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Historical Determinism in the Constitution of the United States and the Spanish Constitution of 1812

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Abstract. The Constitution of the United States has not been a document specially referred to, nor considered, by Spanish academics who have studied the Constitution of 1812. Even the constitutionalists gathered in Cádiz fled from anything that could evoke a republican and federalist constitution being their purpose radically different. In a general way, it has been the French Constitution of 1791, the reference text "par excellece". But, beyond the liberal principles that Americans and most of the Spaniards embraced, there were some historical coincidences in the United States and Spain which conditioned in a similar way the final result of both political documents.
Keywords: Constitution, USA, Spain, Liberalism, Congress.

[es] El determinismo histórico en las Constituciones de Estados Unidos y Española de 1812

Resumen. La Constitución de los Estados Unidos no ha sido un documento especialmente referencial, o considerado, por los académicos españoles estudiosos de la Constitución de 1812. Incluso los propios constitucionalistas reunidos en Cádiz huían de cuanto pudiera aludir una constitución republicana y federalista cuando su propósito era radicalmente distinto. De forma general ha sido tradicionalmente la Constitución Francesa de 1791 el texto evocado por antonomasia. Sin embargo, tanto en Estados Unidos como en España, se produjeron una serie de coincidencias históricas que, más allá de los principios liberales que los americanos y buena parte de los españoles abrazaban, condicionaron de forma similar el resultado final de ambos documentos políticos.
Palabras clave: Constitución, Estados Unidos, España, Liberalismo, Congreso.

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1. State of the question

The constitutions of the United States and France were already in force when the Spanish constitutionalists met in Cádiz in 1812. The hypothetical influence that the

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French model, in addition to the English legislation, had on the first Spanish constitution has been a recurrent academic field for debate. Less interest has inspired the Constitution of the United States.

1.1. French Constitution and British laws

It has been traditionally considered that the French Constitution of 1791[2] was the reference document that illuminated the deputies gathered in Cádiz in 1812. Two years after our constitution was drafted, Father Vélez published a 20-page pamphlet in which he compared both constitutions showing the influence that the French had had on the Spanish. Miguel de Burgos, translator of the French Constitution into Spanish, also echoed such influence,

> Empéñanse algunos en que la constitución española tiene mucho de la célebre que los franceses no supieron conservar. Otros pretenden que la nuestra sea original. Para que todos cotejen y se desengañen sale la presente traducción.[3]

It was "checked" by Karl Marx himself; he questioned those who defended that the Constitution of 1812 was "a mere imitation of the French Constitution of 1791, transplanted on the Spanish soil by visionaries, regardless of the historical traditions of Spain"; Marx understood that it was "a genuine and original offspring of Spanish intellectual life, regenerating the ancient and national institutions, introducing the measures of reform loudly demanded by the most celebrated authors and statesmen of the eighteenth century, making inevitable concessions to popular prejudice." (5)[4]

In any case, the influence of the French constitutional texts has been an essential and significant point of debate among scholars of the Spanish text. Pedro Cruz Villalón in "La Constitución de 1808 en perspectiva comparada" mentions the French referent stating that the *Estatuto de Bayona*, previous the Constitution of 1812 and that he considers with the rank of Constitution, belongs to a singular genre that he calls "Napoleonic Constitutionalism" to which the Spanish also belonged: "Desde luego, no es polémico que la Constitución española de 1808 pertenece a un `género´, tal como no ha habido más remedio que adelantar ya, como es el del `constitucionalismo napoleónico´" (84). Marta Friera Álvarez and Ignacio Fernández Sarasola, defend in "La opción patriótica: las Cortes de Cádiz y la Constitución de 1812" that "Los puntos de conexión entre el texto gaditano y la Constitución francesa de 1791 son bastante evidentes..."; an appreciation similar to that of Joaquín Varela Suanzes-Carpegna, who in "Las Cortes de Cádiz y la Constitución de 1812" states,

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[2] Spanish scholars usually refer to this constitution, although those of 1793 and 1795 are also punctually mentioned.

[3] Quoted in Jairdilson Da Paz Silva, 44.

[4] In New York Daily Tribune, November 20, 1854. Quoted in Adam Sharman and Stephen G.H. Roberts, "Introduction: Put in Writing". Marx's rhetoric is at least "singular" due to its imperialist evocations: "From the remote angle of the Gaditana Island they undertook to lay the foundation of a new Spain, as their forefathers had done from the mountains of Covadonga and Sobrarbe. How are we to account for the curious phenomenon of the Constitution of 1812, afterward branded by the crowned heads of Europe, assembled at Verona." See https://www.marxists.org/archive/marx/works/1854/revolutionary-spain/ch06.htm. Translation into Spanish at http://www.izca.net/index.php?option=com_content&view=article&id=191:karl-marx-&catid=14:formacion

> No resulta extraño, por todo ello, que el modelo constitucional más influyente entre los liberales doceañistas fuese el que se había vertebrado en Francia a partir de la Declaración de Derechos de 1789 y de la Constitución de 1791. Un texto este último que se tuvo muy en cuenta a la hora de redactar la Constitución española de 1812, aunque entre ambos códigos haya notables diferencias, como luego se tendrá oportunidad de comprobar. (195)

Similar approach expresses Emilio La Parra in the "Introducción" to *La libertad de prensa en las Cortes de Cádiz*, because even assuming the similarity of our constitution with the French one, there are important differences between both.

