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# In the Shadow of Cádiz? Exogenous and Endogenous Factors in the Development of Portuguese Constitutionalism, c. 1780-1825

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## **In the Shadow of Cádiz? Exogenous and Endogenous Factors in the Development of Portuguese Constitutionalism, c. 1780-1825**

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There is little doubt that Portuguese intellectual and political life was profoundly affected and influenced by *El Momento Gaditano*. There are a sufficient number of studies attesting to *La Pepa*'s diffusion and its centrality to political debate and constitution-making, from Rio de Janeiro to Goa, to prove its decisive influence definitively.<sup>1</sup> The adoption of the 1812 Cádiz Constitution throughout the Luso-Brazilian Atlantic World in 1821 and the transparent similarity of the 1822 Portuguese Constitution with its 1812 Spanish forebear might suggest that that Portuguese constitutionalism was a largely derivative phenomenon, imitating its Iberian neighbor and differing only in the details. Yet drawing such an inference would lead to intolerable distortions. Though Cádiz constitutionalism exerted great influence, and in spite of the fact that Ibero-Atlantic constitutional processes and political histories converged in the early 1820s, Spanish legal ideas were merely one among many factors determining the development of Portuguese constitutionalism during the Age of Revolutions. This article offers an overview of Portuguese constitutionalism during this crucial period and analyzes the impact of exogenous and endogenous factors on its development, confining itself to Peninsular developments, as the present author has treated the transatlantic dimensions of this process elsewhere.<sup>2</sup>

In order to understand Lusitanian constitutionalism in the early nineteenth century, a brief excursus to previous centuries is useful. There is a scholarly consensus that early modern Portugal was a corporate society, in which the Crown enjoyed uneasy pre-eminence over other bodies. The king was

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<sup>1</sup> Among others, see C.A. Bayly, *Recovering Liberties. Indian Thought in the Age of Liberalism and Empire* (Cambridge: Cambridge University Press, 2012); and Márcia Regina Berbel, "A Constituição Espanhola no Mundo Luso-Americano (1820-23)," *Revista de Indias* 68 (2008): 225-54; and Joaquin Varela Suanzes-Carpegna, "O Constitucionalismo Espanhol e Português durante a Primeira Metade do Século XIX (Um Estudo Comparado)," *Historia Constitucional*, 11 (2010): 237-74.

<sup>2</sup> See Gabriel Paquette, *Imperial Portugal in the Age of Atlantic Revolutions: The Luso-Brazilian World, c. 1770-1850* (Cambridge: Cambridge University Press, forthcoming), esp. chs. 2-3.

qualitatively different from the nobility: he was the ultimate arbiter of justice and responsible for the enforcement of law, empowered to hear appeals and dispense grace. If the Crown's symbolic superiority over other powers was clear, its compromised legislative authority, institutional weakness, and fiscal limitations undercut its position. In the seventeenth century, the Church enjoyed freedom from monarchical interference. Outside of the large urban centers (with the notable exceptions of Aveiro, Vila Real, and Bragança), where the Crown was ascendant, the military orders and lay nobility enjoyed significant control over Portugal's land, wealth, and the exercise of legal jurisdiction. There was, then, a constant tension between the unity and autonomy of the various parts of the polity, which was simultaneously monarchical and pluralist: the concentration of power in the Crown's hands, and its concomitant capacity to supersede competing seigniorial and ecclesiastical jurisdictions, would not occur until the eighteenth century.<sup>3</sup>

Until then, Portugal's political culture was characterized by the special rights and prerogatives of multiple semi-autonomous bodies, corporations, and social units, which together conspired to thwart any attempts at consolidation by the Crown. The Crown was embedded in a complex, interdependent system, of which the Cortes was one of many bodies.<sup>4</sup> In general, it was an assembly of the Three Estates, or *Três Estados*, of the realm (clergy, nobles, and commoners). There is scholarly debate concerning the function and composition of the Cortes before the fourteenth century. The first assembly that was more than a royal council met in 1211 while popular participation, which was probably merely a royal expedient to secure extra taxation, was registered for the first time at the Cortes of Leiria in 1254.<sup>5</sup> After a brief golden age in the fourteenth and fifteenth centuries, it re-emerged after the restoration of Portugal's independence after 1640, for the purpose of handling issues surrounding royal succession and taxation.<sup>6</sup> The problem was that the supposed precedent for the Cortes as it emerged in the late seventeenth century, the so-called Cortes of Lamego which

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<sup>3</sup> A.M. Hespanha, *As Vésperas do Leviathan. Instituições e Poder Político. Portugal. Séc. XVII* (Coimbra: Livraria Almedina, 1994), 343, 422, 427, 431, 436-438, 527-528; Pedro Cardim, *Cortes e Cultura Política no Portugal do Antigo Regime* (Lisbon: Edições Cosmos, 1998), 185.

<sup>4</sup> Cardim, op.cit., 186.

<sup>5</sup> A.H. de Oliveira Marques, *History of Portugal* (New York: Columbia University Press, 1972), I, 99.

<sup>6</sup> On the nature and function of the Cortes in the early modern period, see A. Bareto Xavier, A.M. Hespanha, and P. Cardim, "A Representação da Sociedade e do Poder", in A.M. Hespanha, *O Antigo Regime 1620-1807* [Vol. IV of José Mattoso, ed. *História de Portugal*] (Lisbon: Editorial Estampa, 1993), 121-55.

supposedly convened in 1143, was revealed later to have been a forgery, though this was not confirmed until the nineteenth century.<sup>7</sup> Recently, historians have shown that the medieval Cortes never enjoyed anything resembling popular sovereignty, as nineteenth and twentieth century liberal historiography, in search of precedents for mixed monarchy, asserted.<sup>8</sup> Still, the long-standing existence of a Cortes, conceived narrowly as a representative body and counterweight to royal authority, regardless of its actual authority, served as a reminder that Portugal's ancient constitution possessed at least some representative features. In this sense, the Portuguese situation resembled the Spanish one, where the Crown was dependent on the Cortes for at least some of its revenue, as much as 60 per cent in 1640-1650.<sup>9</sup>

