José Antonio Aguilar Rivera

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LIBERALISM IN MÉXICO
Introduction

After their independence from Spain in the early nineteenth century, all of the new nations of Spanish America (except for the brief and ill-fated Mexican Empire) adopted the same model of political organization: the liberal republic. As the twentieth century comes to a close all of these countries remain republics. Yet, at the same time, the Latin American dictator has become a hallmark of despotism and brutality. This contradiction between ideal and reality has produced a vast body of literature. Historians, political scientists and sociologists have tried to explain the pervasive authoritarianism of Spanish America. One key peculiarity of Latin America among developing and former colonial regions is its liberal experience, the “ideas and institutions that became established in this outpost of Atlantic civilization.” Yet, the failure of written constitutions to bring about the rule of law in that part of the world is well documented. As Hale asserts:

Much of the skepticism about the liberal experience has focused on constitutionalism—the effort to guarantee individual liberty and limit central authority by the legal precepts of a written code. The strivings of liberal legislators to establish separation of powers, federalism, municipal autonomy, and even at times parliamentary supremacy or a plural executive typify the divergence between ideals and reality and between liberal institutional forms and political practice that is the hallmark of Latin American politics.

In this paper I will first try to recast the Latin American constitutional experience during the nineteenth century under a new light. While the literature in general has focused on the impact of liberalism in the new nations, here I ask the reverse question: what is the relevance of Spanish America for liberal theory? Then I will review the debates over liberalism and Mexican history. I will focus on the impact of liberal ideas on constitution-making in Spain and Mexico. Finally, I will explore the role played by emergency powers in the 1812 Spanish constitution.

2. Ibid.
The Liberal Constitutional Moment

Latin America has been excluded from the liberal experience by many scholars. Liberalism, they contend, was only a disguise for traditional practices. As one of the supporters of this view argues: "Eighteenth-century political liberalism was almost uniformly and overwhelmingly rejected by Spanish America's first statesmen." However this interpretation is wanting in several respects. Never before were liberal constitutional procedures applied in so many places at the same time. To assume that this fact says nothing about the viability of the model itself is myopic at best. Liberal theorists have refused to draw any lessons from the Latin American liberal experiment. While it is true that many liberal constitutional principles flew in the face of "Spanish political traditions and the realities of Spanish America at the time," scholars have not seized the opportunity to see Spanish America as the laboratory where liberal theories were put to test. Until then, liberals had little empirical evidence to support their claims of universal applicability: the historical record was inconclusive at best. Why was the evidence from Spanish America disregarded by liberal pundits? Embedded in the central propositions of liberalism, Joyce Appleby contends, "was the story of its own triumph, but it was a peculiarly ahistorical one." The idea of progress helps to explain why, in the eyes of past and present liberals, the failure of liberalism in Spanish America was dismissed so easily and thus avoided the questioning of the general validity of liberal institutions. "Shining through the darkness that was the past", Appleby asserts, "were liberal triumphs to be recorded, examined, and celebrated. The rest of known history was useless to an enlightened present, its existence a reproach to the human spirit so long enshrouded in ignorance." Since Latin America could not be celebrated as a liberal triumph it was repudiated from the liberal pantheon.

Yet, Spanish America constitutes the great post-revolutionary constitutional experiment. After independence all of the revolutionary leaders moved quickly to write constitutions. Almost all of these constitutions proclaimed the existence of inalienable natural rights, (liberty, legal equality, security, property); many provided for freedom of the press and some attempted to establish jury trials. Almost all


4. Even theoretically, the general applicability of the liberal constitutional model was problematic, as Montesquieu's small-republic theory evidenced.


6. Ibid.
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sought to protect these rights through the separation of powers and by making the executive branch relatively weaker than the legislature.  

Only in the first five years of the movement for independence in northern South America approximately twenty constitutions were drawn up in the provinces and capitals of the old viceroyalty of New Granada (present-day Ecuador, Colombia, Venezuela, and Panama).  

At first glance, Spanish America provides more "cases" to assess the effectiveness of liberal institutions than the American and French cases alone. The breach of constitutions in the new nations could be attributed to several reasons. Some argue that constitutionalism was necessarily a dead letter because it was completely out of touch with Spanish political traditions. It may also be suggested, however, that there were key design flaws in the edifice of liberal constitutionalism.  

The Liberal Experience Revisited  

The "Liberal constitutional moment" denotes the moment, and the manner, in which liberal constitutionalism made its appearance in the Hispanic world at the dawn of the nineteenth century. In Spain it can be traced back to 1808. In Rio de la Plata, New Granada and Venezuela the moment fell between 1810 and 1827, in Bolivia it was concentrated in the 1820's and in Mexico and Guatemala its peak occurred between 1820 and 1830.  

As Safford states, this "reformist burst" was followed almost everywhere by a period of pessimism and conservatism. One of the main weaknesses of the intellectual history of the Iberian world has been its isolationism. Historians of Spanish America, Anthony Pagden asserts, "generally study Spanish America as if neither New France nor the Thirteen Colonies had ever existed." After all, America began as a Europe transplanted: "the intellectual history of its early development is a history of transmission, and re-interpretation, a history of how traditional European arguments from classic texts were adapted to meet the challenges of new and unforeseen circumstances."  


One of the peculiarities of the liberal constitutional moment in the Hispanic world, I argue, is that the sway of liberal ideas was, for the most part, uncontested. Absolutism was more a practice than an ideology. Moreover, the Bourbon absolutism that preceded the liberal revolutions in Spain and her colonies was an enlightened despotism. There was a continuity between absolutist reform and liberal revolution: a confidence in the power of reason to order society. Moreover, liberalism found in Spain native support in the theoretical writings of Gaspar Melchor de Jovellanos and of Francisco Súarez. For Spanish liberals, however, the "enlightened" character of the monarchy ceased when Charles IV and his favorite minister, Godoy showed clear signs of political incompetence.

The originality of the Spanish American experience can only be seen in comparative perspective. A novel interpretation of the Hispanic revolutions is a by-product of the revision that the American founding has undergone for the past twenty years. A brief discussion of such revision will suffice here. For years the United States was considered as the liberal paradigm. Historically, Spanish Americans have striven to come close to that model of political organization. However, the "Lockean" interpretation of the American revolution, made famous by Louis Hartz, has been relentlessly challenged by revisionist scholars since the 1960's. Bernard


12. Jovellanos was the "major intellectual figure" in Spain from 1780 to 1810. See: Gaspar Melchor de Jovellanos, Obras 2 Vols. (Madrid: Atlas, 1951-52). On Jovellanos' arguments regarding the ancient constitution of Spain, property rights, and education see: Charles A. Hale, El liberalismo mexicano en la época de Mora, 1821-1853 (Mexico: Siglo XXI, 1972): 66-73. See also, John R. Polt, Jovellanos and his English Sources (Philadelphia: American Philosophical Society, 1964). In the Seventeenth century, the Jesuit Francisco Súarez, was of the opinion that monarchy -- or rule 'by one head' -- afforded the best form of political government. Yet, the source of the king's power was an act of transfer on the part of the community as a whole, expressive of its 'own consent.' In transferring its power to a monarch, a community did not deliver itself into 'despotic servitude.' The transfer was made 'under obligation, the condition under which the first king received the kingdom from the community.' The monarch should rule 'politically.' He who ruled otherwise ruled tyrannically. In extreme circumstances such a ruler might lawfully be deposed. See: Francisco Súarez, Tractatus de Legibus ac Deo Legislatore (Madrid: Consejo Superior de Investigaciones Científicas, 1971-81). Besides his Tractatus de Legibus (1610), Súarez wrote other influential works: Defensio Fidei Catholicae et Apostolicae Adversus Anglicanae Sectae Errores (1613), and Opus de Triplici Virtute Theologico: Fide, Spe, et Charitate (1621). J. H. Burns, (ed.), The Cambridge History of Political Thought, 1450-1700 (Cambridge: Cambridge University Press, 1991): 292-298.


