

# THE INFLUENCE OF THE CONSTITUTION OF THE UNITED STATES ON THE MEXICAN CONSTITUTION OF 1917

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## INTRODUCTION

It is an enormous honor to have been invited to participate in this collective work of foreign influences on the Political Constitution of the United Mexican States of 1917. This essay offers not only the opportunity to examine the areas of influence of the U.S. Constitution on that of its southern neighbor, but also to delve more deeply into the rich history and remarkable characteristics of the Mexican Constitution.

At first blush, the Constitution of the United States of America and the Constitution of the United Mexican States are wildly different. The U.S. Constitution has a mere 7 articles and 27 amendments; that of Mexico contains 136 articles divided into nine titles, plus 16 original transitory provisions, and it has been amended 227 times.<sup>1</sup>

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<sup>1</sup> See [http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum\\_crono.htm](http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm). The actual number of changes is greater than this, as individual amendment occurrences often make amendments to numerous constitutional provisions. It has been said that “[t]he actual number of constitutional amendments varies depending on the criteria used to calculate them.”

One English translation of the Mexican Constitution contains more than 60,000 words while the U.S. Constitution consists of a meager 7,500 words. The Mexican Constitution contains myriad political, social, and economic guarantees such as the right to free basic education,<sup>2</sup> gender equality,<sup>3</sup> family formation,<sup>4</sup> adequate housing,<sup>5</sup> rehabilitation and social adjustment following incarceration as a goal of the penal system,<sup>6</sup> criminal victim rights,<sup>7</sup> agricultural and environmental rights, land reform and control of foreign investment,<sup>8</sup> freedom of competition,<sup>9</sup> extensive labor rights,<sup>10</sup> and regulation of ministries of religion<sup>11</sup> that are wholly absent from its U.S. counterpart. The Mexican constitution acknowledges the defining role of political parties while political parties are nowhere mentioned in the U.S. document. And the Mexican Constitution contains a provision for the suspension of individual liberties in circumscribed situations<sup>12</sup> as well as a catalogue of duties of citizenship,<sup>13</sup> to which no U.S. counterparts exist.

Even in areas where there is meaningful overlap between the Mexican and U.S. approaches, there are significant differences in the details. Both are systems based on principles of federalism, republicanism, and a national government based on separation of powers and checks and balances, but the specific contours and implementation of these doctrines differ in important respects. Historically, for instance, the Mexican presidency and the federal government at-large have been significantly more powerful vis-à-vis the states than is true in the United States. While both the Mexican and U.S. Constitutions attempt to

Stephen Zamora, José Ramón Cossío, Leonel Pereznieta, José Roldán-Xopa, and David Lopez, *Mexican Law 132* (Oxford University Press, 2005) (hereinafter Zamora et al.). See also Part III.C., *infra*.

<sup>2</sup> Political Constitution of the United Mexican States, Article 3.

<sup>3</sup> *Id.*, Article 4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*, Article 18.

<sup>7</sup> *Id.*, Article 20.

<sup>8</sup> *Id.*, Article 27.

<sup>9</sup> *Id.*, Article 28.

<sup>10</sup> *Id.*, Article 123.

<sup>11</sup> *Id.*, Article 130.

<sup>12</sup> *Id.*, Article 29.

<sup>13</sup> *Id.*, Article 31

neutralize the influence of religion in public life, the Mexican Constitution of 1917 goes much further in those efforts than does the U.S. Constitution.

The fact that the Mexican Constitution subsists in a system based on the civil law system while the U.S. Constitution operates under a common law tradition means that there is divergence in the starting point for analysis and comparison between the two systems. That the Mexican system lies within the civil law tradition may in itself explain the detail in and length of the Mexican Constitution.<sup>14</sup> And the character and goals of the respective documents differ as a result of their distinctive underlying legal traditions. The Mexican Constitution, it has been said, is more aspirational than normative, and “has been consistently characterized by Mexican constitutional scholars as a project to be accomplished, a statement of revolutionary ideals that is nominal in that there is no intended immediate congruency between its stated aspirations and reality.”<sup>15</sup> The difference in the underlying systems also leads to significant variations in the practical application of constitutional provisions, even when those provisions share textual commonalities.<sup>16</sup> These dissimilar-

<sup>14</sup> Zamora et al., *supra* note 1 at 78.

<sup>15</sup> James F. Smith, *Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 U.S. –Mex. L.J. 85, 94 (1993), citing Jorge Carpizo, *La Constitución Mexicana de 1917* 125 (1986). See also Zamora et al. at 78-79 (“the Constitution is very much a planning document, a place for the Mexican people to signal their political priorities and to provide the means to realize objectives”).

<sup>16</sup> As one scholar has written, “[i]n some respects, the example of the United States had only limited utility. The United States Constitution was an extension of the common law tradition; constitutional provisions presupposed the existence and operation of common law rules and practice.” Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. Pitt. L. Rev. 891, 902 (1988). It has been said that there are four interrelated and particularly relevant characteristics of the civil law system that distinguish it from the common law system: First, “a depreciation of judges and a resistance to, even a hostility toward, judge-made law.” Second, the notion that law emanates from the legislature. Third, “a strict adherence to the separation of powers in government, conceived of differently from the so-called separation of powers in the United States.” And finally, “a deeply held distinction between private and public law, a distinction that has been generally unimportant in common law countries.” Charles A. Hale, *The Civil Law Tradition and Constitutionalism in Twentieth-Century Mexico: The Legacy of Emilio Rabasa*, 18 Law & Hist. Rev. 257, 261-62 (2000).

ities are perhaps most apparent with regard to the role of the judiciary in each system.<sup>17</sup>

Nevertheless, there is no doubt that the U.S. Constitution had an important influence on the drafters of the Mexican Constitution of 1917 and its predecessor documents. And it is evident that both were the product of their unique respective times, histories, and cultures. (The principal features of the United States Constitution, for its part, were informed most dramatically both by its Anglo-American legal origins and, somewhat paradoxically, by the failures the colonists experienced under British rule.) Both Constitutions were groundbreaking – even radical – and rather progressive at the time of their ratification. Both have proven to be durable. And both have been looked to as models by other constitutional democracies.

Part II of this article makes some general observations about and evidence of the influence of the Constitution of the United States on Mexican constitutionalism. Part III discusses specific areas of influence that the U.S. Constitution had on the Mexican experience – federalism and state and popular sovereignty; separation of powers and checks and balances; and individual rights and liberties. Part IV ends with some modest conclusions.

## II. GENERAL OBSERVATIONS ON THE INFLUENCE OF THE U.S. CONSTITUTION IN MEXICO

### *Historical References*<sup>18</sup>

The Constitution of the United States, the world's first and longest-standing written Constitution,<sup>19</sup> has had a great impact on cons-

<sup>17</sup> See, e.g., Michael C. Taylor, *Why Do Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 N.M. L. Rev. 141, 143-44 (1997).

<sup>18</sup> Additional historical references, where available, are noted in Part III, *infra*.

<sup>19</sup> Albert P. Blaustein, *Constitution is Most Important U.S. Export*, IIP Digital US/Department of State, <http://iipdigital.usembassy.gov/st/english/article/2004/04/20040402110801maduobba0.7845575.html#axzz436aexaGy> (March 2004). See also G. Alan Tarr, *United States of America, in Constitutional Origins, Structure, and Change in Federal Countries* 382 (ed. John Kincaid and G. Alan Tarr) (“The United States of America is the world's oldest, continuing, modern federal democracy”).

tutions around the world, and has been described as our nation’s “most important export.”<sup>20</sup> The “great” influence of the U.S. Constitution in Latin America has been widely recognized,<sup>21</sup> and this influence plainly reached Mexico.<sup>22</sup> Although exaggerated, it has been asserted flatly that “[t]he Mexican Constitution ... [was] modeled after the U.S. Constitution”<sup>23</sup> and observed that in the Nineteenth Century, few regions of the world “made greater use of North American constitutionalism”<sup>24</sup> than Latin America. Jose Maria Morelos himself, one of the leaders of the Mexican independence movement, is said to have “openly acknowledged” that the U.S. Constitution was “a major source of inspiration” to the drafters of the *Constitución de Apatzingán* of 1814.<sup>25</sup>

The influence that the U.S. Constitution has had on Mexico is seen not only in the Constitution of 1917 but also in its predecessor documents, including the 1814 Constitution (despite never being put into effect), the 1824 Constitution (which is seen as having inspired large-scale structural concepts that remain in place today), and of course the Constitution of 1857, which is widely seen as the model for the current document.<sup>26</sup>

<sup>20</sup> “The U.S. Constitution is America’s most important export.” Blaustein, *supra* note 19.

<sup>21</sup> Robert S. Barker, *supra* note 16 at 892.

<sup>22</sup> “Mexico adopted in form much of the United States Constitution.” Hale, *supra* note 16 at 258. Also influencing Mexican constitutionalism from the U.S. were colonial charters, religious covenants, and secular political compacts. See George Athan Billias, *American Constitutionalism Heard Round the World, 1776-1989: A Global Perspective* 9 (2009).

<sup>23</sup> Alexis James Gilman, *Making Amends with the Mexican Constitution: Reassessing the 1995 Judicial Reforms and Considering Prospects for Further Reform*, 35 *Geo. Wash. Int’l. L. Rev.* 947, 949 (2003).

<sup>24</sup> Billias, *supra* note 22 at 105. See also M.C. Mirow, Marbury in Mexico: Judicial Review’s Precocious Southern Migration, 35 *Hastings Const. L. Q.* 41, 42 (2007) (“The United States Constitution has played an extremely important role in the establishment and development of constitutional orders in Latin America”).

<sup>25</sup> Barker, *supra* note 16 at 899, citing W. Robertson, *Rise of the Spanish-American Republics* 153 (1918).

<sup>26</sup> See Javier M. Aguirre, *Constitutional Shift Toward Democracy: Mexico City’s Amendment to Grant Elections Gives Rise to a New Constitutional Order*, 21 *Loy. L.A. Int’l & Comp. L.J.* 131, 136 (1999) (“The delegates of the Mexican Constitutional Congress of 1916-1917 relied upon two prior Mexican Constitutions and the U.S. Constitution

*1814 Constitution:* Even though the 1814 Constitution was never put into effect, it was said to have been influenced by the Constitution of its northern neighbor:

There were slight traces of North American constitutional influence in the Constitution of Apatzingan of 1814 written in Chilpancingo by the first political assembly convened in the country.... [A]mong the names listed as contributing ideas were Jefferson and Paine. The inspiration derived from two other North American sources—the U.S. Constitution and the Massachusetts Constitution of 1780—also was acknowledged.<sup>27</sup>

*1824 Constitution:* Aspects of the 1824 Constitution bore a striking resemblance to the U.S. model. In particular, the 1824 document

established a federal republic with a national government consisting of three branches, with a bicameral National Congress (Congress) composed of a Senate, in which each state was equally represented, and a House, in which representation was based on population. The President was chosen by an electoral college and, as was the case in the United States prior to the adoption of the twelfth amendment, the candidate with the second largest number of electoral votes became Vice President.<sup>28</sup>

As explained in detail:

The influence of the U.S. Constitution became much greater once Mexico achieved independence and wrote its 1824 charter. Stephen Austin, a citizen of Texas, then part of Mexico, submitted several plans for a charter. In writing his proposal in 1823, Austin frankly admitted, “I condensed the principles of the Constitution of the United States” and pointed out that a comparison of his plan with the Acta constitutiva of 1824 “shows a striking similarity.” His biographer agrees.

as models”).

<sup>27</sup> Billias, *supra* note 22 at 129. It has even been said that even earlier, the 1810 *Grito de Dolores* was adapted from the Declaration of Independence. *Id.* at 121, citing D. A. Brading, the *First America: The Spanish Monarchy, Creole Patriots, and the Liberal State, 1492-1867* 5 (1991).

<sup>28</sup> Barker, *supra* note 16 at 905.

More evidence that Mexicans borrowed from the U.S. Constitution in 1824 came from other contemporaries. In the constitutional congress, an enthusiastic young delegate from Yucatan (who exaggerated) declared: “What we are offering for the deliberation of the congress [in the draft constitution] is taken from ... [the U.S. document] with a few reforms to fit the circumstances of our people.” José Luis Mora ... did not believe that the North American experience provided a proper model for Mexico. But even he was forced to concede that the 1824 constitution was “very similar” to the 1787 North American document. Henry Ward, the English *chargé d’affaires*, likewise concluded that Mexico had modeled some of its institutions after those of the United States.

The best evidence of borrowing, however, comes from comparing the two constitutions, which reveals numerous parallelisms. Mexico established a federal form of government, a president elected for a fixed term, a bicameral legislature, and a judicial branch with a supreme court and justices appointed for life. As in the United States, lower house members were chosen for two-year terms according to population. The upper house was elected by the state legislatures, as was the case in North America at the time. Within the executive branch, the borrowing was even more obvious: the president and vice president had to be native-born citizens and thirty-five or more years of age and were elected to four-year terms. Bills vetoed by the president could be overridden only if passed by two-thirds of both houses. Certain powers specifically granted to the congress, such as the power to regulate commerce, also were quite similar to those granted to the Congress of the United States.<sup>29</sup>

The influence of the U.S. Constitution on the *constituyentes* in 1823 is hardly surprising given that, at the time, there were only a few available written constitutional models<sup>30</sup> – the French Declaration of Hu-

<sup>29</sup> Billias, *supra* note 22 at 130.