In Portugal, colonial wealth tipped the scales in the Crown's favor, providing new sources of revenue, fresh opportunities for military and political action, and new administrative units, appointments to which the Crown controlled.<sup>10</sup> The influx of gold and diamonds after the Brazilian mineral strikes of the 1690s permitted the Crown to dispense with the nuisance of convening the Cortes, which met for the last time in 1697-1698. But the Crown's control of patronage, and its generally freer hand, should not disguise the fact that Portugal, Peninsula and overseas dominions alike, were also pluralistic, with competing and cooperating corporate bodies sharing juridical and political authority.<sup>11</sup> In general, then, throughout the territories composing the Portuguese empire, the Crown was ascendant, but its centralizing pretensions were constrained by a morass of legislation, accumulated over several centuries, which served to preserve the positions of privileged groups even as the Crown's authority itself was strengthened as a result of colonial ventures and the booty they yielded.

Efforts to draw up a new legal code in the eighteenth century revived dormant debates concerning the nature of Portugal's "constitution". The term

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<sup>7</sup> The circumstances surrounding the forgery of documents related to the Cortes of Lamego, primarily to justify Dom João IV's revolt against Spain in 1640, are described in depth in Oliveira Marques, op.cit., I, 325-27.

<sup>8</sup> Cardim, op.cit., 185.

<sup>9</sup> I.A.A. Thompson, "Crown and Cortes in Castile, 1590-1665," *Parliaments, Estates and Representation* 2 (1982), 39.

<sup>10</sup> Hespanha, *As Vésperas do Leviathan*, op.cit., 473, 496.

<sup>11</sup> A.M. Hespanha, "Antigo Regime nos Tropicós? Um Debate sobre o Modelo Político do Império Colonial Português," in João Fragoso and Maria de Fátima Gouvêa, eds., *Na Trama das Redes: Política e Negócios no Império Português, Séculos XVI-XVIII* (Rio de Janeiro: Civilização Brasileira, 2010), 75.

“constitution” in early modern Europe, of course, did not refer merely to a written document, or charter, or solely to the form of government, but also encompassed factors relating to the functioning of the body politic, including social structure, institutions, and customs. All were subsumed in the term “constitution”. By the mid-eighteenth century, though, the definition had been narrowed considerably. In 1758, Emmerich de Vattel stated that “the fundamental regulation that determines the manner in which public authority should be regulated is the constitution of a state.” This mid-eighteenth century conception jostled for primacy with other, older meanings of constitution, often grouped under the heading “fundamental law,” or *lei fundamental*. As in France, many usages and understandings coexisted, making its deployment in political argument immensely attractive to every political persuasion. As an historian has demonstrated, “by the early seventeenth century, it had become the standard term for any laws, rights, privileges or customs that writers thought of special importance for the well-being of a community.”<sup>12</sup> In Portugal, both terms, “*constituição*” and “*lei fundamental*,” circulated widely by the middle of the eighteenth century.

Building on a 1778 decree, Dona Maria established a *Junta de Revisão e Censura do Novo Código*, directed by an old Pombaline hand, José de Seabra da, in 1784. The Junta’s purpose was to compile the dispersed, fragmented laws which had accumulated since the restoration of Portugal’s independence from Spain in 1640, endow them with some semblance of order, remove redundancies and resolve contradictions, and fashion them into a systematized legal code.<sup>13</sup> One of the Junta’s members was António Ribeiro dos Santos, a regalist canon lawyer, who advocated the need for robust royal authority, particularly relative to the Church.<sup>14</sup> But Ribeiro dos Santos simultaneously held that the Cortes, a stalwart feature of Portugal’s juridical past, should be convened to recalibrate the relative power of the various corporations and orders within the monarchy. He thus proposed to revitalize tradition in order to prop up beleaguered absolutism. Though aware of the perils posed by the revival of the Cortes almost a century

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<sup>12</sup> Martyn P. Thompson, “The History of Fundamental Law in Political Thought from the French Wars of Religion to the American Revolution,” *American Historical Review* 91 (December 1986), 110.

<sup>13</sup> Caetano Beirão, *D. Maria I 1777-92. Subsídios para a Revisão do seu Reino*, 2<sup>nd</sup> edn (Lisbon: Empresa Nacional de Publicidade, 1944), 226.

<sup>14</sup> Ribeiro dos Santos’s *De Sacerdotio et Imperio* (1770) offered a clear-eyed regalist statement that the Church should be autonomous and separate from the state, with concern limited to doctrine and sacraments. See Kenneth R. Maxwell, *Pombal: Paradox of the Enlightenment* (Cambridge: Cambridge University Press, 1995), 94-95.

after it had last been convened, he believed that circumstances required it.<sup>15</sup> In a widely circulated manuscript, “On the Origin of Princely Power,” he argued that

the convocation of the Cortes can bring with it, due to the bad disposition of its vassals, terrible consequences for a prince: but this will not necessarily occur. If a prince is good, if he governs well, if he demonstrates a willingness to improve his government, the convocation of the Cortes will benefit him and, far from threatening his throne, will provide a new, firm foundation for his government.<sup>16</sup>

The timing of Ribeiro dos Santos’s manuscript’s appearance was awful. In 1789, his views on the Cortes were attacked by jurist Pascoal de Melo Freire (1738-1798), a colleague on the Junta as well as a Coimbra professor. Melo Freire contended that his colleague’s theories threatened the throne. Ribeiro dos Santos did nothing to endear himself to Melo Freire when he penned a commentary on Melo Freire’s draft of a public and criminal code, intended to replace the outdated *Ordenações Filipinas*. He accused Melo Freire of confusing the order of operations. A *lei fundamental* was necessary before any such code could be drawn up or reformed, for the latter served as the basis for the former, not the other way round. In Ribeiro dos Santos’s view, a Prince’s first duty was to uphold the fundamental laws of the kingdom, which emanated from the original foundation of society.<sup>17</sup> Interestingly, though probably not as a result of Ribeiro dos Santos’ criticism, Melo Freire never submitted his drafts for royal approval. Had he done so, Portugal might have preceded Austria and France as the first country with a uniform civil code.<sup>18</sup> As things turned out, the task of codifying dispersed legislation would fall to the *Vintistas* two decades later.