Bailyn and Gordon Wood undertook a major reinterpretation of nation-building and constitution-writing in the United States. They found that eighteenth-century Americans structured political discourse around the models of the ancient world. In an effort to re-connect the American experience to world history, J.G. A. Pocock offered an explanation in which classic republicanism made civic virtue "--the capacity to place the good of the commonwealth above one's own-- the linchpin of constitutional stability and liberty-preserving order." After the Glorious Revolution, he argues, Englishmen turned to the interpreters of classical politics. During the eighteenth century, England's Country party, guided by a Renaissance ideology hostile to change, experienced economic and social innovations as alien intrusions. Fears of decaying standards, corruption and loss of virtue can be understood as part of this classical discourse. In America, a colonial strain of republicanism provided a language for discussing all actions in the public realm. In the reigning assumptions of classical republicanism, Appleby asserts, "social historians have found the antidote to the instrumental logic and demystifying rationality of that Lockean liberalism which has dominated historical writing for so long." As Pocock asserts: "an effect of the recent research has been to display the American Revolution less as the first political act of revolutionary enlightenment than as the last great act of the Renaissance."

If Pocock and the republican revisionists are right, then perhaps the place where liberalism did play a key ideological role was not the United States, but the Hispanic world. Unencumbered by republicanism and fearful of the effects of unlimited popular sovereignty, the Spanish and Spanish American revolutionaries would stage the first political act of modern liberalism. As Guerra asserts, when all of Europe had turned to monarchical, and even absolutist regimes, only the Spanish American countries stayed as republics with modern constitutions. The background of this ideological dominance, however, was a traditional social structure.

Several developments prepared the ground for the uncontested predominance of liberalism in the early nineteenth century. First, there was no equivalent of Harrington in Spain. As the fifteenth-century debate between Leonardo Bruni and


Alonso de Cartagena over the merits of Bruni’s translation of the *Ethics* showed, the Italians saw Aristotle as an author whose texts had some literary and philosophical merit, while the Spaniards regarded him merely as “an exponent of natural virtue.” Although the impact of humanist Aristotelianism was felt in Spain at about the same time as it was in Italy, by the end of the sixteenth century Spain had reached the brink “of that desperate obscurantism so characteristic of the seventeenth and eighteenth centuries.” When Florentine political thought was flourishing in Italy, the School of Salamanca was instead devoted to new scholasticism and speculative thought. Later, the reaction of Spaniards to Machiavellian ideas was enormous. In the following two centuries, treatises such as Rivadenira’s *Treatise of Religion, and Virtue which the Christian Prince Must Have to Govern and Conserve his States, against what Machiavelli and Politicos of this Time teach* (Madrid, 1595), were often written to refute the “perfidious, impious and godless” Machiavelli. Lipsius, not the Florentine, would be the key figure during the seventeenth century in Spain. In a word: there was no Machiavellian moment, nor classical republican tradition, in Spain.

The other historical development that proved crucial for Spanish liberalism was the French revolution. Hispanic revolutionaries would have to perform two different tasks at the same time; on the one hand, to make the revolution, on the other, to avoid following the steps of France. The terms “liberalism” and “liberal” were coined by the Spanish Cortes in Cádiz, while drafting the 1812 constitution.


To recast the Spanish American revolutions as constitutive elements of the liberal experience is necessary to assess the effectiveness of the institutional strategies designed to limit the power of absolute sovereigns in large states, that are found at the core of the modern liberal republic. In the assessment of key institutional devices of liberal constitutionalism there has been what modern political scientists would call “selection bias”. As John Dunn asserts:

There were probably more bourgeois liberal republics or republican constitutional states in the immediate aftermath of the collapse of European colonial rule than there had ever been before. But a good many of them have not stayed the course [...] It is therefore of considerable importance to understand just what features of a society really are incompatible at a particular time with the bourgeois liberal republic; not just sites where the popolo and the grandi hate each other with almost as much violence as either cares for their own security or where several different political communities are ready to struggle with each other until death within what is notionally a single political community, but also the far greater variety of other settings from Brasilia and Buenos Aires to Berlin, Djakarta, Tokyo, Manila and Beijing where the bourgeois liberal republic has been tried out for a time and gone under, or where it has required the drastic application of foreign power to give it at all a protracted chance.

While it is important to identify those societal traits that are incompatible with liberal constitutional rule, it is also necessary to assess comparatively the effectiveness of the institutional components of such model. Historically, some firmly established doctrines, such as the separation of powers, have had different, and sometimes conflicting, interpretations. For instance, in order to resolve the problem of security of the subjects in a modern state and to do so with particular attention to the dangers which those subject must always fear from their own rulers, what institutional frame proved to be more effective: a system of clearly defined “boundaries”, as the one advocated by the Anti-federalists in the late eighteenth-century, or the one proposed by Madison, which relied on checks and balances?


25. As Biancamaria Fontana asserts, the accent of the bourgeois liberal republic was not so much on hereditary government but upon “the limited, moderate character of the power that any government should be allowed to exercise.” Biancamaria Fontana, “Introduction: the invention of the modern republic” in Biancamaria Fontana (ed.), *The Invention of the Modern Republic* (Cambridge: Cambridge University Press, 1994): 1-5.


United States, but instead was the accepted doctrine in the Spanish American republics 30 years later.  

Dunn himself acknowledges that the limits to the sway of the bourgeois liberal republic, "have been a product of its technological limitations: its failure to specify an array of institutions and practices capable of furnishing its subjects with security of life and capable of protecting that array against internal and external threat." Not only the notion of a common good is missing from the liberal constitutional model but also the institutional procedures to protect it in perilous situations.

**Liberalism in Mexico**

As political practice strayed from ideal, Mexican historians and politicians sought to reaffirm the country’s liberal past. To show that, in spite of authoritarian practices, liberalism was at the core of the founding of the republic has been the object of many books and articles. Against this view, some scholars asserted that liberalism was a political tradition alien to the Spanish American nations. The British scholar, Cecil Jane, contended that there were several contradictions within Spanish culture. Spaniards were idealistic extremists who sought both order and individual liberty in such perfect forms that politics went from one extreme (despotism) to the other (anarchy), rather than "finding stability in constitutional compromise between the two contending principles." Conservatives in power carried the "pursuit of order" to such an extreme as to provoke a violent reaction in behalf of liberty. Likewise, when liberals enacted "standard western liberal protections of the individual," Spanish

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28. The 1787, 1788 and 1789 French debates over the form of the legislature are examples of the different interpretations that constitutional principles could have in the eyes of constitution-makers. In the field of action, liberals discovered, "there was a limit to what nations could borrow from one another, a fact that had not been apparent in the realm of ideas." Appleby, "The American Model for the French Revolutionaries" in *Liberalism and Republicanism*, 252.