<sup>30</sup> The importance of the U.S. Constitution as an early *written* document cannot be overstated – not only for our nation but also for those who were in the constitution-making business in the decades following its ratification. The written constitution “created a sense not only of permanence but also openness, transparency, and contractual agreement. This primacy of a written document represented a decisive departure from the British practice. It is a truism of modern constitutional history that the American founders were responsible for reviving the modern practice of incorporating a regime’s governing principles and practices in a written document.” Billias, *supra* note 22 at 9, citing Donald S. Lutz, *The Origins of American Constitutionalism* (1988).

man Rights of 1789 and the revolutionary constitution of 1791; the United States Constitution of 1787; and the episodic Cadiz Constitution of 1812.<sup>31</sup>

Others noted that “all those who have read the Constitution of the United States will know very well that everything that we offer to the deliberation of the Congress is taken from that same Constitution with one or another reform, according to the circumstances of our peoples.”<sup>32</sup> And this: “Possibly the chief gain for the democrats lay in the fact that the Constitution recognized so freely that of the United States as an ideal to be striven for.”<sup>33</sup> It was also observed that “[t]here is no question that the Mexicans greatly admired the United States and that they hoped to emulate our success - political stability and economic prosperity - success which they attributed, in part, to our institutions and the Constitution.<sup>34</sup> In particular, “[t]he 1824 Constitution adopted the form of government present in the United States: republican, democratic, federal, presidential, and bicameral.”<sup>35</sup> It appears thus that “[i]n framing their constitution of 1824 ... Mex-

<sup>31</sup> Jose Gamas Torruco, *The Separation of Powers in Mexico*, 47 *Duq. L. Rev.* 761, 777 (2009). See also Barker, *supra* note 16 at 905 (“Mexico, in 1824, adopted a republican constitution patterned after that of the United States”).

<sup>32</sup> Robert J. Knowlton, *The Early Influence of the United States Constitution in the Western Hemisphere: The Cases of the Mexican Constitution of 1824 and Bolivar’s Ideas* 4, Discussion Paper No. 78, University of Wisconsin – Stevens Point, available at <https://www4.uwm.edu/clacs/resources/pubs/pdf/knowlton78.pdf>, quoting Manuel Crescencio Rejon, *Psnsamiento politico* (1968). “In framing their constitution of 1824... Mexico had been influenced by the U.S. Constitution.” Billias, *supra* note 22 at 105, quoting Robert Kolesar, *North American Constitutionalism and Spanish America: A Special Lock Ordered by Catalogue, Which Arrived with the Wrong Instructions and No Keys*, in *American Constitutionalism Abroad: Selected Essays in Comparative Constitutional History* 41-43 (ed. George Athan Billias 1990) and Andrzej Rapaczynski, *Bibliographic Essay: The Influence of U.S. Constitutionalism Abroad*, in *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* 411-12 (ed. Louis Henkin and Albert J. Rosenthal 1990).

<sup>33</sup> Knowlton, *supra* note 32, quoting Wilfrid H. Callcott, *Church and State in Mexico, 1822-1857* (1926).

<sup>34</sup> *Id.*

<sup>35</sup> Torruco, *supra* note 31 at 777. See also Zamora et al., *supra* note 1 at 20 (“Like the United States of America, the *Estados Unidos Mexicanos* was made up of separate states .... The federal government of the Mexican government followed the U.S. model, with a bicameral legislature and separation of powers between the legislative, executive, and judicial branches”).



ico had been influenced by the U.S. Constitution.”<sup>36</sup> It also has been said that “Ramos Arizpe presented the body [the constituent congress] with a working paper modeled very closely after the Constitution of the United States.”<sup>37</sup>

*1857 Constitution:* The 1857 Constitution in many aspects was influenced by the 1824 document<sup>38</sup> and by the U.S. Constitution, including historical references to Thomas Jefferson (specifically with regard to the Senate and the judicial power) and Alexis de Tocqueville’s *Democracy in America* regarding the political structure of the constitutional model.<sup>39</sup>

*Reasons for Influence of U.S. Constitution on Mexican  
Constitutional Development*

Similar Ideals

It has been argued (although controversially<sup>40</sup>) that Mexico and the U.S. shared common repressive colonial histories and that similar revolutionary impulses and ideals underlay their constitutional development. “Like the new nations of Latin America, [the United States] had endured a long period of colonial rule under a European monarchy and had fought a successful war against its mother country in the name of

<sup>36</sup> Billias, *supra* note 22 at 105, quoting Kolesar, *supra* note 32 at 41-43 and Andrzej Rapaczynski, Bibliographic Essay: The Influence of U.S. Constitutionalism Abroad, in *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* 411-12 (ed. Louis Henkin and Albert J. Rosenthal 1990).

<sup>37</sup> Knowlton, *supra* note 32, citing Michael C. Meyer and William Sherman, *The Course of Mexican History* (3d ed.)

<sup>38</sup> “Como es sabido ... el constituyente de 1856-1857 basó una buena parte de su obra en los dos documentos constitucionales de 1824: Acta Constitutiva y Constitución.” Emilio O. Rabasa, *Historia de las Constituciones Mexicanas*, Pág. 65 (5 pdf, chapter V), available at

<http://biblio.juridicas.unam.mx/libros/libro.htm?l=234>. See also Imer B. Flores, *La constitución de 1857 y sus reformas: a 150 años de su promulgación*. Part of the *Colección: El proceso constituyente mexicano: a 150 años de la Constitución de 1857 y 90 de la Constitución de 1917* 291-292 (7-8 pdf), available at <http://biblio.juridicas.unam.mx/libros/libro.htm?l=2389>.

<sup>39</sup> See Rabasa, *id.*

<sup>40</sup> See Part II.B.2., *infra*.

liberty.”<sup>41</sup> This affinity created by similar colonial and revolutionary experiences was reinforced by philosophical attitudes prevalent when Latin American republics were writing their constitutions. Indeed, the leaders of the Latin American wars of independence and those who drafted their constitutions

had been raised in the tradition of the Enlightenment, with its emphasis on reason and its belief that human beings, by the use of reason, could construct political institutions so in harmony with the natural laws of the universe that the inevitable result would be the ideal civil society. A crucial element of Enlightenment thought was the belief that man was naturally free, and that liberty was both the consequence and condition of the ideal society.<sup>42</sup>

Much the same ideals galvanized the American Revolution which, it has been said

inspired a sense of a new era. It added a new content to the conception of progress. It gave a whole new dimension to ideas of liberty and equality made familiar in the Enlightenment. It got people into the habit of thinking more concretely about political questions, and made them more readily critical of their own governments and society.<sup>43</sup>

Pragmatism

Alternatively, it has been asserted that the impulses that animated the Mexican adoption of

aspects of the U.S. Constitution had far less to do with shared political philosophies and common histories and much more to do with pragmatism. Simply put, the “American system appeared workable. The establishment of a republican structure in Mexico under the Constitution of 1824 was essentially the result of an immediate need for practical political machinery in that turbulent country.”<sup>44</sup>

<sup>41</sup> Robert S. Barker, *supra* note 16 at 896.

<sup>42</sup> *Id.* at 896-97.

<sup>43</sup> Robert R. Palmer, *The Age of Democratic Revolution: A Political History of Europe and America*, 1760 – 1800, Volume I, 282 (1964).

<sup>44</sup> Watson Smith, Influences from the United States on the Mexican Constitution of 1824, 4 *Journal of the Southwest* 113, 113 (1962).

It has further been argued that the prevailing political situations and philosophies at the time were divergent in the two nations:

During the first quarter of the nineteenth century, Americans were wont to assume that the Mexicans were in a political situation analogous to that of the Anglo-American colonists in 1775, and that they consciously looked to the United States as to a great exemplar for the solution of their troubles. The Mexicans to a large degree did copy the form of government which then existed in the United States, but their choice was due principally to local circumstance and not to any conviction as to the excellence of the system.<sup>45</sup>

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The Mexican patriots were not champions of democracy as it was understood in the United States, in England, or in France; they were not the disciples of Rousseau or Jefferson, although they borrowed phrases from the writings of these philosophers. Nor was it reasonable to expect that they should have been democrats. The revolution in Spanish America in its genesis was utterly different from that in the Anglo-American colonies – it did not spring from an outraged sense of the repression of the ideal of liberty or of the natural rights of man..... The decision to adopt the federal form certainly did not represent a consensus of thought among Mexican lawmakers, for during the debates over the projected constitution several political leaders voiced strong sentiment against federalism.<sup>46</sup>

#### Availability of Written Materials

Part of the explanation for the influence that the U.S. Constitution apparently had in Mexico lies in the fact that the Constitution and related materials were readily available to the framers of the 1917 Mexican constitution and its predecessor documents:

In Mexico, the United States Constitution was serialized by the *Diario* as early as 1812. In the short time between Mexico's Declaration of Independence in 1821 and the adoption of a federal constitution in 1824, North American constitutional documents were published in large numbers. The Constitution appeared in the *Semanario Político y Literario* as well as in a

<sup>45</sup> Id. (footnotes omitted).

<sup>46</sup> Id. (citations omitted).

published edition along with *Common Sense*, the Declaration of Independence, and the Articles of Confederation, under the title *Ideas necesarias a todo pueblo Americano independiente que quiero [sic] ser libre...* In 1823, *El Aquila Mexicana* published a comprehensive description of the United States which included a detailed treatment of the Massachusetts state constitution.<sup>47</sup>

This trend continued:

During the three years between Mexico's declaration of independence and the adoption of its 1824 constitution, large numbers of North American constitutional or near constitutional documents were reprinted. They included the Declaration of Independence, Articles of Confederation, U.S. Constitution, and Paine's *Common Sense*, all of which appeared in an edition published in Puebla in 1823. Copies of the U.S. Constitution translated into Spanish were offered for sale in Mexico City in 1823, and the entire document was reprinted in the *Seminario politico y literario*.<sup>48</sup>

Another scholar noted that "the papers circulated during the Wars of Independence, and enthusiasm for North American institutions followed quickly on adoption of the United States Constitution.... Mexico's [Constitution] of 1824 ... [was] directly modeled on the United States document."<sup>49</sup> And it was reported that in 1837, "copies of de Toqueville's *Democracy in America* became available in Mexico, and was read with great interest."<sup>50</sup> In preparation for the drafting of the 1824 Constitution, it has been said, "[t]he deputies of the new states arrived full of enthusiasm for the federal system and their manual was

<sup>47</sup> Kolesar, *supra* note 32 at 48, citing Robertson, *Hispanic-American Relations* 651 and Brack, *Mexico Views Manifest Destiny* 18, 23-25 (1975). See also Billias, *supra* note 22 at 117 ("In Mexico City, the *Diario de Mexico*, despite strict censorship, serialized the U.S. Constitution").

<sup>48</sup> Billias, *supra* note 22 at 117, citing Gene Brack, *Mexico Views Manifest Destiny, 1821-1846: An Essay on the Origins of the Mexican War* 24-25 (1975).

<sup>49</sup> Daniel L. Horowitz, [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1133&context=duke\\_fs](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1133&context=duke_fs), footnotes omitted, citing Albert Blaustein, "On the Influence of the United States Constitution Abroad," paper Notes 35 prepared for the Berlin Conference on the Law of the World, July 21-26, 1985, World Peace Through Law Center, Washington, D.C. 5.

<sup>50</sup> Barker, *supra* note 16 at 906.

the Constitution of the United States of the North, of which they had a bad translation, printed in Puebla, which served as a text and model for the new legislators.”<sup>51</sup>

#### Diplomats, Propagandists, and Proselytizers

Diplomats, propagandists, and proselytizers also had a significant role in disseminating such documents and the views reflected therein.<sup>52</sup> Some influence is said to have originated with “Americans who [had] been called upon to serve as advisers in the writing of other constitutions. Americans ... helped draft the ... Mexican ... constitution [among others].”<sup>53</sup>

#### *Some Negative Influence*

The influence of U.S. political institutions and documents, however, was not all positive, and it must be openly acknowledged that the cautious relationship between the United States and Mexico and their people may have resulted in some adverse impacts of the U.S. Constitution on the Mexican Constitution.

For instance, the attitude and actions of Joel Roberts Poinsett, the “most active agent of the United States in Spanish America”<sup>54</sup> arguably disaffected Mexicans to U.S political institutions. Indeed, his actions in Mexico “became so outrageous that in 1829 the Mexican government asked that he be recalled. The net result of Poinsett’s meddling in Mexico’s internal politics was to undercut previously favorable impressions Mexicans had had of North American political institutions.”<sup>55</sup>

<sup>51</sup> Zavala, Lorenzo, *Ensayo Histórico de las revoluciones de Méjico, desde 1808 hasta 1830*, available at <https://archive.org/details/ensayohistoricod02zavagoog>. See also Tena Ramírez, Felipe in “Leyes Fundamentales de México, 1808-2005” page 153; Knowlton, supra note 32.

