

A SOVEREIGN PEOPLE: HOW REVOLUTION UNDERMINES THE RULE OF LAW IN MEXICO

Alejandro Madrazo*

ABSTRACT

The article is a comparative study in constitutional culture. It traces the genealogy of popular sovereignty in Mexico. Following the evolution and uses of the constitutional clause establishing a “right to revolution” as an entry point, the article explores the intersection between the concepts of revolution and constitution in Mexico. The article then explores, by comparing it with the American constitutional imagination, the contemporary structure of Mexican political and constitutional imagination resulting from that genealogy. By teasing out the differences between both countries and drawing out the implications for the commitment to the rule of law that stem from them, we gain important insights as to the possibilities and short-comings of our constitutional imaginations.

INTRODUCTION	127
I. SOVEREIGNTY: FROM THE NATION TO THE PEOPLE	131
II. CONSTITUTION	142
III. REVOLUTION	158
IV. THE RIGHT TO REVOLUTION: POPULAR SOVEREIGNTY, REVOLUTION AND THE FRAGILITY OF THE RULE OF LAW	169

* JSD Yale Law School ('06). Schell Center Visiting Human Rights Fellow, Yale Law School. Professor-Researcher, Centro de Investigación y Docencia Económicas (CIDE), in Aguascalientes, Aguascalientes (on leave). I would like to thank my colleagues who read and commented on this article in the two different seminars where parts of this document were discussed: Comparative Constitutional Cultures: The Case of Constitutional Self-Government hosted at the European University Institute in Florence, Italy in January of 2010 and SELA 2016 hosted at La Habana, Cuba in June of 2016. Also, I would like to thank the Schell Center for International Human Rights at Yale Law School. Their generous support during my year as a Schell Center Visiting Human Rights Fellow enabled me to revise this text and publish it. Finally, I would like to thank Andrea Oñate for her revision and comments to the final draft as well as Jorge Contesse, first bringing to my attention the term “a sovereign people” as an alternative to “popular sovereign.”

A. <i>The Autonomy of the Political in Mexico</i>	169
B. <i>The Subordination of Law to Politics</i>	174

“ . . . [W]e are the true heirs of the builders of our nationality, we are the dispossessed millions and we call upon our brothers to join this call as the only path left to us in order to avoid dying of hunger before the unending ambition of a 70 years dictatorship led by a handful of traitors who represent the most conservative and *vendepatrias* [sellers of the fatherland] groups. They are the same ones who opposed Hidalgo and Morelos, who betrayed Vicente Guerrero, they are the ones who sold over half of our territory to the foreign invader, they are the ones who brought a European prince to govern us, they are the ones who established the dictatorship of the Porfirian *Científicos*, the very same who opposed the Oil Expropriation (sic), the same who massacred railroad workers in 1958 and students in 1968, the same who today take form us everything, absolutely everything.

To avoid this and as our last hope, after having tried everything to put into practice the rule of law based on our Magna Carta, we appeal to it, our Constitution, in order to apply Constitutional Article 39 which literally states:

“National sovereignty resides essentially and originally in the people. All public power springs from the people and is instituted for its benefit. *The people have at all times the inalienable right to alter or modify its form of government.*”¹

- Comité Clandestino Revolucionario Indígena

“You don’t need the bullet when you got the ballot.”²

- Parliament, *Chocolate City*

¹ COMITÉ CLANDESTINO REVOLUCIONARIO INDÍGENA – COMANDANCIA GENERAL DEL EJÉRCITO ZAPATISTA DE LIBERACIÓN NACIONAL [CLANDESTINE REVOLUTIONARY INDIGENOUS COMMITTEE-GENERAL COMMAND OF THE ZAPATISTA ARMY OF NATIONAL LIBERATION], DECLARACIÓN DE LA SELVA LACANDONA [DECLARATION OF THE LACANDON JUNGLE] (June 1994), <http://palabra.ezln.org.mx/comunicados/1994/1993.htm>. [https://perma.cc/KE5N-P7QV] (emphasis added).

² PARLIAMENT, *Chocolate City*, in CHOCOLATE CITY (Casablanca 1975).

“Imaginemos cosas chingonas.”³

- Javier “Chicharito” Hernández

INTRODUCTION

Revolution in the name of the law may sound like an oxymoron. Nevertheless, it has deep roots in Mexico’s political and legal culture. It actually predates both Mexican law and polity. Of course, not infrequently do rebels claim to have the better right, but, in Mexico, the text of the constitution and the government’s dominant political discourse for most of the 20th century intersect, making for a peculiar relationship between revolution and law. To some, the right to revolution has constitutional standing, making for a powerful trope in political discourse. To those of us inquiring into comparative constitutional culture, the right to revolution presents an opportunity to inquire into the complexity and contradictions that underlie Mexican legal culture and compare it with another constitutional culture with more stable notions of rule of law, such as that of the United States.

In the United States, revolution and law, though intimately related, are imagined as mutually exclusive: they depend on each other, but cannot coexist. For the legal culture of the United States, Paul Kahn has argued, revolution precedes law and succeeds only if and when it establishes the rule of law, but rule of law and revolution cannot simultaneously exist.⁴ The popular sovereign appears during a revolution, gives law, and then recedes. Revolution is fluid but short lived; the rule of law is stable and long running. In Mexico, by contrast, revolution has come to be imagined as ongoing, and the popular sovereign is recurrently imagined as a standing presence. Thus, both the constitution and the rule of law must exist in the ever-possible immediate presence of the popular sovereign. The right to revolution, as read into the Mexican constitution, is an insightful entry point for exploring the unstable relationships between rule of law and revolution in Mexican political and legal imagination.

When I speak of the “right to revolution,” I refer to a contested interpretation of article 39 of the Mexican constitution. It states:

National sovereignty resides essentially and originally in the

³ “¡Imaginemos cosas chingonas!”: la esperanzadora frase de Chicharito que tiene soñado a México con ganar el Mundial de Rusia 2018, [Imagine amazing things!: the hopeful phrase of Chicharito that dreamed of Mexico winning the 2018 World Cup in Russia], BBC NEWS MUNDO (June 24, 2018), <https://www.bbc.com/mundo/deportes-44592456> [<https://perma.cc/3SYM-N68P>].

⁴ PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 69 (Yale University Press 1997) [hereinafter KAHN, REIGN OF LAW].

people. All public power springs from the people and is instituted for its benefit. *The people have at all times the inalienable right to alter or modify its form of government.*⁵

The “right to revolution” has been read into the closing sentence of the article, for it speaks of an inalienable *right* to alter government. Of course, the question of exactly *how* the inalienable right is to be exercised is contested and, for the most part, neutralized in sanctioned legal opinion by holding that the right is to be exercised through representative bodies according to the amendment procedure established in the constitution.⁶ The clause, however, has staying power in popular political imagination and has been invoked by the two most prominent political opposition movements that have questioned the legitimacy of the Mexican government of recent times: the Zapatista rebellion of the mid 1990s and former presidential candidate Andrés Manuel López Obrador in the wake of the controversial presidential election of 2006.⁷

The idea that revolution can be the exercise of a legal right seems to cut against the understanding that revolution and constitution are co-dependent, yet mutually exclusive moments in the life of a polity.⁸ It is not in spite of, but rather *because of* the contradictions inherent in conceiving a *right* to revolution that studying Mexican constitutional

⁵ Constitución Política de los Estados Unidos Mexicanos, CP [Constitution of the United Mexican States], Title II ch. 1 art. 39 Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-08-2018 (Mex.) (emphasis added).

⁶ This position was defended from the current text’s inception, argued by Congressman Mata in defense of the clause during the 1856 Constitutional Congress, downplaying its revolutionary potential. Nevertheless, it was contradicted by President Arriaga, who held “the people” (el pueblo) could exercise it directly (through the right to petition). Both spoke in defense of the clause as it was approved, so we cannot tell which interpretation weighed more in the majority’s decision. FRANCISCO ZARCO, CRÓNICA DEL CONGRESO EXTRAORDINARIO CONSTITUYENTE (1856-1857) [CHRONICLE OF THE EXTRAORDINARY CONSTITUENT CONGRESS (1856-1857)] 575 (El Colegio de México 1957).

⁷ López Obrador’s movement split off from his party, the Party of the Democratic Revolution, after he lost the 2012 election and became a new political party—National Regeneration Movement, or MORENA—participating in the federal legislative elections of 2015. López Obrador was elected president in 2018, in a historic landslide election and will enjoy ample majority in both houses of Congress. *Mexico Election: López Obrador Vows Profound Change After Win*, BBC NEWS (July 2, 2018), <http://www.bbc.com/news/world-latin-america-44677829> [<https://perma.cc/993K-WFQJ>].

⁸ KAHN, REIGN OF LAW, *supra* note 4, at 69; *see also* PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE 161 (Princeton Univ. Press 2005) [hereinafter KAHN, LIBERALISM].

culture from the vantage point of this constitutional clause promises to be insightful. It should shed some light on the contradictory relationships between law and politics, revolution and rule of law, rebellion (and maybe disobedience) and constitution in Mexico.

As the opening article to the constitutional chapter on “National Sovereignty and Form of Government,” Article 39 stands at the inception of the Constitution’s organization of the state.⁹ Together with the other two articles in that chapter, Article 39 establishes the basic political definitions that organize the State, its “principle[s] of order,”¹⁰ and the normative guidelines that inform the design of state organs. It is a chapter impregnated with political concepts, yet it remains largely unexplored as a manifestation of the political and legal imagination that informs Mexican constitutional culture. In the closing section of this paper, I will argue that this means that Article 39 brings the State’s efficient cause, revolution, into its formal cause, constitution, confusing both and embedding the former into the later.¹¹

This paper is divided into four sections. The first, *Sovereignty*, deals with the transitions from royal to national to popular sovereignty as sources of legal and political authority in Mexico. Tracing their origins to the immediate antecedents of the insurgency against Spanish rule in the early 19th century, I will explore both the *experiences* of sovereignty surrounding the struggle for independence and its later *conceptualization* in the constitutional text that in 1814 originally proclaimed and articulated popular sovereignty.¹² The second

⁹ Title I of the 1917 constitution consists of four chapters. In its first chapter, it establishes the Bill of Rights; its second, third and fourth chapters regulate Mexican nationality, status of foreigners and Mexican citizenry, respectively. Chapter I of Title II is the text we are concerned with, dealing with sovereignty and form of government; Chapter II regulates the territories and the federal structure of government. Title III organizes the branches of government—the legislative, executive, and judiciary. Title IV deals with administrative responsibility of public servants. Title V regulates the political and legal structure of the states, the federal district, and municipalities. Title VI contains a single article regulating labor relations. Finally, Title VII includes “general provisions,” meaning it contains miscellaneous rules such as the binding character of international law, default rules for determining jurisdiction, the procedure for reforming the constitution, etc. Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-08-2018 (Mex.).

¹⁰ That is, the core of the formal cause, see KAHN, LIBERALISM, *supra* note 8, at 264.

¹¹ See generally KAHN, LIBERALISM, *supra* note 8, at 265-272. I will unpack this idea in the final section.

¹² Mexico has had a number of constitutions throughout its history. Still under Spanish rule, it was subject to the liberal 1812 constitution adopted by the Spanish

section, *Constitution*, will examine how the difficulties faced by post-independent Mexico to constitute itself as a permanent, stable political community with a common identity led to the radical liberal reform movement and the Constitution of 1857, which reinstated both popular sovereignty and the “right to revolution.” I will claim that the recurrent failure to constitute the political community during the first decades following independence was overcome by establishing a largely unobserved legal framework with radical undertones that effectively produced stability under the rule of men, not laws. These two sections correspond to the exercise of negative and positive liberty by the nascent sovereign; the former, the negative liberty to undo, being exercised successfully; the latter, the positive liberty to engender, not so much. The third section, *Revolution*, explores the role of the Revolution of 1910 in shaping political discourse and how this discourse ties into a radical idea of popular sovereignty; radical, yet captured by official discourse. I will argue that this radical-yet-captured role for revolution strangely succeeded in establishing not only a stable government, but also a strong national identity that the constitutional efforts of the 19th century had failed to do. A final section, *The Right to Revolution*, will tie these three strands together, first, by engaging with Paul Kahn’s analytic framework for understanding “the autonomy of the political” and then by exploring the resulting structure of imagination in Mexico’s legal and political culture, focusing on the tension between constitution and revolution and how this tension is conducive to a fragile rule of law. I will illustrate this final point with examples of how the claim to a “right to revolution” plays out in both

resistance to the Napoleonic invasion. In 1814, the insurgency adopted a provisional Constitution of Apatzingán for the duration of the War of Independence (1810-1821), but it was short lived (until 1815) and only partially effective in the territories controlled by the insurgency. Following independence from Spain, a string of constitutions followed in a couple of decades: an Imperial Statute was adopted in 1822 for the short-lived First Empire; a federalist constitution in 1824 established the first republican government; in 1835 it was replaced by a centralist constitution, in turn replaced by another centralist constitution in 1843, in turn replaced by the reinstatement of the 1824 constitution, with amendments, during the U.S. invasion of Mexico in 1847. Constitutional continuity was inaugurated with the federalist and liberal 1857 constitution which, though interrupted by the French Invasion (1862-1867) that was imposed on the Second Empire for a few years, was to formally rule Mexico until 1917 when the current constitution was adopted, originally conceived as a package of amendments to the 1857 constitution which was to be reinstated after a coup in 1913 was suppressed. Importantly, the legislatures—Mexico is currently on its 61st—are still counted starting with the inauguration of the first legislature after the adoption of the 1857 constitution. See FELIPE TENA RAMÍREZ, *LEYES FUNDAMENTALES DE MÉXICO* [FUNDAMENTAL LAWS OF MEXICO] (1808-1999) *passim* (Porrúa, 22th ed. 2008).

the government's attitude towards the Constitution, as well as in the two most recent open challenges to the legitimacy of government (the Zapatista uprising of 1994 and the electoral protests of 2006).

Mexico faces a historic hiatus as the 2018 election and its aftermath play out. In the years to come, it will be important to reflect on Mexico's constitutional genealogy so as to understand its constitutional imaginary. Mexico's prolonged democratic transition, starting in 1996, has yet to address one of the issues at the core of its current crisis: its unstable relationship to the rule of law. The after effects of this year's election are difficult to ascertain, but they promise to have deep implications for Mexico's future. Mexico's past, the layers upon which its constitutional imaginary is built, will determine the range of solutions the political community can imagine and, therefore, deploy.

I. SOVEREIGNTY: FROM THE NATION TO THE PEOPLE

"A people must free themselves before they can form themselves."¹³

A tradition of rebellion in the name of the law predates the idea of Mexico as a political community. Philosopher Luis Villoro, in his classic interpretation of the ideological evolution of the War of Independence,¹⁴ holds that the war for independence that started in 1810 needs to be understood in light of events preceding it by two years, when elite *peninsulares*¹⁵ broke the established legal order by carrying out a *coup* against the Viceroy and the mostly *criollo*¹⁶ City Council ("*ayuntamiento*") of Mexico City, sparking *criollo* imagination to question the legitimacy of Spanish rule. When in 1808 Napoleon invaded Spain, forcing both king and successors to abdicate in his favor, loyal subjects of the Crown in both the Iberian Peninsula and America resisted, held the abdication null, and took over government in one form or another.¹⁷ Upon learning the news, the *ayuntamiento*

¹³ KAHN, LIBERALISM, *supra* note 8, at 265.

¹⁴ LUIS VILLORO, EL PROCESO IDEOLÓGICO DE LA REVOLUCIÓN DE INDEPENDENCIA [THE IDEOLOGICAL PROCESS OF THE INDEPENDENCE REVOLUTION] (Conaculta 2002) (1953).