But Melo Freire did not remain silent altogether. He refused to permit his colleague’s assertions to stand unchallenged. He denounced Ribeiro dos Santos’s allegedly anti-monarchical tendencies, and clarified his own position on fundamental laws and constitutions. Melo Freire maintained that the monarch was encumbered by few restrictions and that he was, undoubtedly, unrestrained by the terms of Portugal’s *Lei Fundamental*, which determined nothing except the order of royal succession. Royal authority emanated from the right of succession, itself

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<sup>15</sup> J.E. Pereira, *O Pensamento Político em Portugal no Século XVIII. António Ribeiro dos Santos* (Lisbon: Imprensa Nacional-Casa da Moeda, 1983), 165, 166, 263.

<sup>16</sup> Ribeiro dos Santos, quoted in Pereira, op.cit., 264.

<sup>17</sup> Ribeiro dos Santos’s manuscript “Notas ao Plano”, quoted in Pereira, op.cit., 269.

<sup>18</sup> Linda Lewin, *Surprise Heirs, vol. I: Illegitimacy, Patrimonial Rights and Legal Nationalism in Luso-Brazilian Inheritance, 1750-1821* (Stanford: Stanford University Press, 2003), 133.

based on earlier conquest, not some social pact or contract enshrined in a written constitution, which he ridiculed as something existing “only in the minds and convoluted imaginations of some philosophers”. Melo Freire went further still, rejecting the notion of supposedly sacrosanct privileges and special rights, particularly the *foros*, claiming that they were not inviolable. While he stopped short of championing a “tyrannical or despotic king,” and stressed the importance of secure property rights and a well-administered judicial system, Melo Freire wanted few limits on the king’s pursuit of the “public good” as he deemed fit. Furthermore, the entire political system should produce “vassals who love and respect their prince; not those who [falsely] claim possession of chimerical and seditious privileges and rights.”<sup>19</sup>

In many regards, Melo Freire and Ribeiro dos Santos were unlikely adversaries. Staunch regalists who sought to curb the authority of the Papacy, ecclesiastical privilege, and canon law, both Crown servants were unmistakable products of Pombal’s overhaul of the Coimbra curriculum. Like other late eighteenth-century jurists, they shared an abiding interest in the Iberian legal heritage, emphasizing the primacy of existing national law, including customary law, to the exclusion of Roman civil law and canon law. As in Spain, this prompted interest in the historical evolution of Portuguese institutions, the post-Roman, pre-Islamic Visigothic past. It had been the Visigoths, for example, who enshrined in law the calling of assemblies, a precedent from which Portugal’s medieval Cortes descended.<sup>20</sup> The rediscovery of this proto-national legislation, which renewed debates on the nature of Portugal’s ancient constitution, coincided with the vogue for written constitutions, popular sovereignty, and legislative assemblies, forcing them into raucous dialogue.

Shared interests, background, and regalist predisposition notwithstanding, Melo Freire and Ribeiro dos Santos reached divergent conclusions regarding the nature of Cortes in particular and character of Portugal’s ancient constitution in general. Ribeiro dos Santos’s vision of a monarch whose authority was derived from, and limited by, a fundamental law, co-existing with the Cortes, ran contrary to Melo Freire’s understanding of the king as superior to the Cortes (and all other institutions). In Melo Freire’s interpretation of Portugal’s legal past, the Cortes was a consultative, not legislative, body, which was convened at the king’s pleasure and could not frame legislation constraining him.<sup>21</sup> In 1789, Melo Freire bested his adversary. After their intellectual feud, the faintest suggestion of

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<sup>19</sup> Melo Freire, quoted in Pereira, *op.cit.*, 293, 301.

<sup>20</sup> See Lewin, *op.cit.*, 123-47 *passim*.

<sup>21</sup> Cardim, *op.cit.*, 178.

convening a Cortes became incendiary, even a punishable offense. In 1799, when Seabra da Silva gently suggested the convocation of the Cortes in order to confirm Dom João as regent, he was sacked.<sup>22</sup>

But the debate was far from settled and the ideas of both Melo Freire and Ribeiro Santos were employed eclectically by later proponents of constitutionalism. In the 1820s, for example, Ribeiro dos Santos was rehabilitated by the revolutionary liberals as a proto-*Vintista*, a controversial and selective appropriation.<sup>23</sup> Melo Freire's ideas, too, were integrated into the emerging canon of liberal jurisprudence by way of an extensive commentary written by one of his students, published between 1818 and 1824.<sup>24</sup> Borges Carneiro would draw on both figures as he sought to raze the legal foundations of the Old Regime, adapting Pombaline jurisprudence to meet the requirements of liberal constitutional government.<sup>25</sup>

In the intervening period (1790-1820), a superabundance of factors influenced the development of Portuguese constitutionalism. In addition to the Portuguese legal traditions discussed previously, constitutional stimuli wafted in from abroad, first from France and then from Spain. Junot, commander of the French occupying force, convened the *Junta dos Três Estados* in May 1808. This was not a Cortes, to be sure, but a nominally representative body, revived by Junot for the self-serving purpose of petitioning Napoleon to place a new king on Portugal's vacant throne. The origins of this Junta may be located in the seventeenth-century War of Independence, when Dom João IV governed with the assistance of a rump legislature, whose remit was confined to the fiscal aspects of war-making against Spain: soldiers pay, equipment, fortifications, and finance, especially the creation and collection of extraordinary, new, and temporary taxes.<sup>26</sup> This Junta, however, had not been convened for over a century, an unsurprising non-occurrence given that the Cortes itself had ceased to meet in 1698. The revived Junta, hand-picked by Junot, begged Napoleon to bestow a constitution upon Portugal similar to that given previously to the Grand Duchy of Warsaw. The Warsaw Constitution was unequivocally a constitutional monarchy,

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<sup>22</sup> Isabel Nobre Vargues, *A Aprendizagem da Cidadania em Portugal (1820-23)* (Coimbra: Minerva, 1997), 112; in the second half of the seventeenth century, the Cortes had been convened on several occasions to ratify or otherwise confirm the succession to the throne or a royal marriage that would impact succession. See Oliveira Marques, op.cit., I, 393.