<sup>52</sup> Billias, supra note 22 at 117-18.

<sup>53</sup> Blaustein, supra note 19.

<sup>54</sup> Kolesar, supra note 32 at 45.

<sup>55</sup> Id. at 45.

This ambivalence was also a result of racist attitudes perpetuated by some high-profile individuals from the U.S. toward their southern neighbors:

North American racism made admiration of its institutions increasingly difficult for Latin Americans. As early as 1826 the newspaper *El Sol* of Mexico was clearly displeased by the “fanatical intolerance” of John Randolph’s Senate speech in which he asserted that the United States should not associate with the South Americans, who were descended from Africans. The ambivalent Mexican attitude of fear and admiration of the United States turned more hostile after the Texas revolution of 1836 and other acts of aggression.<sup>56</sup>

*Prominent Differences and Influence of Other Factors*

The aim of this paper is to show the influences that the U.S. Constitution had in Mexico. At the outset, however, it is frankly recognized that ours was not the only important inspiration and that important “other forces were at play.”<sup>57</sup> And, while Part III below may accentuate the similarities between constitutional structures and downplay the variances, it is openly acknowledged that “even more striking than the similarities were the differences.”<sup>58</sup> In fact, the misperception that many from the U.S. may have had about the extent of the influence that we had on our southern neighbors may have been sorely misplaced:

In the United States at the time there was a strong and rather smug assumption that the Mexicans in their constitutional deliberations had been influenced by the American system, and that they enthusiastically and almost exclusively had drawn upon the Federal Constitution of 1787 as a model. But neither the influences, nor the channels through which they flowed, were clear-cut, and in general the effect was much less direct than supposed.<sup>59</sup>

<sup>56</sup> Id. at 46-47, citing Horsman, *Race and Manifest Destiny*; and Brack, *Mexico Views Manifest Destiny* 15, 44-45, 169.

<sup>57</sup> Smith, *supra* note 44 at 113.

<sup>58</sup> Id. at 123.

<sup>59</sup> Id. at 116.

And of course a simple replication would have proven to be disastrous. As many Latin American countries discovered:

[I]mitation was no simple matter. Time and again, they found that North American ideals, ideas, and institutions did not fit their situation. As one historian put it, paraphrasing [Isabel Allende]: “It was like a lock ordered by catalogue from the United States that came with the wrong instructions and no keys.” “The limited transplantability of [North] American constitutional ideas is the main lesson of ... Latin America,” wrote another scholar.<sup>60</sup>

#### SPECIFIC AREAS OF INFLUENCE OF THE U.S. CONSTITUTION

This Part describes a number of specific elements of the Mexican Constitution<sup>61</sup> that appear to have been influenced by the U.S. counterpart. Some elements will be discussed briefly and others in greater detail. Where possible, sources suggesting the impact are indicated. In other cases, the connection between the Mexican and U.S. documents is simply inferred but not proven through any reliable means and influence is inferred from the presence of similar models or language.

Part A. discusses government structures and shared powers in the two systems – federalism and notions of sovereignty (1.); separation of powers and checks and balances (2.); and intergovernmental relations (supremacy and full faith and credit provisions) (3.). Part B. considers individual rights and liberties.

##### *Government Structures and Shared Powers*

The Mexican and U.S. Constitutions embrace similar large-scale principles of government organization – specifically a system of shared powers that, at least technically, protect the sovereignty of the states as important political sub-divisions, and of the people; and a national

<sup>60</sup> Billias, *supra* note 22 at 105.

<sup>61</sup> Unless otherwise indicated, references are to the Political Constitution of the Mexican States of 1917.

government founded on principles of separation of powers and checks and balances.

#### Federalism and Notions of State and Popular Sovereignty

##### Federalism

The United States and Mexico both are marked by systems of federalism that are deeply ingrained into their respective constitutional traditions. The respective systems of federalism differ but they share many important hallmarks.

##### Evidence of U.S. Influence

The United States, it has been said, invented modern federalism.<sup>62</sup> As outlined in Part II., *supra*, there is evidence of a direct influence of the U.S. system on Mexican constitutional structures. It has been noted, for instance, that “[t]he Mexican Constitution has virtually copied the critical provisions of the United States Constitution regarding federalism.”<sup>63</sup>

#### Reasons for Development of Federalist System in Mexico

A gamut of historical and practical reasons helps to explain the attractiveness of a federalist system for Mexico. In 1824, when a federalist constitution was first adopted in Mexico, decentralization of power

was a way to counteract the former centralist administrative authority of the colonial period...The constitutional congress (*constituyente*) of 1823 was able to entice the separate territories into a political union by adopting a

<sup>62</sup> Keith S. Rosenn, *Federalism in the Americas in Comparative Perspective*, 26 U. Miami Inter-Am. L. Rev. 1, 4 (1994) (“the framers of the U.S. Constitution of 1787 invented modern federalism”). See also G. Alan Tarr, *supra* note 19 at 382 (“The United States of America is the world’s oldest, continuing, modern federal democracy. Indeed, the framers of the United States Constitution are widely regarded as the inventors of modern federalism.”).

<sup>63</sup> Smith, *supra* note 15, at 95, citation omitted.



federal model that limited the powers of the central government and left the states with a great deal of autonomy.<sup>64</sup>

But the 1824 model did not vest sufficiently strong powers in the national government. As was the case with the U.S. Articles of Confederation, which produced a painfully weak national government with no taxing or spending authority,<sup>65</sup> the federal government under the Mexican Constitution of 1824 “was so anemic as to produce chaos. The federal government lacked any significant taxing power... Within ten years, the vacuum at the center of the political system resulted in a growing sentiment in favour of a more centralized form of government.”<sup>66</sup> The 1857 Constitution, the model for the current Constitution, “more clearly distributed the balance of power between the states and the federal government.”<sup>67</sup>

More practical intentions also contributed to the development of a federal system in Mexico, which included the apparent social, economic, and political successes of the U.S. experiment and “direct North American proselytizing.”<sup>68</sup>

Since federalism and a decentralized form of government authority had been operating successfully in the United States, it offered an attractive model... Because federalism grants autonomy to subordinate units, it is particularly useful for governing large countries with a huge landmass. Hence, it is no coincidence that ... Mexico ... tried to adopt a federal system....<sup>69</sup>

<sup>64</sup> Zamora et al., *supra* note 1 at 104-05 (citations omitted).

<sup>65</sup> See, e.g., Eric M. Freedman, *Why Constitutional Lawyers and Historians Should take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*,

<sup>66</sup> *Tenn. L. Rev.* 783, 785-86. George Washington, the first President of the United States, reportedly referred to the confederation created by the Articles of Confederation as a “a rope of sand.” See [http://photos.state.gov/libraries/amgov/30145/publication-senglish/1310\\_Outline\\_of\\_US\\_Government\\_English\\_TEXT\\_Low\\_WEB.Pdf](http://photos.state.gov/libraries/amgov/30145/publication-senglish/1310_Outline_of_US_Government_English_TEXT_Low_WEB.Pdf).

<sup>67</sup> Zamora et al., *supra* note 1 at 106 (citation omitted).

<sup>68</sup> *Id.* at 107.

<sup>69</sup> Kolesar, *supra* note 32 at 44.

<sup>69</sup> Billias, *supra* note 22 at 110, quoting A.T. Edelman, *Latin American Politics and Government* 395 (1965).

### Similar Dominant Features

The defining features of both federalist systems are the same: The national government is a government of limited powers whose competence is restricted to a list of enumerated powers; and residual governmental powers are within state authority. Under both systems some powers are exclusive to the federal governments, some are exclusive to the state governments, and some are shared.

The savings clause in each Constitution that leaves residual government power, *i.e.*, powers not delegated to the federal government, to the states are quite similar. The U.S. Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”<sup>70</sup> In much the same fashion, the Mexican Constitution states that “[a]ll powers not explicitly vested by this Constitution on federal authorities, are reserved to the States.”<sup>71</sup> It has been said:

As with the 1857 Constitution, the Constitution of 1917 established a federal system patterned after the constitutional structure of [the] United States. The division of federal/state power is identical in form in both Constitutions: certain clauses grant specific powers to the federal government in matters of national concern and a general savings clause reserves all remaining powers to the states. In comparing the Mexican savings clause with its U.S. model, one sees that they are almost identical.<sup>72</sup>

Accordingly, neither Constitution specifies powers granted to the states:

Because all powers originally belonged to the sovereign peoples of the constituent states, the people and their states retained all powers that they did not delegate to the federal government. Thus, although the Constitution prohibits some state powers, it does not delegate powers to the states, nor

<sup>70</sup> Constitution of the United States of America, Amendment 10 (1791).

<sup>71</sup> Political Constitution of the United Mexican States, Article 124. “Article 124, modeled after the 10th Amendment to the U.S. Constitution, provides that the powers of the federal government are limited to those specifically delineated, the remainder being reserved for the states.” Rosenn, *supra* note 62 at 46.

<sup>72</sup> Zamora et al., *supra* note 1 at 108.

does it contain a list of powers that the states share with the federal government.<sup>73</sup>

Areas of federal competency specified in both the U.S.<sup>74</sup> and the Mexican Constitution<sup>75</sup> are extensive and many of them are identical – such as the power to tax and spend, to declare war, to regulate interstate commerce, to establish a post office, to print money, to establish a system of weights and measures, to borrow money on the credit of the nation, and to regulate patents and copyrights, bankruptcy, immigration and naturalization.<sup>76</sup> The Mexican Constitution, however, gives the federal government competence over many areas that are within state authority in the United States, such as the power to legislate on all matters of commerce,<sup>77</sup> which includes corporate structures and commercial law. The presence in Mexico of a single commercial code diverges sharply with the U.S. system in which each state has its own statutes regulating commercial transactions and corporate structures. The Mexican system also departs from the U.S. model in that the former spells out many elements of state and local governance<sup>78</sup> and imposes restrictions on state and local activity<sup>79</sup> which are absent from the U.S. Constitution. Of particular note, Mexico's Constitution expressly prohibits states from engaging in interstate commerce,<sup>80</sup> which is merely implicit in the U.S. Constitution and has been recognized by a judicial precept known as the “negative” or “dormant” commerce clause.<sup>81</sup>

<sup>73</sup> Tarr, *supra* note 19 at 385.

<sup>74</sup> See, e.g., Constitution of the United States of America, Article I section 8, Amendment 13, Amendment 14, Amendment 15.

<sup>75</sup> Political Constitution of the United Mexican States, Article 73.

<sup>76</sup> Constitution of the United State of America, Article I, section 8. Regulation of the home of the federal government (*i.e.*, the Distrito Federal in Mexico and the District of Columbia in the United States) in both constitutions was also a power housed in the federal legislature, see Constitution of the United States of America, Article I section 8; Political Constitution of the United Mexican States, Article 301 A. Recently, the Mexican Constitution was amended to make Mexico City a state. See [http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum\\_crono.htm](http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm).

<sup>77</sup> Political Constitution of the United Mexican States Article 73 X.

<sup>78</sup> *Id.*, Article 116.

<sup>79</sup> *Id.*, Articles 115- 122

<sup>80</sup> *Id.*, Articles 117-18.

<sup>81</sup> See, e.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824).

In both systems, states retain important powers and adopt their own civil codes, criminal codes, and codes of criminal procedure.<sup>82</sup>

In both countries, the Constitutional structure fails to adequately define the precise contours of the powers of the respective sovereigns, and disagreement continues as to whether certain powers fall within federal competence: “In both constitutions, the balance of legislative and executive power between the states and the federal government, while defined in broad constitutional outline, has been open to re-definition throughout the history of each country.”<sup>83</sup> And in nearly identical passages, both Constitutions grant the national legislature the power to use ample means in executing their assigned powers.<sup>84</sup>

Both Systems Highly Centralized ...  
But Mexico More so than the United States

Mexico and the United States both are systems that have moved toward centralization:

The concept of states’ rights ... has steadily eroded on both sides of the border, provoked in Mexico by the dominance of the executive branch, the passage of a series of constitutional amendments, and the enactment of several federal codes which serve as models for state codes. In the United States, congressional acts subsequently approved as constitutional by the Supreme Court have broadened the scope of federal prerogatives to the point where any limit is no longer considered a constitutional-legal restraint but simply a political one. While both systems continue to have concurrent federal-state

<sup>82</sup> With some exceptions, as in the United States and as contrasted with many other federalist countries, “Mexico permits the states to enact their own basic codes,” Rosenn, *supra* note 62 at 16.

<sup>83</sup> Zamora et al., *supra* note 1 at 102, citing Jorge Carpizo, *Sistema Federal Mexicano*, in 3 *Gaceta Mexicana de Administracion Publica Estatal y Municipal* 81 (1981).