¹⁵ Spaniards born in Spain. NAT'L PARK SERV., *The Spaniards - Peninsulares, Criollos, and Mestizos*, SAN ANTONIO MISSIONS (Sept. 1, 2016), <https://www.nps.gov/saan/learn/historyculture/history3spaniards.htm> [<https://perma.cc/W9YX-Q73X>].

¹⁶ Spaniards born in America. *Id.*

¹⁷ The assumption of sovereignty or government by local authorities in Spanish domains was a wide spread reaction to the deposition of King Charles IV by Napoleon. For a general picture of the 1808 reaction to the French invasion of Spain in Spain and its American domains, *see generally* 1808: LA ECLOSIÓN JUNTERA EN EL MUNDO HISPANO [1808: THE JUNTERA HATCHING IN THE HISPANIC WORLD] (Manuel Chust ed., FCE

of Mexico City invoked a long-standing political doctrine¹⁸ which held that, in the absence of the King and a legitimate heir, sovereignty reverted to the kingdom, specifically to its constituted representatives.¹⁹

As “Head” of the Kingdom of New Spain, Mexico City, acting through its *ayuntamiento*, took it upon itself to temporarily represent the kingdom and to call upon all *ayuntamientos* across the viceroyalty to come together and take measures to govern and defend the realm

2007). Specifically for the case of Mexico, see Virginia Guedea, *La Nueva España [The New Spain]*, in 1808: LA ECLOSIÓN JUNTERA EN EL MUNDO HISPANO [1808: THE JUNTERA HATCHING IN THE HISPANIC WORLD] 84, 84 (Manuel Chust ed., FCE 2007).

¹⁸ In contrast with the dominant political doctrines in the Protestant tradition, which held that kings received authority directly from God and thus were not subject to any law, Catholic thinkers of the counter-reformation developed a political doctrine that held that kings governed by divine right, though mediated through the political community. In line with the dominant Aristotelian-Thomistic school, Counter-Reformation theologians held that the king’s political authority was derived from God, through the community: God ordains by nature that man be a social animal, and in accordance with this nature man forms communities which in turn come to be articulated as political communities and transfer sovereignty to the king. Importantly, this doctrine made the King subject to natural law. The Jesuit Francisco Suárez articulated this doctrine in its more sophisticated form during the 17th century. See QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 163 (Cambridge Univ. Press 1978). In chapters V and VI Villoro holds that the doctrine was taken from criollo nationalist Jesuit intellectual of the late 18th century, Francisco Xavier Alegre, who was influenced by the Second Scholastics, specifically the Dominican Vitoria and the Jesuit Suárez, as well as by the Natural Law School of Northern Europe, which included both Grotius and Puffendorf. See VILLORO, *supra* note 14, at 47.

¹⁹ The nation, the body politic, was thought of as an aggregate of corporations or estates (clergy, citizens, Indians, etc.) with pre-established, legitimate representatives. The most representative body in the realm was the political representation of the “Head” of the Kingdom of New Spain (Mexico City), the members of the Ayuntamiento who represent Mexico City; that is, the very people invoking the doctrine that reinstated them in power. This understanding of the body politic had the body, rather than contract, as the guiding metaphor and corresponded to a medieval understanding of political community. The medieval constitution, as understood by Fioravanti, is as follows:

The fundamental law is therefore not an abstract proposition to which one can attribute a normative and binding character in relation with the prince, but something more concrete which belongs to the world of things: it is the law that regulates the relations between the parts that constitute the political community, assigning to each one reserved spheres and precise duties regarding the universality.

MAURICIO FIORAVANTI, *CONSTITUCIÓN. DE LA ANTIGÜEDAD A NUESTROS DÍAS [CONSTITUTION. FROM ANTIQUITY TO OUR DAYS]* 63 (Trotta 2001). See *id.* at ch. 2, for more on the “medieval constitution.”

from the French invaders.²⁰ The *ayuntamiento* recognized standing authorities but refused to recognize officials on their way from Spain, newly appointed under the authority of a government subject to the invading French Army.²¹ They requested standing Viceroy Iturrigaray to continue governing, but now under the *ayuntamiento's* authority, not the deposed king's.²² This autonomist stance did not go unpunished and was quickly and violently repressed by a coalition of Mexico City's elite *peninsular* merchants, church officials, and the *Audiencia*, the highest royal (i.e. non-representative and dominated by *peninsulares*) tribunal.²³ The *peninsulares* imprisoned or killed the leaders of the *ayuntamiento*, imprisoned the Viceroy Iturrigaray, and after appointing a new one, continued business as usual.²⁴

According to Villoro, this *coup* was a breaking point for the *criollos*:

The *criollo* finds himself before an order of law that ruled him for three hundred years; but before it seemed to him anchored on irrevocable principles that he never thought to call into question; now, in contrast, he begins to discover that behind this order was the arbitrary will of the legislator who imposed it. . . .

Social structure is no longer a *given* for the *criollo*, something definitively constituted, it is now *imposed* from outside by an instance that does not subject itself to its own laws.²⁵

When open, popular revolt against Spanish rule broke out in Mexico in 1810, the popular movement's leader, parish priest Miguel Hidalgo, incited his flock to rebellion by pointing out that "rewarded [are] those who sequestered the viceroy. . . for defending you. . ."²⁶ Ringing church bells, calling his whole parish to mass, Hidalgo improvised a call to arms in the early morning hours of the 16th of September, when he learned the conspiracy he and others led had been discovered. It has come to be known as the *Grito de Dolores*, after the town of Dolores, where it took place.²⁷ The call to arms would turn into a

²⁰ TIMOTHY J. HENDERSON, THE MEXICAN WARS FOR INDEPENDENCE 46-7 (Hill and Wang 2010); LUIS MALPICA DE LAMADRID, LA INDEPENDENCIA DE MÉXICO Y LA REVOLUCIÓN MEXICANA. A TRAVÉS DE SUS PRINCIPALES DOCUMENTOS CONSTITUCIONALES, TEXTOS POLITICOS Y TRATADOS INTERNACIONALES. 1810-1985, TOMO 1 140-147 and 158-166 (Limusa 1985); TENA RAMÍREZ, *op cit. supra* note 12, at 11.

²¹ TENA RAMÍREZ, *op cit. supra* note 12, at 11-12.

²² *Id.* at 15.

²³ HENDERSON, *op. cit supra* note 20, at 46-49.

²⁴ *Id.*

²⁵ VILLORO, *supra* note 14, at 65.

²⁶ *Id.* at 68.

²⁷ It was later renamed Dolores Hidalgo in honor of its rebellious parish priest.

bloody rampage by an angry mob, willing and capable of slaughtering the urban, civilian predominantly white population wherever it resisted.²⁸ In turn, the professional royal armies slaughtered the mob as it advanced toward Mexico City and, later, retreated from it.²⁹ Hidalgo's victories depended largely on his numbers and their willingness to sacrifice themselves *en masse*.³⁰ The cry for freedom was quickly paid for in flesh.³¹

In a later proclamation Hidalgo contrasted the legitimacy of the liberty claimed by the Americans with the illegitimacy of the liberty taken by the “. . . Europeans, when they committed the offense of taking hold of the person of His Excellency [the deposed viceroy] Mister Iturrigaray and travestied the government *to their whim* without our knowledge, taking us for stupid men. . . .”³² The legitimacy of insurgency was cast in opposition to the illegitimacy of government, for the latter had broken the law. According to this narrative, it was the *sectarian* disruption of the legal order that triggered insurgency.

The nature of the revolt—a massive, spontaneous uprising of mobilized poorly-armed peasants with no military training—was as important to the development of the idea of sovereignty as its claim to rebel against government established in violation of the law.³³ It was a violent and bloody rebellion, in which impoverished masses mobilized, pillaged and sacrificed self and foe before they actually organized into an army (if they ever actually did).³⁴ This popular, unorganized rebellion was short lived; within the year, key leaders were captured and executed.³⁵ It would be left to the better-organized rebellion of José María Morelos, another priest and former student of Hidalgo, who had been commissioned by Hidalgo himself to carry the insurgency south.³⁶ Hidalgo, in spite of his failed revolt, would

José María Muriá, *Folletería mexicana del siglo XIX* [Mexican brochures of the 19th century], 6 SEQUENCIA. REVISTA DE HISTORIA Y CIENCIAS SOCIALES 6 [SEQUENCE. JOURNAL OF HISTORY AND SOCIAL SCIENCES] (1986) (Mex.).

²⁸ HENDERSON, *supra* note 20 at 74-75 and 80; VILLORO, *supra* note 14, at 77-78

²⁹ HENDERSON, *supra* note 20 at 82-90; VILLORO, *supra* note 14, at 77-78.

³⁰ VILLORO, *supra* note 14, at 78-79; HENDERSON, *supra* note 20 at 77-90.

³¹ Literally “dolores” means “pains” in Spanish, so a more fitting name, The Shout of Pains, could not have been found.

³² VILLORO, *supra* note 14, at 68.

³³ For a brief narrative of Hidalgo's insurgency see Elsa Gracida & Esperanza Fujigaki, *La Revolución de Independencia* [The Independence Revolution], in 2 MÉXICO, UN PUEBLO EN LA HISTORIA [2 MEXICO, A PEOPLE IN HISTORY] 11 (Enrique Semo ed., 1983).

³⁴ *Id.* at 32.

³⁵ *Id.* at 34-35.

³⁶ *Id.* at 42.

nevertheless take up a place as father of the nation.³⁷ In historical narrative and popular imagination, it was the spontaneous, popular, chaotic, bloody and *failed* rebellion of 1810 that broke Spanish rule and gave birth to Mexico.³⁸

Let us pause to consider the meanings of these words and events. The rebellion of 1810 follows the events of 1808 in so far as the former is rendered possible by the latter. When the *peninsulares* broke the law, in the eyes of the *criollos*, they created the space needed by the *criollos* for imagining the polity in a different manner. According to Villoro, the result of the suppression of the *ayuntamiento's* claim to safeguard and exercise sovereignty was not only the sense of the illegitimacy of the resulting government, but an incipient liberation of the *criollos* from bonds of Spanish law, now understood as a vehicle of the *peninsulares'* economic interests.³⁹

Yet, the ideas that inspired the events of 1808 differed much from the experience of 1910. During the events of 1808, the proposals and claims of the *criollos* voiced by the *ayuntamiento* were rather orthodox. Speaking of the “civil” death of the King and successor, council member Juan Francisco Azcárate held that:

By their absence or impediment sovereignty resides represented in the whole Kingdom, and in the classes that constitute it, and more specifically in the superior Tribunals that govern it, administer justice and in the bodies that carry the public voice, all of whom conserve [sovereignty] intact, defend it and sustain it as a Holy deposit, so as to give it back, either to the Lord Charles fourth himself, or to his son the Lord Prince of Asturias. . . .⁴⁰

The underlying theory was that “the Nation” had

. . . entrusted [the Kingdom] to his Royal Person only for its better Government. . . In consequence the abdication neither abolished the natural and legal incapacity that all have to give away what is not theirs; nor could it abolish the just right of his Royal

³⁷ HENDERSON, *supra* note 20, at 104-07; VILLORO *supra* note 14, at 71-105.

³⁸ Villoro *supra* note 14, at 107.

³⁹ VILLORO, *supra* note 14, at 66.

⁴⁰ *Acta del Ayuntamiento de México, en la que se declaró se tuviera por insubsistente la abdicación de Carlos IV y Fernando VII hecha a Napoleón: Que se desconozca todo funcionario que venga nombrado de España; Que el Virrey Gobierno por la Comisión del Ayuntamiento en representación del Virreinato, y otros Artículos* [Act of the City Council of Mexico, in which it was declared that the abdication of Carlos IV and Fernando VII made to Napoleon was considered insubstantial: That any official appointed from Spain be unknown; That the Viceroy Govern by the City Commission on behalf of the Viceroyalty, and other Articles], in TENA RAMÍREZ, *supra* note 12, at 14.

descendants to obtain what the Nation gives them in their respective case and turn.⁴¹

Sovereignty, at this point, is not thought of as self-determination, but self-government or more precisely self-management. That is, the Nation, having recovered its sovereignty cannot reinvent itself, it cannot be something other than what it is. It can simply rule itself.

The notion of “sovereignty” means something parallel to independence as simply freedom to manage. It is not the power of self-determination, but rather of self-government in each circumstance, according to defined principles, without the need of external tutelage. It does not reside in the “general will” of citizens; sovereignty is located in a nation already constituted, organized in estates and represented in established governing bodies.⁴²

The quote takes us directly to the second point: the Nation is a preexisting entity, composed of estates, communities, both Hispanic and Indian, towns⁴³ (*pueblos*, meaning towns, as opposed to *el Pueblo*, the People), guilds, monastic orders, the Church, etc. Thus, the rhetoric of the *ayuntamiento* of 1808 claims that the king’s political power stems from the Nation and remains with him insofar as the king fulfills his part.⁴⁴ But it is nowhere near the idea that the polity can reinvent itself.

Two years later, when Hidalgo’s popular insurgency broke out in the heartland of New Spain, it called for the overthrow of the “bad government” (*mal gobierno*), while claiming loyalty to the still captive Bourbon dynasty.⁴⁵ What it said was very much akin to what was said in 1808, but what it *did* was radically different.⁴⁶ The popular uprising

⁴¹ *Id.* at 13.

⁴² VILLORO, *supra* note 14, at 56.

⁴³ The Spanish word *pueblo* means both “a or the people” and “town.” In early constitutional discourse, especially during this period, reference is made to “*pueblos*,” in plural, referring to the towns and villages that make up the kingdom; later rhetoric speaks of “*el pueblo*” in singular, which best translates to “the people.” The issue is not that the same word has two distinct meanings, but that the ambivalent meaning of the word reflects the transition from the idea of the body politic as composed of an aggregate of different constitutive organs, where the dominating metaphor is the body, to the idea of the body politic as a united and uniform community of individuals, where the dominating metaphor is contract and not the body. *Pueblo*, SPANISHDICT.COM, <http://www.spanishdict.com/translate/pueblo> [<https://perma.cc/N3ZA-TP8K>].

⁴⁴ VILLORO, *supra* note 14, at 43-69.

⁴⁵ Gracida & Fujigaki, *supra* note 33, at 128.

⁴⁶ VILLORO, *supra* note 14, at 71-94.

itself was transformative. Villoro interprets Hidalgo's rebellion as the direct putting into practice of popular sovereignty for the first time, lacking still doctrinal articulation:

Thus, the transit from "national sovereignty" as management of royal goods, to authentic popular sovereignty, is done in practice before it is done in doctrine, the people have put themselves at the origin of society.⁴⁷

Villoro holds that Hidalgo's spontaneous, disorganized rebellion is an exercise of negative liberty, undertaken with "lightness" and in "frenzy"—Hidalgo's own words.⁴⁸ Accordingly "most of his provisions were of a repealing character"⁴⁹ - the abolishment of slavery, the repeal of taxes and the banning of monopolies established by law. For Villoro, it was left to José María Morelos (Hidalgo's unlikely successor and the most successful leader of Mexico's ten-year insurgency) to exercise positive liberty, articulate the idea of popular sovereignty and, for the first time, conceive sovereignty as the power of the polity to reinvent itself.⁵⁰ But the people, the masses, not as an abstract idea, but as a presence, a threat, to many, had already erupted into history and, thus, carved a peculiar place for itself in the political imagination. This explosive, spontaneous and dangerous presence remains a key factor if we are to understand Mexican political and legal imagination.

The early experience of Mexico's political independence, Hidalgo's uprising, is relevant to our inquiry for three reasons. First, it is the remote precedent of an attempt to put into play the idea that sovereignty resides originally in the political community as a whole, not in the King, to whom it is delegated. Second, it sets up a clear precedent of an instance where (the semblance of) legal authority does not guarantee legitimacy. Third, it makes "the people," as incarnate in Hidalgo's masses, look more like an immediate, tangible reality than a remote, transcendental entity.⁵¹

⁴⁷ *Id.* at 79.