29. My emphasis. While Dunn recognizes that "the bourgeois liberal republic has done as well in the face of external violence as any other type or regime," it is in its internal organization and domestic self-understanding, he adds, that "both the distinctive power and the distinctive residual vulnerability of the bourgeois liberal republic resides." The reason is straightforward: the theoretical inheritance of the bourgeois liberal republic does not include "a substantive conception of a bien común." Dunn, "Identity of the bourgeois liberal republic" in Fontana, *Invention of Modern Republic*, 222.


Americans did not use these liberties with the responsibility expected by the "Englishmen who had developed these liberties, but rather carried them to the extreme of anarchy."\textsuperscript{32}

Another cultural explanation has been formulated by Richard Morse.\textsuperscript{33} For him, the key to understanding Spanish America lies in the Spanish patrimonial state.\textsuperscript{34} The State was embodied in the patrimonial power of the king, who was the source of all patronage and the ultimate arbiter of all disputes. Without the presence of the king the system collapsed. According to Morse, Spanish American leaders in the nineteenth century were constantly trying to reconstruct the patrimonial authority of the Spanish crown. One factor obstructing the reconstruction of authority along traditional Spanish lines, Morse argues, was the meddling of Western constitutional ideas. Anglo-French liberal constitutionalism --with its emphasis on the rule of law, the separation of powers, constitutional checks on authority and the efficacy of elections-- stood as a contradiction to those traditional attitudes and modes of behavior which lived in the marrow of Spanish Americans. Because liberal constitutionalism was ill adapted to traditional Spanish American culture, "attempts to erect and maintain states according to liberal principles invariably failed." The authority of imported liberal constitutional ideas, while insufficient to provide a viable alternative to the traditional political model, was often sufficient to undermine the legitimacy of governments operating according to the traditional model. This interpretation, as it has been noted, treats culture in a excessively static manner, and while liberal constitutional ideas in Spanish America failed to gain the hegemony that they enjoyed in other parts of the world, they did have a significant effect on modes of political thought and became at least partially incorporated into the political rules.\textsuperscript{35}

Cultural approaches disregard the role of both economic and social structural factors in destabilizing political systems.

Following Morse's line of argument, Edmundo O'Gorman argued that México had a monarchic historical constitution that outlived the colonial period.\textsuperscript{36} Liberal theories had to contend with traditional ideas and practices, such as the

\textsuperscript{32} Ibid.


\textsuperscript{34} Morse is heavily influenced by Weberian concepts. A "patrimonial" domination is opposed to a legal-rational type of domination.


\textsuperscript{36} Edmundo O'Gorman, \textit{La supervivencia politica novohispana} (Mexico:CONDUMEX, 1967).
common negotiation among actors over the enforcement of laws, as well as long established patron-client relations. For years, historians debated whether modernity had lost to tradition or vice versa. Daniel Cosío Villegas, in his well-known history of México claimed that political practice after the Reforma and República Restaurada (the era of liberal dominance) had “betrayed” the political constitution of the country. Jesús Reyes Heroles, on the contrary, proposed that liberalism had been successful in establishing an alliance between the middle classes and the lower strata of the population. Whereas Cosío focused on the second half of the nineteenth century, Reyes Heroles’ optimism was grounded in an analysis of the first decades after independence.

In contemporary Mexico, nineteenth-century liberalism is not just a historical phenomenon. It is, as Charles Hale states, an ideological landmark. The political relevance of liberalism has often obstructed the conduction of sound historical research. National histories, as Appleby recognizes, rest on a volatile mixture of the moral and the instrumental. Because they “aim to establish order through shared sentiments, they seek consensus, but because they partake in scholarly traditions inimicable to propaganda, they encourage critical reasoning.” Until the late sixties, the historiography on liberalism reflected more the first trait than the second. Reyes Heroles, a statesman, was far from a detached scholar. His interpretation of liberalism was inevitably partisan. Against this “official” history Charles Hale provided in 1968 a more objective view of early liberalism in Mexico. His work still is the best and most authoritative account on the subject. Before Hale’s work, little


40. Jesús Reyes Heroles was minister of Education as well as President of the ruling party in Mexico, the PRI, in the sixties and seventies. For a sympathetic discussion of Reyes Heroles’ arguments see: Ublester Damián Bermúdez, “¿Qué es el liberalismo social mexicano?,” unpublished ms. CIDE, 1995.

41. Hale’s two main works are: Charles A. Hale, Mexican Liberalism in the Age of Mora, 1821-1853 (New Haven: Yale University Press, 1968). [The references above are from the Spanish translation: Charles A. Hale, El liberalismo mexicano en la época de Mora (Mexico:Siglo XXI, 1972)] and The Transformation of Liberalism in Late Nineteenth-century Mexico (Princeton:Princeton University Press, 1989). It is worth noting that Hale’s first book was published around the same time that the historiographical revolution of the American founding was started by the seminal works of Bailyn and Wood. Unfortunately, nothing compared to the republican revision of the American revolution has occurred in the field of Mexican intellectual or political history.
comparative research had been undertaken. Hale argued that two phases in the history of liberalism in Mexico were readily identifiable. Constitutional optimism prevailed from the Independence, in 1821, to 1830. After the third decade of the century, liberals lost confidence in the power of written constitutions.

Lately, scholarly discussion has focused on another set of questions such as: was liberalism a widespread ideology or was it on the contrary confined to the ruling elite? Did liberal programs enjoy popular support or not? Alan Knight asserts that the civil wars in the nineteenth century produced a strong bond between liberalism and popular patriotism. This bond, he contends, remained unbroken until the 1910 revolution. Against this view, David Brading asserts that the parochial Catholicism that reigned in rural Mexico was inimical to liberal patriotism. Some authors have raised methodological questions as well. How can the existence of popular liberalism be established? The debate over popular liberalism has moved the discussion from the national perspective to the local and regional dimensions. This recent trend has also shifted attention from liberalism, understood as a body of political doctrines and principles, to the social aspects of the phenomenon. The attempt to locate the Mexican experience within a broader frame of European political thought has been abandoned by most scholars.