<sup>84</sup> The U.S. Constitution gives Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. Constitution Article I section 8. The Mexican Constitution, in similar fashion, vests in Congress the power “[t]o enact all laws required to make effective the forgoing powers and any other powers vested on the Powers by the Union of this Constitution.” Mexican Constitution Article 73, section XXX.

jurisdiction over an infinite variety of measures, it is the national government's prerogative to preempt such areas as it chooses.<sup>85</sup>

But the experience in Mexico (at least until recently) has been notably more dramatic than that of the U.S. In fact, centralization in Mexico has been so profound as to lead some to say that Mexico's federalism is "a great lie."<sup>86</sup> As described by Jorge Carpizo, "[a] good part of the federated states' autonomy is under central will. In this fashion, what really exists in Mexico is a centralized government with some decentralized aspects."<sup>87</sup>

*Notions of State and Individual Sovereignty*

Neither the word "sovereign" nor "sovereignty" appears in the Constitution of the United States, yet notions of individual sovereignty and the autonomy of the various states have long been understood as fundamental to our constitutional underpinnings. This understanding is drawn from our particular history and also from textual allusions, beginning with the opening words of the Constitution:

<sup>85</sup> Smith, *supra* note 15, at 96 (citations omitted). It should be noted that Smith's article was written prior to the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *National Federation of Independent Businesses v. Sebelius*, 567 U.S. \_\_\_ (2012), which limited – however minimally – federal commerce power. The essence of Smith's statement remains true. See also Tarr, *supra* note 19 at 385.

<sup>86</sup> Billias, *supra* note 22 at 110, quoting A.T. Edelman, *Latin American Politics and Government* 395 (1965).

<sup>87</sup> Jorge Carpizo, *Federalismo en Latinoamérica* 78 (1973). See also Imer B. Flores, *Reconstituting Constitutions – Institutions and Culture: The Mexican Constitution and NAFTA: Human Rights Vis-à-Vis Commerce*, 17 Fla. J. Int'l L. 693, 698 (2005). ("Much has been said of the historically unrepresentative, authoritarian, and centralized features of the Mexican legal and political system. These tensions between the formal and real constitutions justify, at least partially, the need not only for reforming our Mexican Constitution to reduce the gap between the two but also for reconstituting it into a true representative, democratic, and Federal Republic"); Martin C. Needler, *The Influence of American Institutions in Latin America*, 428 *Annals of American Academic of Political and Social Sciences* (November 1976) 43, 45 (in Mexico, "the federal government is much more powerful relative to the states than in the federal government of the United States").

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>88</sup>

Notions of popular and state sovereignty were reinforced in the Bill of rights, which proclaims that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>89</sup>

The Mexican Constitution is more explicit about sovereignty, and addresses the topic at some length, devoting an entire chapter to the subject. Chapter I of Title II, entitled National Sovereignty and Form of Government, provides as follows:

Article 39. The national sovereignty resides essentially and originally in the people. All public power originates in the people and is instituted for their benefit. The people at all times have the inalienable right to alter or modify their form of government.

Article 40. It is the will of the Mexican people to organize themselves into a federal democratic, representative Republic composed of free and sovereign States in all that concerns their internal government’ but united in a Federation established according to the principles of this fundamental law.

Article 41. The people exercise their sovereignty through the powers of the Union in those cases within its jurisdiction, and through those of the States, in all that relates to their internal affairs, under the terms established by the present Federal Constitution and the individual constitutions of the States’ respectively, which latter shall in no event contravene the stipulations of the Federal Pact.<sup>90</sup>

#### Separation of Powers and Checks and Balances

Both the U.S. and the Mexican Constitutions divide federal power into a legislative branch, an executive branch, and a judicial branch.

<sup>88</sup> Constitution of the United States of America, Preamble.

<sup>89</sup> Id., Amendment 10 (1791).

<sup>90</sup> Political Constitution of the United Mexican States, Articles 39, 40, and 41

The U.S. Constitution does so by constituting and empowering the three branches in Articles I, II, and III. The Mexican Constitution establishes this division more overtly by proclaiming that “[t]he Supreme Power of the Federation is divided, for its exercise, into Legislative, Executive, and Judicial branches.”<sup>91</sup> “This tripartite division of governmental power into three supposedly equal branches has been a feature of Mexican law since the Constitution of 1824, which copied the principle of separation of powers that had been adopted by the U.S. and French Constitutions, and by the 1812 Spanish Constitution of Cadiz.”<sup>92</sup> At the same time, both Constitutions provide for some level of participation and influence by each branch over the others.<sup>93</sup>

In addition, in both systems, the legislative and executive powers issue from popular vote (albeit indirect in the case of the U.S. President), each elected separately and thus each bearing its own legitimacy. Both systems thus differ from parliamentary systems that are commonly found elsewhere.

#### Federal Legislative Power

The Constitution of the United States establishes and empowers the federal legislative branch in Article I. The Mexican federal legislative branch is established and empowered in Articles 50-79 of the Constitution. The U.S. and Mexican federal legislative powers have significant commonalities, suggestive of a U.S. influence over the development of Mexican structures

#### Bicameralism and Membership

The U.S. Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall

<sup>91</sup> Id., Article 49.

<sup>92</sup> Zamora et al., *supra* note 1 at 136-37.

<sup>93</sup> “The Constitution of 1917 attempted to create a balance between the Congress and the Presidency through the classic “check and balances.” Torruco, *supra* note 31 at 765-66.

consist of a Senate and House of Representatives.<sup>94</sup> The Senate consists of 100 members – two from each of the 50 states.<sup>95</sup> There are 435 members of the House of Representatives, whose members are elected from congressional districts drawn proportionally within the states.<sup>96</sup>

Mexico's legislative branch, “[f]ollowing the U.S. model,”<sup>97</sup> is a bicameral institution, composed of a *Camera de Diputados* (similar to the House of Representatives) and a *Senado* (akin to the U.S. Senate). The opening language of the Mexican Constitution's provisions on the legislative power read much like Article I, section 1 of the U.S. Constitution: “The Legislative Branch of the United Mexican States is vested in a General Congress which shall be divided into two Houses, one of deputies and one of senators.”<sup>98</sup> The *Camera* consists of 300 members selected within districts like the U.S.,<sup>99</sup> and the Senate consists of 128 senators – three from each state and the *Ciudad de Mexico* (formerly known as the *Distrito Federal*).<sup>100</sup>

#### Elections, Terms, and Reelection

*Elections:* In the United States, Senators and Representatives are selected through direct voter elections held in the respective states and congressional districts.<sup>101</sup> Members of the Mexican legislature are elected by direct votes within their respective districts.<sup>102</sup>

*Terms:* In the United States, Senators serve for terms of six years<sup>103</sup> and members of the House of Representative serve for two-year terms.<sup>104</sup> In Mexico, in similar but not identical fashion, members of

<sup>94</sup> Constitution of the United States of America, Article I section 1.

<sup>95</sup> Constitution of the United States of America, Article I section 3.

<sup>96</sup> 2 USC §2a; Constitution of the United States of America, Article I section 2

<sup>97</sup> Zamora et al., supra note 1 at 138. See also id. At 180 (“the formal exercise of legislative power in Mexico follows the model adopted from the U.S. Constitution”).

<sup>98</sup> Political Constitution of the United Mexican States, Article 50.

<sup>99</sup> Id., Article 52.

<sup>100</sup> Id., Article 56.

<sup>101</sup> Senators originally were chosen by the respective state legislatures. Article I section 3. Amendment 17, ratified in 1913, made the election of Senators direct.

<sup>102</sup> Political Constitution of the United Mexican States, Articles 54 and 56.

<sup>103</sup> Constitution of the United States of America, Article I, section 3

<sup>104</sup> Id., Article I, section 2.



the *Senado* serve for six-year terms<sup>105</sup> and members of the *camera* serve for three-year terms.<sup>106</sup>

*Eligibility for Re-Election:* When it comes to eligibility of members of Congress to be re-elected, the Mexican and U.S. experiences diverge. The U.S. Constitution does not provide any limits on the re-election of members of Congress, and indeed, the U.S. Supreme Court has held that states may not impose any such limits.<sup>107</sup> In the original 1917 Constitution, members of Congress were not eligible for re-election; amendments to the Mexican constitution now permit Senators and deputies to seek re-election but Deputies may serve only for four terms and Senators for two<sup>108</sup> – still far fewer than the unlimited terms permitted under the U.S. Constitution.

#### Qualifications of Members

Article I of the U.S. Constitution sets out minimal qualifications for members of each chamber, which includes citizenship, residency, and age requirements.<sup>109</sup> The Mexican Constitution similarly outlines qualifications to serve in the *Camera*<sup>110</sup> and the *Senado*. As in the case of the U.S., these qualifications include citizenship, age, and residence. The Mexican Constitution goes further than does the U.S. by disqualifying individuals on the basis of a number of factors, including certain government/judicial positions active military, police, or security force service and being a religious minister.<sup>111</sup>

#### Legislative Immunity

Members of the United States Congress enjoy immunity pursuant to the so-called Speech and Debate Clause:

<sup>105</sup> Political Constitution of the United Mexican States, Article 56.

<sup>106</sup> *Id.*, Article 51.

<sup>107</sup> See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

<sup>108</sup> Political Constitution of the United Mexican States, Article 59.

<sup>109</sup> United States Constitution Article I, sections 2 and 3.

<sup>110</sup> Political Constitution of the United Mexican States, Articles 55 and 58,

<sup>111</sup> *Id.*, Articles 55 IV., V., and VI. and 58.

The Senators and Representatives ... shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.<sup>112</sup>

Federal legislators in Mexico enjoy immunity as in the U.S.:

Deputies and senators shall be privileged from being held accountable for their opinions in the performance of their office and may never be questioned for such opinions.

The speakers of each House shall oversee that their members' constitutional immunity and the inviolability of the legislative Houses where they hold sessions, is respected.<sup>113</sup>

#### Limitations on Other Offices

Members of the U.S. Congress may not during their time in office serve in other federal government capacities.<sup>114</sup> Similarly, members of the Mexican legislature are not permitted to hold other federal or state offices.<sup>115</sup>

#### Oath of Office

Members of the U.S. Congress are “bound by Oath or Affirmation, to support th[e] Constitution.”<sup>116</sup> Members of the Mexican legislature likewise must take an “oath to uphold the Constitution and the laws emanating from it.”<sup>117</sup>

<sup>112</sup> Constitution of the United States of America, Article I, section 6.

<sup>113</sup> Political Constitution of the United Mexican States, Article 61.

<sup>114</sup> Constitution of the United States of America, Article I, section 6.

<sup>115</sup> Political Constitution of the United Mexican States, Article 62.

<sup>116</sup> Constitution of the United States of America, Article VI.

<sup>117</sup> Political Constitution of the United Mexican States, Article 128.

### Control Over Affairs

In both the Mexican and U.S. examples, members of Congress enjoy significant power over the functioning of internal legislative affairs. The U.S. Constitution provides that “[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”<sup>118</sup> Likewise, under the Mexican Constitution, Congress “shall enact the law that shall govern its internal operations and structure.”<sup>119</sup>

### The Legislative Process

The legislative process in both countries is similar. In Mexico, as in the United States, the process begins with the introduction of a bill in either chamber. In contrast to the U.S. system in which only members of the respective chambers may introduce legislation, in Mexico bills may be introduced by members of the legislature as well as the President, state legislatures and the Ciudad de Mexico, and, under certain circumstances, citizens.<sup>120</sup> In both the U.S. and Mexico, the budget process must begin in the lower chamber.<sup>121</sup> If a bill is approved by both chambers, it will be presented to the President.<sup>122</sup> In both systems, the President can sign, return the legislation, or execute a pocket veto.<sup>123</sup> To override the Mexican President’s veto, there must be a 2/3 vote by each chamber<sup>124</sup> – which is exactly the same as the U.S. model.<sup>125</sup>

The Mexican Constitution expressly provides that the President may veto legislation in whole or in part.<sup>126</sup> Congress in the Line Item

<sup>118</sup> Constitution of the United States of America, Article I, section 5.

<sup>119</sup> Political Constitution of the United Mexican States, Article 70.

<sup>120</sup> Political Constitution of the United Mexican States, Article 71,

<sup>121</sup> Constitution of the United States of America, Article I, section 7; Political Constitution of the United Mexican States, Articles 72 subsection H, 74, and 75.

<sup>122</sup> Constitution of the United States of America, Article I, section 7; Political Constitution of the United Mexican States, Article 72 subsection A.

<sup>123</sup> Constitution of the United States of America, Article I, section 7; Political Constitution of the United Mexican States, Article 72 subsections A, B, and C

<sup>124</sup> Political Constitution of the United Mexican States, Article 72 subsection C.

<sup>125</sup> Constitution of the United States of America, Article I, section 7.

<sup>126</sup> *Id.*, Article VII.

