).

³ Rodríguez, *The Independence of Spanish America*.

⁴ Mirow, “The Age of Constitutions,” 229–235.

⁵ Guerra, “El Soberano,” 1–2; Guerra, *Modernidad, 177–225*; Lorente, “Esencia,” 293–314; Van Young, “El momento,” 221–292.

⁶ Annino, *La Revolución*, 12–15; Garriga, “Orden Jurídico,” 37–41.

⁷ Garriga, “Orden Jurídico,” 41.

⁸ Garriga and Lorente, *Cádiz*; Rojas, “De reino,” 212–216.

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tool box employed by politicians to work political change, reform, or restoration. This hindered the ability of constitutions to transcend the political sphere in Latin America. In contrast, the United States Constitution, dating from the same period, has been able to govern above various political parties, policies, and movements. The result of the politically instrumental use of constitutions can be seen in the present lack of constitutional entrenchment and in the high frequency of new constitutions from which Latin America suffers today. These results can be traced to the region's experience with its first written constitution, the Constitution of Cádiz.

The Constitution of Cádiz is as much a constitution of empire as it is a foundational text of liberalism. The successes of European and Latin American liberalism have obscured the Constitution's place in the history of the Spanish Empire. The Constitution of Cádiz was a scramble to maintain the existence of the Spanish Empire and to maintain peninsular control of that empire through novel legal processes and institutions. It was an imperial bargain with liberalism in which established imperial beneficiaries – the church, the military, traders, and American élites – jealously and closely negotiated many liberal reforms. Those drafting and promulgating the Constitution cautiously balanced the internal conflicts in constitutional aspects now sometimes viewed as inevitably triumphant. These aspects included rights to liberty and property; the representative quality of the new government under the Constitution; the status of Indians, free blacks, and slaves; and national sovereignty.

This book seeks to inform the literature on comparative constitutionalism that is developing around the world. Some works, including some of my previous writings, argue that the United States Constitution should be viewed as an export product throughout the world and specifically in Latin America. The influence of the Constitution of Cádiz has been underestimated in the migration of constitutional ideas. While scholars have pointed out the essential contribution of the Constitution of Cádiz to the development of political ideas of independence and self-rule for the new republics of Latin America, this book focuses on its *legal* and *constitutional* legacy. Viewed from this perspective, the Constitution and its legacy have a multifaceted quality with successes and failures for legal and constitutional development in the region.

If the Constitution of Cádiz led the way into the realm of Latin American constitutionalism slightly more than 200 years ago, perhaps the next most important landmark constitution in the region is the Mexican Constitution of 1917, now approaching its hundredth

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anniversary. The Constitution of Cádiz was Latin America's first written constitution, and many have argued that the Mexican Constitution of 1917 was Latin America's first truly Latin American constitution. Each played a pivotal role in the nature, style, and ideology of constitutions in the region that would follow them. While the Constitution of Cádiz shaped nineteenth-century constitutional thought and practice in Latin America, the Mexican Constitution of 1917 was a turning point for the twentieth century, particularly through its advancement of social welfare rights related to work and its radical turn away from liberal notions of property. Since the Constitution of 1917, redefining the role of property and establishing constitutional regimes of agrarian reform have been core elements of attempts to deal with economic, political, and power imbalances in the region.

Constitutional law and meaningful, effective constitutional adjudication in Latin America have blossomed in recent decades as countries of the region have tried to shed dictatorships and autocracies for effective democratic governance and the rule of law. Substantial academic effort has been trained on present problems and challenges to an effective constitutional order in the region. By placing some of these challenges in historical context, this book reexamines the nature of these challenges and may tacitly provide some ideas about ways to move forward.

Scholars have arrived at different structures for the periods of Latin American constitutionalization. For example, Bernardino Bravo Lira has seen the region locked into a cycle of constitutionalism, anarchy, and militarism; failed democratic constitutional experiments led to anarchy that led to military dictatorships that led to new democratic periods.⁹ Roberto Gargarella has recently divided Latin America's 200 years of constitutional history into the following periods: a first period from approximately 1810 to 1850; a second "foundational period" from approximately 1850 to 1900 dedicated to notions of "order and progress"; a third shorter period of crisis when the ideas of "order and progress" no longer functioned; a fourth period of social constitutionalism beginning in the 1930s; and a fifth period from the end of the twentieth century into the present as one of "new Latin American constitutionalism."¹⁰

Gargarella's periodization is useful in its broad strokes. This book similarly follows a chronological structure but ascribes the foundational period to the constitutionalism arising from the Constitution of Cádiz in

⁹ Bravo Lira, *El estado constitucional*, 3, 196.

¹⁰ Gargarella, *Latin American Constitutionalism*, ix.

