

PRE-CONSTITUTIONAL LAW AND CONSTITUTIONS: SPANISH COLONIAL LAW AND THE CONSTITUTION OF CÁDIZ

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The Spanish Constitution of Cádiz of 1812¹ (“Constitution”) has recently attracted the attention of constitutionalists and legal historians for its role as an essential step in the development of both world and Latin American constitutionalism. The interest in the Constitution has increased due to its 2012 bicentennial and the rolling independence bicentennials of the Latin American republics. There is a well-documented connection between the events leading to the Constitution’s implementation throughout the Spanish Empire and both initial Latin American independence movements and subsequent constitutional texts and practices.² There are fewer studies, however, concerning the pivotal role the extant Spanish colonial law (*derecho indiano*) played in these events.³

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1. The name Constitution of Cádiz comes from the city where this Spanish constitution was promulgated, Cádiz, in Andalusia, Spain. For a description of this vibrant trading city on the Atlantic coast of Spain during the period presented in this Article, see RAMÓN SOLÍS, *EL CÁDIZ DE LAS CORTES: LA VIDA EN LA CIUDAD EN LOS AÑOS DE 1810, at 1813* (2000).

2. See, e.g., MANUEL CHUST, *LA CUESTIÓN NACIONAL AMERICANA EN LAS CORTES DE CÁDIZ (1810–1814)* (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* 209–36 (2010); IVANA FRASQUET, *LAS CARAS DEL ÁGUILA; DEL LIBERALISMO GADITANO A LA REPÚBLICA FEDERAL MEXICANA (1820–1824)* (Universitat Jaume I) (2008); Eduardo Herrera, *Los Orígenes del constitucionalismo en Iberoamérica*, in *AMÉRICA Y LA HISPANIDAD: HISTORIA DE UN FENÓMENO CULTURAL* (Antonio Cañellas ed., 2011); Abelardo Levaggi, *Constitución de 1812: Presencia Latinoamericana*, in *LA CONSTITUCIÓN DE 1812: REFLEXIONES JURÍDICAS EN LA VÍSPERA DEL BICENTENARIO* 57, 57–81 (Juan María Terradillos Basoco ed., 2006); MARTA LORENTE SARIÑENA, *LA NACIÓN Y LAS ESPAÑAS: REPRESENTACIÓN Y TERRITORIO EN EL CONSTITUCIONALISMO GADITANO* (2010); JAIME E. RODRÍGUEZ O., *THE INDEPENDENCE OF SPANISH AMERICA* (1998). Recent volumes of the *ANUARIO MEXICANO DE HISTORIA DEL DERECHO* and *RECHTSGESCHICHTE* are dedicated to this topic. See 22 *ANUARIO MEXICANO DE HISTORIA DEL DERECHO* (2010) and 16 *RECHTSGESCHICHTE*

Instead of exploring the effect produced by the Constitution in subsequent constitutional developments, this study examines the way existing law informed the constitutional process in Cádiz and shaped the Constitution itself. More specifically, this article examines the role and function of Spanish colonial law as related to both the constitutional debates and the text itself.⁴ It seeks to explore the important place Spanish colonial law had in the Constitution's construction, the way it limited the scope of the Constitution, and the way the Constitution, in turn, shaped Spanish colonial law.

Spanish colonial law's effect on the Constitution and in the Cortes⁵ has three distinct aspects. First, Spanish colonial law served as a common

(2010), both with numerous contributions by experts in the field. The Constitution of Cádiz has also recently attracted the attention of legal scholars in the United States. *See, e.g.*, 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). For more on the promulgation of the Constitution in Florida and Cuba, see M.C. Mirow, *The Constitution of Cádiz in Florida*, 24 FLA. J. INT'L L. 271–330 (2012); M.C. Mirow, *The Constitution of Cádiz in Cuba and Florida*, in THE CONSTITUTION OF CÁDIZ AND ITS IMPACT IN THE ATLANTIC WORLD (Scott Eastman & Natalia Sobrevilla eds., forthcoming 2013).

3. *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*, 50 REVISTA DE ESTUDIOS POLÍTICOS 141–61 (1951). For studies concerning Spain's unwritten constitution before the Constitution of Cádiz ("the Constitution"), see EDUARDO MARTIRÉ, DOS LECCIONES DE HISTORIA DEL DERECHO ARGENTINO: LOS DERECHOS DE LAS PERSONAS EN INDIAS, GARANTÍAS Y LIBERTADES 11–35 (1989); JOSÉ MARÍA PORTILLO VALDÉS, REVOLUCIÓN DE NACIÓN: ORIGENES DE LA CULTURA CONSTITUCIONAL EN ESPAÑA, 1780–1812, at 13–155 (2000); DINÁMICAS DE ANTIGUO RÉGIMEN Y ORDEN CONSTITUCIONAL: REPRESENTACIÓN, JUSTICIA Y ADMINISTRACIÓN EN IBEROAMÉRICA SIGLOS XVIII–XIX (Marco Bellingeri ed., 2000). For the term "*derecho indiano*," see *infra* note 4.

4. Translating *derecho indiano* into English is particularly problematic. There is a strong argument that it is best left untranslated. However, "Spanish colonial law," the translation used in this text, captures the essence of the term and improves accessibility for English-speaking readers. Even the Library of Congress classification system struggles with the term, as it 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.*, Antonio Dougnac Rodríguez, *Manual de Historia del Derecho Indiano*, LIBRARY OF CONGRESS ONLINE CATALOGUE (1994), available at <http://catalog.loc.gov/cgi-bin/Pwebrecon.cgi?v3=1&ti=1.1&SEQ=20120213153837&Search%5FArg=antonio%20dougnac%20derecho%20indiano&Search%5FCode=GKEY%5E%2A&CNT=100&PID=6RM5GKxo6kvCPE8WaUVBeyYE0-X5&SID=1>. 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 (Stanley N. Katz ed., 2009); M.C. Mirow, *South and Central America: Overview*, in 5 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 284–85 (Stanley N. Katz ed., 2009).