⁴⁸ *Id.* at 73.

⁴⁹ *Id.* at 79.

⁵⁰ As I will explain in the following section, Morelos's—and the insurgency's—eventual military defeat, followed by the constitutional and political instability of the 1820s, 30s and 40s speak of a failed exercise of positive liberty, a failure which had its most tangible manifestation in the territorial losses of the first half of the 19th century.

⁵¹ This last point, I will argue further down, should encourage us to re-think the notion of *popular sovereignty*, the sovereignty of the transcendental entity we call "the People," and consider using a more fitting concept of a *sovereign people*, a tangible yet undetermined of persons that self-identify as a political collective with the authority to constitute themselves, when speaking of Mexico's constitutional imagination.

The first two ideas, put together, allow for the questioning of the legitimacy of government and open the door for popular opinion to directly challenge authority and deny legitimacy to institutional government. The third idea allows us to imagine *how* government is to be challenged and by whom. Moreover, independence and with it the end of bad government, *el mal gobierno*, would take over a decade to become a reality. This means that both the usurpation of sovereignty and a standing yet illegitimate government can both be prolonged phenomena in historical memory.

On the conceptual side, sovereignty was understood as “national”, not “popular” at this early stage of the insurgency. In the political language of the time, “national,” as opposed to “popular,” referred to the union of the multiplicity of corporations, such as secular church entities, military, Indian communities, regular Church orders, cities and towns, guilds, lay religious organizations such as co-fraternities, conceived as fixed and preexisting, each with its collective preordained representatives.⁵² The body politic was imagined as a concrete organism, with distinct organs playing distinct roles.⁵³ In contrast, “popular” sovereignty would refer to a community of individuals conforming the polity, on equal standing (and thus, in Mexico’s profoundly unequal communities, an abstraction).⁵⁴

Following the defeat of Hidalgo in 1811, the notion of sovereignty would quickly evolve in the rhetoric of the insurgents. By 1812, the movement, under the temporary leadership of Ignacio López Rayón, labeled sovereignty “popular,” not “national,” yet held that it resided—was embodied—in the king. It was in 1812, two years into open rebellion, that sovereignty would be proclaimed as a prerogative of the people, not the nation: Ignacio López Rayón, the leader of the insurgency after the defeat of the original leaders of 1810, proposed in article 5 of his Constitutional Elements, the document that was drafted to be the basis for the first insurgent constitution, the following:

Sovereignty springs directly from the people, resides in the person of don Fernando VII [heir of the Bourbon dynasty] and its exercise in the Supreme American National Congress.⁵⁵

⁵² VILLORO, *supra* note 14, at 56-57.

⁵³ MAURIZIO FIORAVANTI, CONSTITUCIÓN. DE LA ANTIGÜEDAD A NUESTROS DÍAS [Constitution. From Antiquity to our days] 60-61 (Trotta 2001); VILLORO, *supra* note 14 at 56-57.

⁵⁴ FIORAVANTI, *supra* note 53, at 80-81; VILLORO, *supra* note 14, at 116-17, 167-69.

⁵⁵ Ignacio López Rayón, *Elementos constitucionales circulados por el Sr. Rayón* [Constitutional elements circulated by Mr. Rayón], in TENA RAMÍREZ, *supra* note 12, at 23.

The nation remains an important concept, but it is now detached from the traditional representatives of the different corporations and is used to speak of Congress. It is an important move towards the liberal political doctrine that would later become dominant. It is also the initial transition of the concept of “nation” from a corporate aggregate of bodies to a direct political identity in which individuals participate.

By 1813, the first well-organized insurgent government, under the leadership of José María Morelos, drafted the first official Declaration of Independence.⁵⁶ In it, insurgents refer to “recovered” sovereignty as having been “usurped,” still justifying its recovery on “the current circumstances” in Europe (i.e. the deposition of the legitimate king and other sequels of the French invasion of Spain), but now holding that the link to the Spanish crown was “forever dissolved.”⁵⁷

Soon, still under the influence and protection of Morelos, the first American (as opposed to *peninsular*) constitutional text would follow: commonly called the “Constitution of Apatzingán,”⁵⁸ it was named after the remote mountain town where it was adopted in 1814. Importantly, it was not thought of as a permanent constitution, but rather as establishing a revolutionary government intent on “reintegrating the Nation in the exercise of its august and imprescriptible rights. . . [so as to]. . . lead it to the glory of independenceFalse”⁵⁹ That is, it was a temporary constitution for the war, not the definitive constitution of government or nation. Nevertheless, it is the first text in which the popular sovereign

This passage holds close to the original doctrine of 1808, but for the first time locates the people, not the nation, as the source of sovereignty.

⁵⁶ TENA RAMÍREZ, *supra* note 12, at 31; HENDERSON, *supra* note 20, 138-40.

⁵⁷ Congreso de Anáhuac [Anahuac Congress], *Acta Solemne de la Declaración de Independencia de la América Septentrional* [Solemn act of the Declaration of Independence of North America], in RAMÍREZ, *supra* note 12, at 31.

⁵⁸ ROBERTO GARGARELLA, *THE LEGAL FOUNDATIONS OF INEQUALITY 5* (Cambridge University Press 2010). Gargarella, in his hemispheric revision of early constitutionalism, identifies three constitutional traditions in America—radical, liberal and conservative—and classifies this first Mexican constitution as one of the most clearly radical constitutions. The radical tradition, strongly influenced by Rousseau, championed popular sovereignty, strong legislatures, robust political rights, among other features, against liberal ideas of divided government or conservative proposals for a strong Executive or minority rights. Interestingly, he holds that the Constitution of 1857, usually identified as liberal, has deep radical strains. As we will see, regarding popular sovereignty and the right to revolution, there certainly is continuity between the constitutions of 1814 and 1857.

⁵⁹ Congreso de Anáhuac, *Decreto Constitucional para la Libertad de la América Mexicana* [Constitutional Decree for the Freedom of Mexican America], in TENA RAMÍREZ, *supra* note 12, at 32-58.

exercises “positive liberty” by organizing a government and establishing the basic political and legal commitments of the nascent political community.

The Constitution of Apatzingán defined sovereignty as “the power to dictate laws and establish the form of government most convenient to society” (article 2) and held it to be “by nature” imperishable, indivisible and inalienable (article 3).⁶⁰ More importantly, in article 4, it states:

Because government is not instituted for the honor or interest of individuals of any family, for any man or class of men, but for the protection and general security of all citizens, *willingly united in society*, this later *has the undeniable right to establish the government that it finds most favorable, to alter it, modify it or abolish it wholly when its happiness so requires*.⁶¹

It is at this moment, in the very first constitution of the emerging polity still struggling for independence in the midst of a revolutionary war, that we find explicit reference to what will later be referred to as the “right to revolution.”⁶² Moreover, because the text is unusually explicit, we learn much about the right to revolution: *because* government is instituted for the protection of *citizens* united *willingly* in society, society can alter and even abolish government. The political community (“society”) is no longer the Nation, a quasi-natural, almost inalterable *fact*, but rather a community of equals who, through will, come to be. It follows that they can become something else if they so choose. Because it is willing individuals, not preordained corporations, that form government, they can abolish it. Because society is the product of the will of individuals, not of nature as manifest in already constituted bodies, it can reinvent itself.

Article 5 continues:

Therefore, sovereignty resides originally in the people, and its exercise in the national representation composed of representatives elected by citizens as established by the constitution.⁶³

The transformation from national to popular sovereignty is complete: national representation is representation of equal citizens through elections, not of corporations with disparate representations and through different methods. It is the will of citizens, on equal

⁶⁰ *Id.* at 33.

⁶¹ *Id.* (emphasis added).

⁶² *Id.*

⁶³ *Id.*

standing, that transfers authority to government. The nation is now an abstract (and still undetermined entity), not the concrete aggregate of relations between classes, estates, towns, and corporations.

The language of the constitution of 1814 must be understood in its context: an itinerant Congress, in the midst of a full-fledged war with an uncertain outcome, drafted it. Moreover, the army behind it was a popular, non-professional, rebel army. It understood itself as continuing the very same uprising of Hidalgo's masses, but it was now a well-organized and equipped, though still popular, body.⁶⁴ When stating that the people could modify or abolish government, the Congress of Anáhuac was not speaking of a hypothetical situation projected into the future or going about an invocation of its own supposed origins, but rather speaking of the very real, tangible situation in which the members of the insurgent Congress were immersed. The right to revolution was being exercised even as it was proclaimed. It was not a distant and abstract popular sovereign interrupting into history, but rather *a concrete, tangible and mobilized sovereign people exercising a specific claim*.

In 1821, Mexico gained political independence from Spain, but not by the popular uprising headed by Morelos, apprehended in 1815 and executed by royal authorities.⁶⁵ Instead, it was the royal army itself, in an uneasy allegiance with the Church, and the diminished insurgent guerrillas that remained from Hidalgo's and Morelos's uprisings, that proclaimed independence under the leadership of Agustín de Iturbide.⁶⁶ The Church, the royal army and the elite sought independence after 11 years of successfully keeping it at bay, in order to avoid complying with the (somewhat liberal) Spanish constitution of 1812, reinstated a year before.⁶⁷ Iturbide's army marched without much opposition under the "Three Guarantees" his Army proclaimed: Independence, Unity and (Catholic) Religion.⁶⁸

Hidalgo's rebellion failed militarily. So did Morelos, and the guerrilla leaders who succeeded him. Nevertheless, Hidalgo's exercise in negative liberty is pinpointed at the origin of the nation. The 16th of September, the date of Hidalgo's *Grito de Dolores*, has been undisputedly marked, since the second half of the 19th century,⁶⁹ as

⁶⁴ HENDERSON, *supra* note 20, at 112-15.

⁶⁵ *Id.* at 149-54.

⁶⁶ Jan Bazant, *From Independence to the Liberal Republic, 1821-1867*, in MEXICO SINCE INDEPENDENCE 1, 1 (Leslie Bethell ed.1991).

⁶⁷ VILLORO, *supra* note 14, at 195-96; HENDERSON, *supra* note 20, at 167-72.

⁶⁸ TENA RAMÍREZ, *supra* note 12, at 107-16.

⁶⁹ Throughout the first decades of the 19th century, other dates were celebrated as the central National Holiday, including September 27th, the date of (former-royalist-

the date in which Mexican independence, the coming into being of Mexican sovereign, is celebrated. Locating the origin of the nation in a failed insurgency, the negative exercise of liberty brings forth the nation. Hidalgo's revolt was, however, not followed by an (successful) exercise of positive liberty: Morelos was defeated; Iturbide would become Emperor in 1822, deposed within the year and later executed.⁷⁰ In the four decades following independence, the country's territory was dismembered piecemeal, whether by local independence or foreign intervention, and invaded 4 times by foreign armies.⁷¹ The generation that lived through this period would read it as failure of the Mexican nation to constitute itself anew, which in turn would lead to the radicalization of traditional and transformative positions,⁷² the Reform and the Constitution of 1857.

II. CONSTITUTION

"A state that operates under the rule of men, not law, has no unity over time; it is as various as the interests of those who come to rule."⁷³

If the insurgency represents the eruption of the Mexican popular sovereign into existence through the exercise of negative liberty, that is, the destruction of the colonial regime, then the three decades following independence represent the effort to exercise positive liberty by the new sovereign through the establishment of a constitutional order. This effort was largely unsuccessful. It was also a more moderate exercise in sovereignty, in so far as it did not seek to remake the political community so much as reorganize it while preserving what was perceived as the core constituent element that unified the country: notably Catholicism. For the proponents of building the newly independent polity as a "Catholic Nation," the political community was imagined as overlapping with, and stemming from, the religious

officer-turned-insurgent) Iturbide's entry into Mexico City "consummating" (as opposed to "initiating") independence and October 4th, the date of the adoption of the first independent Constitution in 1824. FERNANDO SERRANO MIGALLÓN, *EL GRITO DE INDEPENDENCIA: HISTORIA DE UNA PASION passim* (Porrúa, ed., 2010).

⁷⁰ HENDERSON, *supra* note 20, at 189-209.

⁷¹ Spain attempted an unsuccessful and brief "reconquest" in 1829; France attempted a failed intervention in 1838; the U.S. successfully conquered half of Mexican territory in 1846-47; and finally France invaded Mexico from 1861-1867 and set up a puppet empire under Austrian prince Maximilian. MICHAEL C. MEYER & WILLIAM L. SHERMAN, *THE COURSE OF MEXICAN HISTORY* 320, 328, 347-48, & 391 (3d ed. 1987).

⁷² RICHARD N. SINKIN, *THE MEXICAN REFORM 1855-1876: A STUDY IN LIBERAL NATION-BUILDING, passim* (Latin American Monographs Ser. No. 49, 1979).

⁷³ KAHN, *LIBERALISM, supra* note 8, at 265.

community, the *corpus mysticum* of the faithful united in the Eucharist.⁷⁴

The radical understanding of sovereignty of 1814 as “popular” and directly exercised through revolution would be much tempered in the decades following independence. After a short-lived Empire in 1822, headed by Iturbide, Congress adopted a federalist constitution in 1824.⁷⁵ The 1824 constitution was a compromise stemming from the uneasy alliance of royal army officers, Church hierarchy, and the successors of the original insurgency that had achieved independence under Iturbide’s leadership. It established that sovereignty resided in the Nation, not in “the people.”⁷⁶ The idea of what the Nation was and who embodied it had changed since 1808 and was now associated with elected bodies (elected through indirect, limited elections), rather than with traditional representations of corporations, estates, guilds or classes.⁷⁷ For decades “the people” would no longer be the locus sovereignty in our constitutional texts, but rather an intermediate but undefined entity: the Nation.

Importantly, the constitution of 1824 established that the Catholic religion as the official religion, division of powers and the federalist structure of government were un-modifiable (article 171).⁷⁸ That sovereignty itself was partially, but rigidly, restricted for future generations harks back to the understanding of government as management rather than full-fledged self-determination. For its part, the establishment of Catholicism to the exclusion of all other religions, drew on a long-standing and widely-accepted notion that understood Catholicism as simultaneously the unifying element in a large, disperse and segregated society and thus the foundation of its national identity, and the notion that Mexico (New Spain beforehand) had a transcendental mission to defend Catholicism and establish a political community where it was duly followed.⁷⁹

⁷⁴ BRIAN CONNAUGHTON, ENTRE LA VOZ DE DIOS Y EL LLAMADO DE LA PATRIA [BETWEEN THE VOICE OF GOD AND THE CALL OF THE FATHERLAND] 101 (FCE 2010).

⁷⁵ TENA RAMÍREZ *supra* note 12, at 15.

⁷⁶ Article 3 of the Acta Constitutiva de la Federación [Constitutive Act of the Federation] that preceded the Constitution. TENA RAMÍREZ, *supra* note 12, at 154.

⁷⁷ VILLORO, *supra* note 14, at 117, 166-70.

⁷⁸ Constitución federal de los Estados Unidos Mexicanos: sancionada por el Congreso general constituyente el 4 de octubre de 1824. [Mexico City]: Imprenta del Supremo Gobierno de Los Estados-Unidos Mexicanos, en Palacio, [1824] [Federal Constitution of the United Mexican States: sanctioned by the General Constituent Congress on October 4, 1824. [Mexico City]: Printing Office of the Supreme Government of the United Mexican States, in the Palace [1824]].

⁷⁹ CONNAUGHTON, *supra* note 74, at 107-08.