> En primer lugar, sus decisiones legislativas son menos radicales; predomina, mucho más que en el caso francés, el compromiso entre las fuerzas revolucionarias y las tradicionalistas y, sobre todo, quedó circunscrita al nivel teórico, pues la incidencia en la transformación efectiva del país fue escasa. (3)

The British model, on the other hand, was the favorite of the anglophile Jovellanos. It might be because the figure of the monarch was incorporated and, in addition, due to its bicameral system granting the aristocracy a legislative capacity. Taking into account the Spanish singularity, this could satisfy the legislative demands that the new times required.[5] Furthermore, as Varela points out, "Los diputados realistas mostraron sus simpatías por el constitucionalismo inglés [ ]Los diputados liberales tenían en alta estima ciertos aspectos del constitucionalismo británico, como el Jurado y la libertad de Imprenta..." (194).[6] In Spain the purpose was not to overthrow the monarchy as it was in France and America,[7] but to end with the absolutism of the previous regime by establishing a "Monarquía moderada" as will be seen later. Francisco Tomás y Valiente in *Génesis de la Constitution de 1812* points out how the principles of our text were inspired from the same sources as the British legislation. The British based their laws on the customary rights being the king, who played a secondary role, its depositary - the historical "Common Laws" were similar to the Spanish *Leyes Fundamentales*-. In short, what the Spanish constitutionalists pretended, implicitly evoking those British principles, was a "construcción entre histórica y mítica, vigente y difundida por la Europa de la segunda mitad del XVIII y va a pesar, con su prestigio que la convierte en modelo a imitar, sobre muchos de nuestros reformitas más moderados, desde el Arzobispo de Santiago de Compostela en 1810 hasta Jovellanos" (15-16). This potential influence of British laws in the Spanish Constitution has been studied, among others, by Manuel Moreno Alonso in "Sugerencias inglesas para unas cortes españolas"; and also by Varela in "Un precursor de la monarquía parlamentaria: Blanco-White y `El Español´ (1810-1814)", and "El

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5 Varela states: "A este respecto, trajeron [los realistas] a colación la teoría de los cuerpos intermedios, acuñada por el autor del Espíritu de las Leyes, e insistieron no tanto en la importancia de un ejecutivo monárquico fuerte al estilo del británico, cuanto en la necesidad de una representación especial para la nobleza y sobre todo para el clero, estamento al que pertenecía buena parte de los realistas. Una representación especial, similar a la cámara de los Lores, que Jovellanos había defendido en su mencionada Memoria." (*Las Cortes de Cádiz y la Constitución de* 1812, 194).

6 In *Las Cortes de Cádiz y la Constitución de 1812*.

7 When using "America" I will always refer to the United States.

debate sobre el sistema británico de gobierno en España durante el primer tercio del Siglo XIX."[8]

Nevertheless, there is a certain consensus in recognizing the French influence over the hypothetical one of the British. French professor Gérard Dufour,[9] interviewed by the Asturian newspaper *La Nueva España*, is skeptical about the possibility that British legislation influenced the constitutionalists in Cadiz. The interviewer asks him if his approaches did not "underestimate" the English influence in the ninetieth constitutional text, to which he replies: "España sacó de Inglaterra el oro y las tropas de Wellington, que no es poco. Pero las ideas en España proceden más bien del bando favorable a la Constitución francesa de 1791, que está entre 1789 y la Revolución popular y la República de 1792 y el posterior terror, que por supuesto se rechaza completamente. Lógico, fue escalofriante."[10] Regarding this matter, Varela is particularly conclusive in "Los modelos constitucionales en las Cortes de Cádiz",

> mientras la evolución de la Monarquía inglesa había transcurrido por unos derroteros muy distintos a los de la española, entre ésta y la francesa existía un indudable paralelismo desde comienzos del siglo XVIII. Un factor que unido al influjo notable del pensamiento francés sobre el español -mucho más patente, desde luego, que el que sobre este último había ejercido el inglés- permite explicar una no pequeña coincidencia de sentimientos y objetivos entre el liberalismo doceañista y el francés de 1791.[11]

1.2. The Constitution of the United States

Less interest has provoked the hypothetical influence of the Constitution of the United States. Even the constitutionalists themselves gathered in Cádiz tried to put distance between themselves and the Americans, especially when that constitutional process -their predecessor being the Articles of Confederation- had taken place as a consequence of their emancipation from the British crown ... and the Spanish overseas territories could follow the same path. It is not an opinion or speculation, the Conde de Toreno himself, in the session of January 12, 1812, during the debates of Article 324 regarding the representations in the *Diputaciones Provinciales* (Provincial Councils), stated that "las diputaciones y ayuntamientos deben considerarse como unos Agentes del poder executivo, y no como cuerpos representativos" doing so he pretended to avoid the consequences that could arise from that because "... si no lo evitamos se vendría a formar, sobre todo con las provincias de ultramar, unas federaciones como las de los Estados-Unidos..." Today, the arguments of the deputy from Burgos, Francisco Gutiérrez de la Huerta in his opposition to the Constitution of the United States are hilarious. He exposed, in regard to religious freedom, that if accepted the American model as a reference,

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8 In Biblioteca Virtual Cervantes he has also published "Los modelos constitucionales en las Cortes de Cádiz" quoted next.

9 In that same interview he also assures that "La España de la Constitución de Cádiz sigue a Francia en todo salvo en el laicismo. Recommended his essay "Del discurso histórico de las Luces al liberalismo" (Bulletin d´histoire contemporaine de l´Espagne. Nº 37-42 (35-48).

10 https://www.lne.es/oviedo/2010/10/04/espana-constitucion-cadiz-sigue-francia-salvo-laicismo/975686.html.

11 http://www.cervantesvirtual.com/obra-visor/los-modelos-constitucionales-en-las-cortes-de-cdiz-0/html/0062b6f8-82b2-11df-acc7-002185ce6064_6.html#I_1_

"estableceríamos por dogma la tolerancia" and they should face the danger of "fuéramos tomados por tolerantes".[12]

As seen, the American constitution presented serious problems for liberals or absolutists to accept it. The liberals advocated for a strong central government, which was opposed to the federalist American principles; the absolutists could not admit the republican principles even equating the figure of the king to that of the president.