5. The Cortes were the quasi-representative bodies that gathered in southern Spain, usually Cádiz, as a governing bodies of the Spanish Empire loyal to the absent King Fernando VII after the

knowledge base concerning the status of the Americas, their institutions, and their relation to peninsular Spain.⁶ Second, Spanish colonial law served as a source to resolve questions of law during the constitutional drafting process.⁷ Third, Spanish colonial law was at the forefront of a broader debate concerning the Constitution's historicity and the extent to which the Constitution's text merely affirmed pre-existing institutions, rights, concepts, and structures into a new written text.⁸

To understand fully the interaction between the Constitution and Spanish colonial law, the two must first be understood separately. The Constitution is well known by historians of political thought, constitutional law, and nineteenth-century liberalism.⁹ 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 during the independence period.¹⁰ 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.¹¹ The text included provisions that evinced a liberal bias: representative elections at multiple levels of government,¹² restrictions on the power of the king,¹³ rights to property,¹⁴ and rights for the criminally accused.¹⁵ Because the Constitution was drafted by deputies representing not only peninsular Spain but also the American provinces, it was the first

Napoleonic invasion of Spain. The first convocation of the Cortes led to the General and Extraordinary Cortes (*Cortes Generales y Extraordinarias*) on September 24, 1810. The General and Extraordinary Cortes drafted and promulgated the Constitution of Cádiz. Subsequently, Cortes was held under the provisions of the Constitution of Cádiz and, thus, was no longer "extraordinary." M.C. Mirow, *Visions of Cádiz: The Constitution of 1812 in Historical and Constitutional Thought*, in 53 *STUDIES IN LAW, POLITICS, AND SOCIETY* 63–64, 76 (Austin Sarat ed., 2010) [hereinafter Mirow, *Visions*].

6. See *infra* notes 22–53 and accompanying text.

7. See *infra* notes 54–79 and accompanying text.

8. See LORENTE, *supra* note 2, at 12–20; Mirow, *Visions*, *supra* note 5, at 66–67.

9. Mirow, *Visions*, *supra* note 5, at 59–81. For an English translation of the Constitution see M.C. MIROW, *FLORIDA'S FIRST CONSTITUTION, THE CONSTITUTION OF CÁDIZ: INTRODUCTION, TRANSLATION, AND TEXT* (2012).

10. See RODRÍGUEZ, *supra* note 2, at x, xi, 59, 69, 70–74.

11. C.E. art. 12, Mar. 19, 1812 (Spain).

12. *Id.* arts. 27–103.

13. *Id.* art. 172.

14. *Id.* 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.")

15. For more on 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* 189–205 (Georges Martyn, Anthony Musson & Heikki Pihlajamäki eds., 2013).

truly transatlantic constitution, and the American influences on the Constitution and vice-versa have been a subject of substantial speculation, historical scholarship, and debate.¹⁶

Because the exact status of the Americas in the Spanish Empire was not entirely clear—the Americas could arguably be seen as completely separate from Spain, or as incorporated provinces of the Spanish Empire—Spanish colonial law oscillated between law best characterized as strict imperial law, and that which falls closer to 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.¹⁷ 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.¹⁸ The *Recopilación*, referred to throughout this study, was divided into nine books roughly dealing with the following subject matters: (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.¹⁹ The diversity of sources contributing to Spanish colonial law,

16. See, e.g., CHUST, *supra* note 2; ESTRADA, *supra* note 2; FRASQUET, *supra* note 2; LORENTE, *supra* note 2; M.C. MIROW, *The Constitution of Cádiz in Florida*, *supra* note 2; MARIE LAURE RIEU-MILLAN, LOS DIPUTADOS AMERICANOS EN LAS CORTES DE CÁDIZ (IGUALDAD O INDEPENDENCIA) (1990); MARIO RODRIGUEZ, THE CÁDIZ EXPERIMENT IN CENTRAL AMERICA, 1808 TO 1826 (1978).

17. VICTOR TAU ANZOÁTEQUI, ¿QUÉ FUE EL DERECHO INDIANO? 23 (3d ed. 2005).

18. 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: A COMPARATIVE LEGAL HISTORY OUTLINE 162–81, 224–31, 241–55 (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*, at 47–48, 50.

The public law of the Indies was successfully compiled in 1680 as the *Recopilación de Leyes de las Indias*. . . . Providing the rules for government structures and institutions, this work was consulted and cited frequently, and it has been the subject of numerous studies. In enacting the *Recopilación* of 1680, Charles II ordered that earlier, contradictory laws no longer held authority. . . . Its sources are laws emanating from the Spanish crown and peninsular royal bodies, but not from the colonial *audiencias*, viceroys, *consulados*, or *cabildos*. The first edition was published in 1681 with reissues in 1756, 1774, and 1791. . . . It is divided into nine books and 218 titles.

Id. at 47.