With these three features, “national” sovereignty, religious intolerance, and constitutional rigidity, the idea of popular sovereignty as legitimately being exercised in the form of revolution, were suppressed from constitutional texts following independence. Catholicism and religious intolerance would remain central themes in political discourse in the decades to come, in public celebrations, political speeches and public religious ceremonies, slowly evolving from being the thin base of a broad, but unstable coalition on what was to be the new nation’s identity, to becoming the symbolic core of a full-fledged civil war as the role of the Church was debated and increasingly questioned during the 1850s and 60s.⁸⁰ The two centralist constitutions that subsequently replaced the federal constitution of 1824 (in 1835-6 and 1843) spoke of a sovereign Nation, not people, and preserved religious intolerance and official Catholicism.⁸¹

The notion that Mexico had a transcendental role in universal history linked to the defense of the true religion can be traced back to the first Franciscan missionaries and their understanding of the conquest and evangelization of the New World as a divine mission to spread Catholicism in the New World as the evil of the Protestant Reform spread throughout Europe.⁸² The early insurgents who claimed to protect the King’s sovereignty had relied upon the defense of a truer form of Catholicism threatened by European impiety as a trope to instigate against royal authorities, who were seen as subordinate to a French regime that threatened to spread the irreligious ideas of the French Revolution.⁸³ Both Hidalgo and Morelos had been priests who, under the banner Virgin of Guadalupe, understood their revolution as protecting, and protected by, the true faith and the true Church.⁸⁴

⁸⁰ *Id.* at 108-09.

⁸¹ Constitución federal de los Estados Unidos Mexicanos: sancionada por el Congreso general constituyente el 4 de octubre de 1824. [Mexico City]: Imprenta del Supremo Gobierno de Los Estados-Unidos Mexicanos, en Palacio, [1824] [Federal Constitution of the United Mexican States: sanctioned by the General Constituent Congress on October 4, 1824. [Mexico City]: Printing Office of the Supreme Government of the United Mexican States, in the Palace, [1824]].

⁸² ANTONIO RUBIAL GARCÍA, EL PARAÍSO DE LOS ELEGIDOS. UNA LECTURA CULTURAL DE NUEVA ESPAÑA (1521-1804) 25 (2010); CLAUDIO LOMNITZ-ADLER, DEATH AND THE IDEA OF MEXICO 63-177 (2005)

⁸³ CONNAUGHTON, *supra* note 74, at 101.

⁸⁴ For instance, Morelos wrote a letter justifying the insurgency because “. . .we protect the holly, catholic, roman apostolic religion more then our enemies; preserving and defending ecclesiastical immunity so many times violated by the Spanish government [who] so many times leveled clergymen to the lowest classes, slitting their throats on the [cadalso].” José María Morelos y Pavón, *En vibrante discurso a los*

Iturbide had promised Religion, alongside Independence and Union. In the years following independence, a recurrent political message was that “stemming from a common biblical past of suffering and lament, Mexicans conceived of themselves as a collectivity involved in the divine liberation of humanity and would occupy a place of honor in the culmination of human history.”⁸⁵ Oddly, official Catholicism was not perceived as necessarily opposed to liberalism, the growing political ideology of the time during the first half of the century. Clergymen most often did not combat liberalism, and even claimed that its central premises, such as equal rights, stemmed from Catholicism.⁸⁶ For them, the condition for the coexistence between liberalism and Catholicism was that Church privileges be preserved and religious intolerance enforced.⁸⁷ These two elements would, eventually, prove incompatible with liberalism, but for the early independent period they remained.

The constitution of 1824 is illustrative of the timidity with which sovereignty was conceived: not as a making anew of oneself, but as a clinging to what was left of the Nation’s old self, notably Catholicism.⁸⁸ Underlining the common element of Catholicism was central to the political discourse of the time. Catholicism was a prerequisite for citizenship itself in the constitutions of 1824, 1835-6 and 1843:

Mexico proved incapable of achieving a sense of permanence and stability that some monarchies achieved by presenting the Crown as a corporate identity superior to any person reigning as monarch. Thus, it would attempt its own continued collectivity and perpetuity through the precision of those durable elements of its exceptional history, which was privileged with divine preference in the course of human evolution.⁸⁹

The period following independence, from 1821 to 1867, was marked

pueblos de Oaxaca, Morelos explica las justas razones que fundamentan la cruzada libertadora acaudillada por él (23 de Diciembre de 1812) [In vibrant speech to the people of Oaxaca, Morelos explains the just reasons that support the liberating crusade led by him (December 23, 1812)], in ERNESTO LEMOINE VILICAÑA, MORELOS, SU VIDA REVOLUCIONARIA A TRAVÉS DE SUS ESCRITOS Y DE OTROS TESTIMONIOS DE LA ÉPOCA [MORELOS, HIS REVOLUTIONARY LIFE THROUGH HIS WRITINGS AND OTHER TESTIMONIES OF THE TIME] 242-46 (UNAM 1991).

⁸⁵ CONNAUGHTON, *supra* note 74, at 100.

⁸⁶ *See id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 107.

⁸⁹ *Id.* at 108.

by political instability, military coups, foreign interventions and, finally, a full-fledged civil war in 1858-1860 that would transform into the French Intervention of 1862-1867.⁹⁰ Only Guadalupe Victoria, the first President (1824-1828), and José Joaquín Herrera (1848-1851), who held the Executive immediately after the U.S.-Mexico war, finished their constitutional four-year term.⁹¹ During this period, constitutions would be even more short-lived than that of 1824 (in force for only a decade), with several constitutional congresses meeting (not all successfully produced new constitutions, but did suppress temporarily the standing ones) and two constitutions established (in 1835-36 and in 1843), before the reinstatement of a modified 1824 Constitution in 1847 (in the midst of the U.S. invasion of Mexican territory).⁹²

Throughout this period, Mexico also underwent a process of territorial contraction, imposed both from internal and external actors. Central America, including Chiapas, seceded when Iturbide was proclaimed emperor in 1822 (Chiapas would return, when a federal regime was established in 1823-24).⁹³ The state of Zacatecas and the territory of Texas proclaimed independence in 1836 with the suppression of the federal regime and the adoption of a centralist constitution (the former would be defeated militarily and forced to rejoin the nation; the latter, though not recognized as independent by Mexico, would be annexed to the U.S. 9 years later in 1845, leading to the Mexican-American war).⁹⁴ The State of Yucatán would declare independence twice, in 1841 and 1847, but was first repressed and later voluntarily rejoined, in the midst of a massive Mayan uprising that threatened to ethnically cleanse the territory of white *criollos*.⁹⁵ The Mayan uprising would lead to a *de facto* independent Mayan theocracy on the western coast of Yucatán, and it would not be until

⁹⁰ Upon military defeat during the 1858-1860 civil war, the conservative party sought French support and negotiated that Austrian prince, Maximilian of Hapsburg (of the same royal dynasty that had ruled over the Conquest of New Spain), be proclaimed Emperor of Mexico and supported by a French army. *Maximilian, Emperor of Mexico (1832-1867)*, in *ENCYCLOPEDIA OF THE AGE OF IMPERIALISM, 1800-1914: VOL. 1*, 462, 463 (Carl Cavanagh Hodge ed., 2008).

⁹¹ William R. Shepherd, *The Hispanic Nations of the New World*, in 20-21 *THE CHRONICLES OF AMERICA SERIES: VOL. 50* (Allen Johnson ed., 1919).

⁹² TENA RAMÍREZ *supra* note 12, at 153-477.

⁹³ Shepherd, *supra* note 91, at 21.

⁹⁴ Miguel Ángel González Quiroga, *Nuevo León Durante La Independencia de Texas, 1835-1836*, [New León during the Independence of Texas], 256 *HISTORIA MEXICANA [MEXICAN HISTORY]* 427, 433-4 (2006).

⁹⁵ *Historia*, YUCATÁN GOBIERNO DEL ESTADO [YUCATAN STATE GOVERNMENT], http://www.yucatan.gob.mx/?p=historia_yucatan [<https://perma.cc/3AFB-5W38>].

the late 19th century that government could gradually regain control of the territory, at the cost of recognizing British possession of Belize (in exchange, the British Crown agreed to cease supplying arms to the Maya rebels).⁹⁶ Finally, the territories of California and New Mexico, which together with Texas represented over half of Mexico's claimed territory in 1845, would be occupied and annexed by the United States in 1848, as a result of the war.⁹⁷ Most of Mexico was occupied by French troops from 1862 to 1867.⁹⁸

In this context, Catholicism as a proxy for national identity was used to call for political cohesion in the face of repeated failures to constitute the body politic through law and to maintain territorial integrity. The attempt to forge a new nation by preserving the few strands that unified the old polity was increasingly perceived as a failure, especially after the U.S. invasion. In 1850, two years after the U.S. withdrew its troops and severed Mexico's northern territories, in the official speech delivered in the port of Veracruz commemorating the *Grito de Dolores*, José Ignacio Esteva claimed that

Independence imposed upon us the duty to organize ourselves, *to constitute ourselves*; and that is the task still pending; although we've attempted many times, we have not yet achieved it.⁹⁹

The first three decades of independence are relevant for at least two reasons. First, they represent a failure to successfully establish a stable, constitutional government and to retain the physical (territorial) integrity of the "fatherland." Second, they reflect a timid understanding

⁹⁶ ROBERTA LAJOUS VARGAS, *LAS RELACIONES EXTERIORS DE MÉXICO (1821-2000)* 134-135 (El Colegio de México ed., 2012); *see also* NELSON A. REED, *THE CASTE WAR OF YUCATÁN* (Stanford University Press ed., 2002) *passim*.

⁹⁷ Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922.

⁹⁸ SINKIN, *supra* note 72, at 163-166.

⁹⁹ José Ignacio Esteva, *Discurso pronunciado en la plaza principal de la H. Veracruz, el 16 de septiembre de 1850, aniversario de la independencia nacional, por el ciudadano José Ignacio Esteva, comisionado al efecto por la Junta Patriótica, Imprenta del Comercio, Veracruz, 1850* [Speech delivered in the main square of H. Veracruz, on September 16, 1850, the anniversary of national Independence, by the citizen José Ignacio Esteva, commissioned by the Junta Patriótica, printing Company of Comercio, Veracruz, 1850], in CONNAUGHTON, *supra* note 74, at 127. Esteva had delivered the official speech in 1838 and would do so again in 1853. Other public speakers would interpret the U.S. invasion so as to reinforce the national commitment to Catholicism. In 1851, in Puebla, on the occasion of the same civic ceremony, Andrés José Nieto compared U.S. expansionism to Noah's Deluge, and called upon the Mexican nation to face it piously in order to succeed in stopping it, *see* Andrés José Nieto, *Discurso pronunciado el día 16 de septiembre de 1851 por el Licenciado Andrés José Nieto, Imprenta de José M. Macías, Puebla, 1851* [Speech delivered on September 16, 1851 by Mr. Andrés José Nieto, José M. Macías press, Puebla, 1851], in CONNAUGHTON, *supra* note 74, at 115.

of sovereignty that looks back to “management” and shies away from self-determination. This is linked to a conception where national identity, understood as anchored in Catholicism, was taken to precede and survive the failures of political constitution, both historically and conceptually. That is, Mexico *was*, even though it failed to establish *what* it was through a constitution. In the midst of territorial contraction and foreign invasions, the concern was increasingly whether it would continue to be.

The failure to constitute the new nation during its first three decades did not go unnoticed. Spurred by the crisis following the U.S. invasion and the massive loss of territory, both the conservative and the radical liberal party pushed more aggressively for articulating and establishing their vision of the nation.¹⁰⁰ In 1853, under ever-recycled strongman Santa Anna who had already been President of Mexico ten times, the conservatives established a constitution-less dictatorship (conservatives had sought a European monarch willing to reinstate the monarchy, but had failed).¹⁰¹ In response, liberals would revolt in 1854 against the dictatorship.¹⁰² The revolt would evolve into a two decade long sustained effort to substantively transform Mexican society.¹⁰³

At the core of this transformation, was an attempt to redefine the role of the Church in the now not-so-new polity. It was not unprecedented. The liberal party had made its first serious bid to transform Mexican society in the early 1830's under the leadership of Vice-President Valentín Gómez Farías.¹⁰⁴ Assuming control of the federal administration in 1833, his government launched a series of reforms to restrict the privileges of the Church and secularize key social functions—such as education—that had been largely left in its hands.¹⁰⁵ This attempt was short lived: the Vice-President was deposed in 1834 and the following year an openly conservative constitution abolished the federalist regime.¹⁰⁶ Now, in the after-math of the U.S. invasion and under a conservative dictatorship led by General Santa Anna, the man held responsible for losing Texas in

¹⁰⁰ Santiago Roel, *History of Mexican Constitutional Experience: From Zitacuaro, 1811, to Queretaro, 1917*, 4 CAL. W. L. REV. 251, 260 (1968).

¹⁰¹ *Id.* at 259.

¹⁰² *Id.* at 260.

¹⁰³ SINKIN, *supra* note 72, at ch. 2.

¹⁰⁴ María de Lourdes Alvarado, *La universidad en el siglo XIX in LA UNIVERSIDAD DE MÉXICO: UN RECORRIDO HISTÓRICO DE LA ÉPOCA COLONIAL AL PRESENTE* 92 (Renate Marsiske ed., 2001); TENA RAMÍREZ *supra* note 12 at 199-200.

¹⁰⁵ TENA RAMÍREZ *supra* note 12, at 199-200.

¹⁰⁶ *Id.*

1836, losing the war with the U.S. in 1847 and then, as dictator in 1853, of selling another piece of land to the U.S., the liberal party gained momentum.¹⁰⁷ In 1854 it called forth an armed revolution that, unlike the coups of the first four decades, would lead to a mayor civil war and, finally a stable (though largely ineffective) constitutional regime.¹⁰⁸ This military enterprise, and the political refurbishing of the state that followed are known as the Reform.¹⁰⁹

It was the Reform that produced the constitution of 1857, and brought back the language of popular sovereignty into the constitutional texts, including “the right to revolution.” The Reform started off as a revolt to depose the Santa Anna dictatorship, but soon had broader aims. Notably, it targeted religious intolerance and corporate property, that is, Church property.¹¹⁰ Liberals had for some time made the Church as an institution, not religion itself or Catholicism in particular, the target of its criticisms, and had gained support among broader segments of society.¹¹¹ Once successful, reformers produced a liberal Constitution with radical undertones¹¹² and prevailed on the battlefield in a full-blown civil war with the conservative party between 1858 and 1860. Finally, they successfully resisted the French Invasion of 1862-1867.¹¹³ Originally, the Reform consisted of a coalition of “pure” and “moderate” liberals, but the former came to dominate the movement and the government throughout the armed conflicts that lasted a decade.¹¹⁴

The Reform and its constitution are important for many reasons. To begin, the current constitutional regime claims continuity from it: the constitution of 1917, still in force, was originally conceived as a bulk

¹⁰⁷ Roel, *supra* note 100, at 259-60.

¹⁰⁸ *Id.* at 260.

¹⁰⁹ SINKIN, *supra* note 72, *passim*.

¹¹⁰ The two main owners of corporate property were Indian townships and, more importantly in terms of value and concentration, the Church. In targeting the material resources that enabled these two types of corporations to exist, the liberals of the Reform were effectively targeting two of the most important—if not the most important in terms of affecting the lives of the majority of the populations- institutions of colonial society. Gilberto Argüello, *Medio siglo de vida independiente (1821-1865) [Half a century of independence (1821-1865)]* in 2 MEXICO: UN PUEBLO EN LA HISTORIA [2 MEXICO: A PEOPLE IN HISTORY] 26 (Enrique Semo ed., 1989).

¹¹¹ See, e.g., CONNAUGHTON, *supra* note 74, 227-46, 363-404.

¹¹² According to Gargarella’s typology, see VILLORO, *supra* note 33.

¹¹³ Roel, *supra* note 100, at 262.

¹¹⁴ Argüello, *supra* note 110, at 271-76; MICHAEL C. MEYER & WILLIAM L. SHERMAN, THE COURSE OF MEXICAN HISTORY 377-381 (5th ed. 1995).

of amendments to the 1857 constitution.¹¹⁵ Moreover, legislatures – currently, the 61st – count back to the first legislature of the 1857 regime. At first sight, this looks like a successful exercise in positive liberty, in which Mexicans were finally capable of constituting themselves under a rule of law.