For Varela, in the aforementioned essay of the Biblioteca Virtual Cervantes, "Los Diputados liberales incluso repudiaron de forma expresa el modelo constitucional de los Estados Unidos en alguna ocasión."[13] Similar approach to that of Manuel Martínez Sospedra in *La Constitución de 1812 y el primer liberalismo español: el constitucionalismo liberal a principios del s. XIX* when he says "... el modelo norteamericano era de muy difícil asimilación" if at all "... podía servir a lo sumo como ejemplo de cómo organizar la relación ejecutivo-parlamento..." (41). Of a identical nature is the reasoning of José Manuel Vera Santos, who offers a suggestive study in "Los precedentes franceses y estadounidenses y su influencia en la rigidez constitucional de la Constitución Española de 1812"; focusing exclusively in legal aspects, he reaches the conclusion that "El reflejo del modelo norteamericano en nuestro texto de 1812 queda muy diluido." (505). Fidel Gómez Ochoa shares the same criteria when affirming in "Antifederalismo en España en las primeras décadas de la época liberal (1810-1837)" that "Muy significativamente, los liberales gaditanos rechazaron expresamente tener a Estados Unidos como posible referente revolucionario a seguir." (82) and explicitly points out the true causes why the American federalist model could not be applied in Spain,

> Se trataba para ellos de un fenómeno americano extendido peligrosamente por el Nuevo Mundo, donde España tenía posesiones que no quería perder y para las cuales muchos consideraban el gobierno republicano federativo o un sistema de vinculación federal a la monarquía como el más adecuado. (82)

Recently some works have been published defending an alternative point of view. Antonio Fernández García in *Las Cortes y la Constitución de Cádiz* highlights the coincidences between both constitutions, "... la Declaración de Derechos de Virginia y la propia Constitución norteamericana ofrecen bastantes paralelismos y coincidencias con el texto español" (51). It can also be mentioned the reference to this topic in the thesis of Jairdilson Da Paz Silva (2014)[14] where he states that "... otro modelo constitucional también era conocido y manejado por los diputados; modelo este que traía una opción menos radical que el texto francés, el constitucionalismo norteamericano" (45). In the minutes of the sessions we observed, as Varela affirmed, that at specific moments the most erudite speakers referred to the American text. We even have the case of the deputy Antonio José Ruiz de Padrón, from Canary Islands,

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12 En *Diario de las Discusiones y actas de las Cortes*. Tomo 11 (212). This same deputy also mentioned the United States during the debates on religious freedom "*Diario de las Discusiones y Actas de las Cortes*. Tomo VIII p. 96".

13 Continuing with Varela, the overseas constitutionalists of Latinamerica deserve special mention, "A los diputados americanos [de los territorios españoles de ultramar] no les satisfacía, en cambio, ni el modelo constitucional británico ni el francés de 1791. [...] Si acaso sus simpatías se inclinasen por el [modelo] de los Estados Unidos."

14 The date corresponds to the defense of his thesis at the University of Salamanca. Later published in book in 2016 (see bibliography). The thesis is not about Spanish or North American constitutionalism.

who met with George Washington and Benjamin Franklin in Philadelphia during his stay in the United States at the end of the 18th century.[15] In 2012 Moreno Alonso announced that he had discovered, in the *Sección de raros* (Rare section) of the Biblioteca Nacional in Madrid, a copy of the Constitution of the United States translated to Spanish, and dated in 1811.[16] In this edition it is mentioned that in those years it was "moda publicar voluminosos proyectos de Constitución", ending with the emphatic affirmation that "todos suponen tan buena la de Estados Unidos".[17] Moreno Alonso concludes, logically, that this "prueba, de forma fehaciente, el conocimiento que se tuvo en Cádiz de la Constitución de los Estados Unidos antes de la promulgación de `La Pepa´".[18] In any case, it is the official website of the Spanish Congress, where the Constitution of the United States is recognized as one of the references considered by the *Junteros de Cádiz*,

> La separación de poderes [en la Constitución de 1812], la más rígida de nuestra historia, siguió el modelo de la constitución francesa de 1791 y la de los Estados Unidos, lo cual impidió el nacimiento del régimen parlamentario en España.

2. The historical enactment in the Constitutions of the United States and Spanish of 1812

This essay does not pretend to take side by any of the aforementioned theories on the hypothetical influences that previous constitutions had in the Spanish text of 1812. From my point of view they all grow from the same spirit and liberal principles; being so, it is obvious that there are philosophical, political, and doctrinal coincidences. The legislation of the constitutional texts is a faithful reflection of the principles of liberalism that had derived from the ideological premises of the Enlightenment whose origin is found in Locke and his *Two Treatises of Government* (1689),[19] with the subsequent conceptual development of Montesquieu in *De l'esprit des loix* (1748), expanded by Rousseau in *Le contrat social ou Principes du droit politique* (1762). Let´s mention just one example; the legislative framework of both constitutions is built on the political foundation of liberalism: the principle of the division of powers and the control mechanisms of one respect to another ("Check and Balances"). This is what I analyzed in my *Nexos liberales: la Constitución de los Estados Unidos y la española de 1812* (2018).

Being the liberal ideal the cornerstone of the American and Spanish constitutions, it is no less true that in both cases there were a series of coincidences of historical nature; these conditioned, in one way or another, the final result. The five that I consider decisive would be:

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15 He even published a sermon in English against the Inquisition. The sermon was printed and widely distributed.

16 Published in the printing press of Ximenez Carreño in Cádiz.

17 Quoted in Jairdilson Da Paz Silva p. 44 (f.n. 138). At the same time Da Paz quotes José María Portillo Valdés, "Entre la monarquía y la nación: cortes y constitución en el espacio imperial español" Also at http://www.elmundo.es/elmundo/2012/03/19/andalucia/1332149301.html

18 In *La aventura de la historia*, nº 161; p. 55. Manuel Moreno Alonso is author of *La Constitución de Cádiz, una mirada crítica*; (Ed. Alfar, 2012).