19. MIROW, LATIN AMERICAN LAW, *supra* note 18, at 48.

the multiple provincial provisions, and the variety of local customs leads to an understanding that perhaps there was not one uniform system of Spanish colonial law.²⁰ Thus, one may think in the plural of Spanish colonial laws. Despite the increasing centralization within the Spanish Empire leading up to the century of the Cortes of Cádiz, local variations continued and the laws and customs of indigenous communities also continued to be expressed as applicable legal norms.²¹

I. SPANISH COLONIAL LAW AS A COMMON BASE OF LEGAL KNOWLEDGE

One does not need to read much of the Constitution to realize that it has much to do with America, or *Ultramar*, as Spaniards then called it. 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.”²² Article 10 reinforces the continental continuity, stating that the territory of Spain explicitly includes, in this order: New Spain, New Galicia, the Yucatan, Guatemala, the Provinces of the East, the Provinces of the West, Cuba, the Floridas, Santo Domingo, Puerto Rico, New Granada, Venezuela, Peru, Chile, and Rio de la Plata.²³ Other articles make it clear that the Cortes of Cádiz never stopped thinking about America’s place within the Spanish Empire and within the text of the Constitution. The ideas of “both hemispheres,” America, or *Ultramar*, are found in articles dealing with citizenship,²⁴ the formation of the Cortes,²⁵ elections at the city (*parroquia*), district (*partido*), and province (*provincia*) levels,²⁶ the composition of the Permanent Deputation of the Cortes, a kind of standing committee when the Cortes were not in session,²⁷ the creation of an Office of Overseas,²⁸ the composition of the Council of State,²⁹ the jurisdiction of the tribunals to hear appeals in the region,³⁰ and the power of the deputations to oversee public works.³¹

20. TAU, *supra* note 17, at 20–38.

21. *Id.* at 38–44.

22. C.E. art. 1, Mar. 19, 1812 (Spain) (“*La Nación española es la reunión de todos los españoles de ambos hemisferios.*”).

23. *Id.* art. 10.

24. *Id.* arts. 18–25.

25. *Id.* arts. 28–33.

26. *Id.* arts. 37, 61, 80.

27. *Id.* arts. 157–58.

28. *Id.* art. 222.

29. *Id.* art. 232.

30. *Id.* arts. 261(9), 268.

31. *Id.* art. 335(4).

Americans had significant representation in various political and representative bodies created during the period, including memberships in the Regency,³² as presidents, secretaries, and vice-presidents of the Cortes, in the Permanent Deputations, and on the committee that prepared the draft Constitution.³³ No fewer than 47 deputies, representing overseas interests, out of a total of 183 signers, signed the Constitution.³⁴ Of the 86 deputies from the Americas, approximately one third (28) were trained lawyers.³⁵ They fought diligently to increase the Americas' power and influence 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.³⁶ Issues related to the Americas were often before the Cortes. 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.³⁷

American deputies at the Cortes were important contributors to the drafting of the Constitution. A site filled with ships and businesses, sailors and merchants, and cafés and traders at the time of the Constitution, Cádiz was a bustling economic hub with political institutions tied to foreign trade, and trade with the Americas in particular.³⁸ In addition to the political and economic activities that tied the Americas to Cádiz, American financial contributions were essential in continuing the Spanish fight against the French.³⁹ 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.”⁴⁰ Nonetheless, the quality of

32. A regent served in place of the king. The Regency was the group of individuals serving as the representative of the king in his absence. Mirow, *Visions*, *supra* note 5, at 6.

33. RAFAEL MARÍA DE LABRA, *AMÉRICA Y LA CONSTITUCIÓN ESPAÑOLA DE 1812*, at 61–63 (1914).

34. *Id.* at 63–64.

35. RIEU-MILLAN, *supra* note 16, at 58.

36. DE LABRA, *supra* note 33, at 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).

37. DE LABRA, *supra* note 33, at 74–84.

38. SOLÍS, *supra* note 1.

39. Mirow, *Visions*, *supra* note 5, at 71.

40. RIEU-MILLAN, *supra* note 16, at 66.

debate and overall consideration of the Americas in Cádiz suffered in several crucial respects due to a lack of knowledge and understanding about the current state of affairs in the Americas.⁴¹ American voices were respected and heard, but not always victorious, in the process of drafting and promulgating the Constitution.⁴²

About one hundred years ago, Rafael María de Labra began his study of the Americas and the Constitution with a detailed description of the content of the *Recopilación*.⁴³ He was correct to begin with this source because the sources of Spanish colonial law, and especially the *Recopilación*, defined the manner in which the drafters of the Constitution understood the Americas. De Labra noted the traditional topics related to the Americas, the conversion of the indigenous inhabitants, transatlantic trade, and the Crown's guidance of the Roman Catholic Church in the Americas, called the *Real Patronato*.⁴⁴ Despite these distinctive features, there was also a juridical uniformity between the Spain of Europe and the Spain of the Americas.⁴⁵ 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.⁴⁶

41. RIEU-MILLAN, *supra* note 16, at 69–74. There may have even been jealousy of the perceived ease 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 243–66 (1981).

42. Mirow, *Visions*, *supra* note 5, at 71–81.

43. DE LABRA, *supra* note 33.

44. *Id.*

45. *Id.* at 37.

46. *Id.* at 36–37 (“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 Metropolitica, manteniendo la unidad del derecho en todo el Imperio y la identidad de español de Europa y de América.”).

The overarching understanding is one of legislative and cultural similarities, 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. De Labra's use of the *Recopilación* illustrates this. Although at times the deputies wanted to change, and in fact changed much related to the Americas through the Constitution, Spanish colonial law remained the first source the drafters turned to for consultation on the relationship between the monarchy and the American territories.