Veto Act of 1996 attempted to give the President this power, but the law was declared unconstitutional by the U.S. Supreme Court.<sup>127</sup>

#### Enumerated Powers

In both the United States and Mexico, the federal legislative powers are limited to competencies outlined in the respective constitutions. The limits on federal legislative power in both countries are addressed elsewhere in this paper.<sup>128</sup>

In both systems, each chamber is assigned specific duties. For instance, in the United States, bills for raising revenue must originate in the House of Representatives,<sup>129</sup> which also has the power to impeach high-level federal officials.<sup>130</sup> The Senate has the power to ratify treaties, to confirm judicial nominations made by the president, as well as presidential nominations to cabinet positions, ambassadors, and consuls,<sup>131</sup> and to try impeached officials.<sup>132</sup>

Similar exclusive powers are assigned to each chamber in the Mexican legislature. As in the U.S., the budget process must begin in the *Camara de Diputados*<sup>133</sup> and the *camera* is responsible for impeaching public officials.<sup>134</sup> The Senate ratifies treaties, and confirms presidential appointments.<sup>135</sup>

#### Federal Executive Power

The federal executive branch is established and empowered in Article II of the U.S. Constitution and in Articles 80-93 of the Mexican

<sup>127</sup> Clinton v. City of New York, 525 U.S. 417 (1998).

<sup>128</sup> Part III.A.1.a., supra.

<sup>129</sup> Constitution of the United States of America, Article I, section 7.

<sup>130</sup> Id., Article I, section 2.

<sup>131</sup> Id., Article II, section 2.

<sup>132</sup> Id., Article I, section 3.

<sup>133</sup> Political Constitution of the United Mexican States, Article 74.

<sup>134</sup> Id., Article 75.

<sup>135</sup> Id., Article 76. With respect to the appointment of Supreme Court ministers, the Constitution as amended now provides that the Senate selects Supreme Court *Ministros* from a short list submitted by the President. See [http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum\\_crono.htm](http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm).

Constitution. There are numerous similarities – but also vast differences – between the federal executive power in the United States and Mexico.

#### Presidential Systems

Article II of the U.S. Constitution instructs that “[t]he executive Power shall be vested in a President of the United States of America.”<sup>136</sup> The U.S. Constitution also acknowledges the presence of a Vice President.<sup>137</sup>

The Mexican Constitution similarly vests “[t]he exercise of the Supreme Executive Branch of the Union ... in a single individual who shall be called the ‘President of the United Mexican States.’”<sup>138</sup> In contrast to the U.S. system, the 1917 Constitution makes no provision for a vice president.

#### Elections, Terms, Reelection, and Removal

*Elections:* The President and Vice President of the United States are elected indirectly through the Electoral College.<sup>139</sup> In Mexico, in contrast, “[t]he election of the President shall be direct.”<sup>140</sup>

*Terms:* The U.S. President “shall hold his Office during the Term of four years.”<sup>141</sup> The Constitution as originally promulgated contained no limitation on the number of terms for which a President could serve, but a two-term limitation was effectively imposed in 1951 by Amendment 22.<sup>142</sup> In contrast, the Mexican President serves for a single six-year term without any possibility of reelection.<sup>143</sup>

<sup>136</sup> Constitution of the United States of America, Article II, section 1.

<sup>137</sup> Id.

<sup>138</sup> Political Constitution of the United Mexican States, Article 80.

<sup>139</sup> Constitution of the United States of America, Article II, section 1, modified by Amendments 12 (1804).

<sup>140</sup> Political Constitution of the United Mexican States, Article 81.

<sup>141</sup> Constitution of the United States of America, Article II, section 1.

<sup>142</sup> “No person shall be elected to the office of the President more than twice....”

<sup>143</sup> Political Constitution of the United Mexican States, Article 83.

*Removal from Office:* Both Constitutions provide a mechanism for removing the President. The U.S. President may be removed from office only upon impeachment for and conviction of “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>144</sup> In Mexico, the President “may be impeached only for treason against the United Mexican States and high crimes under ordinary jurisdiction.”<sup>145</sup>

#### Qualifications

The U.S. Constitution imposes citizenship, residency, and age eligibility requirements to be President,<sup>146</sup> and the President must be “a natural born citizen” of the United States.<sup>147</sup>

The Mexican Constitution also sets out qualifications for the President, which, like the U.S. counterpart, include provisions regarding citizenship by birth, age, and residence.<sup>148</sup> Unlike in the U.S., there are a number of other restrictions, including that the President may not be “a member of the clergy nor a minister of any creed.”<sup>149</sup>

#### Oath of Office

The President shall take an oath to “preserve, protect, and defend the Constitution of the United States.”<sup>150</sup> A similar oath is prescribed by the Mexican Constitution.<sup>151</sup>

#### Powers

Article II of the U.S. Constitution fixes the powers of the President, which include serving as Commander in Chief,<sup>152</sup> granting pardons

<sup>144</sup> Constitution of the United States of America, Article II., section 4.

<sup>145</sup> Political Constitution of the United Mexican States, Article 108.

<sup>146</sup> Constitution of the United States of America, Article II, section 1.

<sup>147</sup> Id.

<sup>148</sup> Political Constitution of the United Mexican States, Article 82, I., II., and III.

<sup>149</sup> Id., Article 82, IV.

<sup>150</sup> Constitution of the United States of America, Article II, section 1. See also Article VI.

<sup>151</sup> Political Constitution of the United Mexican States, Article 87.

<sup>152</sup> Constitution of the United States of America, Article II, section 2.

for federal crimes (except in cases of impeachment),<sup>153</sup> entering into treaties, with the approval of two-thirds of the Senate,<sup>154</sup> nominating and, upon Senate confirmation, appointing “Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States ... which shall be established by Law,”<sup>155</sup> fill vacancies during congressional recesses, which expire at the end of the session,<sup>156</sup> “from time to time [to] give to the Congress Information of the State of the Union” and make recommendations for legislative consideration,<sup>157</sup> convening either or both chambers of Congress “on extraordinary occasions,”<sup>158</sup> receiving ambassadors and other public ministers,<sup>159</sup> and to “take Care that the Laws be faithfully executed.”<sup>160</sup>

The Mexican President shares many of the same powers as that of the chief executive of the U.S., including the power to promulgate and execute laws passed by Congress, the power to appoint cabinet ministers and other federal officials, the power to act as commander in chief and to declare war pursuant to an act of Congress, to grant pardons to persons convicted of federal crimes, and to conduct foreign relations and conclude treaties, with the approval of the Senate.<sup>161</sup> As in the United States, the Mexican President is commanded to present a report on the state of the union, but unlike in the U.S., the report delivered to Congress by the Mexican President must be in writing.<sup>162</sup>

The Mexican President, however, enjoys a number of significant powers not shared by his U.S. counterpart. These include the power to order the deportation without hearing of any foreign citizen whose presence in Mexico is “inconvenient,”<sup>163</sup> to carry out agrarian reform

<sup>153</sup> Id.

<sup>154</sup> Id.

<sup>155</sup> Id.

<sup>156</sup> Id. For an interesting discussion of this power see *National Labor Relations Board v. Noel Canning*, 537 U.S. \_\_\_ (2014).

<sup>157</sup> Constitution of the United States of America, Article II, section 3.

<sup>158</sup> Id.

<sup>159</sup> Id.

<sup>160</sup> Id.

<sup>161</sup> Political Constitution of the United Mexican States, Article 89.

<sup>162</sup> Id. at Article 69.

<sup>163</sup> Id. at Article 33.

and protect against the exploitation of natural resources,<sup>164</sup> and to introduce legislation.<sup>165</sup> This last power has been broadly executed; it has been said that “the vast majority of all federal legislation has been drafted in the executive branch, within the presidential office or in the cabinet ministries (secretarias).”<sup>166</sup>

Despite the many similarities between the formal provisions for the executive branch in the Mexican and U.S. Constitutions, the experience has been vastly different in the two systems. Until relatively recently, Mexico’s system was dominated by a system of *presidentialismo* or “hyperpresidentialism.”<sup>167</sup> Under this system, the President has been a “formidable participant in the system of checks and balances”<sup>168</sup> such that “[w]hile in office, [his] will is tantamount to law.”<sup>169</sup> As a result, “during the twentieth century, the Mexican Constitution was applied so as to give clear predominance to the executive branch.”<sup>170</sup> Thus, despite the tripartite separation of federal powers,

the President retained significant ‘indirect’ legislative powers by virtue of the political leadership of the President in a one-party ‘democratic’ system. For this reason, the constitutional separation of legislative and executive powers in Mexico was, until recently, a legal fiction that did not reflect reality. While the President was careful to follow the *formal* constitutional requirements prohibiting executive incursions into the legislative arena, the political process allowed him to dictate the development of Mexican law.<sup>171</sup>

<sup>164</sup> Id. at Article 27.

<sup>165</sup> Id. at Article 71.

<sup>166</sup> Zamora et al., *supra* note 1 at 139.

<sup>167</sup> Keith S. Rosenn, *supra* note 62 at 46, citing Carlos Nino. The powers of the Mexican President have been referred to as “metaconstitutional.” Jeffrey Weldon, *The Political Sources of Presidentialismo in Mexico*, in *Presidentialism and Democracy in Latin America* 254-55 (1997).

<sup>168</sup> Tarr, *supra* note 19 at 392.

<sup>169</sup> Zamora et al., *supra* note 1 at 141-42.

<sup>170</sup> Id. at 137.

<sup>171</sup> Zamora et al., *supra* note 1 at 137. “Total discipline [within the ruling PRI], as well as respect for final decisions, was generated internally; pluralism of opinion was permitted within the party and negotiations were normal. Once a decision was made, it was to be carried out.” Torruco, *supra* note 31 at 772-73; “Mexico’s ruling party, the Partido Revolucionario Institucional (PRI), governed for almost a century with remarkably little violence. It was, as the Peruvian novelist Mario Vargas Llosa once remarked, the ‘perfect dictatorship.’ Mexico’s political order under the PRI blended authoritarianism with flexibility because some constitutional rules, like the prohibition on presidential



It is important to note, however, that the party structure rather than Constitutional formalities were largely responsible for the growth of *presidentialismo* in Mexico.<sup>172</sup> In fact, as early as 1826, support for moderate executive power was expressed<sup>173</sup> and this concern drove constitutional development since.

### *Federal Judicial Power*

As with the other organs of government, there are many similarities but also significant differences between the judicial systems created by the U.S. and Mexican constitutions, respectively. The federal judicial branch is established and empowered by Article III of the U.S. Constitution and Articles 94-107 of the Mexican Constitution.

#### Structure of the Judicial Branches

The Constitution of the United States provides for “one supreme Court” and “such inferior Courts as the Congress may from time to

re-election, were respected, allowing the system to evolve over time. The flexibility of Mexican authoritarianism made Mexico the most successful dictatorship of the twentieth century.” Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia*, 16 *Ind. J. Glob. Legal Stud.* 173, 177-78 (2009) (footnote omitted).

<sup>172</sup> “Institutional design was not the culprit in Mexico, as its 1917 Constitution established a reasonable balance of powers between the different branches of government. The strong powers wielded by Mexican presidents flowed not from their formal powers, but from their control over the PRI, which, in turn, controlled every level of government until late in the twentieth century. The ‘metaconstitutional powers of the president’ trumped the formal separation of powers guaranteed by Article 49 of the Mexican Constitution of 1917. The reason this matters is that when Mexico democratized and political parties opposed to the PRI gained office, vertical and horizontal separation of powers emerged quickly. The institutions by which different political factions check each other had not been destroyed during the period of PRI ascendancy, but had simply lain dormant until pricked into activity by the emergence of political competition.” Schor, *supra* note 171 at 178 (footnotes omitted).

<sup>173</sup> In arguing against a proposal to grant extraordinary power to the executive intended to combat internal factions and external threats, Zavala in a senate speech on 1826 said this: “Let us remember the conduct that our neighbors to the north have followed, even in the days of their greatest danger. The great Washington never had nor requested extraordinary powers.” Knowlton, *supra* note 32, citing Felipe Tena Ramirez, *Leyes fundamentales de Mexico, 1803-1967* (3d ed.), quoting Lorenzo de Zavala, *Obras, El historador y el representante popular* (1969).

time ordain and establish.”<sup>174</sup> The Mexican Constitution of 1917 went somewhat further, and vested the federal judicial power in “a Supreme Court of Justice, in circuit courts,... and in district judges.”<sup>175</sup> It is possible that the structure of the U.S. judicial branch – which long has included regional circuits and district courts<sup>176</sup> – inspired the formation of the Mexican judicial branch.

The Supreme Court of the United States sits only *en banc*, while the Mexican Constitution provides that the Nation’s Supreme Court of Justice “shall function in Full Court or in Chambers.”<sup>177</sup>

#### Qualification and Selection of Judges

In contrast to the provisions relating to the legislative and executive branches, there are absolutely no constitutional requirements for serving as a U.S. federal judge. The Mexican Constitution represents a departure and sets forth requirements for service on the Supreme Court of Justice, including citizenship by birth, residence, age, reputation, and legal education. Having held certain government positions or having been convicted of a crime is disqualifying for the office. In addition, those who are appointed Justices should be “individuals who have distinguished themselves for their honorability, proficiency and a good professional record in the exercise of legal duties.”<sup>178</sup> These characteristics in the U.S. are left to the political processes.