19 Anonymously published fearing the reprisals that he might suffer. He wrote it in response to *Patriarcha* (1680) by Sir Robert Filmer, and *Leviathan* (1651) by Thomas Hobbes.

1) Both constitutional processes emerged as the result of a war.
2) In the United States and also in Spain there was previous legislation that had to be overcome.
3) In both cases two large groups, with opposing interests and wills, were formed; the result came from negotiation between them.
4) In both nations, there were ethical-moral conditions that conditioned the final agreements.
5) If the original goal of each constitution was reached it was due to the will, determination, and leadership capacity of two characters of unquestionable liberal principles: Madison and Argüelles.

2.1. The constitutions resulting from a war

The analysis of any text - literary, biblical, political ... - can be approached from intertextual, religious, legal ... and also historical principles. From this last perspective a constitutional text is the result of the social environment in which it is written and for which it is written. The "Preamble" of the French Constitution of 1791 is written with the intention of clearly showing the rupture with the overthrown monarchy. That is the reason why its intention is abolishing "irrevocably the institutions that hurt freedom and equal rights"; for this reason it is emphasized that "There is no longer nobility, nor procerate [pairie], nor hereditary distinctions, nor distinctions of orders, nor feudal regime, nor patrimonial justices..." More recently the German Constitution, technically called *Fundamental Law for the German Federal Republic* (*Grundgesetz für die Bundesrepublik Deutschland*), 1949, also proves the principle of breaking with its immediate past. The historical reality of Nazism is undoubtedly responsible for the fact that Article 1 focuses on "The protection of human dignity" and that the first sentence of the article is: "Human dignity is intangible", to defend in the second subsection the "inviolability of human rights".[20] The current Spanish Constitution of 1978 mentions in the first section of Article 1 the "*pluralismo político*" as a "*valor superior*"; a clear reminiscence of the 40 years of dictatorship with the prohibition of political parties.

The Constitution of the United States was drafted in 1787, four years after the end of the war against the British crown in 1783; the Spanish of 1812 in the heat of the War of Independence against France. Both events conditioned the mood of the representatives gathered on both sides of the Atlantic.

In the United States, the imprint of the war conflict is unquestionably appreciated in the "Articles of the Confederation", an antecedent of the constitutional text. In the writing of those 13 articles, the war recently ended was taken into account, instead of the times of peace that were to come. Its fundamental objective was to protect each state and help any other in case of foreign attack (Article 3); it also favors the creation of militias, allowing each state "the appointment of junior military officers to the rank of colonel" (Article 7). The spirit of these two articles remained as such in the Constitution; especially the creation of militias, intimately linked to the Sec-

[20] It is even more explicit in its rejection of the Nazi spirit in articles 9 - where associations opposed to "... the idea of understanding between peoples" are prohibited - and 139 guaranteeing "Maintenance of the validity of denazification provisions".

ond Amendment relating possession of personal weapons.[21] American constitutionalists had to choose, as a starting point, between two a priori antagonistic plans: the Virginia Plan defended by James Madison, and the New Jersey Plan defended by William Paterson. But, although it is barely mentioned and is unknown to many, a third plan was presented: the Hamilton Plan. Although many of the delegates admitted that it was well structured and responded to the demands, it was rejected. American congressmen rejected any connection with Great Britain because of the recent war, and Hamilton Plan resembled too much the British model.

The influence of war is also unequivocal in the Spanish case. The document was drafted in a historical context of war and the war *zeitgeist* in Cádiz indirectly and directly influenced the final result. Indirectly through the appointment of the "substitutes", who, due to the difficulties in the displacements, replaced the "oficial holders".[22] The use of substitutes was especially necessary to complete the representation of the overseas territories; it was an intermediate solution to satisfy the demands of those who advocated delaying the process until the representatives of these provinces were present.[23] At that time there were present in Cádiz 177 people from the overseas territories, and they elected 29 substitutes to represent the provinces from *Nueva España* in the North to *Tierra de Fuego* in the South.[24] The group consisted of 16 soldiers and almost a dozen Creole merchants waiting for the ships back to America; most of them were very active and had a powerful influence on the final result. Beyond this type of specific aspects, the truth is that the Constitution of Cadiz is "el principal producto de la Guerra de Independencia" (127) as pointed out by Marcos F. Masso Garrote in "Significado y aportes de la Constitución de Cádiz de 1812 en el Constitucionalismo español e iberoamericano".

In the United States, the terms Revolutionary and Independence period are used interchangeably and although in Spain the revolutionary expression is banished, it is no less true that the transformation of ideas proposed by liberals in Cadiz, was a true revolution. When Americans and Spaniards revolted against the British and French respectively, they were advocating not only for independence, but for an authentic political revolution. The wars of American and Spanish independence were the opportunity that the most progressive minds in those two nations were expecting in order to put an end with the absolutist regime represented by the English and Spanish monarchies. Both, in the United States and in Spain, those who advocated for radical social changes saw in the crisis situation represented by the war, and in its consequences, the propitious moment to initiate a series of transformations in their societies based on a new ideology and social conception. As Carlos Cossio affirms in "La filosofía latinoamericana", "La historicidad le adviene a las ideas por obra de quienes, en correspondencia con las ideas del taumaturgo, las asumen y comparten o las rec-

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21 This nexus is explicitly obvious in the constitutions of Virginia (1776, Art. 13); Pennsylvania (1776, Art. 13); Maryland (1776, Art. 25); North Carolina (1776, Art. 17); New York (1777, Art. 40); Vermont (1777, Art. 1); and Massachusetts (1780, Art. 17).

22 The importance of the substitutes was such that even the constitutional text that emerged in Cadiz legislated about substitute deputies, establishing their number in 54 for the peninsula and 30 for the overseas territories.