The proposals of the Cortes or of groups of deputies often required drastic changes in the governing legislation. For example, on the 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.⁴⁷ 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 addressing institutional representatives.⁴⁸ Additionally, Spanish colonial law informed the discussion on other fundamental institutional topics, such as the American highest courts of appeal (*audiencias*) and ecclesiastical administration.⁴⁹ 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.⁵⁰

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*:

It is prohibited that individuals live away from towns and separated by the mountains and hills, depriving themselves of all spiritual and

47. RIEU-MILLAN, *supra* note 16, at 175–218.

48. *Id.* at 219–53.

49. *Id.* at 253–62, 269.

50. *Id.* at 266–67.

bodily benefit, without the aid of help and which human necessity requires that men ought to give to each other.⁵¹

According to Rieu-Millan, “[t]he Commission only proposed that the existing laws be enforced.”⁵² Even after the first decades of the nineteenth century, Spanish colonial law, in the form of the *Recopilación*, shaped peninsular ideas of the Americas within Spanish constitutional practices and texts.⁵³ Because it served as a fundamental source of the rules, ideas, structures, and institutions related to the Americas, Spanish Colonial law was the first source that the deputies turned to when considering the Americas and their relationship to the Spanish Empire. This allowed the Cortes and the drafters in many instances to reassert general propositions about the law, rather than create a new system of governance with respect to the Americas.

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,” it must be noted that this text was, of course, a constitutional solution to a large and difficult problem. The moment Fernando VII renounced the throne in favor of Napoleonic occupation of the peninsula, the American colonies were without direction and clear leadership.⁵⁴ On the one hand, the American colonies were 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. . . . 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.⁵⁵

51. *Id.* at 141 (“[S]e prohíbe que los individuos vivan fuera del poblado y separados por las sierras y montes, privándose de todo beneficio espiritual y corporal, sin socorro de ministro y del que obligan las necesidades humanas que deben dar unos hombres a otros.”). Living apart and especially in mountains was not only an 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 222–36 (2010).

52. RIEU-MILLAN, *supra* note 16, at 141.

53. LORENTE, *supra* note 2, at 217–60.

54. Mirow, *Visions*, *supra* note 5, at 61–62.

55. García Gallo, *supra* note 3, at 170 (“[y] las leyes castellanas eran comunes; y, por otra parte, se consideraban las Indias como una unidad en que quedaban sin relieve sus diferencias de toda clase

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. As a result of the French occupation of Spain and the political uncertainty created throughout the empire, the ill-defined status of the Americas surfaced in political and constitutional debate.⁵⁶

Spanish colonial law played an important role in the process of determining a political solution to the question of the status of the Americas. The juridical base for assertions of equality between both hemispheres can be found in the legislation concerning 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.⁵⁷

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 argued that the equal treatment the Americas received under the Constitution was inconsistent with labeling them “colonies.”⁵⁸

. . . 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.”). For a philological and historical study of the divisions and regions of America in this period, see 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).

56. Mirow, *Visions*, *supra* note 5, at 71–81.

57. RIEU-MILLAN, *supra* note 16, at 96–97 (“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.”). For more on the role of the Junta Central before the gathering of the Cortes, see Mirow, *Visions*, *supra* note 8, at 62–63. 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 America*, 1 J. GLOB. HIST. 241 (2006). For a discussion of recent literature concerning this question, see Estrada, *Los Reinos*, *supra* note 2.

58. ARGÜELLES, *DISCURSOS*, *supra* note 41, at 245. Argüelles states:

En cuanto al otro punto de subsistir las Américas gobernadas segun el sistema colonial, solo apelo à la justificacion del Congreso. Una Constitucion que concede iguales derechos à todos los españoles libres; que establece una representacion nacional; que ha de juntarse todos los años à sancionar leyes, decretar contribuciones y levantar tropas; que erige un

One deputy even found a specific legal answer to the entirely political question of the status of the Americas 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, 1810.⁵⁹ Although most deputies considered only the political nature of the question, 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 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.⁶⁰

Consejo de Estado compuesto de europeos y americanos, y que fija la administracion de justicia de tal modo, que bajo de ningun pretexto tengan que venir estos à litigar en la Península; una Constitucion, digo, que reposa sobre estas bases ¿es compatible con un régimen colonial?

Id.

59. 1 DIARIO DE SESIONES DE LAS CORTES GENERALES Y EXTRAORDINARIAS 353 (1870).

60. *Id.*

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 Carlos 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 ley 1a, 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.

This is the kind of argument one might expect from a doctor of both civil and canon laws and chaired professor of the University of San Marcos in Lima.⁶¹ Deputy Morales Duárez's analysis was based on the various sources of the Spanish colonial law as incorporated into the *Recopilación*. He displayed and used his knowledge of the applicable legislation to reach a conclusion on the question presented. Thus, Spanish colonial law provided important evidence concerning the pressing political question of the status of the Americas. It was the first source that members of the Cortes, from both hemispheres, turned to for an answer.

Shortly after establishing the equality of the Americas under a decree of October 15, 1810, the Cortes ironically had to consider an administrative system for the overseas territories (*Ultramar*). The process of creating an administrative structure for the Americas revealed and exacerbated the extant differences between the Americas and the peninsula. 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 complex aspects with respect to the American territories.⁶² Despite the equality of the Americas, their exceptional quality was also a reality.⁶³

In the course of setting out the fundamental differences between the Americas and 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.⁶⁴ Spanish colonial law also played a role in these determinations. To be a Spaniard, one had to have free status. Spanish colonial law, as expressed in the *Leyes Nuevas* of 1526 to 1549, as found in Book 6 of the *Recopilación*, prohibited the servitude of indigenous peoples.⁶⁵ Thus, one source of Spanish colonial law indicated that indigenous people were free when considering the requirements for being a Spaniard. On January 11,

Debe hacerse alto en esas palabras incorporadas y unidas, para entender que las provincias de América no han sido ni son esclavas ó vasallas de las provincias de España; han sido y son como unas provincias de Castilla, con sus mismos fueros y honores.