In the United States, federal judges are nominated by the President and appointed once confirmed by the Senate.<sup>179</sup> In Mexico, the Constitution of 1917 originally provided by appointment through the same

<sup>174</sup> Constitution of the United States of America, Article III, section 1.

<sup>175</sup> Political Constitution of the United Mexican States, Article 94. This provision was subsequently amended to include an Electoral Tribunal. See [http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum\\_crono.htm](http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm).

<sup>176</sup> Judiciary Act of 1789, codified in various sections of Title 28 of the United States Code.

<sup>177</sup> Political Constitution of the United Mexican States, Article 94.

<sup>178</sup> *Id.*, Article 95.

<sup>179</sup> Constitution of the United States of America, Article II, section 2.

process as in the U.S.,<sup>180</sup> although a different rule is now in place pursuant to constitutional amendment.<sup>181</sup>

#### Tenure of Judges and Salary Protection

Federal judges in the U.S. enjoy life tenure.<sup>182</sup> Justices in the Mexican Supreme Court of Justice hold their terms for a period of 15 years.<sup>183</sup> Circuit and district judges in Mexico hold their terms for six years.<sup>184</sup>

As an additional safeguard of judicial independence, both the U.S. Constitution and the Mexican Constitution provide that the salaries of federal judges (in the case of the U.S.) and Supreme Court of Justice ministers (in the case of Mexico) cannot be reduced during their time in office.<sup>185</sup>

#### Removal of Judges

Federal judges in the U.S. may be removed upon impeachment and conviction of “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>186</sup> In Mexico, judges are “liable for any actions or which they incur in the performance of their respective duties.”<sup>187</sup> Upon impeachment and conviction, through a proceeding that bears similarities to the U.S. procedures,<sup>188</sup> judges will be removed from office and dis-

<sup>180</sup> Political Constitution of the United Mexican States, Article 96. Interestingly, the Senate was required to act within a ten-day period. No timeframe is imposed on the U.S. Senate in considering presidential nominations, which omission is particularly noteworthy in light of the political issues surrounding President Obama’s recent Supreme Court nominee.

<sup>181</sup> [http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum\\_crono.htm](http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm),

<sup>182</sup> Constitution of the United States of America, Article III section 2 (providing that judges hold their positions “during good Behaviour”).

<sup>183</sup> Political Constitution of the United Mexican States, Article 94.

<sup>184</sup> *Id.* at Article 97.

<sup>185</sup> Constitution of the United States Article III, section 1; Political Constitution of the United Mexican States, Article 94.

<sup>186</sup> *Id.*, Article II, section 4.

<sup>187</sup> Political Constitution of the United Mexican States, Article 108.

<sup>188</sup> *Id.*, Article 109.

qualified from other public functions, “public offices, employments or commissions of whatever nature.”<sup>189</sup>

#### Oath of Office

All U.S. judicial officers are required to take an oath or affirmation to support the Constitution.<sup>190</sup> An oath is similarly required of members of the Mexican Supreme Court of Justice.<sup>191</sup>

#### Jurisdiction

Federal courts in the United States have jurisdiction over the following categories of cases and controversies:<sup>192</sup>

- Arising under the Constitution, federal laws, or treaties.
- Affecting ambassadors, public ministers and consuls.
- Arising under admiralty and maritime jurisdiction.
- In which U.S. the is a party.
- Between two or more states.
- Between a state and a citizen of another state.
- Between citizens of different states.
- Between citizens of the same state claiming lands under grants of different states.
- Between a state or citizens thereof and foreign states, citizens, or subjects.

The U.S. Supreme Court has exclusive jurisdiction over cases “affecting ambassadors, other public ministers and consuls,” and those in which a state sues another state.<sup>193</sup> Other cases are exclusively within the jurisdiction of the federal courts only when required by federal statute.

Federal court jurisdiction in Mexico has many similarities to U.S. federal court jurisdiction. As in the U.S., there are cases of exclusive

<sup>189</sup> Id., Article 110.

<sup>190</sup> Constitution of the United States of America, Article VI.

<sup>191</sup> Political Constitution of the United Mexican States, Article 97.

<sup>192</sup> Constitution of the United States of America, Article III, section 2.

<sup>193</sup> Id.

federal court jurisdiction, cases of exclusive state court jurisdiction, and cases of concurrent jurisdiction, and these categories bear some striking similarities.

In Mexico, federal courts have exclusive jurisdiction over:<sup>194</sup>

- Claims of infringement on constitutional rights.
- Federal laws that abridge or encroach on state sovereignty.
- State laws that encroach on federal jurisdiction.

The following additional categories of cases fall within the competence of the Mexican federal courts:<sup>195</sup>

- Arising under federal law or treaties.
- Pertaining to the law of the sea.
- In which the Federation is a party.
- Between a state and one or more residents of another state.
- Involving members of the diplomatic and consular service.
- Arising “by reason of jurisdiction between the Courts of the Federation, between the latter and State Courts ..., between a State Court and a Court from another State, or between a State Court.”<sup>196</sup>

The Supreme Court of Justice has exclusive jurisdiction over the following cases:<sup>197</sup>

- Constitutional controversies, except for electoral matters,<sup>198</sup> between a defined set of governmental parties.
- Specified actions of “unconstitutionality directed to establish a possible contradiction between a general legal provision and this Constitution.”<sup>199</sup>
- Certain appeals issued by district courts in proceedings in which the federal government is a party “and which so merit it, in the light of their interest and transcendence.”<sup>200</sup>

<sup>194</sup> Political Constitution of the United Mexican States, Article 103

<sup>195</sup> Id., Articles 104, and 105.

<sup>196</sup> Id., Article 106

<sup>197</sup> Id., Article 105.

<sup>198</sup> Id., Article 46.

<sup>199</sup> Id., Article 105 II.

<sup>200</sup> Id., Article 105 III.

## Judicial Review

Scholars have suggested that the U.S. model of judicial review influenced the Mexican institution,<sup>201</sup> although the models of judicial review differ in fundamental ways. In one sense, the judicial review in Mexico is more expansive than in the United States; in Mexico, pursuant to a liberal reading of Article 14, federal courts have assumed competence over a wide range of state-law matters,<sup>202</sup> which has not occurred in the U.S. In another sense, the power of judicial review in the United States is far more robust given policies of *stare decisis*, which are expansive in the U.S. and far more limited in Mexico,<sup>203</sup> coupled with the principle that judicial decisions in the U.S. are broadly applied and not limited to the actual parties as in Mexico.<sup>204</sup>

## Intergovernmental Relations

### Supremacy

Both the U.S. and Mexican Constitutions provide for the supremacy of federal law in provisions that are facially similar.

<sup>201</sup> “Judicial review likewise was transplanted. Although it failed to work as effectively as in the United States, the practice was incorporated into nearly all Latin American countries.” Billias, *supra* note 22 at 106. See also Eduardo Ferrer Mac-Gregor and Ruben Sanchez Gil, *Foreign Precedents in Mexican Constitutional Adjudication*, IV Mexican Law Review 293, 296 n. 9 (2012) (“It is widely accepted that the *juicio de amparo* rose from American judicial review”); Mirow, *supra* note 24 at 45 (“The United States origin of judicial review in Mexico had important ramifications for the doctrine’s continuation to the present day.... [There is] overwhelming evidence that Mexican judicial review is borrowed directly from United States law”).

<sup>202</sup> See Rosenn, *supra* note 62 at 26-27 (“Mexican federal courts routinely review state court decisions in which the only federal question is whether the state court correctly interpreted or applied state law....The Supreme Court leaves the interpretation of the facts to the state courts, but every question of the meaning of state law can be converted into a federal constitutional question”).

<sup>203</sup> See Jose Gamas Torruco, *Constitutional Litigation: Procedural Protections of Constitutionalism in the Americas...and Beyond*, 49 Duq. L. Rev. 293, 328-29 (2011); Manuel Gonzalez Oropeza, *Recent Problems and Developments on the Rule of Law in Mexico*, 40 Tex. Int’l L.J. 577, 583 (2005).

<sup>204</sup> See Oropeza, *id.* at 583 (“[T]he relative effect of judicial resolutions to only the parties involved in the lawsuit limits the scope of the binding effects and creates unequal application of the law across the general population”).

The Constitution of the U.S. declares as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>205</sup>

The Mexican Constitution similarly provides as follows:

This Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States.<sup>206</sup>

Thus, the Constitutions of both Mexico and the United States expressly and resolutely acknowledge the supremacy of valid federal law over the law of the respective states. And it has been said that Mexico's supremacy provision was "directly modeled on the U.S. Supremacy Clause."<sup>207</sup>

*Full Faith and Credit*

Both the U.S. and the Mexican constitutions have similar provisions that stipulate the extent to which states must respect records established and judgments entered by other states. The U.S. Constitution

<sup>205</sup> Constitution of the United States of America, Article VI.

<sup>206</sup> Political Constitution of the United Mexican States, Article 133. In addition, Article 41 provides that "the individual constitutions of the States ... shall in no event contravene the stipulations of the Federal Pact."

<sup>207</sup> Rosenn, *supra* note 62 at 23. See also Barker, *supra* note 16 at 904 ("Article 133 of the Constitution of Mexico establishes constitutional supremacy in language almost identical to that found in the Supremacy Clause of the United States Constitution"); Eduardo Mac-Gregor and Ruben Sanchez Gil, *supra* note 201 at 296 n. 9 (2012) ("the text of Article 133, for example, is practically identical to the text of Article VI of the American Constitution"); Flores, *supra* note 87 at 707.

contains a “full faith and credit” provision while the Mexican counterpart refers to “full faith and credence” but their texts and apparent meanings are similar.

The United States Constitution provides as follows:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.<sup>208</sup>

This Mexican Constitution’s provision for “full faith and credence” is similar:

Complete faith and credence shall be given in each State of the Federation to the public acts, registries, and judicial proceedings of all the others. The Congress of the Union, through general laws, shall prescribe the manner of proving such acts, registries, and proceedings [consistent with some specified principles].

This textual similarity implies that the U.S. document in some way influenced the language employed in the Mexican constitution.

### *Individual Rights and Liberties*

#### Preliminary Remarks

This section compares individual rights and liberties in the U.S. and Mexican Constitutions. Numerous similarities exist, while of course there are important differences. A few general observations are made at the outset.

First, the Mexican Constitution of 1857 had a bill of rights of sorts,<sup>209</sup> as does the 1917 Constitution, which is codified in Title I of the Constitution, entitled “Fundamental Rights. Here the Mexican Constitution compiles a list of rights, somewhat suggestive of the

<sup>208</sup> Constitution of the United States of America, Article IV, section 1.

<sup>209</sup> The Mexican Constitution of 1857 “contained a full bill of rights” modeled on that of the United States. Billias, *supra* note 22 at 120.



U.S. Bill of Rights<sup>210</sup> – although the Mexican Constitution<sup>211</sup> articulates a greater panoply of rights than does the U.S. constitution – including a catalogue of political, social, and economic rights, as discussed above.<sup>211</sup>

Second, even when there are textual likenesses between the Mexican and U.S. constitutions, the implementation of stated rights varies between the respective systems. U.S. courts, consistent with their common law approach, have interpreted rights articulated in the Constitution expansively, while this has not always been the Mexican experience – as would be expected given its civil law tradition:

In interpreting constitutional protections of individual rights, the Mexican Supreme Court follows the general tradition of the Mexican judiciary in avoiding what is referred to in the United States as “judicial activism”, that is, judicial interpretations of general constitutional provisions, such as “due process” or “equal protection”, to mandate far-reaching decisions that establish rules of law. Interpretations of similarly vague provisions in the Mexican Constitution have not led to similarly aggressive judgments. The Mexican Supreme Court has held that, because individual rights emanate from the Constitution, a constitutional guarantee must not be interpreted in an absolute sense, but rather in keeping with the other provisions of the Constitution.<sup>212</sup>

Third, the difference between the broad application of court decisions in the U.S. versus the application of Mexican Supreme Court decisions only to the parties before the court gives much greater breadth and applicability to U.S. court decisions interpreting rights and liberties.<sup>213</sup>

Finally, a note about the prohibition of slavery: Although the 13<sup>th</sup> Amendment to the U.S. Constitution (“[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”) appears similar to Article 5(2) of

<sup>210</sup> Constitution of the United States of America, Amendments I – X (1791).

<sup>211</sup> See text accompanying notes 2-10, *supra*.

<sup>212</sup> Zamora et al., *supra* note 1 at 236.