23 The only American present at the beginning of the sessions was the representative of Puerto Rico, Ramón Power, who would occupy the vice presidency of the Cortes.

24 This election was immediately contested in the Spanish territories of América. For the "Gaceta de Buenos Aires" it was "un puñado de aventureros sin carácter ni representación"; (in Marie-Laure Rieu-Millan, "Los diputados americanos en las Cortes de Cádiz: Elecciones y representatividad". Quinto Centenario; nº 14. Madrid: Universidad Complutense; 1988. p. 57).

hazan con una suficiente dimensión colectiva que todos ellos constituyen conjuntamente como un 'nosotros'" (189).

2.2. Overcoming previous legislation

The states of the Union, it has been mentioned, had the Articles of the Confederation as a legal framework for the relationship between themselves. The Spaniards had the *Leyes Fundamentales*; these were a result of tradition and historical evolution rather than a formal legislative development.[25] The entry into force of the new constitutional texts presupposed the repeal of previous Articles and Laws.

The seed of the American Constitution was planted in the Mount Vermont Conference on March 21, 1785, which concluded with the signing of the Mount Vermont Compact on the 28th of the same month between the representatives of Virginia and Maryland. It was a 13-point document that would govern navigation on the Potomac and Pocomoke rivers and the Chesapeake Bay. In addition, other agreements on trade regulation, import taxes, or fishing rights were also established. Madison proposed a new meeting, this time to extend the agreement to all the states of the Union. The Annapolis Convention held between September 11 and 14, 1786, was a somewhat failure -not all the states sent delegates-; but it was clear that it was necessary to reform the Articles of Confederation[26] to promote trade, and there was a consensus about calling a new meeting in Philadelphia. The American delegates went to that city with the original intention of remodeling[27] the Articles of the Confederation to facilitate trade, but they found themselves with the proposal of a new constitutional text. To repeal the Articles, it was necessary the unanimity of the 13 states; this was impossible because of the absence of Rhode Island, which had decided not to send delegates suspecting what was going on. Rhode Island feared that, being a small state, its decision-making capacity would be drastically cut, being subordinated to the interests of the most powerful -populated- states. This concern was shared by the southern states, less populated than those in the north, if only the white population was considered. The main problem was referred to representativeness: no state should have its rights reduced by current legislation depleted. The obstacle was solved adopting a bicameral system: in one, the House of Representatives, the representation would be proportional to the inhabitants of the states; in the other, the Senate, the representation would be equal for all of them regardless of their population. It was also established that the final text should be endorsed by 2/3 of the states for its entry into force.

In Spain, the problem of a hypothetical illegality had to do with the position of absolutists, for whom the Constitution represented a serious danger by cutting historical rights of the king, and also because it was contrary to the interests of the nation. For these the current *Leyes Fundamentales* represented (and/or were a result of) the bilateral pact between the monarch and the citizens (subjects); so being the king absent the pact could not be unilaterally broken. They assumed that the laws in force represented in themselves a centennial constitution that could be reformed in specif-

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[25] Already with the Trastámara dynasty the mentioning was to "leyes perpetuas e por siempre verdaderas".

[26] Formally, *Meeting of Commissioners to Remedy Defects of the Federal Government*.

[27] Literally "... for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions." As Madison mentions in Federalist Paper nº 40; 18th January; 1788.

ic nuances, but rejected any alteration in its essence and/or spirit. In addition, the French invasion had led to the empowerment of the *Juntas Provinciales* and the subsequent *Junta Suprema Central*, which assumed the representation of national sovereignty by having the support of the people. Miguel Artola in *La burguesía revolucionaria*, mentions how after the popular uprisings there was a "traslación de poder al que acompaña el sentimiento generalizado de una reasunción popular de la soberanía..." (14). Alcalá Galiano also echoed the event in *Índice de la revolución de España en 1808*, stating that "Se concedió a las Juntas potestad absoluta, igual a la del rey a quien representaban, acaso mayor en cierto modo; en suma, una dictadura militar."[28]

It was the *Junta Central* itself who already in its first session (October 7, 1808) proposed the calling to Cortes, which would finally materialize in May 1809. Regarding the reserves of the absolutists, it was Agustín de Argüelles who managed to solve the stumbling block through the "*Discurso Preliminar*" which will be discussed later.

2.3. Ideological groups and negotiation

The final documents in Philadelphia and Cádiz were the result of negotiations between the two groups that were formed, in both cases, with opposed, when not confronted, principles and interests. The two that were established in the United States had to do with the population in the states. Two opposing factions were established: on the one hand, there were the most populated states; on the other, those with the smaller population. Except for specific exceptions, these two groups also corresponded to geographical demarcations, corresponding to northern states vs. southern states. In the Spanish case, the delegates were also concentrated in two large groups according to their political principles: the liberals and the absolutists. The points of debate and conflict between the groups of the two nations were numerous and, both in one and the other, the final result was the result of negotiation rather than imposition. All the discrepancies could be summarize stating that there was a conflict of interests between those who defended the old economic and social system - representatives of southern states and absolutists - and those - representatives of the northern states and liberals – who advocated for a new social model of bourgeois society that, beyond such aspects as national sovereignty, favored individual liberties and guaranteed trade and private property.

In the United States, the substantial issue of controversy had to do with representativeness. The aforementioned Virginia and New Jersey Plans clearly explained the discrepancies. The bicameral system, with a House of Representatives and a Senate, was a solution that satisfied everyone. But to reach this agreement the negotiations between the groups interested other points such as tax models and referents and, very especially, the "numerical value" that was conferred to black slaves. The slave states of the south defended that they should be counted as a citizen even if they lacked rights; this would imply that states with a lower white population had greater representation due to slavery population. The 3/5 agreement proposed by James Wilson and Roger Sherman was reached: every 5 slaves would be counted as 3 white citi-

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[28] Quoted in Antonio Moliner i Prada, p. 86.

zens for purposes of representation, presidential election, and "possessions" for tax payment.