<sup>23</sup> J.E. Pereira, op.cit., 261.

<sup>24</sup> Lewin, op.cit., 152.

<sup>25</sup> Lewin, op.cit., 155.

<sup>26</sup> Vargues, op.cit., 112.

boasting a bicameral legislature, whose representatives would be elected by municipal *câmaras*. Equality before the law, the establishment of the Napoleonic Code, and the sale of mortmain also were broached.<sup>27</sup>

The second external influence on Portuguese constitutional thought came from Spain. In many regards, Francisco Martínez Marina's historicist account of the Cortes, particularly his *Teoría de las Cortes* (1813), resonated and dovetailed with the Melo Freire-Ribeiro dos Santos debate in Portugal. Martínez located the origins of modern liberalism—chiefly representative institutions—in Spain's medieval past, suggesting that the people's representatives had participated in political decision-making alongside the king.<sup>28</sup> This conception of constitutionalism sought to synthesize laws available in old statutes, with a special emphasis on the rights historically acquired by the distinct groups (estates, regions, and municipalities) composing the Spanish Monarchy. Martínez's historical constitutionalism proved influential in Portugal, including in José António de Sá's *Defeza dos Direitos Nacionaes e Reaes da Monarquia Portuguesa* (1816), which identified (falsely) the Cortes of Lamego of 1143 as the founding moment of Portugal's authentic ancient constitution. Such ideas were fleshed out and made explicit in Cypriano Rodrigues das Chagas's *As Cortes, ou Direitos do Povo Português* (1820), which claimed that the medieval Cortes moderated the absolute power of kings and expressed the interests of the people.<sup>29</sup> This position, of course, was highly controversial, and was rejected by many jurists and political writers, as shall be explained subsequently in this article. But it is crucial to recall that these traditions of legal-historical scholarship and polemic conditioned the reception and use of foreign constitutional models, including the 1812 Spanish Constitution.<sup>30</sup> In addition to the influence of this *gaditano* charter, the flurry of republican constitutions that proliferated during the 1810s in Spanish America resonated throughout the Luso-Atlantic sphere, including in the 1817 Pernambucan Revolution.<sup>31</sup> While many of these

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<sup>27</sup> *ibid.*, 113-114.

<sup>28</sup> On Spanish and Spanish-American constitutionalism and liberalism, see Roberto Breña, *El Primer Liberalismo Español y los Procesos de Emancipación de América 1808-1824. Una Revisión Historiográfica del Liberalismo Hispánico* (Mexico City: El Colegio de México, 2006); on the idea of historical constitutionalism in Spain, see Richard Herr, *The Eighteenth-century Revolution in Spain* (Princeton: Princeton University Press, 1958).

<sup>29</sup> Cardim, *op.cit.*, 179-80, 181.

<sup>30</sup> Berbel, *op.cit.*; for a comparative study of Spanish and Portuguese constitutionalism in this period, see Varela Suanzes-Carpegna, *op.cit.*

<sup>31</sup> The literature is enormous. In English, see Roderick Barman, *Brazil: The Forging of a Nation, 1798-1852* (Stanford: Stanford University Press, 1988).

constitutions also bore the deep imprint of successive French Constitutions of the 1790s, they had been suitably amended and updated, and thus drew attention from Portuguese commentators. There was a great connection and interchange between European and Latin American liberal and revolutionary ideologies.<sup>32</sup>

The third general influence after 1814 on Portuguese constitutionalism was the French *Chartre*, the first in the wave of self-fashioned “moderate” constitutions which sought to mediate between the extremes of unbridled reaction and revolutionary republicanism. *O Portuguez*, based in London, published many articles on a range of constitutional models. Besides the French *Chartre* and English constitution, its editor, Rocha Loureiro, often commented upon excerpts drawn from the constitutions of the Low Countries (1815) and the Grand Duchy of Baden (1818). Other constitutions and legal codes debated in émigré newspapers included Tuscany’s criminal code, three of the French Constitutions (1791, 1793, 1795), the constitution of the Grand Duchy of Hesse-Darmstadt of the Germanic Confederation, and the USA 1787 Constitution. After the 1820 Porto Revolution, unsurprisingly, more constitutions were brought forward for public scrutiny and were incorporated into debates, both periodical and parliamentary. Perhaps the most important compendium was the *Collecção de Constituições Antigas e Modernas*, published in 1820, which contained not only all of the “Fundamental Laws” of Portugal (including the Cortes of Lamego), but also an array of French Constitutions (and Declaration of the Rights of Man), Louis XVIII’s *Chartre*, and the proceedings of the Cortes of Cádiz. Another important, widely-circulated collection was the *Obras Constitucionaes de Hespanha e Napoles*, published in Lisbon in 1820-21.<sup>33</sup> These weighty tomes were joined by slew of slimmer pamphlets and booklets which reprinted translations of the Cádiz Constitution.

It is accurate, then, to observe that constitutionalism was “in the air,” though such a vague pronouncement would insinuate that Portuguese constitutionalism’s origins were exogenous, that the spark was received from abroad. It is more precise, however, to assert that Portuguese empire, in the throes of a protracted political and economic transformation, was compelled to reconsider its legal infrastructure. Its legal inheritance was now viewed afresh in the light cast by the constitutional explosions in neighboring states. Given the multiplicity of influences, it is unsurprising that the meaning of “constitution” was contested fiercely. By 1815, to advocate constitutionalism meant to champion a

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<sup>32</sup> Maurizio Isabella, *Risorgimento in Exile: Italian Émigrés and the Liberal International in the Post-Napoleonic Era* (Oxford: Oxford University Press, 2009), 47.