<sup>213</sup> See text accompanying note 204, *supra*.

the Mexican Constitution (“[n]o one can be compelled to render personal services without due remuneration and without his full consent, excepting labor imposed as a penalty by the judiciary”), Article 5(2) was borrowed directly from the Mexican Constitution of 1857, leaving speculation as to whether the 13<sup>th</sup> Amendment, ratified in 1865, may have been influenced by the Mexican Constitution.<sup>214</sup>

#### Freedom of Expression of Ideas

Both the Mexican and the U.S. Constitutions contain robust protection for the expression of ideas. The U.S. Constitution boldly proclaims that “Congress shall make no law ... abridging the freedom of speech...”<sup>215</sup> The Mexican counterpart appears somewhat more limited in providing that “[t]he expression of ideas shall not be subject to any judicial or administrative investigation, unless it offends good morals, infringes the rights of others, incites to crime, or disturbs the public order.”<sup>216</sup> The Mexican Constitution further ensures that “[t]he freedom to write and publish on any subject is inviolable.”<sup>217</sup>

#### Freedom of Assembly and Association

The U.S. and Mexican constitutions both guarantee the freedom of assembly and association.

The U.S. Constitution provides that “Congress shall make no law ... abridging ... the right of the people peaceably to assemble...”<sup>218</sup> A

<sup>214</sup> Political Constitution of the republic of Mexico of 1857, Section 1.

<sup>215</sup> Constitution of the United States of America, 1<sup>st</sup> Amendment (1791). This limitation was extended to the states in *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>216</sup> Political Constitution of the United Mexican States, Article 6. Article 6 “is interpreted to cover oral and visual freedom of expression, by conversations, speeches, conferences, debates, or any other kind of means of expression, such as artistic expression (including music, painting, sculpture, cinema, television, and radio) through other than written words.” Zamora et al., *supra* note 1 at 244 (footnote omitted).

<sup>217</sup> Political Constitution of the United Mexican States, Article 7. Article 7 is said to cover “freedom of expression in writing, including the writing or publication of books, newspapers, magazines, booklets, or any other kind of publication.” Zamora et al., *supra* note 1 at 244.

<sup>218</sup> Constitution of the United States of America, 1<sup>st</sup> Amendment (1791). This limitation was extended to the states in *De Jonge v. Orgeon*, 299 U.S. 353 (1937).

similar prohibition is found in the Mexican Constitution, which proclaims that “[t]he right to assemble or associate peaceably for any lawful purpose cannot be restricted.”<sup>219</sup>

#### Right to Petition the Government

Both the U.S. and the Mexican constitutions provide a right to petition the government. The U.S. Constitution provides that Congress shall make no law respecting ... the right of the people ... to petition the Government for a redress of grievances.”<sup>220</sup> The Mexican Constitution provides a similar right of petition and requires that “[e]very petition shall be replied to in writing by the official to whom it is addressed, and said official is bound to inform the petitioner of the decision taken within a brief period.”<sup>221</sup>

#### Religious Rights

The U.S. and Mexican constitutions both provide for freedom of religion and prohibit the establishment of religion.

The U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>222</sup> The first of these two provisions, known as the no-establishment clause, is the basis for the so-called separation of church and state. The second clause provides for religious freedom.

The Mexican Constitution likewise provides for freedom of religion: “Everyone is free to embrace the religion of his choice and to practice all ceremonies, devotions, or observances of his respective faith.”<sup>223</sup> The Mexican Constitution further stipulates that religious

<sup>219</sup> Political Constitution of the United Mexican States, Article 9. Important constitutional limitations on the freedom of association have been identified. See Zamora et al., *supra* note 1 at 247.

<sup>220</sup> Constitution of the United States of America, 1<sup>st</sup> Amendment (1791). This limitation was extended to the states in *Edwards v. South Carolina*, 372 U.S. 229 (1963).

<sup>221</sup> Political Constitution of the United Mexican States, Article 8.

<sup>222</sup> Constitution of the United States of America, 1<sup>st</sup> Amendment (1791). This limitation was extended to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise) and *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1 (1947) (no establishment).

<sup>223</sup> Political Constitution of the United Mexican States, Article 24.

acts “may not constitute an offense punishable by law” and that “religious act[s] of public worship must be performed strictly inside places of public worship, which shall at all times be under governmental supervision.”<sup>224</sup> The Mexican Constitution also has a no-establishment clause by proclaiming that “Congress cannot enact laws establishing or prohibiting any religion.”<sup>225</sup>

Right of Privacy of Persons, Home, and Effects

Both the U.S. and Mexican constitutions defend the integrity of a person, his home, and effects. The U.S. Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>226</sup>

The Mexican Constitution similarly provides as follows:

No one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken. No order of arrest or detention shall be issued against any person other than by the competent judicial authority, and unless same is preceded by a charge, accusation, or complaint for a credible party or by other evidence indicating the probable guilt of the accused; in cases of flagrante delicto, any person may arrest the offender and his accomplices, turning them over without delay to the nearest authorities. Only in urgent cases instituted by the public attorney without previous complaint or indictment and when there is no judicial authority available, may the administrative authorities, on their strictest accountability, order the detention of an accused person, turning him over immediately to the judicial authorities. Every search warrant, which can be issued only by judicial authority and which must be in writing, shall specify the place to be searched, the person or persons to be arrested, and the

<sup>224</sup> Id.

<sup>225</sup> Id. at Article 130 (58).

<sup>226</sup> Constitution of the United States of America, 4<sup>th</sup> Amendment (1791).

objects sought, the proceedings to be limited thereto; at the conclusion of which a detailed statement shall be drawn up in the presence of two witnesses proposed by the occupant of the place.<sup>227</sup>

Through this provision, the Mexican Constitution spells out some of the specifics of the search and seizure requirements that have been developed in the United States through case law.

#### Due Process

The concept of due process in the U.S. Constitution is remarkably broad and encompasses a number of more specific procedural and substantive elements articulated in the Mexican Constitution.

The Constitution of the United States provides for due process in both the Fifth Amendment (applicable to the federal government) and the Fourteenth Amendment (applicable to the states). The Fifth Amendment requires that “[n]o person ... shall ... be deprived of life, liberty, or property, without due process of law.”<sup>228</sup> The Fourteenth Amendment uses functionally equivalent language.<sup>229</sup>

Although the Mexican Constitution does not use the words “due process,” it contains numerous provisions throughout that similarly promote adherence to the rule of law. As in the U.S. Constitution, the Mexican Constitution provides that “[n]o person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act.”<sup>230</sup> Due process principles also are embodied in a number of related provisions, most particularly Articles 14, 16, and 17.

The reach of Article 16 is particularly broad, and

prohibits any act of authority that is inconsistent with any law or ruling issued by a government agent or agency that is not in keeping with the appli-

<sup>227</sup> Political Constitution of the United Mexican States, Article 16.

<sup>228</sup> Constitution of the United States of America, 5<sup>th</sup> Amendment (1791).

<sup>229</sup> Id. at 14<sup>th</sup> Amendment.

<sup>230</sup> Political Constitution of the United Mexican States, Article 14.

cable law or regulations. That protection has been interpreted broadly by the Supreme Court, to apply not only to laws and regulations in force in Mexico, at any government level; it also protects persons against individual actions by public officials that constitute violations of laws or the Constitution.<sup>231</sup>

Closely related to due process rights are prohibitions on *ex post facto* laws.<sup>232</sup> The Constitution of the United States provides that “[n]o ... *ex post facto* Law shall be passed.”<sup>233</sup> The Mexican Constitution similarly provides that “[n]o law shall be given retroactive effect to the detriment of any person whatsoever.”<sup>234</sup>

#### Equal Protection

Both the Mexican and the U.S. constitutions provide for a form of equal protection – the general notion that similarly situated people should be treated in the same way. The Constitution of the United States simply states that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>235</sup> The Mexican Constitution’s counterpart more broadly and explicitly provides that:

[e]very form of discrimination motivated by ethnic or national origin, gender, age, incapacities, sexual preferences, status or any other discrimination that violates human dignity or seeks to annul or diminish the rights and liberties of the people, is prohibited.<sup>236</sup>

#### Rights in Criminal Context

Both the U.S. and the Mexican Constitutions contain a range of provisions designed to protect those accused of criminal activity. The U.S. Constitution, for instance, offers the following guarantees:

<sup>231</sup> Zamora et al., *supra* note 1 at 248.

<sup>232</sup> Also fundamental to due process are rights bestowed in the context of the criminal justice system. These are discussed separately in Part III.B.9., *infra*.

<sup>233</sup> Constitution of the United States of America, Article I, section 9.

<sup>234</sup> Political Constitution of the United Mexican States, Article 14.

<sup>235</sup> Constitution of the United States of America, 14<sup>th</sup> Amendment (1868)

<sup>236</sup> Political Constitution of the United Mexican States, Article 1.

- Prohibition against warrantless searches.<sup>237</sup>
- Presentment of cases before a grand jury.<sup>238</sup>
- Right to be informed of the nature and cause of the accusation.<sup>239</sup>
- Prohibition against double jeopardy.<sup>240</sup>
- Prohibition against compelled self-incrimination.<sup>241</sup>
- Right to a speedy trial.<sup>242</sup>
- Right to a public trial.<sup>243</sup>
- Right to trial by jury in all felony cases.<sup>244</sup>
- Right to be confronted with witnesses against defendant.<sup>245</sup>
- Right to compulsory process for obtaining witnesses in defendant's favor.<sup>246</sup>
- Right to assistance of counsel,<sup>247</sup> which has been interpreted to give right to counsel provided by the state for indigent defendants.<sup>248</sup>
- Right to be free from excessive bail.<sup>249</sup>
- Right to be free from excessive fines.<sup>250</sup>
- Right to be free from cruel and unusual punishments.<sup>251</sup>

The Mexican Constitution provides for many of the same protections in the criminal process. For instance:<sup>252</sup>

<sup>237</sup> Constitution of the United States of America, 4th Amendment (1791). See also Part III.B., *supra*.

<sup>238</sup> Constitution of the United States of America, 5<sup>th</sup> Amendment (1791). At present, this right is applicable only in federal cases. See *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>239</sup> Constitution of the United States of America, 5<sup>th</sup> Amendment (1791).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*, 6<sup>th</sup> Amendment (1791).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>249</sup> Constitution of the United States of America, 8<sup>th</sup> Amendment (1791).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> The Mexican Constitution contains numerous additional protections for criminal defendants, including a provision that one may not be imprisoned for civil debts (Article

- Prohibition of warrantless searches.<sup>253</sup>
- Requirement of presentment before a “competent judicial authority.”<sup>254</sup>
- Right to be notified of “his accuser and the nature of and cause for the accusation.”<sup>255</sup>
- Prohibition of double jeopardy.<sup>256</sup>
- Right to be free from forced self-incrimination.<sup>257</sup>
- Right to public trial.<sup>258</sup>
- Right to trial by jury “for all offenses committed by means of the press against the public peace or against the domestic or foreign safety of the nation.”<sup>259</sup>
- Right to be “confronted with the witnesses against” the defendant.<sup>260</sup>
- Right to assistance in securing presence of witnesses in favor of defense.<sup>261</sup>
- Right to counsel.<sup>262</sup>

17); that the federal and state governments establish institutions for the treatment of juvenile delinquents (Article 18); that within three days of detention there must be a formal order of commitment which states the nature and substance of the offense and the facts that support it (Article 19); that any ill-treatment during or arrest or confinement, or any treatment without justification are punishable by law (Article 19); that the defense shall be provided with all available information requested for the defense (Article 20); trial shall occur within four months or within one year if the maximum penalty is greater than two years’ imprisonment (Article 20); that imprisonment or detention may not be extended for failure to satisfy monetary obligations or other civil liability (Article 20); that detention may not exceed the maximum time set by law for the offense charged (Article 20); and that fines against day laborers and workmen may not exceed one week’s wages (Article 21). The Mexican Constitution also provides certain rights for the victim of crimes, including the right to counsel, to assist the prosecutor, to receive urgent medical and psychological care (Article 20).

<sup>253</sup> Political Constitution of the United Mexican States, Article 16. See also Part III.B.6., *supra*.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*, Article 20 (III.).

<sup>256</sup> *Id.*, Article 23 (“No person, whether acquitted or convicted, can be tried twice for the same offense”).

<sup>257</sup> *Id.*, Article 20 (II.).

<sup>258</sup> *Id.*, Article 20 (VI.).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*, Article 20 (IV.).

<sup>261</sup> *Id.*, Article 20 (V.).

<sup>262</sup> *Id.*



- Prohibition of excessive fines.<sup>263</sup>
- Prohibition of cruel and unusual punishments, specifically “[p]unishment by mutilation and infamy, branding, flogging, beating with sticks, torture of any kind, excessive fines, confiscation of property and any other unusual or extreme penalties.”<sup>264</sup>
- Right to be free on bail.<sup>265</sup>
- Right to be heard in own defense.<sup>266</sup>

#### Right to Compensation for Public Taking of Property

Both the Mexican and U.S. Constitutions provide that the owner of any private property taken for a public purpose must be duly compensated. The U.S. Constitution states “nor shall private property be taken for public use, without just compensation.”<sup>267</sup> This power of eminent domain contains an implicit recognition of inherent sovereign power.<sup>268</sup> The Mexican Constitution stipulates that appropriations can only occur to benefit the public, and provides for payment of compensation to the owner in Mexican pesos consistent with the tax value of the expropriated property; if there is a significant gap between the tax value and the market value of the property, the owner has a right to request a federal district judge to order compensation at fair market value.<sup>269</sup>

#### Right to Bear Arms

Both the Mexican Constitution and the U.S. Constitution provide individuals with the right to bear arms. The Constitution of the United States provides that “[a] well regulated Militia, being necessary to the

<sup>263</sup> *Id.*, Article 22.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*, Article 20 (I.) (offering significantly more detail than the U.S. counterpart).