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1812, a document mentioned just a handful of times in his study. The present study finds foundational fissures from this period that have affected the region's constitutional development to this day. These include, for example, not only the clumsy juxtaposition of liberal and conservative ideas and hyperpresidentialism noted by Gargarella, but also the immediate politicization of constitutions and their lack of social entrenchment and political transcendence. We observe and report in different ways many of the same phenomena, and this book sees their origins stemming from a more distant foundational moment. And if Gargarella emphasizes change in the path of constitutionalism in Latin America, this work emphasizes continuity.

Chapter 1 discusses the crucible of the Constitution of Cádiz, mostly from an American perspective. The years leading up to the Constitution were politically unstable for the American parts of the Spanish Empire and the French invasion of Spain led to a rupture of the well-established and highly complex unwritten constitutions of colonial administration. This was a moment of constitutional limbo in Spanish America, with periods of unrest accompanied by nascent independence movements, often contradictorily grounded in direct loyalty to Fernando VII. As Latin American countries search for the “big bang” of their independence, they are often chagrined to find that there was no big bang at all, but rather a mixture of interests and assertions of loyalty to an exiled king marking the very first inklings of regional autonomy. Chapter 1 studies these moments from a constitutional standpoint, particularly in relationship to the appeal of the Cortes of Cádiz as a unifying representative body.

Chapter 2 shifts our focus to Spain. The Constitution of Cádiz can only be understood in its Spanish and European context as well. From 1808 to 1812, Spain was ravaged by war and political uncertainty. The Cortes of Cádiz met, debated, drafted, and acted against this backdrop. It was, of course, a highly interesting intellectual moment in European history. While cannon shots were heard as the deputies debated, the Cortes considered widely divergent views of what should be done with and for the Spanish Empire. This chapter explores the main issues that were at stake, the intellectual influences and political perspectives that guided the debate, and how the final text of the Constitution reflected and resolved these varied viewpoints.

Chapter 3 reveals the work of Americans in Cádiz. “The American question” involved issues of the representation of American populations and the citizenship of indigenous populations. Whether various populations counted for purposes of representation was debated with concern

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and passion. Just as the United States Constitution was forced to consider issues of slaves, slavery, and the slave trade, so too we find these issues at the forefront of the American question in Cádiz, Spain. The Americas were too powerful, too economically important, and too essential to Spain's funding of the war against France to be disregarded. Americans were not peripheral considerations; they often steered the agenda, led the debate, and greatly influenced the final text of the Constitution. They brought expertise, along with vocal expressions of national, regional, and local concerns. They continued to assert these interests in the Cortes that followed the Constitution in 1813 and 1814, and in the Cortes that were held again in the 1820s under the Constitution. This chapter also examines the constitutional ideas and experiences many returning deputies brought back to their countries, many of which were already well on the path to complete independence.

Chapter 4 considers the failures and successes of the Constitution of Cádiz. Here the furtive applications of the Constitution in Spain and in those areas that remained loyal to the Spanish crown or Cortes during these uncertain decades are examined. The chapter also consider the way the Constitution played into Latin American independence and to what extent the text and ideas behind the Constitution were influential in the constitutions of the early republics.

Chapter 5 traces what happened in Latin American constitutionalism as countries moved beyond the independence period after the 1820s and into the later nineteenth and twentieth centuries. Constitutions became tools in internal political squabbles and major political battles. Countries struggled with creating and enforcing constitutional rights through new procedural tools and courts.

The legacy of the Constitution of Cádiz as it is reflected in Latin American constitutionalism in the twentieth century is the topic of Chapter 6. The Constitution established certain patterns in the region, producing what I call the "Cádiz effect." Present-day constitutional intransigence and the frequency with which new constitutions are promulgated are part of this pattern. Indeed, the Constitution of Cádiz and its subsequent treatment by Fernando VII established a practice of the politicization of constitutionalism leading to a lack of entrenchment in legal and societal terms. This helped create a culture of constitutional noncompliance exacerbated by continued difficulties of effective constitutional enforcement mechanisms. The Cádiz effect even touches some of the theoretical problems of constitutional decision making in the region today. The Mexican Constitution of 1917, a document many consider

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to be the first truly autochthonous constitutional product of Spanish America, is a pivotal point in this chapter.

Nonetheless, Chapter 7 addresses more recent developments and suggests that the Cádiz effect can be overcome. Constitutionalism and courts enforcing constitutions are uncovering useful language in the new constitutions of the region. European and international models of constitutional practice and interpretation are informing new constitutional courts and tribunals. The region has witnessed brave constitutional judges and bold holdings directed toward the executive, legislative, and military branches, indicating that the Cádiz effect is not necessarily a permanent fixture of Latin American constitutionalism. Challenges, however, remain, and this brief assessment of current constitutional practices in the region also reports on hindrances to effective constitutional rule.