In Spain, the most important point of conflict was that relating to National Sovereignty. Liberals defended that it was a prerogative of the people, and as derivation, in their representatives in the Cortes; the absolutists, on the contrary, considered the king as the depository of such an attribute. The discrepancy was resolved through negotiation. For example, in Article 3 on National Sovereignty the adverb *esencialmente* was introduced to satisfy the demands of the realists: "La soberanía reside esencialmente en la Nación española." It was an intended ambiguity with the purpose of avoiding to stir up the absolutists not eliminating radically the authority of the king. In the session of the first day José María Guridi Alcocer proposed to be replaced by *radicalmente*, "... para que se entienda con claridad lo que le es esencial a la Nación, y el modo de residir en ella la soberanía." His proposal was seconded the following day by Juan de Lera because "la Nación en todo tiempo ha tenido en sí radicalmente la soberanía o poder de gobernarse". The Conde de Toreno explained that by using the adverb *esencialmente* the reference was to the very origin of the nation; the concepts of sovereignty and nation coexisted because "La Nación no puede desprenderse de su soberanía, como el hombre no puede desprenderse de sus facultades físicas".[29] Another deliberate nuance was the use of the adjective "moderate" in article 14 when defining the Spanish Monarchy: "El Gobierno de la Nación española es una Monarquía moderada hereditaria." It was again the Conde of Toreno who, in the session of 4 October 4, 1810, clarified the meaning of the adjective by explaining that the government is a "moderate monarchy" because "es gobierno de un hombre a quien rige y enfrena la ley, para que en el ejercicio de su poder atienda el bien común".

2.4. Ethical-moral constraints

German J. Bidart Campos states in "Estado y Constitución" that "... todo estado tiene una Constitución porque está constituido de una manera determinada,..." (25) and both constitutional processes had to confront two complicated issues that were historically imbricated in the social networks of each country and interested ethical-moral aspects: slavery in the United States and the Inquisition in Spain. As already mentioned, any constitution is a product of the social model for which it is generated and in which it is generated; slavery and Inquisition were part of the social imaginary in the United States and Spain. However, to deal with this unhuman anachronism within the ideology and liberal principles was very difficult. Again the interests of the two large groups just referred to, were at odds. The profile of the American representatives was eminently mercantilist, the Spaniards were fundamentally religious; this was translated into the protection of economic interests and of Catholic religion respectively.

Slavery was already a subject of intense debate in American society. The eminent and popular John Jay in a letter to R. Lushington (New York, March 15, 1786), expressed himself in the following terms, "It is much to be wished that slavery may be

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[29] This and previous quotes taken from Antonio Torres del Moral p. 91 in f.n. 67 refers to "Intervención del Conde de Toreno, *DSCG* de 28 de agosto de 1811."

abolished."[30] Paradoxically 25 of the 55 delegates at the convention owned slaves;[31] George Washington, who owned more than 100 slaves, described slavery as "disgusting", James Mason as "diabolical", Dickinson as "inadmissible" ... However, the ethical-moral conditions were relegated to the background. They approach this matter from a commercial and political perspective; as John Rutledge of South Carolina emphasized, "Religion and humanity had nothing to do with this question." [32]

Economy in southern states depended on the slave system; to abolish legal slavery would mean their economic ruin. Charles C. Pinckney, also a delegate from South Carolina, emphasized that "South Carolina can never receive the plan if it prohibits the Slave-trade." Oliver Ellsworth from Connecticut stated that "The morality or wisdom of Slavery is considerations belonging to the States themselves. What enriches a part enriches the whole, and the States are the best judges of their particular interest." As a matter of fact, representatives admitted that the slave system was "tolerable"; the substantial problem was the representation that black population could confer to southern states. If the slaves were computed numerically like the white one, those states would obtain greater representation although around 40% of their population were blacks. It would also be an inconsistency because slaves had no right to vote. But it was also an incongruity to recognize them as "possession", when determining wealth and the subsequent payment of taxes, and not when establishing representation.

Once again, pragmatism prevailed in a subtle economic-political symbiosis. It was admitted a moratorium of 20 years -until January 1, 1808- to eliminate slave importation in the southern states; in turn they had to pay a tax of $10 for each new slave arriving in US territory. The aforementioned *Three Fifths Compromise* -5 black slaves were "counted" as 3 free citizens- was achieved. The convention also approved the *Fugitive Slave Act* guaranteeing the return of escaped and captured slaves to their rightful owners.[33] But the most revealing fact within the constitutional text was the exclusion of the word "slave" or any derivative, replaced by the expression "all other persons".[34]

In Spain the issue of the necessary validity of the Inquisition was also a matter of social debate. Officially it had been abolished by Napoleon in the *Decretos de Chamartin* (December 4, 1808)[35]; but as the rest of its provisions, they were never

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30 http://teachingamericanhistory.org/library/document/letter-to-r-lushington/

31 At that time there were about 500,000 slaves, representing 1/5 of the total population. About 80% in the southern states.

32 He even proposed that it be explicitly stated that the Federal Government could not legislate on matters concerning the slave trade. Luther Martin of Maryland -himself owner of slaves - opposed this measure because in the case of a slave rebellion the solution would interest the entire nation and not a single state; so it was the responsibility of the Federal Government. This quote as the immediately following ones of Pinckney and Ellsworth are picked up by Madison in entrance corresponding to the session of August 21.