As in the United States, the contemporary debate on liberalism in Mexico is centered on the potency ascribed to inherited intellectual traditions. Liberal historians, following the lead of Cosío Villegas, have constructed an ideal picture of late nineteenth century Mexico. Under liberal rule, they contend, the country enjoyed unparalleled liberty and individual rights flourished as they had never before or after. In order to establish the rule of law, the country must look back to its liberal past, these historians claim. This use of history by liberal intellectuals has been challenged. According to François-Xavier Guerra, Laurens Ballard Perry, and Fernando Escalante, the historical record do not support the rosy picture portrayed.
by Cosío and other sympathetic historians.\(^\text{47}\) Echoing Morse, these three scholars claim that liberal institutions presupposed the existence of a body of citizens. In Mexico these were absent from the political scene: the relevant actors were not individuals but the corporations, the army and the church as well as the Indian communities. Traditional practices superimposed liberal forms. In Mexico, according to Escalante, liberal citizens were "imaginary citizens."\(^\text{48}\) However, other scholars such as Alicia Hernández, have not given up the effort to establish historically the roots of limited and constitutional government in Mexico.\(^\text{49}\) She partakes in the populist and localist version of liberal governments in the nineteenth century.

One of the most interesting developments in the literature of the nineteenth-century is the interpretation of how liberal innovations interacted with traditional political structures. Perhaps liberal institutions did not work as they were expected but they certainly changed the political scenario of the time. For instance, by mandating the formation of municipalities in territories containing more than one thousand persons, the liberal Spanish Cádiz constitution changed radically the traditional structure of representation in Spanish America. A vast constellation of townships were created by this liberal reform. After independence, national leaders had to contend with a large number of newly created municipal governments that had been organized during the last years of Spanish rule. These municipal governments were reluctant to delegate their power to a national state.\(^\text{50}\)

Even this recent scholarship is traditional in the sense that it addresses an old question: why did liberal institutions fail in Mexico? Liberal institutions themselves have not been examined. This research attempts to raise the question: how appropriate were these institutions and doctrines to deal with reality? Not much, I argue.

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Scholars have debated the extent to which modern political forms collided with existing arrangements. For instance, for a long time historians contended that federalism was an alien political form of organization to Mexico and asserted that it was doomed to fail in a centralized country. Later research has shown that federalism was, on the contrary, the result not of alien constitutionalism but of native regionalism fostered by the provincial juntas that sprung out throughout Spain and Spanish America after Napoleon occupied the Peninsula. The Spanish Cortes that met in 1810 later legalized their existence. By the time the colonies broke free from Spain, regional governments had gained considerable independence from the center. Federalism suited well this situation.51

The major enterprise of political liberalism in Mexico during the first ten years after independence was the construction of a constitutional system.52 This endeavor faced, I argue, two main problems. The first one is well documented in the literature: an inhospitable reality. Political disintegration, traditional practices and regional cleavages clashed with constitutional provisions. Yet, there is a second difficulty, less readily noticeable, concerning the institutional devices chosen by Mexican constitution-makers in the nineteenth century. Some of the principles and doctrines of liberal constitutionalism, such as the division of powers, were not unambiguously established at the time. The institutional translation of abstract principles of governance was not self-evident. Furthermore, lacking from the Mexican scene were the doctrinal debates that animated the American and French constitutional experiences.

Mexican liberals followed the French model regarding a strict separation of powers. The American system of checks and balances was little known in Mexico when the first charters were drawn. The Federalist Papers were not translated nor published until 1829.53 It is not surprising then that José María Luis Mora, the leading liberal figure of the time, discovered that the “law” did not provide for adequate boundaries to the legislative branch. That “defect” was responsible, in his eyes, of all the “woes suffered by the peoples of Europe” who had adopted a representative system. In support of his ideas Mora cited the examples of Rome as well as those of the French and Spanish revolutions. In France, he asserted, “in spite of pompous


52. Hale, Liberalismo mexicano, 80.
declarations of rights," the Convention, by means of its *laws of exception*, rivaled with the despotism that existed before 1789.\(^54\)

The finding that the legislative branch was politically more powerful that the other two branches was hardly new. Madison, several years before Mora and his contemporaries, observed that the legislative function was inherently more extensive than the executive and judicial functions.\(^55\) Yet this problem was particularly acute in a system of functional boundaries, which required the voluntary restrain of the legislature. It was the futility of this reliance on uncompelled restrain, Manin asserts, "as opposed to interest and the fear of punishment, that Madison ridiculed through the metaphor of the 'parchment barriers', not the fact that constitutional boundaries existed only on paper."\(^56\)

When assessing the lack of effective restrains on legislative invasion, Mora failed to acknowledge that this was a deficiency of a particular constitutional model (the "functional boundaries" model), not of the constitutional model itself. The weakness of the executive under a system of functional boundaries would become one of the key issues in Mexico during the nineteenth century. This development was seen as a failure of "liberal constitutionalism", not as the shortcoming of a specific version of it. At the dawn of the twentieth century, Emilio Rabasa, a political historian and jurist, pointed out that by making governance impossible, the Mexican 1857 liberal constitution had condemned the country to *de facto* dictatorship. Not surprisingly, Rabasa, unlike many others, was well acquainted with Anglo-American political thought.\(^57\)

Before the American revolution there was no historical precedent to predict where the application of the ideas of the Enlightenment would lead to. Abstract thinking was much more important in the American and French cases than in the Iberian world. Furthermore, the impact of the French revolution on Spanish élites was mainly negative. Spanish American revolutionaries knew, from the French experience, where the revolutionary logic could lead to.\(^58\) These fears where not


\(^{56}\) Manin, "Checks, balances and boundaries," 51.

\(^{57}\) Echoing Madison, Rabasa argued that it was not "sensible to pretend that the exercise of extraordinary virtues would in itself correct institutions, and to think at the same time that those institutions were wise, when they demanded from public officials superhuman qualities." He added, "since the physical existence of government is incompatible with the observance of the constitution, the superior law prevailed and the constitution was subordinated to the supreme necessity of survival." Rabasa explicitly cited *The Federalist*, number 47, when he decried the rejection of the executive veto by the 1856 constitutional assembly. Emilio Rabasa, *La constitución y la dictadura. Estudio sobre la organización política de México* (Mexico: Editorial Porrua, 1956): 67, 112, 173-74.

\(^{58}\) Guerra, *Modernidad e Independencias*, 35.
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without foundation: a large population of these countries consisted of oppressed Indians. The slave revolt of Santo Domingo reminded them of the dangers of a social revolution. Thus, the reactionary atmosphere of Europe, "both reinforced these fears and also subjected Spanish American leaders to more conservative ideological influences than they had known before 1815." The most singular trait of the Spanish American revolutions is the absence of both modern popular mobilization and of jacobinism. This assertion runs counter to a long established tradition that considers the Spanish American revolutions as the ideological heirs of the 1789 revolution. The "decisive" influence of Rousseau over Spanish Americans is, for many historians, an uncontested fact. Yet, this interpretation misses one of the most distinctive features of the Spanish American revolutions. Paraphrasing Pocock, the Spanish American revolutions can be seen less as the last political act of Jacobin radicalism than as the first political act of modern liberalism. Not Rousseau, but Benjamin Constant would prove to be the most relevant influence for Spanish and Spanish Americans in the early nineteenth century. The universal influence of Constant in the 1820's and 1830's, Safford states, "is only one indication of the hegemony of moderate European constitutional ideas among Spanish American intellectuals." The influence of Constant is important because modern liberalism owes much to him. Many of Constant's ideas, particularly those developed in response to the


60. Terror would preclude Terror from happening in the ensuing revolutions. Guerra, Modernidad e Independencias, 36.


63. On Constant see: Benjamin Constant, Political Writings (Cambridge: Cambridge University Press, 1988); Guy H. Dodge, Benjamin Constant’s Philosophy of Liberalism. A Study in
Terror and its Termidorian aftermath (such as the limited nature of popular sovereignty, the freedom of the press, the inviolability of property, and the restrictions upon the military), became incorporated in the liberal theory that still informs many of the constitutions of democratic countries today.