The recent bicentennial of the Constitution of Cádiz provides an apt moment to consider and to reconsider the document's creation, influence, and legacy. The text and those implementing it struggled with questions of sovereignty; electoral representation; the place and incorporation of various peoples within the Americas; limits on the executive branch's exercise of power; the role of the church, religion, and the military in politics and society; the place of the judiciary in these questions; and how to effect a lasting, meaningful, and entrenched constitutional regime that governed well and protected citizens. In many ways, the questions presented by the Constitution of Cádiz and its deputies are the same questions put to Latin American constitutionalism today.

Although the Constitution of Cádiz has been widely praised as a liberal document establishing a constitutional monarchy, it must be properly considered in the historical context of empire. There is also a negative side to the story. The Constitution of Cádiz represents a failed founding constitutional moment from which constitutional regimes in Latin America continue to recover with great effort and, at times, with great success. The constitutions of Latin American countries today must also be considered in their political contexts and in light of the interests that constructed them and administer them.

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I

Constitutional Limbo in Early Nineteenth-Century Latin America

The years leading up to the Constitution of Cádiz were politically unstable for the American parts of the Spanish Empire, and the French invasion of Spain led to a rupture of the well-established and highly complex unwritten constitutions of colonial administration. This was a moment of constitutional limbo in Spanish America, with periods of political unrest and the development of nascent independence movements. Assertions of independence from the peninsula and its provisional government were contradictorily grounded in direct loyalty to Fernando VII, then in exile. As Latin American countries searched for the “big bang” of their independence, they were often chagrined to find that there was no big bang at all, but rather a mixture of interests and assertions of loyalty to an exiled king marking the first inklings of regional autonomy.¹

These moments can be studied from a constitutional standpoint, particularly when recognizing the appeal of the Cortes of Cádiz as a unifying representative body offering imperial continuity. Two primary aspects shaped constitutional thought in the Spanish world as deputies assembled in Cádiz. These were, first, the unwritten constitution of the Spanish Empire, Spain’s “ancient constitution,” on the eve of the Napoleonic occupation and, second, the constitutional documents in circulation at the time of the Cortes, including early American constitutions of independence, often in their own wording, loyal and monarchical in tone. The Constitution of Cádiz in the Americas was prefigured by significant recent institutional changes from the 1760s onward that came from the Bourbon Reforms and by the surprisingly numerous written

¹ Similarly, Rodríguez, “*We Are Now*,” 3.

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constitutions that came before it in Europe and the Americas. Though officially banned, Enlightenment thought and writings were widely available. A member of the Spanish colonial élite, Antonio Nariño, obtained a copy of the French Declaration of the Rights of Man and published a translation of it that circulated widely. He was sentenced but escaped during his transportation to prison.²

Although to think in terms of a clear and inevitable transition of sovereignty from empire to nation may create a neat line of transformation, recent historians have reminded us that there was little or nothing that was core or fixed in either form of sovereignty, and that resulting nations, and underlying notions of nation, were only one direction of many possible directions. These paths toward the nation might include movement backwards, false starts, shifting views, and even moments of profound confusion and uncertainty. Recent investigations of sovereignty in the period reveal that it operated on various levels and that assumptions about territoriality, duality between metropole and periphery, and uniformity within empire must be discarded in favor of a more complex conception incorporating continually negotiated arrangements of internal and external power, jurisdiction, and even geographic formations.³ Similarly, the legally pluralistic nature of empires has been uncovered and analyzed; different legal systems, components, and jurisdictions clashed with each other and with the centers of empire.⁴ The constitutions of this period unwittingly battled with these complex legal models of empire as they sought to standardize and to make uniform the rules of law and government, rules that, in turn, became additional factors in the legal and governmental terrain.

In keeping with this newer appreciation of empire, Jeremy Adelman writes of the “elasticity” of “polymorphous sovereignties” in the period and warns us that “narratives of empire need not collapse repeatedly into familiar dichotomies of empire *or* nation, empire *versus* nation.”⁵ In fact, recent historians of Latin American independence have abandoned the theme of “the birth of the nation” and shifted their focus away from the search for national identity and sovereignty.⁶ Nonetheless, when considering constitutional development and change, questions of sovereignty are central. Indeed, constitutions are essentially implementations

² Bushnell, *The Making*, 32–34, 38; Safford and Palacios, *Colombia*, 70–72.

³ Adelman, “An Age of Imperial Revolutions,” 320–334; Benton, *A Search for Sovereignty*; Benton, *Law and Colonial Cultures*, 1–30; Benton, “The Legal Regime.”

⁴ Benton and Ross, “Empires,” 1–9.

⁵ Adelman, “An Age of Imperial Revolutions,” 336, 337 (Adelman’s emphasis).

⁶ Adelman, “What’s in a Revolution?” 188–189.