<sup>33</sup> Vargues, *op.cit.*, 115, 131, 134.

written constitution that clearly defined the scope and nature of authority of each component of the political community and, consequently, was anti-absolutist to some extent. *O Campeão* captured the prevailing attitude in 1820 when it defined the “political constitution of a state as nothing more than the fundamental law that creates, divides, and authorizes the various powers.”<sup>34</sup> Proponents of constitutional monarchy hoped to carve out a role for an elected assembly wielding some degree of legislative authority (or check on executive power). As early as 1816, the editors of *O Portuguez* called on Dom João to convene a “general assembly,” arguing that “national representation, as practiced in England or the United States, was the sole remedy to heal the desperate infirmity” afflicting Portugal and Brazil. *O Portuguez* promised that “fear of a constitution” was unjustified, for far from “diminishing royal authority, it augmented the power and dignity of the throne, raising it to an almost divine stature.”<sup>35</sup>

In fact, as *O Portuguez* contended, Portugal’s former prosperity and *grandeza* was attributable to its Cortes and the ancient constitution of which that body formed an indispensable part, while its decadence was due to the destruction and ruin of that constitution.<sup>36</sup> *O Campeão Portuguez* contended that the convocation of a Cortes would not “foment revolution, but rather suffocate the revolutionary spirit.”<sup>37</sup> This was because the Cortes was an essential component, even the “most sacred and important” part, of Portugal’s “ancient political edifice.” This was why, in *O Campeão*’s view, the Cortes of Cádiz should be interpreted properly as a “counter-revolution”, a “return to the earliest institutions.”<sup>38</sup> Clamoring for the Portuguese Cortes’ convocation, then, was portrayed as a restoration of long-forsaken institutions, not an overthrow of existing ones or the introduction of new-fangled innovations alien to its political and juridical heritage.

The champions of written constitutionalism, however, imbued the re-fashioned Cortes with the tenets of modern constitutional theory. Such innovations were explained away or justified as consonant with the function and purpose of its extinct predecessor. The Portuguese revolutionaries of the early 1820s presented their project as a return to the values of the now-degraded past, a protest against an administration which had “violated our *foros*, and rights,

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<sup>34</sup> *O Campeão Portuguez*, II (May 16, 1820), 341

<sup>35</sup> *O Portuguez*, V (1816), 361-62.

<sup>36</sup> Alfred Hower, “João Bernardo da Rocha and His ‘O Portuguez,’” *Studies in Romanticism* 1, No. 1 (1961), 42-43.

<sup>37</sup> *O Campeão Portuguez*, vol. I (August 16, 1819), 128.

<sup>38</sup> *O Campeão Portuguez*, vol. II (May 16, 1820), 345.

destroyed our liberties, thus profaning our laudable customs, which characterized the Portuguese since the founding of the monarchy.”<sup>39</sup> The establishment of the Cortes was not an “innovation”, but the “restitution of the ancient and beneficent institutions, corrected and applied in accordance with the *luzes do século*.”<sup>40</sup> The restoration, or regeneration, was necessary for Portugal’s public institutions had been degraded. For Borges Carneiro, Portugal’s “happiness had ended with [the last meeting of] its Cortes”, as a “cadre of egoists, enemies of the public good,” including “self-interested favorites (*validos*)”, “triumphed” and assumed the reins of power.<sup>41</sup> In Almeida Garrett’s formulation, the Portuguese, “declared free at the Cortes of Lamego, became the slaves of vile, ambitious, and insatiable men.”<sup>42</sup> Absolutism, in other words, was a pernicious innovation and Portugal’s plight could be attributed to the perversion of its traditional constitutional heritage. Revolutionaries thus fashioned themselves as part of a proud lineage, stretching back to the English Magna Carta, the “first offspring of European liberty.” After passing to France, and then to Spain, Manoel Ferdandes Tomás’s newspaper, *O Independente*, explained in 1822, the “sacred tree of liberty” was brought to, and planted in, Portugal. There it grew so strong that “it was as if it was a plant truly indigenous to the country” and the Portuguese were seeking to show the world that “we are worthy of possessing and cultivating it.”<sup>43</sup>

In spite of the enthusiasm for written constitutions, revolutionary ardor masked numerous discrepancies of opinion and unresolved debates which dated back to Melo Freire and Ribeiro dos Santos. The first debate concerned whether Portugal’s ancient, unwritten constitution was, in fact, a constitutional monarchy; that is, whether legislative authority was shared between the monarch and a body of representatives (whether defined as the traditional estates or as an undifferentiated mass of the population). On one extreme stood those who argued that legislative authority resided entirely in the Cortes and, on the other, those who insisted that it was possessed solely by the monarch. The second debate concerned the origin of sovereignty, whether it was possessed by the monarch, by some authority preceding the foundation of society, either by virtue of conquest or “divine” right, or if it originated with the “people” or “nation,” however

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<sup>39</sup> A Junta Provisional do Governo Supremo do Reino, “Aos Portugueses,” August 24, 1820, in *Collecção Geral e Curiosa* 1820, np.

<sup>40</sup> *Manifesto da Nação Portuguesa* (December 15, 1820), 6.

<sup>41</sup> Manoel Borges Carneiro, *Portugal Regenerado em 1820*, 3<sup>rd</sup> edn (Lisbon, 1820), 22-23, 26-27.

<sup>42</sup> Almeida Garrett, “O Dia 24 de Agosto”, reproduced in Joel Serrão, ed. *Liberalismo, Socialismo, Republicanismo. Antologia de Pensamento Político Português*, 2nd edn (Lisbon: Livros Horizonte, 1979), 57.