Constant provided Spanish Americans with a practical guide of constitution making. The political elite was interested, above all, in works devoted to the practical arts of government, rather than in “abstract theoretical treatises on the foundation of sovereignty,” thus, Spanish Americans turned to Constant’s Curso de política for its usefulness in constitution writing. Constant was also popular among Spanish readers, Hale asserts, because they found themselves in a similar circumstance: Mora and other liberals faced revolution and arbitrary power, just as Constant in 1815. Therefore they shared the latter’s urgency for establishing safeguards for individual liberty, an urgency that “was not felt in the Anglo-Saxon world.”

Mexico experienced in the 1820’s what Reyes Heroles termed a “constitutional euphoria.” The constitution became a fetish, a magical object that would solve all the social and political ills of the country. In a way, this faith in written constitutions was new. The constitution was not considered as the safeguard of an ancient form of government (as the mixed constitution that preserved liberty by securing a proper equilibrium among the one, the few and the many). It reflected not the ancient constitution but a whole new set of maxims and principles that would create a free state. The constitution was thus, an instrument of the future, not of the past. In the midst of this “euphoria” some writers recommended “prudence.” The “character” and the particular “needs” of the people should be considered by reformers, they claimed. Because, as one pamphleteer argued, “it is undeniable that the safety of the people is the first law of societies, even prior to the best meditated


64. Translations of Constant were readily available to Spanish-speaking readers, the standard translation was: Constant, *Curso de política constitucional* translated by Marcial Antonio López (Madrid, Imprenta de la Compañía, 1820). In his translation, López suppressed the part of the book devoted to religious tolerance. He claimed that tolerance was irrelevant to Spanish Americans, since the only religion practiced there was Roman Catholicism.


constitution and even older than society itself." This was an unusual statement, since the "wise Constant," as Mora called him, thought that "one of the most dangerous maxims ever coined was that ancient one, salus populi suprema lex esto." In his Curso de política, Constant had argued that "society is only the aggregation of private individuals who are members."

Since the theoretical foundations of liberal constitutionalism were not subjected to close scrutiny in Mexico, as it had happened before in the United States and France, Mexican liberals adopted one variant of the doctrine of the separation of powers. On the other hand, Spanish American liberals interpreted correctly other constitutional axioms. Some of these liberal constitutional tenets were flawed. Constant and other influential writers of the time had evicted emergency powers from the constitution. On this point liberal theoreticians were unambiguous, and Spanish Americans took notice of this doctrinal exclusion. As with many other things, they did not question at first the absence of ordinary procedures that would allow them to preserve the constitution during extraordinary situations.

**Constitutional Emergency Powers**

While the republican revisionists have established the continued presence of classical political thought in late eighteenth-century America, they have failed to notice one peculiarity of this late version of the Atlantic republican tradition. The institutional continuity of classical republicanism is not as well established as the persistence of the "problems of historical self-awareness," pointed by Pocock, such as the confrontation of virtue with corruption. According to Judith Shklar, in the Federalist Papers the illusion that any of the thirteen states resembled republican Rome or Athens was to be dispelled once and for all. They were simply too far larger already. However, the old city-states were in any case an unworthy example to follow. [...] The only time Rome is mentioned with full approval in The Federalist is to demonstrate that two concurrent taxing authorities are compatible with achieving greatness [...] With that

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68. Dodge, *Benjamin Constant's*, 103.

exception, the institutions of antiquity were treated as suggestions to be discarded or as examples of everything that was to be avoided.  

Machiavelli had stated that: “It is clear that the dictatorship, so long as it was bestowed in accordance with public institutions, and not assumed by the dictator on his own authority, was always of benefit to the state.” Yet, the American revolutionaries did not include emergency provisions in their constitution. The advice given by Machiavelli, that “republics ought to have among their institutions some device” akin to Roman dictatorship, was simply not followed by eighteenth-century Americans. On the contrary, Publius found that many of the institutions of the ancient city-states failed to pass muster:

Rome had so feeble an executive that it had to resort to dictators in moments of danger, which was a dangerous expedient. The consuls who made up its plural executive, were often at odds and would have been so more often if, as patricians, they had not been united by their fear of the people.

Montesquieu rejected Roman dictatorship because he regarded that institution as an instrument of class warfare of the aristocracy against the people. As an alternative, Montesquieu offered the English suspension of the writ of habeas corpus. Should the legislature, he added, think itself in danger by some secret conspiracy against the state, or by a correspondence with a foreign enemy, it might authorize the executive power, for a short and limited time, to imprison suspected persons, who in that case would lose their liberty only for a while, to preserve it for ever.

In a remarkable passage of the Spirit of the Laws, Montesquieu recognized that there were cases in which a “veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods.” Likewise, for Locke there were


75. Ibid. Book XII, chap. 19.
many things “which the Law can by no means provide for, and those must be necessarily left to the discretion of him, that has the Executive Power in his hands, to be ordered by him, as the public good and advantage shall require...” This power, Locke acknowledged, “to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it, is that which is called Prerogative.”\(^\text{76}\) It must be noted, however, that in Montesquieu’s thought there was no room for a permanent prerogative power: Locke marks the end of prerogative.

The recognition of the legitimacy of prerogative came to an end with the French revolution. By the time the monarchy was restored in France, several political writers rejected any kind of discretionary power. Absolutist despotism, as well as popular sovereignty, were both seen as threats posed by the state against individual liberty. Lockean prerogative was inimical to a school of political thought that emphasized constitutional guarantees for personal freedom. By doing this, the new constitutions ended one of the most hated practices of absolutist rule: the arbitrary orders of imprisonment and of banishment.\(^\text{77}\) A group of French political writers, led by Constant, gained ascendency in the 1820’s. Like Constant, Daunou and Destutt also rejected unlimited popular sovereignty, which in their eyes, had led to revolutionary Terror. Bonapartist dictatorship was no better than popular despotism. The only chance for liberty was a constitutional monarchy, thus these thinkers vigorously defended the 1814 Chartre.

Spanish and Spanish American intellectual elites were deeply influenced by these writers, even more than they were by Montesquieu or Rousseau. Moreover, in Spain and the Spanish American nations many of the constitutional arrangements proposed by Constant and other writers were put to test. A consequence of this influence was the casting of a liberal cloak on emergency powers. The intellectual dominance of French liberal constitutional thought in the early nineteenth century had many significant effects in Spain and in Spanish America. One of them, I will contend in this dissertation, was that it made effective governance, in the dire political environments that the new political regimes faced almost everywhere, even more problematic than what it already was.