33 Sanctioned in Art. 4, Secc. 2; 3.

34 Art. 1, Secc. 2; 3: Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. (this text would be modified in the 14th Amendment)

35 Despite Napoleon's wishes in the Estatuto de Bayona, the Inquisition was not outlawed in order to "evitar las disputas que pudieran excitarse sobre su inteligencia y calmar los temores o escrúpulos de algunas personas excesivamente suspicaces". (In Actas de Bayona, p. 72. Quoted in Jean-Baptiste Busaall, "Nature Juridique de la monarchie espagnole sous Joseph Bonaparte" (235-254) Mélanges de la Casa de Velazquez, 2005. 35: 1) Nevertheless José Bonaparte considered that the Inquisition had been abolished with the referred Estatuto be-

assumed by the Spaniards. Within the constitutional debates, it was Diego Muñoz-Torrero who, in its first intervention, exposed the urgency to abolish the Inquisition. Joaquín Lorenzo Villanueva, and Antonio Oliveros, clerics like Muñoz-Torrero himself, also opposed its validity, as did the majority of liberal deputies with Espiga y Gadea as spokesman. They exposed humanistic and legal reason to do so: the outdated institution despised the value of the person; the procedures imposed contradicted the laws and fundamental principles of law. However prominent voices of liberalism as priest Vicente Terrero –he even came to question the real legitimacy or the monarchical state- vehemently opposed its derogation. Due to this matter, and though Terrero was a convinced liberal, he has been considered as a paradigm of the reactionary positioning of the clergy and the church in general. For these, the inquisitorial procedures were not inhuman or unjust. In addition, religion was suffering continuous attacks from the French occupation, and considered licit any action to preserve the Catholic principles. They argued that the *Santo Tribunal* was the most appropriate mean of guaranteeing religious unity in Spain against the attacks of Reformists and Jansenists. And, finally, they assured that if the Inquisition was suppressed people would revolt against Government.

Liberals understood that having been the *Santo Oficio* a monarchical prerogative with Papal acquiescence, the Cortes, as depositories of national sovereignty, were competent to deal with matters that previously only corresponded to religious institutions, assuming that they were legally entitled to abolish the Inquisition. The absolutists, on the contrary, understood that such a provision could not be legally sanctioned, since this required the authorization of the Pope; denying the Cortes legislative capacity on this issue.

As in the United States regarding slavery, pragmatism was also imposed in Spain. Absolutist postulates were finally accepted; cleric deputies, the most numerous, would have never admitted a constitution in which the Inquisition was abolished. The Church was by far the most powerful organization in the nation and the goal was to avoid sterile clashes. In 1835 Agustín de Arguelles recognized that during the constitutional debates, and especially in matters of religious nature, liberals made a series of concessions to the clergy believing that later some of the adopted provisions could be reformed.[36] The ecclesiastical establishment welcomed the final text. Of course, the Inquisition was not repealed and, in addition, the Catholic religion was perpetuated, as was its incompatibility with other religions as stated in Article 12.[37] Example of this is the paraphernalia that accompanied its approval. His proclamation took place with a mass and a *Te Deum*; it was also agreed that the text should be referred in all the parishes during a special mass of thanksgiving.

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cause in article 98 of Title XI ("Del orden judicial") it was established that "La justicia se administrará en nombre del Rey, por juzgados y tribunales que él mismo establecerá. Por tanto, los tribunales que tienen atribuciones especiales, y todas las justicias de abadengo, órdenes y señorío, quedan suprimidas□, being the court of the Santa Inquisición a "tribunal con atribuciones especiales." At the meeting of July 26, 1808, José Bonaparte summoned the clergy - parish priests, prelates, canons, and auxiliary bishop - leaving out the Inquisidor General, Ramon de Arce, and the members of the Corte Suprema de la Inquición whom he had met in Bayonne in June of that same year.

[36] The Spanish Inquisition was abolished four times: Napoleon Bonaparte in 1808; the Cortes de Cádiz in 1813, during the Liberal Triennium in 1820, and finally and definitively in 1834 during the government of Francisco Martínez de la Rosa, within the regency of María Cristina de Borbón.

[37] "La religión de la Nación española es y será perpetuamente la católica, apostólica, romana, única verdadera. La Nación la protege por leyes sabias y justas y prohíbe el ejercicio de cualquiera otra."

2.5. James Madison y Agustín de Arqüelles

Any historical process follows its own dynamics beyond those who are its architects; being this an unquestionable reality it is not less true that the personal characteristics of the protagonists will mark in one way or another the development of such an event. In the case of the United States and Spain, the final result would have been significantly different if not for two personalities with strong liberal convictions and clear political determination: James Madison and Agustín de Argüelles. In addition to conviction and determination another common feature of both was cunning; without it neither one nor the other would have managed to have the final document signed. The American and the Spanish assumed and understood that, indeed, crises are camouflaged opportunities.

James Madison was instrumental in the initiation, development, approval, and subsequent ratification of the Constitution of the United States. The original purpose was to reform the aforementioned Articles, but Madison's intentions were very different: it was about writing a new constitution. He managed to convince a reluctant George Washington, the most prestigious political personality, to participate and even got him to occupy the presidency. Madison arrived in Philadelphia a week in advance and held meetings with delegates of his own opinion. Already in the first session he made his position clear and proposed the Virginia Plan, previously drafted, as the discussion document. During the sessions, he was the most active protagonist and much of the information that has come to us has been thanks to his diligence taking note of what happened. His capacity for conviction and negotiation was fundamental in such complex matters as representativeness, the election of president, tax policy, commercial agreements ... etc. The signing of the document was on the verge of being frustrated when, having already been completed, the issue of individual rights that were not included in the Constitution arose. Once again it was Madison who managed to convince the most reluctant delegates to postpone that debate, and subsequent inclusion, when it had been ratified by the states. The necessary ratification was much more difficult than expected, precisely because of the absence of the aforementioned individual rights. It was not only in the southern states; in others like Massachusetts or New York, the opposition was also considerable. The *New York Journal* began publishing a series of articles signed by "Cato"[38] opposing ratification; the "Federalist Papers" emerged as a reaction to those writings and the pseudonym "Publius" hid the names of Hamilton, Madison, and Jay. The most important of the 85 articles was number 10, whose authorship is awarded to Madison. [39]

Agustín de Argüelles was the Spanish James Madison. Jovellanos said that he was "*el oráculo de las Cortes*"; he also described him in these terms: "Hay seguramente en las Cortes hombres de instrucción y de juicio, entre los cuales descuella, según dicen, nuestro Agustín Argüelles, *quantum lenta solent inter viburna cupressi...*"[40] His passion and vehemence in his interventions and his way of reasoning

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[38] Maybe George Clinton, governor of New York, although its authorship cannot be proved.