More importantly, the constitution sought to, and in many ways did, radically transform Mexican society by separating Church and State, massively restructuring land ownership and abolishing special regimes; most notably, the privileges of the Church and the prerogatives of Indian towns, the two most persistent surviving colonial corporations.¹¹⁶ After the Reform prevailed in both the battlefield and politics, Mexico's elite fully embraced the project of building a modern society, as opposed to a traditional and, in more than one way, medieval aggregate of communities under a common crown, which Mexico has been in the process of becoming since then.¹¹⁷ For the first time since Morelos, reformers were attempting to exercise sovereignty as self-determination, not just management. And in many ways, they did so successfully. In his classical interpretation of Mexican identity and history, Nobel laureate Octavio Paz holds that:

The Reform consummates Independence and gives it its true meaning, for it proposes to examine the bases of Mexican society itself and the historical and philosophical assumptions on which it stood.¹¹⁸

In the years leading up to the Constitution of 1857, after ousting Santa Anna from office, the Reform movement produced a series laws that are known as the Laws of the Reform¹¹⁹ (1855-1860) that struck

¹¹⁵ Roel, *supra* note 100, at 264.

¹¹⁶ Roel, *supra* note 100, at 261-2.

¹¹⁷ Argüello, *supra* note 110, at 250-51.

¹¹⁸ OCTAVIO PAZ, *EL LABERINTO DE LA SOLEDAD [LABYRINTH OF LONELINESS]* 155 (1997).

¹¹⁹ The most notorious Laws of Reform are: Ley de Administración de Justicia [Law of Justice Administration] in November 25th, 1855; Ley de Desamortización de los Bienes de las Corporaciones Civiles y Eclesiásticas [Law of Disentailment of the Assets of Civil and Ecclesiastical Corporations] in June 25th, 1856, and Ley de Obvenciones Parroquiales [Law of Parochial Obstacles] in April 11th, 1857. These are known as Juárez Law, Lerdo Law and Iglesias Law, respectively. In the historiographical canon, it is considered that the period between 1858 and 1860 is part of the Law of Reform because various decrees that regulated the previous laws were issued. See Marta Eugenia García Ugarte, *Reacción Social de las Leyes de Reforma (1855-1860)* [Social Reaction of the Laws of Reform (1855-1860)], in *EL ESTADO LAICO Y LOS DERECHOS HUMANOS EN MÉXICO [THE SECULAR STATE AND HUMAN RIGHTS IN MEXICO]* (Margarita Moreno and Rosa Álvarez eds., UNAM 2012).

at the heart of the Church, its role in society and its ties to government. A Civil Registry was established, displacing the role played by the Church in registering and regulating everyday life: births, deaths and marriages.¹²⁰ For the first time ever, it would be the state, not the Church, who sanctioned everyday relations of the population. Second, they decreed that the state would no longer enforce Church law, such as fulfillment of religious vows.¹²¹ Finally, the government decreed the abolition of “dead-hand goods”, that is corporately owned goods, forcing the Church (as well as Indian townships) to sell their lands and properties.

These laws forced an open confrontation with the Church, which backed a coup attempt in 1858 by conservatives and then backed them during the civil war that ensued. In historic memory, the key legacy of the Reform is deemed to be the separation of Church and State.¹²² In practical terms, the Reform set the basis for the actual construction of a bureaucracy that could govern the population without relying on the Church structure. The Laws of Reform, *las Leyes de Reformas*, would be incorporated into the 1857 constitution during the 1858-1860 civil war, banning established religion from Mexico.¹²³

The text of the constitution of 1857 was tepid regarding established religion.¹²⁴ It did not dare openly declare a fundamental right to freedom of religion, but for the first time in Mexico’s constitutional history, it omitted direct and explicit establishment of the Catholic as the state religion and the consecration of religious intolerance into the Constitution. It was far less moderate regarding sovereignty. It also introduced article 39, quoted in the introduction, as it remains to date.¹²⁵ It is thus worth looking into it to understand the importance and presence of “the people” in the design of article 39 and its Right to Revolution Clause.¹²⁶

The language used in the text, quoted in the introductory lines to

¹²⁰ See Jorge A. Vargas, *Family Law in Mexico: A Detailed Look into Marriage and Divorce*, 9 SW. J. L. & TRADE AM. 8, 13-14 (2002) (discussing the creation of Civil Registries that overtook the Church as the recorder of Civil status acts).

¹²¹ See *id.* at 13-15.

¹²² See Roel, *supra* note 100, at 261 (discussing the Civil War between the Liberals and Conservatives).

¹²³ See *id.* at 261 (demonstrating how the government separated Church and State).

¹²⁴ See generally Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] de 1857 con sus Adiciones y Reformas hasta el año de 1901, Federación 2-27-1857 (Mex.).

¹²⁵ See generally *id.* at art. 39.

¹²⁶ See generally *id.*

this paper, seems a compromise between the notions of popular and national sovereignty: “National sovereignty resides essentially and originally in the people.”¹²⁷ Although the language speaks of *national* sovereignty, it is clear that the locus of sovereignty is the people, not an intermediate body. The incorporation of “national” seems more a rhetorical compromise than a political stance; an appeal to identity, not a dictum on power.

Importantly, during the constitutional deliberations the discussion came up as to whether the language of “the people” should be incorporated; it was defended on federalist (as opposed to centralist) arguments that it was “the people,” not the nation, that stood behind the powers of the States and municipalities (city governments, the *ayuntamientos*).¹²⁸ It is “the people” that infuses authority to the political authorities closer to them. The proximity of government to the governed that federalism sought, required that sovereignty lay with the people, not the nation. Ironically, as we shall see an example of below, the move to locate sovereignty in the people gave the federal government a direct connection to the source of political legitimacy, the people, and rhetorically allowed it to bypass the intermediate bodies, eventually consolidating the federal government’s dominance over both state and municipal governments. Though unsuccessful at first, the centralization of power in the federal government would characterize the liberal regimes that have governed under the Constitution of 1857 and throughout the 20th century.¹²⁹

On the closing sentence of article 39, which speaks of the “inalienable right to alter or modify the form of government” (henceforth, the Right to Revolution Clause) a revealing discussion took place.¹³⁰ A congressman requested that the text explicitly state that the People needed to exercise this right *through* its legitimate representatives, that is, the elected, representative bodies as established in the constitution itself.¹³¹ This proposal was answered by the President of Congress (and leader of its radical liberal party) Ponciano Arriaga, who held that “the people, in exercising its right to petition and participating in public business, could itself reform the

¹²⁷ See generally *id.*

¹²⁸ ZARCO, *supra* note 6, at 575 (narrating the session of September 9, 1856).

¹²⁹ Centralization not only drew authority from municipal and state governments, but also meant increasing concentration of powers in the presidency. Sinkin calls the end-result of the process a “constitutional dictatorship” because of the preponderance of the Presidency in government. SINKIN, *supra* note 72, at ch. 5.

¹³⁰ ZARCO, *supra* note 6, at 574-75.

¹³¹ *Id.* at 575.

laws.”¹³² Following up on Arriaga’s answer, congressman Mata explained that the proposed drafting of article 125, which determined the procedure for amending the Constitution, required amendments be subjected to the people *after* approval by Congress in the next congressional election.¹³³ With that, the article was approved.

Arriaga argued for direct intervention through petition; Mata referred to the proposed amendment procedure that subjected amendments to ratification by the electorate through two elections.¹³⁴ In both cases, the participation of “the people” in constitutional amendments is imagined as direct, and so they both make sense out of the Right to Revolution Clause. Yet, both have very different implications. Arriaga’s interpretation of the people’s participation is largely *unregulated*. We can read into it that “the people” must activate the amendment process directly in the exercise of the right to petition, but he does not say as much. Rather, his language (that “the people. . . could itself reform the laws”) points to a direct exercise of sovereignty. Mata’s argument is far less radical: he imagines a *regulated*, direct participation of the people, through an amendment process.

In the end, Mata’s argument was rendered moot: the proposed amendment procedure was not approved; instead, a far simpler amendment procedure (still in force) that excluded direct appeal to the people, was adopted: Congress should approve amendments with a two thirds majority, followed by a simple majority of local congresses ratifying it.¹³⁵ And so, the people’s direct participation in amending the constitution and thus exercising the “inalienable” Right to Revolution is either moot or, as Arriaga proposed, unregulated.

As occurred in the war of independence, during the Reform we learn what to make of popular sovereignty more by concrete experience rather than by proclaimed law.¹³⁶ When the liberals succeeded in the

¹³² *Id.*

¹³³ The proposed article 125 established a complex reform mechanism, which required five steps for ratification: a) approval by two thirds of Congress, b) publication in newspapers, three months in advance of the following election, of the approved amendment, c) ratification by the majority of the newly elected electoral college, d) the newly elected congress would then subject the amendment to the people in the following election; e) approval by two thirds of a second electoral college; and f) publication by the Executive. Comisión de Constitución [Constitution Commission], *Proyecto de Constitución. Dictamen de la Comisión* [Constitution Project. Opinion of the Commission], in TENA RAMÍREZ, *supra* note 12, at 572.

¹³⁴ ZARCO, *supra* note 6, at 574-75.

¹³⁵ Constitución Política de los Estados Unidos Mexicanos [CPEUM], art. 127, Diario Oficial de la Federación [DOF] 02-05-1857 (Mex.).

¹³⁶ In many ways, it could not be otherwise. See PAUL KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 31 (Columbia University Press

field of battle and brought down the French-backed emperor Maximilian I in 1867, elections were called for to renew government and bring it out of the state of emergency and into constitutional regularity.¹³⁷ The government, headed by Benito Juárez, taking the opportunity of elections being held, called forth “the people” as sovereign: bypassing the constitutionally established amendment procedure, he submitted a number of amendments to the electorate for it to “authorize” the newly elected Congress to carry them out.¹³⁸ These amendments were not insignificant; they substantially undercut congressional powers and strengthened the executive branch.¹³⁹

In justifying the direct appeal to the people, the government explicitly invoked article 39 stating:

If the Constitution itself recognizes, for it couldn't do otherwise, that the free will of the people can always essentially change even the form of government, it would be absurd for some to invest such fervor in not modifying the Constitution at all, that they intend to deny the people the right to authorize the coming Congress to amend it in specific points.

The nation has approved that amendments to the Constitution be made, without subjecting them before or after to the requirements demanded by the Constitution for amendmentFalse[T]he government. . . has limited itself to appealing to the people, the one and only sovereign.¹⁴⁰

In attempting to bypass the constitution, government invoked the Right to Revolution Clause and referred *other cases* in which the amendment process had been omitted.¹⁴¹ In doing so, it made the popular sovereign tangible, located within hands' reach. In the end, the attempt failed when some of the other constituted bodies did not fully cooperate in bypassing the amendment procedure.¹⁴² After ten

ed., 2011) [hereinafter KAHN, POLITICAL THEORY].

¹³⁷ MEYER & SHERMAN, *supra* 114, at 404.

¹³⁸ SINKIN, *supra* note 72, at 87-88.

¹³⁹ They included the creation of a second chamber of Congress, enlargement of the President's veto powers, and limitations on the calling forth of extraordinary sessions of Congress. The amendments would have moved the constitution away from radical constitutionalism and closer to liberal constitutionalism, in Gargarella's typology. See GARGARELLA, *supra* note 58, at 3-4.

¹⁴⁰ H. CÁMARA DE DIPUTADOS [H. CHAMBER OF DEPUTIES], DERECHOS DEL PUEBLO MEXICANO. MÉXICO A TRAVÉS DE SUS CONSTITUCIONES [RIGHTS OF THE MEXICAN PEOPLE. MEXICO THROUGH ITS CONSTITUTIONS] 79 (Miguel Ángel Porrúa ed., 1994).

¹⁴¹ *Id.*

¹⁴² Some states published the call for referendum, others did so only partially,

years of existence, most of which had been suspended under generous emergency powers granted to Juárez, the text of the Constitution would not be sidestepped that easily.

Even if unsuccessful, the attempt ratified the possibility of direct, immediate appeal to the people, at least in the political imagination. More importantly, it made it clear that the government considered “the people” to be present, in the electorate, and capable of making a decision if called upon. “The People” is thus imagined as a standing entity, always within reach, always present, always capable of being called forth. The opposition to the attempt at a referendum did not deny this, it merely demanded that consultation be done *according to the constitution*. But no one questioned that The People were present, and that it could manifest itself through elections, constitutional or otherwise.

Article 39, including the Right to Revolution Clause, would transit intact into the constitution of 1917.¹⁴³ Its incorporation to the new constitution was approved unanimously and without debate.¹⁴⁴ Popular sovereignty and the presumed ever-presence of the people came with it. Between the constitutions of 1857 and 1917, however, another revolution occurred, but this time with a capital R: The Revolution of 1910 would reformulate the national narrative and, with it, political and constitutional discourse. It would also change constitutional law in important ways, but not Article 39. The current importance of the Right to Revolution Clause, however, needs to be understood at its intersection with The Revolution (of 1910) in political discourse.

However, before moving from Constitution to Revolution, there is another important issue to address. If the story of Mexico’s 19th century is one in which an incipient nation is struggling with exercising positive liberty and constituting or (re)defining itself holds, then it is important to understand what actually happened, once it succeeded in giving itself a stable constitutional arrangement. First of all, if the Reform was, finally, a successful constitution of the polity, it achieved this not only in spite of but, to a certain extent, *in opposition* to what

still others refused to publish it at all. For a comment on the process and the role it played in the consolidation of a “constitutional dictatorship”, see SINKIN, *supra* note 72, at 87-89.

¹⁴³ Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 39, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-08-2018 (Mex.).

¹⁴⁴ H. CÁMARA DE DIPUTADOS [H. CHAMBER OF DEPUTIES], DERECHOS DEL PUEBLO MEXICANO: MÉXICO A TRAVÉS DE SUS CONSTITUCIONES [RIGHTS OF THE MEXICAN PEOPLE: MEXICO THROUGH ITS CONSTITUTIONS] 79 (Miguel Ángel Porrúa 1994).

was conceived as the core of its national identity. As we have seen, Catholicism was consistently identified as the bedrock of national identity and the purpose, or final cause, of both the existence of Mexico and of its independence throughout insurgency and the early regimes of the 19th century.¹⁴⁵ The Reform marginalized first the Church and later Catholicism. The liberal regimes first subordinated the former to the State, and later rendered the second one among many legitimate choices through the establishment of religious tolerance in 1860.¹⁴⁶ This is important, because it would be left to The Revolution, and the narrative it engendered, to replace the still missing elements of a collective, national identity.

Second, the constitution of 1857 did not bring about the rule of law in Mexico. Until 1867, the country was formally in a state of emergency almost continuously.¹⁴⁷ Almost immediately upon reestablishment of constitutional normality, the legality of government and elections came under question, both politically and militarily, although the liberal, constitutional regime was not.¹⁴⁸ More importantly, the stable, modernizing, liberal regime that formally ruled under the 1857 Constitution from 1876 through 1910, quickly evolved into a *de facto* dictatorship, operated through a delicate web of local, regional and national networks of personal and political nature (military and police repression, were called upon when needed) that converged in the person of the president, first Juárez, but later, and most notably, Porfirio Díaz (1876 to 1880 and 1884 through 1911).¹⁴⁹ Economic development and governance were enabled through this complex personal patronage system, not, as one would expect of a liberal constitutional regime, through contract law and democratic elections under effective constitutional rule.¹⁵⁰ Personal patronage substituted

¹⁴⁵ See *supra* Part II.

¹⁴⁶ *Id.*

¹⁴⁷ CHRIS FRAZER, *BANDIT NATION: A HISTORY OF OUTLAWS AND CULTURAL STRUGGLE IN MEXICO 1810-1920* 22 (2006).