The unqualified rejection of the possibility that, under certain circumstances, ordinary procedures might not suffice to preserve constitutional order was new in political thought. By dismissing prerogative and by advocating a single mode of operation of the constitution as the only legitimate one, Constant and his followers departed from Lockean theory but also from Montesquieu. The assertion that there were moments when a veil should be cast over liberty for a moment was challenged


Likewise, Constant criticized Montesquieu’s definition of liberty because, he claimed, it confused the concept of liberty with that of guarantee. Social rights, Constant argued, do not constitute liberty, but only the guarantee of it. Following suit, Daunou, in his Essay on Individual Guarantees, rejected the possibility of any suspension of guarantees: “dangerous situations” were nothing but the pretext of injustice.

The Liberal Cloak

The logic underpinning the Liberal Cloak was that, "the constitutional powers existing only under the constitution cannot suspend it. [...] every time constitutions have been violated it is not the constitutions that are saved but the governments." Constant rejected what can be conceived as the "dualistic mode of operation" of the constitution. This is, that the constitution functioned differently under normal and extraordinary circumstances. Constant contended that there was one and only one mode of operation of the constitution. No right warranted by the constitution to the individuals could be legally suspended for any length of time. Constant criticized extraordinary measures as myopic, short-term responses, to political upheaval. Eventually, Constant asserted, these actions would only make things worse than they were. The evils that they intended to suppress would reappear even stronger than
before. As he put it: "There is no public safety but in justice, no justice but in laws, and no laws without open forms."\(^8^2\)

According to Constant, no coup d'état had ever preserved a people or a family from ruin: "the execution of the accomplices of Catiline without a judgment was the coup d'état of Cicero, who saw the republic fall which he wanted to save."\(^8^3\)

It is easy, Constant asserted, in the midst of a political crisis to "talk about the usefulness of illegal measures and of that extra judicial expedition which, by leaving no time for the seditious to rally, reestablishes order and maintains peace." Because this temptation existed, the classical examples had to be revisited:

The Gracchi, we are told, put the Roman republic in jeopardy. All legal procedures were impotent against them. The Senate resorted twice to the terrible law of necessity and the republic was saved! That is to say: it is from that time that we can date its fall. All rights were disregarded, every form of constitution subverted. The people had merely demanded equal rights: it swore to punish the murderers of its defenders, and the ferocious Marius came to preside over its revenge.\(^8^4\)

Constant asserted in *The Spirit of Conquest and Usurpation and Their Relation to European Civilization* that when governments employ emergency provisions to prevent a conspiracy from breaking out, the evil which has been postponed for a few hours returns more terrible, aggravated by the evil which has now been committed. There are no justifications for those means that serve equally for all intentions and all aims and that advocated by honest men against brigands, reappear in the mouths of brigands with the authority of honest men, with the same apology of necessity, the same pretext of public safety.\(^8^5\)


85. Benjamin Constant, *The Spirit of Conquest*, "During crises of this nature," Constant elaborates, "the culprits who are punished are always a small number. Others remain silent, conceal themselves, and wait. They take advantage of the indignation that violence has aroused in men's spirits. They take advantage of the consternation that the appearance of injustice arouses in the minds of men of scruples. Power, by emancipating itself from the laws, has lost its distinctive character and its happy pre-eminence. When the factions attack it, with weapons like its own, the mass of the citizens may be divided, since it seems to them that they only have a choice between two factions. We will be challenged by citing the interest of the state, the danger of tardy procedures, public safety. Have we not heard these expressions often enough under the most execrable of regimes? Will they never be exhausted? If you admit these imposing pretexts, these specious words, every party will identify the interest of the state with the destruction of its enemies, see the dangers of delay in an hour's work of inquiry, and public safety in a condemnation pronounced without judgment and without proofs." Ibid. 136.
Delayed consequences of emergency measures are explicitly embedded in Constant's fatalistic theory of self-defeating dictatorships. What explains the perverse effects of dictatorship is a consonant theory of how political learning comes about in society. In criticizing the advocates of emergency powers, Constant provided the crispest formulation of this argument: "Liberty, they argued, had to be postponed until factions died down; but factions only die down when liberty is no longer postponed. Violent measures, adopted dictatorially in advance of a public spirit, prevent that spirit from coming into being. It is a vicious circle." Here is another similarity with the Tocquevillian idea that the evils of democracy can only be cured by more democracy.

Constant explicitly acknowledged the existence of emergencies. His quarrel, however, was with the responses that governments gave to these events. There are, Constant asserted, no doubt, for political societies, moments of danger that human prudence can hardly conjure away. But it is not by means of violence, through the suppression of justice, that such dangers may be averted. It is on the contrary by adhering, more scrupulously than ever, to the established laws, to tutelary procedures, to preserving safeguards. Two advantages result from such courageous persistence in the path of legality: governments leave to their enemies the odium of violating the most sacred of laws, and the more they win by the calm and assurance that they display, the trust of that timid mass that would remain at least uncertain, if extraordinary measures were to betray, in the custodians of authority, a pressing sense of danger. Any moderate government, any government resting upon regularity, is ruined by every interruption of Justice, by every deviation from regularity. As it is in its nature to soften sooner or later, its enemies wait until then to take advantage of memories armed against it. Violence seemed for a moment to come to its rescue, instead it has made its fall the more inevitable, since, by delivering it from some of its opponents, it has generalized the hatred that these opponents felt for it.

Dictatorial measures will inevitably cause, in the long run, the downfall of the regime. It is only in liberty that citizens can learn to make good use of political freedom. According to Constant: it is only when a constitution is old, observed for a long time, known, respected and cherished that it can be suspended for an instant, if a great emergency requires it. But if a constitution is new and not in practice nor

86. Constant, Political Writings, 111.


"it" here refers to the government that has deviated from the path of regularity.

88. Constant, Political Writings, 36.
identified with the habit of a people, then every suspension, either partial or temporary, is the end of that constitution. Habeas corpus can be suspended in England because in that country the institutions, the corps, the prerogatives, the rights have a stability guaranteed by 150 years of existence.\textsuperscript{89}

In this apparent contradiction Constant seems to accept, in some cases, the principle of suspension. He appears to recognize that under certain extraordinary circumstances it would be useful to suspend the rights granted by the laws for a brief span of time in order to preserve the constitution. Moreover, even if he did not spell it out, it seems that Constant thought there were no safe institutional procedures that could be devised in order to prevent the potential abuse of emergency powers. He trusted more in habits and old uses brought about by time than in the constitution itself. In between the lines we can read that Constant believed that society's true safeguard against tyranny were Tocquevillian "mores". This underestimation of procedures --the "tutelary deities of societies"-- and of institutions is utterly surprising in a thinker regarded as the "constitutional apostle" of his time. So, it seems that emergency provisions were useful after all; it was only that the laws could not make them fool-proof. There was no safeguard that could be a hundred percent safe against the possibility that these powers might be misused and that a new Terror might ensue. Therefore, Constant tacitly implied, society was better-off if the lid of this Pandora's box was kept on. Perhaps, the procedures existed after all --in the Roman constitution-- although they were cloaked by the liberal tradition and its historical interpretation of the republican experience. In a free state, Clinton Rossiter asserts, the forms of despotism can be "successfully used in time of crisis to preserve liberty."\textsuperscript{90}

The problem of how constitutions become stable in the first place is not addressed by Constant. It is a significant omission, however. Yet, other fundamental assumptions of the theory are questionable. Since any present event can be explained as the result of some delayed backlash of a past occurrence, there is no way for ruling out causal spuriousness in Constant's theory, and some of its claims of inevitability may appear to be rather ludicrous.