[39] None of the three authors claimed authorship; it is admitted that Hamilton wrote 51, Madison of 29, and Jay of 5.

[40] "¿Y sabe usted que nuestro Agustín Argüelles es el oráculo de las Cortes? No conozco bien sus principios, aunque le tengo por muy instruido y también por hombre de juicio, y esto me consuela mucho." Previous quote and this one in letters written December 5, 1810. Both letters in Aula Virtual Cervantes; http://www.cervantes-

earned him the nickname of "*El Divino*" or "*Aristides*[41] *Español*". Paradoxically, he was not a "titular" or "oficial holder" deputy, but a substitute by Asturias, and he became the authentic "Father of the Constitution of 1812". He participated in the most important commissions, especially those with ideological content,[42] presiding three of them, acting as secretary in two, and as a member in five others. The biggest obstacle that the liberals had to overcome in Cádiz was the reticence of the monarchists regarding the legality of the entire development of a new constitution. They understood that the current *Leyes Fundamentales* could not be repealed or replaced without the consent of the king, deriving from it the illegality of the whole process. Argüelles´ strategy focused on demonstrating that it was not a rupture, but a continuation, or derivation, with a legislative tradition that went back to the Visigoths, as he argued and defended in his "*Discurso Preliminar*",

> ... nada ofrece la Comisión en su proyecto que no se halle consignado del modo más auténtico y solemne en los diferentes cuerpos de la legislación española en el que estuviese contenido con enlace, armonía y concordancia cuanto tienen dispuesto las leyes fundamentales...

It was an allegation of clear historicist[43] background in which he tried to link the text that was being questioned with the traditional medieval laws that were still in force. Through this exercise of supposed *aggiornamento* he managed to veil his true intentions: to modernize Spain by burying the old regime. With such a purpose in mind he made significant concessions, for example he accepted that "la religión católica, apostólica, romana, es y será siempre la religión de la Nación española, con exclusión de cualquiera otra." In his speech he also took advantage of the popular rejection to the French by exposing, somehow demagogically, the intentions of Napoleon, who "para usurpar el trono de España, intentó establecer, como principio incontestable, que la Nación era una propiedad de la familia Real..."

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The historical reality that was being lived in the United States and Spain at some convulsive and uncertain moments between the XVIII/XIX centuries, originated and outlined the final result. The application of the constitutional texts that emerged in Philadelphia and Cadiz was far from being guaranteed when they were signed; the

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virtual.com/obra-visor/cartas-a-lord-holland-sobre-la-forma-de-reunion-de-las-cortes-de-cadiz--0/html/ffe047b8-82b1-11df-acc7-002185ce6064_1.html. "... *quantum lenta solent inter viburna cupressi*": "... as cypresses are accustomed among the flexible wickerwork" ("cuanto acostumbran los cipreses entre las flexibles mimbreras"); quoting Virgilio´s *Eclogues* 1,vv. 24-25. When Melibeo questions Títiro about his impression of Rome, which he has just visited, he answers: "... this city rose his head among the rest of the cities as cypresses are accustomed among the flexible wickerwork ("... esta ciudad levantó tanto su cabeza entre las demás ciudades cuanto acostumbran los cipreses entre las flexibles mimbreras."

41 Aristides (530–468 BC) was an ancient Athenian statesman nicknamed "the Just".

42 He opposed torture and slavery for being "opuesto a la pureza y liberalidad de la nación española" advocated abolishing the Inquisition; he defended the legal equality of all citizens, the separation church-state, and of the separation of powers in three branches: legislative, executive, and judicial.

43 In its writing it counted with the collaboration of the archdeacon José de Espiga y Gadea; but he took the historicist framework from *Ensayo histórico-crítico sobre la antigua legislación de los reinos de León y Castilla*, (Madrid, 1808) whose author was the priest Francisco Martínez Marina.

fate of those two constitutions was also determined by the historical reality of the moment; those who opposed their application were numerous and powerful. In the United States, all obstacles were overcome; not so in Spain. When the monarch Fernando VII returned to Spain, 69 deputies of the Cortes Ordinarias (1813-1814, paradoxically elected by virtue of the legislation passed in Cádiz), signed on April 12, 1814, a document known as "*Manifiesto de los Persas*"[44] opposing "*La Pepa*" as the constitution was popularly known due to the date –festivity of Saint Joseph- it has been passed. This Manifesto offered the king the necessary excuse to sign -on May 4, 1814- the repeal of the Constitution of 1812 reestablished the principles of the *Viejo Régimen* by proclaiming: "La Constitución soy yo".

However, we cannot ignore that the intrinsic nature of each constitution was determinant in the American and deterministic in the Spanish one: while that of the United States looked and had a clear vocation for the future, that of Spain looked and was weighed down by the past ... and that always ends up being paid.

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[44] Originally, *Representación y manifiesto que algunos diputados a las Cortes ordinarias firmaron en los mayores apuros de su opresión en Madrid para que la Majestad del Sr. D. Femando VII, a la entrada en España de vuelta de su cautividad, se penetrase del estado de la nación, del deseo de sus provincias y del remedio que creían oportuno.* Fernando VII was very reluctant to what was going on in Cádiz and never came to swear the Constitution of Cádiz.

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