<sup>266</sup> *Id.*, Article 20 (IX.).

<sup>267</sup> U.S. Constitution, Fifth Amendment (1791). This right was extended to apply to the states in *Chicago, B & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

<sup>268</sup> See, e.g., *Boom Co. v. Patterson*, 98 U.S. 403 (1879); *United States v. Carmack*, 329 U.S. 230 (1946).

<sup>269</sup> Article 27 contains extensive rules regarding ownership and transferability of land and natural resources, a detailed discussion of which is beyond the scope of this paper.

security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>270</sup> Not a model of textual clarity, it was only very recently that the Supreme Court of the United States affirmed that this provision provides an individual right to bear arms for self-defense rather than a right that is tied to the development of a militia.<sup>271</sup>

The Mexican Constitution provides for a similar right with more specificity:

The inhabitants of the United Mexican States are entitled to have arms of any kind in their possession for their protection and legitimate defense, except such as are expressly forbidden by law, or which the nation may reserve for the exclusive use of the army, navy, or national guard; but they may not carry arms within inhabited places without complying with police regulations.<sup>272</sup>

#### Right to Refuse to Quarter Soldiers in Times of Peace

Both constitutions have similar provisions about the forced quartering of soldiers. The U.S. Constitution provides that “[n]o soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.”<sup>273</sup> The Mexican Constitution similarly provides that “[n]o member of the Army shall in times of peace be quartered in a private house against the will of the owner nor impose any requirements. In times of war the military can demand lodging, baggage, food and other requirements in the terms set forth by the applicable martial law.”<sup>274</sup>

#### No Titles of Nobility

Both systems have constitutional prohibitions on titles of nobility. The Constitution of the United States provides that “[n]o Title of Nobility

<sup>270</sup> Constitution of the United States of America, 2<sup>nd</sup> Amendment (1791).

<sup>271</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008), extended to the states in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>272</sup> Political Constitution of the United Mexican States, Article 10.

<sup>273</sup> U.S. Constitution, 3<sup>rd</sup> Amendment (1791).

<sup>274</sup> Political Constitution of the United Mexican States, Article 16.

shall be granted by the United States.”<sup>275</sup> It further provides that “no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.”<sup>276</sup> In a very similar fashion, the Mexican Constitution stipulates that “[n]o titles of nobility, or hereditary or prerogatives or honors shall be granted in the United Mexican States, nor shall any effect be given to those granted by other countries.”<sup>277</sup>

#### Amending the Constitution

The U.S. and Mexican provisions for amending the respective constitutions have some facial similarities – notably the indispensable role played by the states in the approval of amendments – but these provisions have been applied in vastly different ways.

The U.S. Constitution stipulates the following procedure for amending the Constitution:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.<sup>278</sup>

The Mexican Constitution states as follows with respect to amendments to the Constitution:

<sup>275</sup> Constitution of the United States of America, Article I, section 9.

<sup>276</sup> *Id.*

<sup>277</sup> Political Constitution of the United Mexican States, Article 12.

<sup>278</sup> Constitution of the United States of America, Article V.

The present Constitution may be added to or amended. In order that the additions or amendments shall become a part thereof, it shall be required that the Congress of the Union, by a vote of two thirds of the individuals present, agree to the amendments or additions and that they be approved by a majority of the legislatures of the States. The Congress of the Union or the Permanent Committee, as the case may be, shall count the votes of the legislatures and shall announce those additions or amendments that have been approved.<sup>279</sup>

Unlike the situation in certain other countries, neither the Mexican nor the U.S. constitution (with one exception<sup>280</sup>) explicitly prohibits the amendment of specified provisions, but scholars in both countries have speculated that there may be certain rights that may not be eliminated through the amendment process.<sup>281</sup>

It has been said – and appears consistent with the language of the respective amendment provisions – that Article 135 was “[i]nspired by the U.S. Constitution.”<sup>282</sup> Yet the U.S. and the Mexican experiences with respect to constitutional amendments have been vastly different. The Constitution of the United States, although in existence for more than 230 years, has been amended only 27 times (the first ten of which were ratified in a single package known as the Bill of Rights);<sup>283</sup> the Mexican Constitution, now in its centennial year, has been amended more than 400 times.<sup>284</sup>

These divergent approaches can be explained by a number of factors.

First, it has been speculated that the powerful role of the U.S. common law courts makes formal constitutional amendments less necessary

<sup>279</sup> Political Constitution of the United Mexican States, Article 135.

<sup>280</sup> Article V of the U.S. Constitution provides that “no state, without its consent, shall be deprived of its equal suffrage in the Senate.”

<sup>281</sup> See, e.g., Jason Mazzone, Unamendments, 90 Iowa L. Rev. 1747 (2005); Hector Fix Zamudio and Salvador Valencia Carmona, Derecho constitucional mexicano y comparado 107-110 (4th ed. 2005).

<sup>282</sup> Jorge A. Vargas, Political Constitution of 1917, Recent Amendments: Article 1, Mexican Legal Dictionary P720-1.

<sup>283</sup> Thousands of amendments have been proposed, but only 33 have been sent to the states for ratification. See Tarr, *supra* note 19 at 404.

<sup>284</sup> See S. Lopez Ayllon and H. Fix Fierro, Tan cerca tan legos, El Estado de derecho en Mexico, 97 Boletín Mexicano de derecho comparado (2000).

while in the Mexican civil law system there is a general reluctance toward the kind of “judicial activism” that has been common in the U.S.:

[T]he Mexican Constitution is seen as the fountainhead of all rights, duties, and procedures affecting society, and Mexican legal tradition has translated this concept into an expectation that the Constitution should be exhaustive. Mexican citizens do not possess rights, and the Mexican government lacks powers, unless those rights and powers are written into the Constitution. Until recently, Mexican courts have exercised a limited ability to interpret constitutional language to support new rights or powers, *i.e.*, they have been loath to “amend” the Constitution by interpretation. Consequently, the duty of constitutional reform falls to the Mexican Congress. In contrast, “the United States Supreme Court has effectively ‘amended’ the United States Constitution hundreds of times.”<sup>285</sup>

Second, the Mexican document in practice, as one that historically has endowed the President and his political party with broad powers,<sup>286</sup> has promoted a system by which political platforms have been advanced and effectuated through constitutional amendments. As one scholar has explained:

Inserting a change in the Constitution as a result of an initiative advanced by the Executive has been well-recognized practice utilized in Mexico to send “messages” to the other federal powers, and to the States, without the Executive being perceived as being overly intrusive....<sup>287</sup>

The Constitution historically thus could be expected to change every 6 years or so to reflect the current President’s agenda and

<sup>285</sup> Zamora et al., *supra* note 1 at 80 (citations omitted). See also James F. Smith, *supra* note 15 at 94-95; John R. Vile, *Constitutional Change in the United States: A Comparative Study of the Role of Constitutional Amendments, Judicial Interpretations, and Legislative and Executive Actions* 76 (1994).

<sup>286</sup> See Part III.A.2.b., *supra*.

<sup>287</sup> Jorge A. Vargas, *Mexico’s Legal Revolution: An Appraisal of its Recent Constitutional Changes, 1988 – 1995*, 25 *Ga. J. Int’l & Comp. L.* 497, 503 (1996). See also Oropeza, *supra* note 203 at 578 (“All previous constitutional amendments – even the most contested ones – [were] passed with an easy unanimous vote from all state legislatures”).

plan.<sup>288</sup> As another scholar explained, the Constitution has been viewed as a

“programmatic” document that is used by Presidential candidates as a platform that they are committed to implement during their term. Consequently, the Constitution is amended quite regularly and with relative ease. Actual amendment to the Constitution is preceded by the publication of the President’s “National Development Plan” (Plan Nacional de Desarrollo), which constitutes the President’s public policy program and agenda.<sup>289</sup>

These more practical features of constitutional practice in the U.S. and Mexico may help to explain how very similar textual provisions for constitutional amendment in the respective documents have been exercised in vastly divergent ways.

## CONCLUSIONS

As explored in this article, there is ample evidence to suggest that the U.S. Constitution did in fact have a significant influence on the development of the Mexican Constitution of 1917. This influence was perhaps most significant with respect to structural issues – in particular the system of federalism and a national presidential system of government based on separation of powers and checks and balances. Textual similarities indicate that the U.S. bill of rights and related protections had some influence on the Mexican experience, as well.

U.S. constitutional law continues to have an impact on Mexico, as in other countries – although the influence of the U.S. in constitutional development around the globe appears to be waning in recent years.<sup>290</sup> In a 2012 article, Eduardo Ferrer Mac-Gregor and Ruben Sanchez Gil demonstrated that U.S. Supreme Court precedents – along with prec-

<sup>288</sup> See Jorge Carpizo, *La Constitución Mexicana de 1917* 291 (1997).

<sup>289</sup> Gilman, *supra* note 23 at 949 (footnotes omitted).

<sup>290</sup> See David S. Law and Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 *NYU L. Rev.* 762 (2012).

edents from other high national courts – continue to shape Mexican constitutional adjudication.<sup>291</sup>

As a citizen and lifelong resident of the United States of America and an enormous admirer of Mexico, her culture, and her people, such a narrative carries great satisfaction. Mexico, simply put, has one of the best records in constitution making in the Americas.<sup>292</sup> Not only is the Mexican Constitution of 1917 the oldest in Latin America,<sup>293</sup> it was truly visionary and has influenced other nations' constitutional models. It has been said, for instance, that the Mexican Constitution of 1917 “represented the most radical constitution of its kind on the globe at its time. Its revolutionary role was distinctive because of its heavy emphasis on the ‘social and economic rights’ of individual citizens.”<sup>294</sup> The 1917 Constitution indeed is

recognized to this day as “the model of a radical but not Marxist, constitution.” It guaranteed an eight-hour workday, minimum wages, equal pay without regard to sex or nationality, and the right to strike. Many of these features were ahead of their time, and some appeared only a generation later in the United States under the New Deal. At the same time, however, many features of this hybrid constitution were derived from the U.S. Constitution.<sup>295</sup>

<sup>291</sup> See Mac-Gregor and Sanchez Gil, *supra* note 201 at 293. In fact, Mexican legislation at times also appears to be influenced by U.S. legislation. Jorge Vargas has said that many of the structural and procedural changes reflected in Mexico's 1995 judicial reform “follow the spirit that caused the United States Congress to alter the structure and functions of the United States Supreme Court in the early stages of its evolution.” Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 *Am. U. Int'l. L. & Pol'y* 295, 298 (1996) (citations omitted), referring to the Judiciary Act of 1789, Ch. 20, 1 Stat. 73 (1789) and its subsequent amendments, especially in 1869, 1875, and 1887. See also Hector Fix Zamudio, *Setenta y Cinco Anos de Evolucion del Poder Judicial de Mexico*, in *Obra Juridica Mexicana* 651 (2d ed. 1787).

<sup>292</sup> Knowlton, *supra* note 32.

<sup>293</sup> Oropeza, *supra* note 202 at 579.

<sup>294</sup> Billias, *supra* note 22 at 270, quoting Thomas E. Skidmore and Peter H. Smith, *Modern Latin American* (3<sup>rd</sup> ed.) 1992) 231.

<sup>295</sup> *Id.* at 270, quoting Robert Payne, *Mexican Constitution of 1917*, in *Constitutions that Made History*, Albert P. Blaustein and Jay A. Sigler 283 (1988) and citing *id.* at 285. See also N. Andrew and N. Cleven, *Some Social Aspects of the Mexican Constitution of 1917*, 4 *The Hispanic American Historical Review* 474, 476 (1921), calling the 1917 Constitution's right of land possession a “[r]evolutionary principle.”

And this, as early as 1921, just four years after its ratification:

[T]he breadth of mind and deep insight into present-day problems, as revealed by the various provisions of this document, are especially worthy of note. It embodies reforms which many students of modern social progress deem essential in any comprehensive scheme for social welfare. Various phases of social activity, usually left to the police powers of the nation, state, and municipality, are here deemed worthy of insertion into a national constitution. At least three national constitutions, framed and adopted since 1917, incorporate reforms of very similar nature: namely those of Germany (1919), of Peru (1919), and of Czechoslovakia (1920).<sup>296</sup>

In the nearly 100 years since, the 1917 document certainly influenced many other constitutional systems.

As we commemorate the 100<sup>th</sup> anniversary of the Constitution of Mexico of 1917, we celebrate the many and varied influences *on* that document as well as *its* deep and abiding contributions – to Mexican law and society and more broadly to global constitutionalism.



<sup>296</sup> Andrew and Clevon, *id.* at 474.