\textsuperscript{89} Benjamin Constant, De la liberté des brochures, des pamphlets et des journaux considérées sous le rapport de l’intérêt du gouvernement, 1814, 471. English translation in Pamphleteer 6(London, 1815):206-38. Cited by Dodge, Constant's Philosophy, 101. But in general, Constant asserts, "Presented initially as a last resort, to be used only in infinitely rare circumstances, arbitrary power becomes the solution to all problems and an everyday expedient. At that point, not only does the number of the enemies of authority increase along with that of its victims, but its distrust also grows out of all proportion to the number of its enemies." The Spirit of Conquest, 135.

**Constitutional Consequences**

The sway of French constitutional ideas in the Hispanic world was such that the only emergency provisions included in the 1812 Cádiz constitution were preventive detention and the suspension of habeas corpus. Liberal concerns had prevailed. On preventive detention, "without" the suspension of habeas corpus, Article 172 stated that: "only in the case that the well-being and the security of the state demand the arrest of some person can the King issue warrants, but with the condition that the individual be presented before a judge or tribunal within forty-eight hours." Likewise, article 308 stated that: "If in extraordinary circumstances the security of the state demand, in all or in part of the monarchy, the suspension of some of the formalities prescribed in this chapter for the arrest of felons, the Cortes may decree it for a determined lapse of time." The similarity between article 308 and the English suspension of habeas corpus is not coincidental. Constitution-makers deliberately intended to reproduce the English practice in article 308. As Villalón shows, the discussion of this article in the Cortes "evidenced that the commission in drafting the article had been inspired by the ‘English Habeas Corpus Suspensions Acts’, in particular by those of Pitt between 1794 and 1801."

Emergency powers in the 1812 Cádiz Constitution were not, as Brian Loveman claims, broadly defined, but on the contrary, they were restricted to the temporal suspension of the habeas corpus. The 1812 constitution was effectively enacted in Spain on three occasions. During the first period (1812-1814), the government called for the use of article 308 only in one occasion. At the time, the Spanish Cortes rejected the petition of the Regency. During the second constitutional period, the application of article 308 "was considered on three occasions and only in one of them, when the city of Cadiz was under siege by the French army and when the constitutional regime was inevitably lost, was this article enacted."


92. Ibid. 95.


95. The petition was made on December 23, 1812. The Commission considered that the extraordinary authority requested by the Regency was unnecessary. Villalón, *Estado de Sitio*, 262.
By 1823, conservative Spanish forces, assisted by French troops and the Holy Alliance, again threatened the survival of the Spanish liberal regime. Ferdinand VII reasserted his authority with the support of Spanish royalists and a foreign army. The Spanish Cortes and the liberal government were placed under siege by royalist forces in the city of Cádiz. Finally, after several months and much deliberation, the Cortes approved a proposal that suspended a few of the formal procedures to arrest criminals in order to face the emergency (however, these suspensions would only take place in those districts declared 'in state of war'). These measures came too late to change the course of events. The Moderates that refused to grant extraordinary authority to the liberal government under article 308 during the October-November crisis of 1822, Villalón asserts, did not mean to impair the constitutional regime, they were sincerely convinced that the suspension of the constitution supposed the end of it. But this contention, that without doubt was valid in those years across the Pyrenees, and that without doubt [these representatives] had read in Constant, for the Spanish liberal regime was disastrous.

This does not mean, Villalón adds, that "the liberal regime would have been saved by virtue of article 308, but it does mean that the political situation was the one contemplated in that article and that in spite of this fact, this recourse was either not employed or was employed blatantly late."97 The second and last time article 308 was used occurred in the midst of civil war, on December 22, 1836. The constitution was re-enacted by the liberal faction, which required from the constituent Cortes the application of article 308.98

While it is true that Spanish governments unsuccessfully requested the use of article 308 in some non-critical cases, it is also true that when real threats appeared such article did not provide the liberal regime with sufficient authority to face emergencies. The suspension of habeas corpus provided in article 308 of the Cádiz constitution was far too restrictive to enable the liberal Spanish government to preserve constitutional rule against aggression from without and from within in 1822-23. When the limited suspension was finally approved by the Cortes, the city of Cádiz, the seat of the liberal government, was under siege and the country was fully invaded by foreign armies.99 The response to such a critical situation demanded that the government had broad powers over taxation, the army and other matters. The suspension of the "formalities prescribed for the arrest of persons" did not provide the government with enough legal means to quell serious revolts that threatened the existence of the regime. Not only was article 308 insufficient to fight the war, but

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96. The first request occurred on September 7, 1820. The second request took place two years later, on October 12, 1822. For a detailed account of these events see Villalón, Estado de Sitio, 262-268.


98. Ibid. 267-268.

99. Ibid.
even this recourse was denied to the government by the Spanish Cortes. The theoretical justification for this refusal to exercise the authority granted by article 308 was provided by Constant and the other French thinkers of the period. The failure of the constitution to provide the Spanish liberal regime with adequate means to survive can be seen as the first consequence of the liberal cloak on constitutional emergency provisions.

In México, the 1812 Cádiz constitution was enacted by the Spanish colonial government. Local authorities throughout Spanish America pledged allegiance to the constitution. The "famous law of habeas corpus" was celebrated by Mexican intellectuals, priests and public officials as they gave their oath of allegiance to the new constitution. A book written by Cottu, on "the administration of criminal justice in England and the spirit of English government," made the law of habeas corpus popular in Spanish America. The English practice was mentioned in the pre-independence 1814 Apatzingán constitution.

The first independent government in México went further than the Cortes in proposing things such as the abolition of racial distinctions for citizenship, the opening of government offices to all citizens and the abolition of slavery. The most important proof that the Mexican independence forces did not oppose the constitution is the fact that the program upon which independence was established, the Plan de Iguala, "endorsed the 1812 Spanish." That is, more than a year after independence had been obtained. Political turmoil in the metropolis suggested to México that the constitution might be endangered in Spain itself and that some drastic action was necessary to preserve it in México. Given the climate of opinion, "the Mexicans needed only an attractive political programme to win them over to the side of independence."

100. The priest Miguel Guridi y Alcocer hailed the "renowned law they call of habeas corpus" in a public speech on June 11, 1820. Reyes Heroles, Liberalismo mexicano, 1:80.


102. Art. 32: "The home of every person will be respected as if it were a sacred asylum and the law will be administered with the prescriptions and restrictions of the famed law of habeas (sic) corpus of England." Reyes Heroles, Liberalismo mexicano, 1:28.