<sup>43</sup> *O Independente*, II, no. 1 (January 2, 1822), 185-86.

conceptualized and delimited. This second dispute flowed into a third major debate concerning which power—legislative or executive—was pre-eminent and thus empowered to block, or veto, the actions of the other.

If the bedrock of the liberals' arguments was historical precedent, their interpretation of that constitutional past, of the origins and scope of representative government was plainly revolutionary. The *Vintistas* argued that the role of the Cortes was legislative, not merely consultative. In fact, they argued, the entire legislative power resided in the Cortes. The laws that the Cortes might pass, in Fernandes Tomás's words, "depended on the King's sanction." The King, however, did not possess a veto. To give the King the authority to veto legislation, he claimed, would "harm the nation, because it would block our reform."<sup>44</sup> This view contradicted that held by absolutism's champions, who argued that legislative authority resided solely in person of the monarch, with the Cortes serving in a mere consultative capacity. Self-proclaimed moderate, though still royalist, figures argued that sovereignty, defined as the authority to make law, was shared between the monarch and representatives chosen by various groups of people, and did not reside solely in any one of the institutions that made up the government.<sup>45</sup> Partisans of both extremes rejected this moderate stance. The *Vintistas* insisted that the Cortes stood at the apex of the hierarchy of legislative, executive, and judicial power. Otherwise, Borges Carneiro warned, "constitutional government will become a three-headed monster."<sup>46</sup>

The debates of 1820-23, then, never rested solely on historical interpretation and legal precedent. To re-make the Portuguese monarchy, to re-conceptualize its constituent parts, and to recalibrate the relations among them involved innovation and a break from the past. It was impossible to adhere faithfully to older forms of organization. "Men today do not think like those who lived in the time of Dom Afonso Henriques or Dom Pedro II. Today there are different sorts of men, different customs, and ways of thinking."<sup>47</sup> It was for this reason that the themes broached and projects pursued would be different from those of the past. One of the chief innovations proposed by the *Vintistas* involved the form the Cortes. The model proposed in 1820 did not adhere to the older model, the convocation of the *Três Estados*. Borges Carneiro conceded that his co-revolutionists were discarding the older form, but he contended that the *Três*

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<sup>44</sup> M.F. Tomás, February 26, 1821, in Tomás, *A Revolução de 1820*, Ed. J. Tengarrinha (Lisbon: Seara Nova, 1974), 81, 84.

<sup>45</sup> Pinheiro Ferreira, *D[iário das] C[ortes]*, July 14, 1821, 1551-1552.

<sup>46</sup> Borges Carneiro, *DC*, February 9, 1822, 133-34.

<sup>47</sup> Miranda n.d., 51.

*Estados* was no longer useful for it “divided the nation into parties and each estate seeks to aggrandize its own; and divides discussions of affairs which should be considered together.”<sup>48</sup> In place of estates, the *Vintistas* sought a single *câmara*, or chamber, and thus was an embrace of the Spanish model and a rejection of the bicameralism enshrined in the French *Chartre*, the US Constitution, and the British parliamentary system.<sup>49</sup> Another innovation was legally-protected freedom of expression. As the revolutionaries put it: “the Inquisition, the *Inconfidência*, true monsters of the social order, horrible invention of despots and tyrants, no longer exist. Humanity, and Reason, have recovered their *foros*.”<sup>50</sup> The liberals of 1822, as well as the 1826 *Carta*’s champions, needed the power of the state, as much to destroy the old order as to establish a new one.<sup>51</sup>

In the event, geopolitical pressures, expediency, and the suitability of the Cádiz Constitution led to its immediate adoption in Portugal and Brazil as an interim constitution while the Cortes framed a new Fundamental Law. One *Vintista* declared that “Spain is an example to all of the world and it is our model.”<sup>52</sup> Another pamphleteer declared that the Cádiz Constitution would be an “excellent base, with a few obvious modifications, is perfectly suited to Portugal.”<sup>53</sup> One newspaper argued that the Spanish constitution “should govern the great European family”<sup>54</sup> whereas another gushed that it was “the greatest wonder of the world” because of its perfection: “Nothing could be added to it without making it defective while nothing could be taken away without diminishing its greatness.”<sup>55</sup> From abroad, Jeremy Bentham urged the Portuguese to adapt the 1812 Spanish Constitution without revision: “adopt it as a mass: time admits not of picking and choosing ... to find ready-made a work already so suitable, is a blessing too great for expectation.”<sup>56</sup>

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<sup>48</sup> Borges Carneiro, op.cit., 78-79.

<sup>49</sup> On broader European debates concerning bicameralism, see Annelien de Dijn, “Balancing the Constitution: Bicameralism in Post-Revolutionary France, 1814-31,” *European Review of History* 12 (2005), 249-68.

<sup>50</sup> *As Cortes Geraes ... aos Brasileiros* (1821), 1.

<sup>51</sup> Hespanha, *As Vésperas do Leviathan*, op.cit., 7-8.

<sup>52</sup> Francisco José de Almeida [Lavrado], *Introdução á Convocação das Cortes debaixo das Condições do Juramento pela Nação* (Lisbon, 1820), 37.

<sup>53</sup> [Anon.], *Reflexões ... Pacto Social* (1821), 80.

<sup>54</sup> *O Portuguez Constitucional Regenerado*, no. 26 (August 31, 1821), 113.

<sup>55</sup> *O Escudo*, no. 5 (1823), 95-96.

<sup>56</sup> Jeremy Bentham, *Three Tracts Relative to Spanish and Portuguese Affairs with a Continual Eye to English Ones* (London, 1821), “Letter to the Portuguese Nation,” 47.