¹⁴⁸ The election of 1867 was easily swept by Juárez, who had headed the government in resistance. His reelection in 1871 was contested both in courts and in the battle field. His death in 1872 quelled the voices that questioned his government's legitimacy, but successor's re-election as president on his own terms was first questioned politically and legally in 1876, and later defeated militarily that same year. MEYER & SHERMAN, *supra* note 114, at 404, 409-10, & 414.

¹⁴⁹ *Id.* at chs. 26 & 28.

¹⁵⁰ For an excellent case study (the state of Chihuahua) of how local, regional and national networks converged to build and sustain the regime and control the economy, see generally FRIEDRICH KATZ, *The Life and Times of Pancho Villa* 11-57 (1998) (discussing how this regime would eventually alienate and provoke the agrarian revolts that sustained the Madero uprising)

constitutional design in the actual functioning of government, allowing for stable governance, but not the establishment of the rule of law and a way of organizing and operating the polity.¹⁵¹

Third, the Reform movement successfully established a national government and resisted a foreign invasion. This was no minor feat for 19th century Mexican governments. In successfully heading the resistance to the French invasion of 1862-1867, and the Second Empire it sustained, supported by both the conservative party and the Church, the liberal governments exorcized the threat of complete dismemberment and disappearance of a Mexican polity that had seemed so close at hand only a decade earlier during the U.S. invasion.¹⁵² In 1846-1848 the conquering government considered annexing the whole country, but in a complex political and military scenario, settled for taking over half of its territory.¹⁵³ The liberal regime came to be, and defined itself, and the polity, in opposition to the Catholic Church, an institution central to Mexican identity until then. Yet its legitimacy was uncontested in the decades following the defeat of the last foreign intervention of the 19th century.

And so, in Mexico the establishment of a constitution in the 19th century had more to do with the defense of political independence and territorial integrity, than with the rule of law. The constitution, and with it the rule of law, served more as a symbolic reference to the existence and aspirations of the polity, than a normative instrument that

¹⁵¹ Emblematic of what the formally liberal Díaz regime's position regarding the rule of law was, is a popular—yet historically supported anecdote—in which, when consulted through telegraph, what to do with political dissenters just apprehended, the aging president did not hesitate to instruct: "Kill them on the spot" ["Mátalos en caliente"]. ENRIQUE KRAUZE, PORFIRIO DÍAZ, MÍSTICO DE LA AUTORIDAD [MYSTIC OF AUTHORITY] (FCE 1987).

¹⁵² SINKIN, *supra* note 72, at 147-63.

¹⁵³ See PETER GUARDINO, THE DEAD MARCH: A HISTORY OF THE MEXICAN AMERICAN WAR 323-325 (Harvard University Press 2017). Guardino concludes that, ultimately, American racism trumped full annexation, as granting equality of what was deemed an inferior race was unacceptable to the prevailing Jacksonian narrative of Anglo-Protestant superiority, while denying citizenship to such a large population would undermine American democracy. Yet there is another element that should be noted, and further explored, that Guardino seems to leave aside: the resistance of Mexico City's population to the victorious invading American army throughout the autumn of 1847, convinced American commanding officer, General Winfield Scott that annexation would require a permanent occupation army. Here is an interesting element that should be considered when assessing the importance of the experience lived by Mexico's "sovereign people": it was the popular uprising of September in Mexico City, not the defeated Federal army, that Scott was struggling with when he so opined.

effectively governs, as I argue below.

III. REVOLUTION

“The state is not a transitional moment in a move towards something else. . .”¹⁵⁴

The Revolution of 1910, the narrative goes, began by interrupting the longest running period of government stability in Mexican history and achieved an institutional, though not technically “constitutional,” arrangement which would last, substantially unmodified, into the 21st century. It was a civil war that involved most of the country, both in territory and population.¹⁵⁵ At its start its claims were moderate: that elections be free, not simulated; that the Constitution of 1857 be complied with, not revered while being transgressed.¹⁵⁶ The rebellion was aimed, specifically, against Porfirio Diaz’s 1910 reelection (he had been reelected 7 times since 1876).¹⁵⁷ It was the opposition presidential candidate, Francisco Madero, who had been imprisoned immediately prior to the 1910 elections, who called forth the rebellion.¹⁵⁸ In calling for armed rebellion, he claimed, as the *ayuntamiento* in 1810, to be defending legality against a government unwilling to comply with its own laws:

. . . the Mexican People have protested against the illegality of the most recent elections, and wanting to exhaust successively all resources offered by the laws of the Republic, in proper manner, it petitioned the House of Representatives for the annulment of the electionsFalse

Under these conditions, the people, who is the only sovereign, also protested energetically against these elections in imposing public meetings throughout the Republic. . .

This violent and illegal situation cannot continue.¹⁵⁹

The rebels questioned a government that had turned illegitimate because it had turned its back on its own laws. But, like the Hidalgo rebellion a century earlier, it unleashed discontents that it could not fully grasp, let alone articulate. And so, again, experience would

¹⁵⁴ KAHN, LIBERALISM, *supra* note 8, at 277.

¹⁵⁵ MEYER & SHERMAN, *supra* note 114, at 565.

¹⁵⁶ *Id.* at 493-95.

¹⁵⁷ *Id.* at 498-500.

¹⁵⁸ MEYER & SHERMAN, *supra* note 114, at 498.

¹⁵⁹ Francisco I. Madero, *Plan de San Luis Potosí* [*Plan of San Luis Potosí*], in TENA RAMÍREZ, *supra* note 12, at 732.

preempt theory, this time producing an ongoing, transformative, and transcendent Revolution. Or so the official narrative goes.¹⁶⁰

To help us grasp the construction of a narrative of “The Revolution”, I will run by some of the many and complex events that are lumped under this label. Before doing so, I should point out that what is most important to our inquiry is not so much what happened during the years of the Revolution, but how the events were interpreted by specific actors and the discourse these interpretations engendered.

The original uprising, led by Madero awoke many aggrieved interests: Indian communities stripped of their lands by expanding *haciendas*, such as those supporting Emiliano Zapata’s peasant army in the valleys and mountains of the south; disaffected frontier men led by Francisco Villa in the north; and the *de facto* disenfranchised emerging middle classes of urban centers which had provided the core of the *Partido Liberal Mexicano* in the last years of the Díaz dictatorship.¹⁶¹ Through military action, Madero’s supporters succeeded in forcing Díaz to resign and leave the country, leading to the first free elections in decades, which Madero won.¹⁶² Many of Díaz’s opponents, including some of Madero’s supporters, however, were left unsatisfied. Emiliano Zapata in the south and Pascual Orozco (who had supported Madero) in the north, took up arms independently, again, against “bad government,” now headed by Madero.¹⁶³ Politically weak, Madero was betrayed in 1913 by the army and murdered during a *coup* led by the officer charged with his personal protection, Victoriano Huerta, who had the support of the U.S. embassy (and eventually would forge an alliance with Orozco).¹⁶⁴

Most of Madero’s supporters of 1910, both loyal and disaffected, as well as independent Díaz’s opponents, took up arms again against Huerta in the name of the 1857 Constitution.¹⁶⁵ A complex, contrasting coalition of peasant armies, armed workers, intellectuals and professional soldiers refused to recognize the Huerta regime and self-proclaimed itself as the Constitutionalist Army. Respecting the constitution of 1857 was its rallying cry. After the successful overthrow of Huerta in 1914, the revolutionary armies gathered at a

¹⁶⁰ Or, more precisely, so the official narrative went up until the PRI lost a presidential election for the first time in the year 2000. Its successor, the PAN, was unsuccessful in articulating an alternative national narrative, as I will argue below.

¹⁶¹ MEYER & SHERMAN, *supra* note 71, at 500-01.

¹⁶² *Id.* at 509.

¹⁶³ *Id.* at 514-15.

¹⁶⁴ *Id.* at 521.

¹⁶⁵ *Id.* at 524-25.

Revolutionary Convention, but failed to agree on a unified government.¹⁶⁶ Civil war ensued.¹⁶⁷ By the closing of 1916 the dominant faction convened a Constitutional Congress so as to *amend*, not substitute, the 1857 constitution. Symbolically, the Congress convened in Querétaro, the same city in which the 1856-57 Constitutional Congress had met, and where, later, the liberals defeated the remnants of the French-backed Second Empire and executed the emperor.¹⁶⁸ Congress published its amended constitution on February 5th of 1917, the anniversary of the adoption of the 1857 Constitution.

The new constitution of 1917 incorporated key demands of the revolutionary armies, notably a project for substantive land reform, national ownership of mineral wealth (including oil), and labor rights such as minimum wage and maximum work-hours.¹⁶⁹ The incorporation of these key demands would be hailed for decades to come as the first constitutional consecration of social rights (anteceding the Soviet revolution), making Mexico the vanguard of the emancipation of the exploited underclasses.¹⁷⁰ The Church had openly opposed the Revolution, and supported both Díaz and Huerta, and so the Constitution of 1917 ratified, and further extended the State's control over the Church, denying priests the rights to vote and be voted, banning them from publicly speaking to political matters, among other measures.¹⁷¹ Another key aspect of the new constitution was the banning of presidential reelection, a demand of the original Madero uprising in 1910.¹⁷²

Revolutionary generals contending for dominance, specifically, for the presidency, marked the period running from the adoption of the constitution in 1917 through 1929. All recognized the constitution as materializing the demands of the Revolution and all claimed to be its legitimate leaders. Yet, violent confrontation, including the assassination of two Presidents and armed rebellions, was recurrent. In 1926 tensions with the Church again erupted in a popular uprising in central Mexico.¹⁷³ Called upon and supported by the Catholic

¹⁶⁶ *Id.* at 535.

¹⁶⁷ *Id.* at 538.

¹⁶⁸ *Id.* at 542.

¹⁶⁹ *Id.* at 544-45.

¹⁷⁰ Which is not without parallels one of early colonial and early independent tropes giving Mexico a protagonist's role in universal salvation, then through the practice of a purer form of Catholicism.

¹⁷¹ *Id.* at 543.

¹⁷² *Id.* at 494-95.

¹⁷³ *Id.* at 587.

hierarchy, the rebels refused to comply with the new constitutional restrictions and controls.¹⁷⁴ In 1928, former president and president-elect (the constitution had been amended shortly before to allow for his reelection) Álvaro Obregón was assassinated.¹⁷⁵ By 1929 most revolutionary leaders had met untimely deaths, Madero, Zapata, Carranza, Villa, Obregón, to name the most salient, or were exiled, among them former president Adolfo de la Huerta and ideologue José Vasconcelos. Realizing the instability of the situation, outgoing president, Plutarco Elías Calles, transferred power to an interim president and soon after called for the unification of all revolutionary leaders under one party, the National Revolutionary Party (PNR), founded that same year.¹⁷⁶ The central purpose was to bring the revolution into institutional, though not necessarily constitutional, channels.¹⁷⁷ Calles also came to an agreement with the Church: the anti-clerical clauses of the Constitution would remain in force, but would not be enforced.¹⁷⁸

Calles would eventually be exiled too, but the party he founded, restructured and renamed in 1938 and later in 1946, was to sweep most elections for most offices for most of the 20th century, most often without need to recur to electoral fraud, but willing and capable of doing so when needed.¹⁷⁹ From 1946 on, the party took up the name of the Institutional Revolutionary Party, or PRI.¹⁸⁰

Throughout the period, the 1917 constitution was held as a symbol of the promises of the Revolution, but its key aspects, except for a ban on reelection which was reinstated in 1929 and extended to all elected offices, went unenforced. Social rights were read as *programmatic* norms, not enforceable rights, by the judiciary throughout the 20th century and early 21st century.¹⁸¹ Much land was redistributed

¹⁷⁴ In fact, the second presidential assassination in this period—that of President Elect Alvaro Obregón—was perpetrated by a religious fanatic and orchestrated by a priest and a nun for religious reasons, or so the official court ruling stated. *Id.* at 589.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 590.

¹⁷⁷ *Id.*

¹⁷⁸ Jean Meyer, *Revolution and Reconstruction in the 1920's*, in MEXICO SINCE INDEPENDENCE 201, 215 (Leslie Bethell ed. 1991).

¹⁷⁹ Piecemeal reforms of the electoral system began in the late 60's and accelerated after 1977, which gradually opened elected office to other parties. It was not until 1988 that the party lost the supermajority needed to amend the constitution and almost a decade later, in 1997, lost its majority in Congress. Finally, it lost the Presidency in the year 2000.

¹⁸⁰ MEYER & SHERMAN, *supra* note 71, at 637.

¹⁸¹ They would not be deemed justiciable until 2011, when a slight majority of six

(especially during the 1930s) and workers' rights were enhanced, but mostly through unilateral administrative decisions or political negotiations, in which legal decisions formalized prior political negotiations and agreements.¹⁸² Legislation regarding the separation of Church and State and a ban on religious education were openly disregarded, as long as the Church did not openly participate in politics.¹⁸³ Of the four key contributions of the Constitution of 1917, only the ban on reelection (after Obregón's assassination) and national ownership of the oil industry (after expropriation of foreign companies in 1838) were strictly enforced.¹⁸⁴

This account of 20th century Mexican history is meant to serve as a minimal backdrop for understanding the rhetoric of the Revolution. As should be appreciated, the events referred to as the Revolution were anything but a linear, clearly oriented process; its protagonists were at war with each other more often than not, and could hardly be expected to construct a single narrative. Yet, that is exactly what resulted: an enduring narrative, involving all of Mexican history, both past and present, where the Revolution is not only unified, but ongoing.

La Revolución emerged as successive official memories in a process not unlike geologic formation: an uneven sedimentation of memory, myth and history. It was named, historicized, and reified quite early on.¹⁸⁵

Porfirio Díaz's regime constructed a historical narrative in which the nation had been built through two successive revolutions: Independence and Reform.¹⁸⁶ In this narrative, the Díaz regime was the successor of the latter. The revolutionaries under Madero adopted and revised this master narrative, adapting it so as to interpret Díaz's regime as a hiatus of oppression that had been duly extirpated:

. . . *la Revolución* was historicized: it was portrayed as the third stage of an ongoing revolutionary tradition that began with the

out of eleven Justices reverted the doctrine of non-justiciability. Amparo en revisión, Pleno de la Suprema Corte de Justicia de la Nación [SCJN], *Semanario Judicial de la Federación y su Gaceta, Novena Época*, tomo XXXIV, julio de 2011, 315/2010 (Mex.). The precedent, however, is not binding on lower courts until 4 alike cases ratify the criteria.

¹⁸² MEYER & SHERMAN, *supra* note 71, at 598-603.

¹⁸³ *Id.* at 602.

¹⁸⁴ *Id.* at 603-04.

¹⁸⁵ THOMAS BENJAMIN, *LA REVOLUCIÓN. MEXICO'S GREAT REVOLUTION AS MEMORY, MYTH AND HISTORY* 20-21 (2000).

¹⁸⁶ *Id.* at 40.

Insurgency of 1810 and continued with the Reform of the mid-to-late 1850's.¹⁸⁷

Madero's followers interpreted his revolution as the culmination of the revolutionary tradition uniting Insurgency and Reform, but would have the Revolution stop with his success.¹⁸⁸ This quickly became a problem for the revolutionaries who soon after revolted against Madero.¹⁸⁹ *They* needed to separate the revolution from Madero and his administration, and so the revolution became a thing in itself, it became The Revolution:

... [*L*]a *Revolución* was reified: it was presented as an autonomous force of nature or history destined to transform Mexico regardless of Madero's mistakes and conservatism and despite the machinations of "reactionaries" pitted against it. In this way, revolutionaries disenchanted with or opposed to Madero justified their actions and rallied their supporters. These enhancements transformed an evocative but multiversant concept into a myth.¹⁹⁰

However, the issue that revolutionaries, both those disenchanted with Madero and his loyal followers, faced a similar problem that was still unresolved.¹⁹¹ When each in turn came to power, their claims echoed Madero's claim: the revolution extended back to incorporate Independence and Reform, but culminated and ceased upon the corresponding leader's appointment.¹⁹² Other revolutionary generals, like Villa and Zapata, who never came to power, never saw an end to the Revolution.¹⁹³

By the 1920s the inherent instability of the situation was clear. Those who did not take power, could not concede the end of the Revolution; those who did take power, would declare the Revolution over at their own risk. The solution that emerged, with the institutionalization of revolutionary leadership in the National Revolutionary Party founded by Calles in 1929, was continuity, a Revolution that extended indefinitely into the future.¹⁹⁴ A Revolution, however, is a struggle, so revolutionary discourse needed something

¹⁸⁷ *Id.* at 42.