Id.

61. *Los Diputados Doceanistas: Morales Duarez, Vicente*, CÁDIZ 2012: CAPITAL IBEROAMERICANA DE LA CULTURA 2012, http://www.cadiz2012.es/diputados_detalle.asp?id=16&letra=m (last visited Oct. 26, 2012).

62. RIEU-MILLAN, *supra* note 16, at 295–99.

63. *See id.* at 295–99.

64. Mirow, *Visions*, *supra* note 5, at 75–76.

65. DE LABRA, *supra* note 33, at 110–16. This was, of course, contrary to a standard practice of exploitation in the Americas. *See* MIROW, *LATIN AMERICAN LAW*, *supra* note 18, at 84–91.

1811, the Cortes debated this provision. In the face of opposition, the jurist Morales Duárez of Lima again used various Spanish authors and sources of Spanish colonial law to argue that indigenous peoples had the legal capacity to be Spaniards.⁶⁶ In addition to the well-known literature of Bartolomé de las Casas and Juan de Palafox y Mendoza, Morales Duárez cited Solórzano to underscore the role and importance that indigenous people had in the monarchy as a whole.⁶⁷ Morales Duárez added that according to the *Recopilación* 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.”⁶⁸ Furthermore, the requirements of legal residence (being a *vecino*) to have the status of citizen were defined by provisions in Spanish sources as varied as the *Siete Partidas* from the thirteenth century and *Novísima Recopilación* of the early nineteenth century.⁶⁹ Similarly, Agustín Argüelles turned to Spanish colonial law to clarify the legal status of America’s indigenous people by citing provisions of the *Recopilación* of 1680 that removed indigenous populations from the supervision of the Inquisition.⁷⁰ Spanish colonial law, however, contained little that could elevate the status of free blacks or slaves.⁷¹ This argument that slavery only existed for blacks and mulattos was used to support the free status of indigenous people.⁷²

66. RIEU-MILLAN, *supra* note 16, at 113–14.

67. *Id.* at 113–15.

68. *Id.* at 114.

69. DE LABRA, *supra* note 33, at 145–46. For more on the *Siete Partidas* and the *Novísima Recopilación*, see MIROW, *LATIN AMERICAN LAW*, *supra* note 18, at 49–53.

70. 1 AGUSTÍN DE ARGÜELLES, EXÁMEN HISTÓRICO DE LA REFORMA CONSTITUCIONAL 336–37 (Lóndres, Imprenta de Carlos Wood ed., 1835) [hereinafter ARGÜELLES, EXÁMEN HISTÓRICO DE LA REFORMA CONSTITUCIONAL].

71. RIEU-MILLAN, *supra* note 16, at 147, 157.

72. DE LABRA, *supra* note 33, at 110–16. Nonetheless, this does not mean that slavery was not an issue debated at the Cortes. José Miguel Guridi Alcócer and Agustín Argüelles spoke about slavery and the slave trade. *Id.* at 127–33. Some scholars in the United States oddly associate the Constitution with the abolition of legal or 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 Stefanic 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 casta 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)). For a more tempered, and more accurate, reading of the articles of the Constitution of Cádiz as they relate to race, see Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 16–18 (2000); see also Nilda Garay Montañez, *La idea de igualdad en el*

American deputies at the Cortes educated the members of the Cortes on how Spanish colonial law functioned in the Americas. Rieu-Millan provides a telling example from the debates on March 30, 1811.⁷³ 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.⁷⁴ When some deputies stated that they knew nothing about the nature of a *repartimiento*, other American deputies spoke to explain the institution, and the Peruvian deputy Feliú provided a short discourse on the topic.⁷⁵ *Repartimientos* were not reintroduced.⁷⁶ Similarly, on another occasion, during a debate concerning the abolition of the *mita*, another form of forced indigenous labor, José Joaquín Olmedo, the deputy from Guayaquil, cited passages from the classic work on Spanish colonial law, Solórzano's *Política Indiana*, to explain the institution.⁷⁷

A final example may be drawn again from Morales Duárez, who argued in defense of the decision to “pay priests with the nine-tenths [taxes] of the king and additionally with the treasury of Lima.”⁷⁸ 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.⁷⁹

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 turned to Spanish colonial law as a source for particular established rules and guides. The pervasive influence of the Spanish colonial law in the Cortes on topics touching the Americas is noteworthy. Spanish colonial law also affected broader questions of exactly how to draft a constitution and how closely the text of the Constitution reflected existing pre-Constitutional legislation and practices.

constitucionalismo liberal español: lo racial, las castas y lo indígena en la Constitución de 1812, 69–70 CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL 129–58 (2012).

73. RIEU-MILLAN, *supra* note 16, at 80.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 124 (debate of Oct. 21, 1812).

78. *Id.* at 80.

79. *Id.* (Toledo in Peru 1569, debate of June 20, 1811).