104. Ibid. 84.

105. Ibid.
The viceregal regime collapsed only seven months after the publication of the Plan de Iguala. Viceroy Apodaca, urged on by his officers, suspended several basic constitutional guarantees in order to resist the rebels. In so doing, Anna asserts, he provoked further disaffection among Creoles “who recognized that the independent faction guaranteed the Constitution of Cádiz while the viceroy now threatened it.”

The dogma that under no circumstance could the constitution be suspended was firmly entrenched in Mexico at the dawn of the century. Mexican liberals had as their favorite maxim that “the first step taken against individual safety constitutes the sure beginning of the ruin of the nation and of the government.”

In Spain, the only emergency powers included in the Cádiz constitution was the liberal suspension of habeas corpus (article 308). The suspension of habeas corpus was inadequate because it did not give the government enough legal means to fight a war against the internal and external foes of the Spanish liberal regime. Moreover, even this limited means was not used during some of the most critical situations. Constitution-makers refused to include provisions granting broad emergency powers--other than the liberal suspension of habeas corpus-- in the constitution: they preferred to take the risk of not regulating extraordinary measures, rather than to place such formidable power in the hands of the government. The absence of broad emergency provisions in the Cádiz constitution led to de facto arbitrary rule in the form of legal degeneration.

Conclusion: Extra-Constitutional Sequels

In Spain, extra-constitutional expediency meant the substitution of civilian authority for military jurisdiction. Initially, Villalón asserts, this substitution took the form of an extension of the martial law. The military, besides dispersing protesting crowds, had the authority to try prisoners instead of presenting them to civilian judges. The origins of this practice were found in the Ancien régime. At that time, road bandits, under certain circumstances, could be tried by the military forces commissioned to pursue them. Between 1820 and 1823 the liberal Spanish regime faced a number of armed revolts that sought to overthrow it. In spite of this fact, judicial authorities were reluctant to issue arrest warrants against the rebels. A law, enacted on April 17, 1821, was the response of the government to this inability to face emergencies.

106. Ibid. 86, emphasis added.
107. Hale, Liberalismo mexicano, 89.
108. Villalón, Estado de Sitio, 300.
legally. With that law, “liberals opened a significant escape hatch from the constitutional regime: the trial of non-military citizens by war councils.”

The law of April 17, 1821 was aimed to abbreviate the judicial processes of offenders charged of crimes against the security of the state. The law was based on article 286 of the Cádiz constitution, that stated that the “laws will provide for the administration of criminal justice in such a way as to insure that processes are handled expeditiously so crimes are punished promptly.” Those persons apprehended by military troops, commissioned by a competent authority to capture them, in hot pursuit, were subject to military jurisdiction. If criminals resisted arrest, then the military had the authority to try the persons, even if the warrants for their arrest had been issued by a civilian authority. Once “resistance” to arrest had been presented, the military were in charge. The law constructed a legal fiction by which the military were competent, even if no resistance was presented at all, since if a peaceful crowd, after having been urged to disperse, did not comply, then the authority considered them as “resisting”, and then they could subject them to military laws.

The legislative commission of the Cortes that drafted the law of April 17, 1821 argued that such law only embodied two ordinances already existing. These laws dated back to 1783 and 1802, and conferred to the military the authority to try bandits and road robbers when, and only if, they opposed resistance to arrest. The privileged status that the constitution recognized to the military (Art. 250) was argued in support of the constitutionality of the law. Yet, as Villalón convincingly argues, that article only proved that military privileges subsisted for the military alone, and did not authorize in any way the subjection of the general citizenry to military procedures.

The key point, however, was that the old laws were concerned with smugglers, robbers and road bandits, whereas the legislative commission intended the April 17 law against the “assailants of the constitutional regime.” The law equated ordinary criminals with political dissidents. The interpretation of the law was so expansive that it could—and was—used to quell urban disturbs and peaceful protests. Unlike other martial laws, such as the English Riot Act, the April 17 law not only provided for the dispersion of an unfriendly crowd, but established military commissions and tribunals to try civilians after disorders had been suppressed. Later, this law provided the legal basis for the “states of siege.” A representative of the constituent Cortes of 1854-1856 claimed that the April 17 law had seldom been used

109. Ibid. 319.

110. Ibid. 322.

111. The two laws are the 12-10-10 and 12-17-8 of the Novísima Recopilación. D. Carlos III, royal decree of May 5, 1783 and royal instruction of June, 1784, Chapter 8. Pena de los bandidos, contrabandistas o salteadores de caminos que hiciesen resistencia a la tropa destinada a perseguirlos. And, Na. R., 12.17.8 D. Carlos IV, by orders of March 30, 1801 and April 10, 1802, Los salteadores de caminos y sus complices, apprehendidos por la tropa en las poblaciones, quedan sujetos al Juicio militar. Villalón. Estado de Sitio, 324.
appropriately. Governments generally abused the law, declaring states of siege when there was no war.\textsuperscript{112} The April 17, 1821 law provided Spanish governments with extra-constitutional and arbitrary authority to repress their political enemies until 1870.

A secondary law, aimed at the prosecution of common criminals, was clearly distorted by the government to transform it into an \textit{ad hoc} instrument to deal with political strife. Perhaps, this legal perversion occurred because the constitution (where a procedure designed to deal with extraordinary situations should have been embedded), lacked broad emergency powers. Since constitution-makers refused to include such powers in the 1812 constitution, the legitimate way to face revolts and other emergencies was closed. Later, liberal governments sought --and found-- a way to circumvent the constitution: by adapting secondary laws, and in doing so distorting their original spirit, intended for other purposes.

It is possible to argue that the absence of broad emergency provisions in the 1812 Spanish constitution led to \textit{de facto} arbitrary rule. Since the liberal constitution only authorized the suspension of habeas corpus, governments increased their power by perverting and expanding the scope of secondary laws. The logic of this causal link is the following. Until the mid-nineteenth century, Spanish constitution-makers preferred to run the risk of not regulating emergency powers in the constitution, rather than placing in the hands of the government a formidable weapon.\textsuperscript{113} However, as the debates over the April 17 Law demonstrate, at the time the use of secondary laws to make-up for the absence of constitutional provisions, was seen by many lawmakers as less detrimental to individual freedom.\textsuperscript{114} For one thing, such laws would \textit{not} be embedded permanently in the fundamental law of the country. The chance of laying down the foundation of protracted dictatorship would be less serious if the constitution was left untouched. The April 17 law would only be a regretful, but temporary deviation forced by the circumstances, from the well designed constitution. In the long run, they contended, the effects of secondary laws would be less damaging to limited government than constitutional emergency powers. The expectation was that sooner or later reality would conform to theory and then the use of troubling secondary laws would fall into oblivion. The liberal constitution was preserved in its purity, the rule of law was not. The story was soon to be repeated in Mexico, where José María Luis Mora complained of irregular military commissions ruling the country in spite of the liberal 1824 constitution.

\begin{itemize}
\item 112. Villalón, \textit{Estado de Sitio}, 326.
\item 113. Ibid.
\item 114. Ibid. 320-328.
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