Not everyone shared Bentham's enthusiasm. In the Cortes itself, Moura contended that Spanish example could not be followed by Portuguese as their "situation was very different [for] we are in great union with our overseas provinces."<sup>57</sup> Monteiro concurred claiming that it was unnecessary to imitate the "errors" of the Spaniards with regard to the representation of *ultramar* in its ranks. "We should not imitate blindly, but only following mature examination and reflection."<sup>58</sup> Other Portuguese liberals were less enamored of foreign models altogether, even if they held the Cádiz Constitution in high regard. The provenance of the constitution was less important than its content and efficacy: "the best constitution for Portugal is neither that of Spain, nor France, nor England, nor one more or less liberal than any of those, but rather [whichever] one assures the happiness of the Portuguese."<sup>59</sup> Fernandes Tomás made a similar point: "we are not making laws for Englishmen, but rather for Portuguese, and the great task is to make [these laws] appropriate to their customs."<sup>60</sup> Pereira do Carmo went further, arguing that, "to the extent possible, our constitution should appear in Portuguese dress, devoid as much as possible of foreign fashions".<sup>61</sup> A nation, Sarmiento added in a speech to the Cortes, might "admire the institutions of another, but to suddenly adopt them is no more possible than borrowing the arms and legs of a neighbor whose beauty we envy."<sup>62</sup> In spite of "rivalry" born from "old injuries" and "spirit of independence," Almeida Garrett conceded that the Portuguese and Spanish constitutions were "almost identical, distinguished only by turns of phrase, words or emphasis." Both constitutions, he believed, could be grouped together under the designation "*sistema de liberdade meridional*."<sup>63</sup>

There were, however, several key differences between the 1812 Spanish Constitution and the 1822 Portuguese Constitution framed by the Cortes. First, the Portuguese document made explicit the king's status as a "constitutional" monarch whereas the Spanish predecessor indicated only that kingdom was a "moderate" monarchy; second, in the Portuguese Constitution executive power was shared between king and the secretaries of state, whereas in Spanish

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<sup>57</sup> Moura, November 14, 1821, in *P[ortugal e] B[rasil]: D[ebates] P[arlamentares 1821-1836]*, Ed. Zília Osório de Castro (Lisbon: Assembléia da República, 2001), 306.

<sup>58</sup> Moura, November 14, 1821, in *PBDP*, 309.

<sup>59</sup> *Reflexões sobre a Necessidade de Promover* (1822), 65.

<sup>60</sup> *DC*, January 2, 1822, 3564.

<sup>61</sup> *DC*, January 4, 1822, 3588.

<sup>62</sup> *DC*, January 24, 1822, 3835.

<sup>63</sup> Almeida Garrett, *Portugal na Balança da Europa* (Lisbon: Livros Horizontes, 2005 [1830]), 41.

Constitution it resides in king alone; third, Portuguese Constitution allowed for direct suffrage with significant limits whereas the Spanish constitution enshrined universal but indirect suffrage; fourth, the Portuguese Constitution did not impose term limits on deputies whereas in Spanish constitution, they were limited to a single term; fifth, the Cádiz Constitution offered more guarantees for freedom of the press than its Portuguese counterpart; and sixth, the 1822 Portuguese Constitution was a compact document, in stark contrast to the sprawling Spanish Constitution.<sup>64</sup>

But the question of similarities and differences was, to a large extent, moot. The 1822 Constitution would never be implemented fully. Anti-constitutional forces in Portugal, in league with foreign governments, managed to snuff out the Southern European revolutions. Metternich crushed the Neapolitan Revolution. In Spain, the French Army, led by the Duke of Angoulême, crossed the Pyrenees, toppled the *Trienio Liberal* government, and restored Ferdinand VII, again, to absolute power in 1823. Ferdinand promptly unleashed a wave of white terror and reprisals, much to the consternation of his liberators.<sup>65</sup> In Portugal, the Cortes' popularity waned precipitously and the forces of reaction soon put an end to the first *Regeneração*.

The ideas animating the Vintistas were anathema to Portuguese conservatives. Conservative thinkers embraced the notion that Portugal possessed an unwritten, “ancient” constitution, or *lei fundamental*. But they scorned the burgeoning fad for written constitutions. This position led them to celebrate the centuries-long existence of the Cortes while unequivocally rejecting the notion that it had functioned as a legislative body and a check on monarchical power. Marques de Penalva made this point clearly at the turn of the nineteenth century, when he argued that “the authority of the Cortes was purely consultative, and never deliberative ... the king sought to listen to his vassals, who never dared to believe that they had ceased to be subjects [*subditos*].”<sup>66</sup> An anonymous 1815 *Discurso* asserted that royal authority derived directly and exclusively from God. The Portuguese monarchy, therefore, “never depended on the *Povos* or any other person whatsoever.” This same tract offered a regalist analysis of the Cortes de

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<sup>64</sup> Jorge Miranda, *O Constitucionalismo Liberal Luso-Brasileiro* (Lisbon: Outra Margens, 2001), 14-15.

<sup>65</sup> On Ferdinand VII's restoration, most recently, see Josep Fontana, *De en Medio del Tiempo: La Segunda Restauración Española, 1823-1834* (Barcelona: Crítica, 2006).

<sup>66</sup> Marquês de Penalva, [Fernando Teles da Silva Caminha e Menezes, 3<sup>rd</sup> Marquis]. *Dissertação a Favor da Monarquia, onde se prova pela razão, autoridade e experiencia ser este o melhor, e mais justo de todos os governos; e que os nossos reis são os mais absolutos, e legítimos senhores de seus reinos* (Lisbon, 1799 [1798]), 130-31.

Lamego: “It was not by the authority or the counsel of the People, nor did the people confer the power or authority to [Dom Afonso Henriques], for he already possessed it from the time of his father’s death. The Cortes of Lamego was convoked for the sole purpose of determining the line of succession to the throne, and the regulation of it [in the future] by means of a *lei fundamental*.”<sup>67</sup> In this view, the Cortes’s authority was radically limited, the pact confined solely to the manner of determining the royal succession, not the nature of monarchy. Such ideas were diffused more widely following the publication of António Caetano de Amaral’s 1819 *Para a História da Legislação e Costumes de Portugal*, which conceded the historical existence of the Cortes of Lamego, but insisted that it, like all subsequent Cortes, had been merely consultative, not legislative.<sup>68</sup> The Cortes was an advisory board, a council of state at most.