III. SPANISH COLONIAL LAW IN THE DEBATES ON THE HISTORICITY OF THE CONSTITUTION

Spanish colonial law was also used to justify the constitutional process and certain provisions of the Constitution itself. Thus, past historical practices and texts that were part of the Spanish colonial law were invoked in making a constitution. This process was often accompanied by the assertion that the Constitution itself contained or proposed nothing new.⁸⁰ The search for the historicity of the Constitution was much more than an after the fact attempt to justify the text.⁸¹ Of course, the search for historicity was part of the self-deception the deputies in the Cortes perpetrated on themselves. Historicity was important to them in that it was more than just a simple manner to introduce unexpected new ideas into the Constitution.⁸²

Political actors sought to justify their actions by relying on established legal authorities and past practices. Otherwise, they could have been subject to charges of treason and revolution for forming governing juntas, asserting royal authority through a regency, or purporting to act on behalf of an absent king.⁸³ There was nothing novel about this method of justifying one's actions in the midst of political change.⁸⁴ The reforms brought by the Cortes and the Constitution were grounded in, or at least asserted to be grounded in, past practices, accepted legal texts, and Spain's historical and political experiences.⁸⁵ 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.⁸⁶ Jaime Rodríguez has expressed the view that using such sources as justification in the drafting of the Constitution was little more

80. Mirow, *Visions*, *supra* note 5, at 66–67.

81. In this context, historicity should be understood to mean that an action is consistent with and based on genuine antecedents in a true existing tradition, rather than the product of convenient fabrication. This and the following three paragraphs are based on Mirow, *Visions*, *supra* note 5, at 66–67.

82. See CARLOS GARRIGA & MARTA LORENTE, CÁDIZ, 1812: LA CONSTITUCIÓN JURISDICCIONAL 15–168 (2007); LORENTE, *supra* note 2, at 19–46, 135–83.

83. Mirow, *Visions*, *supra* note 5, at 66.

84. See JOHN P. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW: THE AUTHORITY OF RIGHTS (1993).

85. See *infra* notes 93–155 and accompanying text.

86. The classic work on the relationship between history and unwritten constitutions, in the English context, is J.G.A. Pocock, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY, A REISSUE WITH RETROSPECT (1987).

than a historical fiction.⁸⁷ Nonetheless, this process of justification was important because it provided the intellectual and rhetorical basis upon which sweeping changes were permitted. This was particularly true in the Americas where, for example, Spain's unwritten constitution was seen as including American rights established by Spanish colonial law.⁸⁸

Proponents of draft proposals and new constitutional provisions grounded their ideas in the "historical constitution of the Monarchy."⁸⁹ To support the creation of a Regency during the absence of the king, those forming the institution turned to the *Siete Partidas*.⁹⁰ In a move likely calculated to stymie innovation in the Constitution, the Sevillian lawyer and deputy Francisco Gómez Fernández suggested that each article cite the established Spanish law that justified it or that it modified, to ensure the historicity of the text.⁹¹ This proposition was voted down, but it illustrates the importance of historical justification and its political use in the drafting process.⁹² While each individual constitutional provision was not linked to established Spanish law, as a general principle, statements tying the Cortes' activities and the Constitution's text to Spain's ancient constitution contributed to the Cortes' acceptance of radical changes in the text of the Constitution.

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 Espiga y Gadea to draft an Introduction (*Discurso preliminar*), which was most likely written principally by Agustín Argüelles.⁹³ The main reason for this Introduction was to demonstrate the Constitution's conformity with the established laws of Spain.⁹⁴ Artola exposed well the polemical use of history evoked to justify novelties within the text. He wrote,

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

87. RODRÍGUEZ, *supra* note 2, at 46–48.

88. *Id.* at 46.

89. Miguel Artola, *Estudio Preliminar*, in II LA CONSTITUCIÓN DE 1812, at 40–41 (Miguel Artola & Rafael Flaquer Montequi eds., 2008).

90. *Id.* at 21.

91. *Los Diputados Doceanistas: Gómez Fernández, Francisco*, CÁDIZ 2012: CAPITAL IBEROAMERICANA DE LA CULTURA 2012, <http://www.cadiz2012.es/diputados.asp?id=189&letra=g> (last visited Oct. 26, 2012).

92. Artola, *supra* note 89, at 64–65.

93. *Id.* at 59; DE LABRA, *supra* note 33, 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 ARGÜELLES, DISCURSOS, *supra* note 41, at xvii.

94. Artola, *supra* note 89, 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.⁹⁵

Artola asked the reader to consider how anything but fancifully interpreted Spanish historical material could be put forth as justification for constitutional innovations. These included 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.⁹⁶ 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.⁹⁷ History was used, in the words of Estrada, “more as a unifying myth than an effective guide,”⁹⁸ 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.⁹⁹ Nevertheless, such historical claims were viewed as essential to produce a text that would find the Cortes’ approval.¹⁰⁰ Argüelles’s Introduction is an important document to examine this desire to base the text in historical antecedents, especially in light of Spanish colonial law.

The Introduction to the Constitution is longer than the Constitution itself. In the Introduction, the importance of the Americas and Spanish overseas territories abuts the justifications of the Constitution’s historicity. The Introduction attempts to present the Constitution as a simple manifestation of the existing Spanish juridical tradition.¹⁰¹ 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

95. *Id.* (“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.”).

96. *Id.* at 60–63, 67.

97. RODRIGUEZ, *supra* note 2, at 3.

98. ESTRADA, MONARQUÍA Y NACIÓN, *supra* note 2, at 401.

99. *Id.* at 402.

100. Mirow, *Visions*, *supra* note 5, at 66–67. Gómez Fernández’s proposal to base every article of the Constitution on an established law or provision has already been noted. Debate on Art. I (Aug. 25, 1811), in II LA CONSTITUCIÓN DE 1812, *supra* note 89, at 317–18.