¹⁸⁸ "After May 1911, Madero spoke of 'the revolution' as an event of the past, something closed and concluded." *Id.* at 44.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 42.

¹⁹¹ *Id.* at 44.

¹⁹² *Id.* at 158.

¹⁹³ *Id.* at 53-54.

¹⁹⁴ *Id.* at 100.

to struggle with indefinitely: a Counterrevolution; at the very least, a latent one. “Revolutionaries not only reified *la Revolución* but also its historical nemesis: *la Reacción*. In revolutionary discourse the Reaction survived the fall of the dictatorship in May 1911 and embarked upon a counterrevolution.”¹⁹⁵ Rivals, even former revolutionary comrades, could be labeled as instruments of the Reaction.¹⁹⁶ But in the early stages, this was not necessary: the Huerta *coup* provided a very palpable Reaction: “The Constitutionalist struggle against Huerta was nothing less than the people in arms against the Reaction.”¹⁹⁷

Thus, reification of both the Revolution and the Reaction allowed not only for indefinite continuation, but also for deeper legitimation. Detached from individual leaders, the Revolution could continue, but it could also come to be identified with the People itself. As government gradually stabilized in the late 1920s, two innovations developed: “First, *la Revolución* was transformed into government (*‘la Revolución hecha gobierno’*) and was thus perceived as permanent and ongoing. Second, *la Revolución* was unified by a ‘revolutionary family’ in which feuds would be forgotten if not entirely forgiven.”¹⁹⁸

When Obregón was assassinated, his personal leadership and patronage were not easily replaced. To fill the vacuum, Calles built an institutional leadership and patronage system, the National Revolutionary Party.¹⁹⁹ Springing from a revolutionary tradition stretching back to Independence and Reform; facing an ever-lurking enemy, the Reaction, which, although defeated, still threatened; the Revolution, the People in arms, was transformed into government, and was to be carried on, indefinitely. Through the exercise of government, it built and came to be incarnate in institutions.

Furthermore, because the Revolution, having become detached from its charismatic, individual leaders, *came to be* “the People in arms,” and then became government, so did “the People.” The People became incarnate in institutions, the Party first and foremost, for it was through it that government was consistently renewed to fuel the continuation of the Revolution. The National Revolutionary Party and its successors, the Party of the Mexican Revolution (PRM, after 1938) and the Institutional Revolutionary Party (PRI, after 1946), were the vehicle enabling the People to govern.

¹⁹⁵ *Id.* at 45.

¹⁹⁶ *Id.* at 61-69.

¹⁹⁷ *Id.* at 61.

¹⁹⁸ *Id.* at 68.

¹⁹⁹ *Id.* at 93.

The foundational documents of the Party reflect both the ongoing character of the Revolution and point to its identification with the People. At its foundation, the Party's fourth (of five) stated principles affirmed:

The National Revolutionary Party declares that when the armed struggle of the Revolution has come to pass and its ideology has become rooted in the national conscience, those governments sprung from the political action of the Party shall dedicate their better energies to national reconstruction, continuing the work that revolutionary administrations have already vigorously developed.²⁰⁰

The Revolution is not exhausted in its armed struggle, which has come to pass. Its ideology is to become engrained in the national consciousness. The construction of the nation is a continuing work inherited from the revolutionary administrations and carried forth through the Party to future governments. The Party became the vehicle of the trans-generational project of an ongoing Revolution.

Delivering a speech at the official commemoration of the Party's restructuring in 1938, Vicente Lombardo Toledano, the powerful and influential leader of the labor movement stated:

The Mexican Revolution, in our opinion, has two principal aspects, that correspond in a natural manner to the structure of a quasi-feudal and quasi-colonial country like Mexico.

First, the Revolution is the people's struggle to abolish the aspects of feudalism, second, the Revolution is also a movement of the people -particularly the proletariat- to conquer economic autonomy for Mexico, fighting against imperialist forces from abroad.²⁰¹

Identification of Revolution and people is more precisely cast as the Revolution being the work of the People. Through its work, and only through its work, the Revolution, do we see the sovereign. And its work is government through the Party. It is a work driven by struggle: the struggle for material prosperity and independence from foreign influence, for autonomy, both material and political.

Finally, the Declaration of Principles of both the Party of the Mexican

²⁰⁰ *Declaración de Principios del Partido Nacional Revolucionario* [Declaration of Principles of the National Revolutionary Party], in PNR, PRM, PRI. ACTAS CONSTITUTIVAS. DOCUMENTOS BÁSICOS [CONSTITUTIVE ACTS. BASIC DOCUMENTS] 16 (Partido Revolucionario Institucional 1991) [hereinafter PNR, PRM, PRI].

²⁰¹ *Acta constitutiva del Partido de la Revolución Mexicana* [Constitutive Act of the Party of the Mexican Revolution], in PNR, PRM, PRI, *supra* note 200, at 41.

Revolution of 1938 and the Institutional Revolutionary Party of 1946 include, as their second principle, the following:

Declares that *all the conquests achieved by our social movement are the result of the permanent struggle of the people*, in its eagerness to better its own economic and cultural conditions, and to organize human interaction on the indestructible base of social justice.²⁰²

The work of the Party is the work of the People; the People manifests itself through government, because government is monopolized by the Party. The Party is the continuation of the Revolution, moving from its armed phase to its institutional phase. People-Revolution-Party-Government come to be conflated full circle. It is ever-present, ever-governing and indefinitely on-going.

Importantly, the revolutionary regime substituted and continued the centralizing and modernizing efforts of the Diaz regime, very much through the same mechanisms of patronage, not rule of law. Patronage, however, took on a more institutional—i.e. through party and government—rather than personal networks.²⁰³

The revolutionary governments of the 1920s and their successors did not restrict themselves to building a political and institutional framework for the country. They worked intensively in constructing, or more precisely refurbishing, a national identity, through art and education. In reformulating the national narrative inherited from the liberal Diaz regime, the revolutionaries drew more heavily than ever before from Mexico's pre-Hispanic past as a source of national identity, purpose and pride.²⁰⁴ The colonial period became a hiatus between free and proud peoples resisting oppression, linking the Aztecs directly to the masses led by Hidalgo. Resistance, not military success, is the common thread linking Aztecs, Hidalgo, the defenders

²⁰² *Declaración de principios y programa de acción del Partido de la Revolución Mexicana* [Declaration of principles and program of action of the Party of the Mexican Revolution] and *Declaración de principios y programa de acción del Partido Revolucionario Institucional* [Declaration of principles and program of action of the Institutional Revolutionary Party], in PNR, PRM, PRI, *supra* note 200, at 377, 477 (emphasis added).

²⁰³ LUIS JAVIER GARRIDO, *EL PARTIDO DE LA REVOLUCIÓN INSTITUCIONALIZADA: LA FORMACIÓN DEL NUEVO ESTADO EN MÉXICO (1928-1945)* *passim* (Siglo XXI 1982).

²⁰⁴ The project of anchoring national identity tracing its origins to the pre-Hispanic past had, in fact, a long history from the 18th century on. See ANTHONY PAGDEN, *SPANISH IMPERIALISM AND THE POLITICAL IMAGINATION: STUDIES IN EUROPEAN AND SPANISH-AMERICAN SOCIAL AND POLITICAL THEORY 1513-1830* 93-108 (Yale University Press 1990). It was the governments stemming from Revolution, however, that fleshed this identity out and successfully projected it to the population. MEYER & SHERMAN, *supra* note 148, at 614-622

of Mexico City during the U.S. invasion, the Reform government during the French Intervention, and the peasants led by Zapata and Villa. Even the successful revolutionary governments were understood as permanently resisting the threat of foreign meddling in internal affairs (most notably the United States) as well as the ever-lurking Reaction.²⁰⁵ Racial segregation and classification, which permeated most social arrangements in Mexico (and, covertly, do so still) were reconceived as a thing of the past, another injustice imposed by the Reaction, and defeated through *mestizaje*, miscegenation, making us all part of a “cosmic race,”²⁰⁶ a race of “bronze,” product of the mixing of all races in Latin America.²⁰⁷ The government successfully disseminated this novel, yet historically rooted, national identity as it built an ambitious and initially successful public school system throughout the country.²⁰⁸ Miscegenation and resistance (to injustice from within and imposition from without) became the marks of the Mexican historical identity.

The revolutionary governments drew upon a generation of artists to support the development of this national identity. The Muralist movement, including people such as Diego Rivera, David Alfaro Siqueiros and Clemente Orozco, starting in the 1920s may be the most notorious artistic group involved in this effort, covering public buildings with murals representing the nation’s history that evoke pre-Hispanic aesthetics.²⁰⁹ Novelists, composers, architects and poets were also called upon to participate in the construction of a new national identity that harked back to the remote and proud Indian past, even if they did not participate in the political edifice: the Party.²¹⁰ And so, the Revolution provided a coalescing national identity, the

²⁰⁵ MEYER & SHERMAN, *supra* note 114, at 572-73.

²⁰⁶ The phrase was coined by 1920’s Minister of Education José Vasconcelos who, as he grew older, also grew more conservative and was exiled after associating himself with the fundamentalist catholic uprisings of the 1920’s. Surprisingly or not, he would flirt with other racist ideologies such as national-socialism in his old age and would lament the persistent Indian past. JOSÉ VASCONCELOS, *BREVE HISTORIA DE MÉXICO* [BRIEF HISTORY OF MEXICO] *passim* (Continental 1956).

²⁰⁷ Vasconcelos also produced, as President of the National University, the coined phrase that still reads in the University’s shield (which depicts Latin America united under the wings of a condor and an eagle, the emblematic birds of South and North America): “For my race, the Spirit shall speak” (“Por mi raza hablará el espíritu”). *Lema*, UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO [NATIONAL AUTONOMOUS UNIVERSITY OF MEXICO], <https://www.unam.mx/acerca-de-la-unam/identidad-unam/lema> [<https://perma.cc/AY8H-L6FF>] (last visited Feb. 16, 2019).

²⁰⁸ MEYER & SHERMAN, *supra* note 114, at 57.

²⁰⁹ *Id.* At 614-22.

²¹⁰ *Id.* at 615.

predecessor of which the Reform movement had suppressed by ousting Catholicism from public discourse.

Eventually, the revolutionary discourse of the PRI was turned down through the 80s, and especially the 90s, when neoliberal economic orthodoxy displaced revolutionary nationalism as the key government project.²¹¹ After the violent repression of student protests in 1968, intellectuals broadly came to question the continuous legitimacy of the Revolution and the government's claim to incarnate it.²¹² The political opposition to the PRI persuasively argued that democracy *required* alternation in government, and so the Party of the Revolution would have to step down if government was to be legitimate. Eventually, this led to the PRI's electoral defeat in 2000. The two administrations that governed between 2000 and 2012 came from the Christian-democratic National Action Party, the party historically identified, from its inception in 1939, as the instrument of the Reaction by revolutionary discourse. The opposition discourse focused on democracy as alternation in government deflated when the PRI became opposition. In twelve years the governing National Action Party did not conscientiously reformulate the narrative of national history so as to affect the structure of the dominant political imagination. They missed the opportunity offered by the bicentennial celebrations of 2010. Ironically, the political opposition that successfully ousted the PRI reinforced the element of resistance in the national narrative legated by the Revolution: resistance by students protesting in 1968 and by political opposition activists throughout the 80s and 90s. The PRI returned to the presidency in 2012 with Enrique Peña Nieto, a scion of one of the PRI's most iconic patronage clans. His short-lived popularity, followed by the collapse of his approval ratings starting in 2014 as corruption and repression scandals hit the media, has fueled the narrative of resistance that made the left-wing presidential candidate and former PRI leader, Andrés Manuel López Obrador, as the undisputed leader of the 2018 presidential election. This time, the narrative of resistance is articulated as opposing the neoliberal orthodoxy upheld by a succession of PRI-PAN governments since 1988. It seems, under a López Obrador Administration, the 1988-2018 period will be recast as a new hiatus the narrative of continued national emancipation tracing its roots back through the Revolution of 1910, the Reform of the 1850s to the Insurgency of 1810. His administration already speaks of being the "Fourth Transformation" in Mexican History.

²¹¹ Id at 684-73.

²¹² OCTAVIO PAZ, *POSDATA* [POSTSCRIPT] *passim* (Siglo XXI 1991).

We are still living within the boundaries of legal and political imagination, as well as the constitutional and institutional edifice, built by The Revolution made government. Moreover, national identity is firmly engrained in the nationalistic, race-blind narrative the revolutionary governments built, in which resistance is measure of valor.

IV. THE RIGHT TO REVOLUTION: POPULAR SOVEREIGNTY, REVOLUTION AND THE FRAGILITY OF THE RULE OF LAW

So where does this leave us? What can we say about the architecture of Mexican political imagination? There are two, related points that I want to make. First, that the path followed by sovereignty, constitution and revolution in the development Mexican political and legal culture result in the autonomy of the political playing out differently in Mexico as it does in the United States. Second, that the relationships between Revolution and Constitution—the negative and positive exercises of sovereignty—set up an unstable relation between law and politics, which is not a very nurturing context for the practice of the rule of law.

A. *The Autonomy of the Political in Mexico*

Mexico shares with other “modern Western states”²¹³ the “autonomy of the political,”²¹⁴ that is, the self-referential character of the state as a frame of meaning. In *Putting Liberalism in Its Place*, Paul Kahn dissects, and so explains, the autonomy of the political by drawing on the Aristotelian four causes, asking the questions what brought the state into being? (efficient cause); what principle of order signifies the state? (formal cause); what is the state made of? (material cause) and what end it pursues? (final cause). Kahn’s answers refer to the modern nation-state, any modern nation-state, but are explicitly modeled after the experience of the United States as

²¹³ KAHN, LIBERALISM, *supra* note 8, at 259. Kahn speaks of “modern Western states —as well as those that model themselves on the West. . .” Whether Mexico is “Western” or somewhat forcefully “modeled on the West” while retaining a fundamentally non-Western (Mesoamerican) character is a question that goes beyond the reach of this paper, but deserves its own reflection. See GUILLERMO BONFIL BATALLA, MÉXICO PROFUNDO: UNA CIVILIZACIÓN NEGADA [passim] (Random House Mondadori 2005) (1987) (making the case that Mexico is forcefully and unsuccessfully modeled on the Western ideals).

²¹⁴ The belief that the state is its own efficient, formal, material and final cause. See KAHN, LIBERALISM, *supra* note 8, at ch. 6.

the paradigmatic Nation-State.²¹⁵ Asking these same questions of the Mexican experience we may gain insight into the architecture of Mexican political imagination. Also, we may advance in the project of comparative cultural constitutionalism more directly, by illustrating how different experiences yield different answers to these questions and enabling the question of what is at stake in the difference between one or another answer.