This conception of the Cortes’s limited function prevailed amongst conservative writers at the outset of the 1820 Revolution. Madre de Deos accused the upstart liberals of misunderstanding that institution’s history. Its origins supposedly lay in the twelfth-century Cortes held at Lamego, though there was already widespread suspicion that knowledge concerning this alleged Cortes was based on a seventeenth-century forgery (which ultimately it turned out to be).<sup>69</sup> At Lamego, it was claimed, the *Três Estados* had agreed that Portugal would be an “absolute monarchy; that is, a government with a single prince independent of all other human powers.”<sup>70</sup> This *lei fundamental*, conservative publicists argued, was unalterable. The Cortes at Lamego declared nothing concerning amendment. “The Cortes of Lamego is the true Carta,” Daun wrote, “the Magna Carta of Portugal; a Carta which neither kings nor the nation can, should, or ever have a right to alter without reciprocal consent, for the fundamental laws cannot be revoked.”<sup>71</sup> Madre de Deos ridiculed the 1821 Cortes for having “dispensed with the formality” of convocation by the king and inclusion of the clergy and nobility in its ranks, “assuming a name to which it was not entitled”, and arrogating to itself the right

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<sup>67</sup> Biblioteca da Ajuda., 54-XI-16, no. 117, [Anon.], “Discurso em que se Demonstra que o Poder dos Reis não Depende dos Povos, e Mormente a dos Senhores Reis de Portugal” [1817], fos. 1v., 9.

<sup>68</sup> Cardim, op.cit., 181.

<sup>69</sup> Oliveira Marques, op.cit., I, 325-327.

<sup>70</sup> F.J. de Madre de Deos, *A Constituição de 1822, Comentada e Desenvolvida na Prática*, 2<sup>nd</sup> edn (Lisbon, 1823), 155-56.

<sup>71</sup> José Sebastião de Saldanha Oliveira e Daun, *Quadro Histórico-Político dos Acontecimentos mais Memoráveis da História de Portugal desde a Invasão dos Francezes no anno de 1807 até á exaltação de sua Magestade Fidelissima o Senhor d. Miguel I ao Throno dos seus Augustos Predecessores* (Lisbon, 1829), 11.

to “legislate or discard legislation on any and every subject based on its will alone.”<sup>72</sup>

In effect, Madre de Deos argued, the 1822 Constitution replaced the traditional “constitution, which had enabled Portugal to achieve greatness over seven centuries.”<sup>73</sup> “The Republicans of Holland”, yet another publicist argued, “were never as free as the Portuguese were before the era of the *Regeneração*”, for “our ancient Cortes is the best example of a political constitution in an independent and hereditary monarchy.”<sup>74</sup> Following Dom João’s 1823 restoration, efforts to diffuse this concept of the Cortes gathered force. A flurry of publications and manuscripts, asserting that Portugal historically had been an absolute monarchy, denounced the *Vintistas* as fools: “their government lacked legitimacy and could not sustain itself; it may be compared to a bronze statue whose head and legs are made of mud, something that can never remain upright for long.”<sup>75</sup> Lisbon’s Academy of Sciences published various documents purportedly produced by the late seventeenth-century Cortes, presenting an image of a docile Cortes, uncritically obeying the wishes of the king, in 1824. In that same year, Joaquim José Pedro Lopes’s tract on the origins, structure, and authority of the Cortes was published, though the staggering erudition contained therein can be reduced to the assertion that the Cortes historically was merely consultative, not legislative.<sup>76</sup> Taken as a whole, conservative political discourse in the early 1820s condemned modern constitutionalism and offered a historicist rebuttal, asserting the adequacy and relevance of Portugal’s early modern institutions.

From the restoration of Dom João VI in 1823 and the independence of Brazil, both of which occurred as neo-absolutist forces gained the upper hand across Europe and particularly in France, the importance of Cádiz constitutionalism waned. The *juste milieu* of French *Chartre* become more politically palatable in a continental political climate hostile to radical liberalism. Dom Pedro’s promulgation of his *Carta* in 1826, based closely on the 1824

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<sup>72</sup> Madre de Deos, *A Constituição de 1822*, op.cit. 151, 156.

<sup>73</sup> Madre de Deos, *Epistola á Nação Francesa, na qual se Demonstrão os Subversivos Principios das Constituições Modernas, e se prova que a Maçonaria tem sido a Authora, e Directora da Revolução de Portugal* (Lisbon, 1823), 49.

<sup>74</sup> [Anon.], *Refutação Methodica* (1824), 12-14 passim.

<sup>75</sup> John Carter Brown Library, Codex Portugal 8, “Narração abreviada da Rebelião de Portugal perpetrada na Cidade do Porto em 24 d’Agosto de 1820 por Inimigos do Altar, e do Throno” (1823), fos. 16v.-17.

<sup>76</sup> Cardim, op.cit., 182.

Brazilian Constitution he also had penned in his capacity as emperor of Brazil, changed the dynamics of constitutional debate in Portugal. While *Vintistas* remained wary, they were forced to embrace the *Carta* against the onslaught of the hyper-reactionary regime of Dom Miguel (r. 1828-1834). Cádiz, and the 1822 Portuguese Constitution it had inspired, if still a beacon for many, no longer commanded a robust following in a public discursive environment dominated by the *Carta*.<sup>77</sup> Surely, the 1822 Constitution would re-emerge after the Civil War. It informed the 1836 September Revolution, briefly replacing the Carta as Portugal's Constitution and becoming a major influence the compromise 1838 Constitution. But at this late stage, *El Momento Gaditano* had passed and Southern European Liberalism entered a new phase.

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<sup>77</sup> These issues are discussed at length in Gabriel Paquette, "The Brazilian Origins of the 1826 Portuguese Constitution," *European History Quarterly* 41 (2011): 444-71.