101. *Discurso Preliminar*, in RAFAEL GARÓFANO SÁNCHEZ & JUAN RAMÓN DE PÁRAMO, LA CONSTITUCIÓN GADITANA DE 1812, at 59 (1987) [hereinafter *Discurso Preliminar*].

structure of these classical works of public law.¹⁰² In fact, the Introduction asserted that if one saw innovation or novel ideas in the Constitution, this would only be the result of not knowing sufficiently “the history and ancient legislation of Spain.”¹⁰³ 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 author with substantial practical legal experience in the Americas), of Pedro Mártir de Anglería (a chronicler and member of the Council of the Indies), and of Juan de Mariana (a Jesuit historian).¹⁰⁴

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.¹⁰⁵ The entire Constitution is presented as a compilation of Spanish public law from the “immense collection of the body of the law that forms Spanish jurisprudence” 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 Recopilación.”¹⁰⁶ 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.”¹⁰⁷ To assure the historicity of the Constitution, the Introduction speaks of another commission that compiled all the pertinent legislation on structural and constitutional issues. The Cortes was to use these materials as guides for their “nature and spirit” and as evidence of laws that continue to advance the common interest.¹⁰⁸

102. *Id.*

103. *Id.* at 60.

104. *Id.* 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 18, 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 18, at 15–16.

105. *Discurso Preliminar*, *supra* note 101, at 61–64.

106. *Id.* at 65, 108.

107. *Id.* at 65 (“*Cuando la Comisión dice que en su proyecto no hay nada nuevo, dice una verdad incontrastable, porque realmente no lo hay en la sustancia.*”).

108. *Id.* at 65, 66. This is probably *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), available at http://www.cervantesvirtual.com/obra-visor/actas-de-la-junta-de-legislacion-octubre-1809enero-1810--0/html/02305a12-82b2-11df-acc7-002185ce6064_2.html#I_13.

The emphasis on the Americas differs 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 clarifies 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.¹⁰⁹ For example, in discussing the theme of rejecting citizenship for slaves and people originating in Africa, the Introduction notes that the situation stems from the prevalence of slaves and Africans in the Americas.¹¹⁰ In fact, it is within this context that one finds for the first time in the Introduction the word “*ultramar*.”¹¹¹ The Introduction also noted the numerous vacant positions in the Americas and explained that the system of representation codified in the Constitution reflects the difficulties that American deputies faced with an overriding policy of “narrowing more and more the ties of union with overseas Spaniards.”¹¹²

A further investigation into the relationship between Spanish colonial law and the Constitution leads one to the writings and thoughts of Agustín Argüelles, beyond his comments in the Introduction to the Constitution. Argüelles was an important voice on these matters in the Cortes.¹¹³ Although Argüelles is not representative of the deputies in the Cortes in all respects, any study of the topic must take note of his Introduction, writings, and activities within the Cortes, and their subsequent history.

Argüelles was born in Ribadesella, Asturias in 1776 and studied law at the University of Oviedo.¹¹⁴ By his mid-twenties, he benefitted from the protection of Gaspar Melchor de Jovellanos, an important Spanish enlightenment thinker and politician of the time.¹¹⁵ He was a secretary to the Bishop of Barcelona, and by 1805 he had an official position with the Ministry of State.¹¹⁶ A year later, he was sent on a diplomatic mission to London, where he remained for three years.¹¹⁷ His first period of residence in England was to be highly influential in Argüelles’s understanding of

109. *Discurso Preliminar*, *supra* note 101, at 69–73.

110. *Id.* at 69.

111. *Id.*

112. *Id.* at 71–74, 101.

113. Mirow, *Visions*, *supra* note 5, at 69.

114. Francisco Tomás y Valiente, *Estudio Preliminar*, in ARGÜELLES, DISCURSOS, *supra* note 41, at xix.

115. *Id.*

116. *Id.*

117. *Id.*

political and constitutional function and structure.¹¹⁸ He befriended Lord Holland, whose activities were an important influence on the Cádiz process and returned to Seville, Spain in 1809.¹¹⁹ In Seville, he served as secretary to the Commission of Legislation of the Cortes.¹²⁰ This position acquainted him with all the political and structural aspects of the Central Junta's government of Spain during the French occupation.¹²¹ Lessons learned in the Commission of Legislation were directly applicable to his service on the Constitutional Commission, which issued the text of the Constitution.¹²² His membership in the Cortes was as a deputy for Asturias.¹²³ After spending 1823 to 1834 in London,¹²⁴ he died in Madrid on March 23, 1844.¹²⁵

Argüelles was very active in the process of drafting 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 conscious of the historicity of the text of the Constitution and of the Cortes' emphasis on historical justifications.¹²⁶ At times, he was a historian *in* the Cortes and *of* the Cortes, but above all Argüelles was a politician,¹²⁷ a deputy,¹²⁸ and a man of the state.¹²⁹ Nonetheless, as noted Spanish legal historian Tomás y Valiente wrote of him, “Argüelles never fought without turning to history.”¹³⁰

Using history and having a well-developed appreciation of historical distance are, of course, two different things. Argüelles's invocation of history has been subject to scrutiny by historians who have questioned his sincerity in his use of the past. For example, Tomás y Valiente concluded that Argüelles lacked historical consciousness and thus was a convenient

118. *Id.* at xix–xx.

119. *Id.* at xx.

120. *Id.* at xxi.

121. *Id.*

122. *Id.*

123. *Id.* at xxi–xxii.

124. *Id.* at xxvi.

125. *Id.* at xxv.

126. *Id.*

127. *Id.* at xi.

128. *Id.* at xxi–xxii.

129. *Id.* at lxxix.

130. *Id.* at xlvi (“Argüelles nunca combate sin recurrir a la historia.”).

presentist in his use of these sources.¹³¹ 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.¹³²

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 between the hemispheres.¹³³ His close involvement with these central texts and questions makes his works a useful point of entry to study the relationship between Spanish colonial law and the Constitution.¹³⁴

In his *Exámen Histórico de la Reforma Constitucional* (Historical Examination of the Constitutional Reform), published in London in 1835, Argüelles, as one always turning to history, noted that the subsequent successes of independence in America complicated the analysis of what in truth had transpired in America before and during the Cortes.¹³⁵ In fact, Argüelles noted that the situations in the Americas and on the peninsula were “not foreseen by the code of the Indias and even less by the tribunals and councils that until then guided and governed them.”¹³⁶ 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 demonstrated 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

131. *Id.* at lxxi (“[A] Argüelles le falta por completo sensibilidad histórica. . . . [[A]rgüelles completely lacks historical sensibility . . .”).

132. *Id.* at lxxii–lxxiii.

133. ACTAS DE LAS SESIONES SECRETAS DE LAS CORTES GENERALES EXTRAORDINARIAS DE LA NACION ESPAÑOLA 16 (1874); Tomás y Valiente, *Estudio Preliminar*, in ARGÜELLES, DISCURSOS, *supra* note 41, 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 159–64 (Alberto Gil Movaes ed., 1979).

134. Dérozier, *supra* note 133. He does not mention the role of Spanish colonial law in Argüelles’s thought. *Id.*

135. ARGÜELLES, EXÁMEN HISTÓRICO DE LA REFORMA CONSTITUCIONAL, *supra* note 70, at 332.

136. *Id.* at 333 (“[N]o previsto en el código de Indias, y ménos aun por los tribunales y consejos que hasta aquella éra la dirigieron y gobernaron.”).

legal positions, the highest offices and positions of the state, in titles, honors, and commendations that were used in all times.¹³⁷

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' 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."¹³⁸ On the contrary, the well-being of America was always on the mind of the peninsula when reforming laws or imposing taxes.¹³⁹ For example, Argüelles tried to explain the reasons for prohibiting the cultivation of certain fruits and for Spain's close control and monitoring of trade in the Americas.¹⁴⁰ 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."¹⁴¹

In reaching this conclusion, Argüelles said, as a skilled historian might, that the moment to compare the Americas and the peninsula must be 1808, not before or after.¹⁴² Argüelles depicted the Americas as a society equal to that of the peninsula, full of wonders attributable to its colonization by Spain: cities, fortifications, roads, civil establishments, churches, scientific and literary groups, agriculture, commerce, and mines.¹⁴³ If the Americas suffered from a lack of liberty and the strangling oppression of a suffocating government in 1808, then the peninsula suffered the same horrible circumstances. The two regions suffered the same abuses and encountered the same worries. The blame was not on the metropole for its actions against the colonies; this was simply a horrible time for all regions

137. *Id.* at 335–36.

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.

Id.

138. *Id.* at 338 ("[D]esignio premeditado en la madre patria de oprimir á las colonias.").

139. *Id.* at 339.

140. *Id.*

141. *Id.* at 340 ("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.").

142. *Id.* at 341.

143. *Id.* at 342–43.

of Spain.¹⁴⁴ In fact, in his estimation, America escaped much of the 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.”¹⁴⁵ Additionally, the Americas had the luxury of being far away from the battles on the peninsula in the war of independence against the French.¹⁴⁶

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. Equality between the Americas and the peninsula was something Argüelles observed as flowing from Spanish colonial law and expressed 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.”¹⁴⁷ History, according to Argüelles, demonstrated that Spain was “constant in considering its colonies as all the provinces of the monarchy.”¹⁴⁸

What annoyed Argüelles was that although the provinces of America received this equal status, in effect, they received special treatment “as if [they] 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.”¹⁴⁹ Argüelles was infuriated by a communication from the Puebla de los Angeles deputy who, without great political sense, requested the creation of a commission to begin the independence process for Mexico.¹⁵⁰

144. *Id.* at 343–44.

145. *Id.* at 345–46 (“[O]presion deliberada hecho contra la metrópoli á fin de justificar la conducta de América durante la reforma constitucional.”).

146. *Id.* at 224, 346–50.

147. *Id.* at 356–57 (“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 experimento.”).

148. *Id.* at 359 (“[C]onstante en considerar á sus colonias como á todas las provincias de la monarquía.”).

149. *Id.* at 243 (“[S]i 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.”).

150. *Id.* at 246–47.

Furthermore, the assertion that the decree of October 15, 1810, applied to the General and Extraordinary Cortes and not just the Constitutional Cortes was a rejection of the promise the Cortes had solemnly and publicly made¹⁵¹ and that resulted in a vote of 69 to 61 not to change the composition of the General and Extraordinary Cortes.¹⁵² Argüelles considered complaints about trade and taxes in relation to the decree that established equality in profession between Americans, indigenous peoples (*indios*), and Spaniards to be grand examples of ingratitude on the part of the American deputies.¹⁵³

Of course, most of the assertions that nothing had changed were 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,

[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.¹⁵⁴

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

151. *Id.* at 253.

152. *Id.* at 255.

153. *Id.* at 257.

154. García Gallo, *supra* note 3, at 170.

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.

Id.

prosperity. All legislation dealing with the Americas will be fundamentally altered by the bases of this Constitution.”¹⁵⁵ The rhetoric of historicism went back and forth depending on the political moment and the argument to be won.

In these ways, Spanish colonial law was brought into the broader debate concerning 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 especially 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 throughout this process and provided a general backdrop of the legal and political world against which constitutional texts would be played. It was also invoked to answer specific questions that arose in the context of constitutional debate and drafting, and finally, was 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.

155. ARGÜELLES, DISCURSOS, *supra* note 41, at 207 (“*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.*”).