Kahn identifies revolution as the efficient cause of the Nation-State, constitution as both its formal cause and its final cause, and the citizen's body as its material cause.²¹⁶ In the following paragraphs, I will engage the questions of the efficient, formal and final causes in the Mexican experience and argue that the answers differ from Kahn's model Nation-State inspired by the United States.²¹⁷

As to the efficient cause of the state, Mexico fits with Kahn's model: it is revolution that brings it into being.²¹⁸ That is, it is the popular sovereign manifesting itself in an exercise of negative liberty that destroys the *ancien régime* that brings forth the state. So far, Mexico

²¹⁵ As Paul Kahn describes:

"The American political order was the first truly modern state because it imagined itself to be founded simultaneously on a revolutionary act by the popular sovereign and on 'inalienable truths'. . . America is paradigmatic of the task of politics in the modern period: every state is to be made, or remade, on the basis of deliberation and choice."

KAHN, LIBERALISM, *supra* note 8, at 261-62.

²¹⁶ *Id.* at 265-76.

²¹⁷ I do not engage the question of the "material cause" here because I believe that the answer differs from Kahn's and has important consequences that should be discussed in length. Much research is required to begin to answer this question, but I intuit that the citizen's body is not—or, more precisely, is not the whole—answer for the Mexican case. Death and sacrifice are far too everyday in Mexican history to carry the full weight of being the material cause of the state. They play a fundamental role—maybe even a more important role than in the United States—in conforming our collective identity, but they do not necessarily inform our legal and political identity. On the topic of death and Mexican identity, see LOMNITZ, *supra* note 82 (arguing that death is the "national totem"). I suspect that territory and natural resources play an important role in baring the state as its material cause in our legal-political imaginary. Their role as both threatening (by way of foreign invasion seeking to exploit resources or take territory) and requiring independence is fundamental in understanding the Mexican state. The constant reference to territory and resources in relation to sovereignty in both political and constitutional discourse points in this direction as well as the celebration of the expropriation of oil companies in 1938 as a national holiday, and, arguably, the climax of the Revolution. *Cf* Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 27, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-08-2018 (Mex.).

²¹⁸ KAHN, LIBERALISM, *supra* note 8, at 265.

does not differ from Kahn's modern Nation-State, except in the fact that in Mexico, as opposed to the United States, it is a sequence of failed revolts, not a single successful one, that come to be interpreted as the irruption of the popular sovereign into history. In any case, the question here is whether failed revolts that fail to produce a constitution can nevertheless produce a successful revolution or whether Kahn's dictum that "[u]nsuccessful revolution is not revolution at all. . ." ²¹⁹ needs to be revised in light of the Mexican case. (For now, the apparently subtle, yet potentially gargantuan, difference between an abstract *popular sovereign* and a concrete *sovereign people*, in arms, or at arm's length, will be overlooked). For analytic purposes, we can for the moment agree that *somehow* failed revolts resulted in successful revolution. Maybe, as Paz held and the reformers wanted to believe, the Reform is the authentic consummation of Independence for Mexico.

It is in answering the questions of what are the formal and final causes of the state that clearly Mexico drifts away from the model Nation-State. Kahn sees constitution as the formal cause of the state, and "constitutionalism without end" as its final cause. Kahn's identification of formal and final cause is fitting with Aristotelian understanding of natural objects. ²²⁰ Both the *modern* state and a naturally occurring object, say, a tiger, are, in Kahn's understanding, ends in themselves, not instrumental means to other ends. ²²¹ Accordingly, it makes sense for both to have a final cause that consists in projecting its formal causes indefinitely into the future (though both shall, at some point, perish).

The Mexican experience, however, does not fit the mold. As we have seen, the exercise of positive liberty in Mexico looked, for decades, as a failure from any angle (military, economic and political).

²¹⁹ *Id.* at 266.

²²⁰ In Aristotelian thought there was a difference between natural things and man-made things in how the substantial form or formal cause related to the final cause of a thing. For Aristotle, the final cause of naturally occurring things and their formal cause (or substantive form) were the same thing; regarding crafted or man-made things, on the contrary, the final cause and the formal cause were two different things. See Gerald A. Press, *Brief Summary of Aristotle's Writings*, in THE COLUMBIA HISTORY OF WESTERN PHILOSOPHY 73 (Richard H. Popkin ed., 1999) ("Unlike products of human art, in which the four causes will be different, in the case of natural things, the form and the end are one and the same. . ."). A tiger's final cause is to be a tiger. A chair's final cause, by contrast, is to sit or to earn a living. Although the state is technically "man-made" —and that is the whole point of the modern Nation-State—it makes sense that the autonomy of the political demand that the state, like the naturally occurring tiger, not have an end different from being what it is.

²²¹ See KAHN, LIBERALISM, *supra* note 8, at 277.

Eventually, a formal constitution, that of 1857, was stabilized, though largely ineffective.²²² Whether the formal cause of the Mexican state is the Constitution of 1857 (and its successor/continuation of 1917) or the system of patronage networks that enabled the Diaz regime (through personal relations) first, and the PRI regime, later (through institutional relations), is debatable and beyond the scope of this article. But in either case, Mexico has had a constitution, whether formal or informal, that structures its political and legal life. It is not the rule of law that has informed the Mexican polity, but the rule of men (or alternatively a “rule of institutions”—government agencies, parties, unions, etc.) that somehow harks back to the corporate organization of the “Nation” during colonial times.

What is most relevant, however, is that for Mexico the final cause of the state does not seem to be “Constitutionalism without end,” but rather “Revolution without end,” the ongoing Revolution. I propose that the Mexican state projects, not its formal cause (constitution) as its purpose (final cause), but rather it projects its efficient cause (revolution) as its purpose.²²³ If this is so, then, for Mexico at least, the quote that opens section III of this chapter is simply wrong: in Mexico, the state *is* a (permanent) transition towards something else: whether that “something else” be the fulfillment of the promises of Revolution, be it a democratic polity or the fulfillment of social rights established, both *programmatic norms* established in the text of 1917 and long pushed recurrently into the future. It is not the trans-generational continuation of the rule of law, the constitutional democracy it claims to be, that the Mexican state seeks, but the continuation of revolution as a way of resisting—or escaping—oppression or, worse still, disappearance.

²²² Constitución Federal de los Estados Unidos Mexicanos, CF, Diario Oficial de la Federación [DOF] 05-02-1857 (Mex.), formato PDF, <http://www.ordenjuridico.gob.mx/Constitucion/1857.pdf> [<https://perma.cc/2KWX-JN9L>http].

²²³ It should be noted that, if so, this sits uneasily within Aristotelian methodology. Deviations from Aristotelian methodology in legal thinking are relatively common, as it was abandoned as a self-conscious reference in the decades following the Enlightenment, but as I explain in Alejandro Madrazo Lajous, *Revelación y Creación: Los fundamentos teológicos de la dogmática jurídica* [Revelation and Creation: The Theological Foundations of Legal Dogmatics] (2016) (unpublished dissertation, FCE-CIDE-UNIANDÉS) (on file with author) one risks speaking nonsense when deviations from Aristotelian methodology do not come with a clear understanding of its underlying ontology. For an English version of a substantial portion of the pertinent text, see Alejandro Madrazo, *Revelation and Creation: The Theological Foundations of Modern Legal Science in Mexico* (2006) (unpublished J.S.D. dissertation, Yale Law School) (on file with author).

It is here that the Right to Revolution Clause is most illuminating. In establishing “the People’s inalienable right” to redefine itself, to alter the polity’s organizing principles, the constitutional tradition stretching back to the popular insurgent Congress 1814 has brought the efficient cause into the formal cause of the state. But because revolution is the quintessential exercise of sovereignty, it looms large over the whole of the constitution and marginalizes the rest of the ordering principles contained in it. Other principles are always subject to the permanent possibility of a readily-at-hand popular sovereign, that is, a *sovereign people*, to erupt into action. Because the Right to Revolution, as established in the Mexican constitutional texts, can be appropriated by anyone claiming to speak for it or to the *sovereign people*, it must be appropriated also by government and thus undermines the idea of government as management under a rule of law. Revolution, and because of it, the popular sovereign, stands not only at the beginning and the end of the life of state, but also everywhere in between.

The political is autonomous in the case of Mexico, but it is also collapsed into its purest sovereign form, revolution, and so it overwhelms its tamer manifestation, the legal. And so, law is subordinate to politics, continuously, not only when politics breaks free in the form of a (contained) revolution.

One final point: it may also be that this is possible not only because of the integration of revolution into constitution, but because in Mexico national identity, even though it is a product of state construction, is *imagined* as predating the state. Kahn correctly points out that the Wilsonian conception of the nation-state, one in which state boundaries map on to national identities, is not quite the modern nation-state, because in the modern nation-state the state precedes and produces the nation.²²⁴ In Mexico, the national identity has been consistently imagined as pre-existing the political community, at the very least, as a constitutional project. First it was imagined as an extension of the religious *corpus mysticum*; later as an extension of the pre-Hispanic past National identity predates, and thus is not dependent upon, a political-constitutional project. The name itself and the Mexican flag illustrate this by portraying, at its center, the “national shield;” an eagle, standing on a cactus, growing on an island, devours a serpent. It represents the mythical foundation of Mexico-Tenochtitlán, the capital of the Aztecs, as prophesized by their god, Huitzilopochtli. Hidalgo freed the long oppressed nation; he did not bring it forth *ex-nihilo*.

²²⁴ KAHN, LIBERALISM, *supra* note 8, at 260-61.

B. *The Subordination of Law to Politics*

The previous section is meant to support three claims. First, that the Mexican state shares with other modern states the autonomy of the political. Second, that it does so in a manner that is different to Kahn's description. And third, that that difference may help explain the fragility of law in Mexico by subordinating law to politics. If I've succeeded in making the first two points, I can now further unpack the third. To do so, I will directly engage with the idea of the popular sovereign and the two forms it has of manifesting itself, through revolution and through constitutional rule of law, leaving the autonomy of the political behind.

I argued that in Mexico's constitutional imaginary, the popular sovereign is repeatedly thought of as a standing presence and its work an ongoing revolution carried out either directly by the People, as in 1814 or else by government mediated through the Party, as through most of the 20th century. This is why I have played with the distinction between the "popular sovereign," conceived as an abstract trans-temporal entity, and the "sovereign people," imagined as a concrete and tangible reality that can be called forth at any moment. It is time to unpack the consequences of the difference in emphasis between these two formulations of the idea that authority derives from the political community itself.

A sovereign that is ever present and engaged in a continuous revolution is not solid ground on which to build the rule of law. It is a political community that comes to be not by speaking (constitution), but by screaming, at best, or by killing. More often, it comes to be by being killed while resisting; through sacrifice. Hidalgo, Morelos, Villa, Zapata, all met untimely deaths while resisting oppression within a revolutionary narrative. This makes for a political community where the sovereign will, when exercised directly, is exercised first and foremost negatively, resisting oppression and imposition. That same will has a hard time moving to the exercise of positive liberty, establishing (a new) order.

At the very least, the architecture of this political imagination leaves us with an uneasy relationship between law and politics.²²⁵ As Kahn points out, in the American political imagination, law stems from, but

²²⁵ I first suggested this uneasiness in an article discussing legal culture and the rule of law in Mexico published in 2002, focusing specifically on legal education. See Alejandro Madrazo, *Estado de derecho y cultura jurídica en México*, 17 ISONOMÍA 203, 223 (2002). The article was written in the months following the 2000 election, when the PRI was defeated for the first time, and the article was concluded a few weeks after the first PAN administration took office in early 2001.

also needs to deny unrestrained political action once established.²²⁶ The sovereign appears during Revolution, bestows Constitution, and in that same act disappears from the ordinary world. The Constitution emerges from the Revolution and is the testimony of the appearance of the Sovereign in the world.

Yet, in Mexico the sovereign either does not successfully speak a Constitution into being, as in the first half of the 19th century; or, if it does, it does not recede, as in 1857 or throughout the 20th century. The People remain present and, moreover, become incarnate in the Party/Government. The Constitution cannot rule if the Sovereign is ever-present. It is superfluous. Political action cannot really be subjected to law because the source of legitimacy of law is precisely the subject carrying out political action. How can the Constitution bind the Sovereign? Not under the radical understanding of popular sovereignty that results from our constitutional history. Political action, when carried out by the institutions that incarnate the sovereign is thus ultimately unrestrained. If it is faced with legal obstacles, even constitutional ones, the obstacles are to be removed.

A relatively recent constitutional amendment illustrates the point. In 2005, the Supreme Court ruled unconstitutional a state law that allowed authorities to detain people for questioning for a number of days without bringing charges against them, a procedure known as *arraigo*.²²⁷ The Court deemed the measure incompatible with eight fundamental rights explicitly included in the Constitution, notably those relating to due process of law.²²⁸ In 2008, the Federal Congress, acting on the initiative of the President, amended the constitution by simply incorporating the *arraigo* in the text of the Constitution, without bothering to accommodate the fundamental rights the Court deemed were incompatible with it.²²⁹ Formally, *arraigo* is no longer unconstitutional, for it is part of the Constitution; but no substantial change was made in order to make it compatible with the fundamental

²²⁶ See KAHN, LIBERALISM, *supra* note 8, at ch. 3 (exploring the relation between law and political action).

²²⁷ Acción de inconstitucionalidad, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XIV, Septiembre de 2005, 20/2003, Página 113 (Mex.), formato PDF, <http://207.249.17.176/Transparencia/Epocas/HistoricoInformacionOtorgadaParticulares/Pleno/2003/ai-20-2003-pleno.pdf> [<https://perma.cc/4XW3-3Q6R>] (last visited Oct. 28, 2018).

²²⁸ *Id.* at 101.

²²⁹ Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 18, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-08-2018 (Mex.).

rights the Court deemed affected only a few years before.

The rough numbers reflect the fluidity (or fragility) of the constitution. Though formally rigid, the constitutional experience tells us that it is actually flexible. In the 94 years since the adoption of the revolutionary Constitution of 1917, it has been amended 233 times, the most recent having been approved September 15th, 2017.²³⁰ These 233 amendment processes actually translate into 704 discrete changes to the text of the Constitution.²³¹ Considering the Constitution consists of 136 articles, even distribution would give us an average of almost four amendments per article in roughly 100 years of constitutional life. It also makes of an average of over two amendment processes per year. This hyperactivity of constitutional amendments makes for a very busy, very present sovereign that is constantly tweaking constitutional law.

But the vulnerability of law before political action does not concern only a government that presumes it incarnates the Sovereign. If the sovereign is ever-present and readily at hand; if historical experience tells us that the people can either burst out or be called upon through no determinate path (not necessarily one established in the constitution); then rhetoric of popular sovereignty can hardly remain the government's monopoly; opposition too will lay a claim to it.

This is again where the Right to Revolution comes into play. Opposition can challenge the government, while remaining loyal to the Sovereign, as did the *ayuntamiento* of 1808. It can do so violently and radically, as Hidalgo's mob did. Opposition can call upon article 39 of the constitution so as to call for the establishment of a new constitution. And this is what we have seen happen at least twice since the closing years of the twentieth century.

When the *Ejercito Zapatista de Liberación Nacional* erupted on the national scene during the first dawn of 1994, as NAFTA came into force, it captured the imagination of many discontented Mexicans. In its Declaration of the Lacandon Jungle, dated 1993 and published during the uprising, the *Zapatistas* play squarely into the master narrative of the Revolution, but cast it against the Party of the Revolution:

²³⁰ Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 18, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-08-2018 (Mex.).

²³¹ See H. CÁMARA DE DIPUTADOS, *Reformas Constitucionales por el Decreto en orden cronológico* [Constitutional Reform by the Decree in chronological order], http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm [https://perma.cc/H4UL-6LU4] (last visited on May 30th, 2018).

. . . we are the true heirs of the builders of our nationality, we are dispossessed millions and we call upon our brothers to join this call as the only path left to avoid dying of hunger before the unending ambition of a 70 year dictatorship led by a handful of traitors who represent the most conservative and *vendepatrias* [merchants of the fatherland]. They are the same ones who opposed Hidalgo and Morelos, those who betrayed Vicente Guerrero, they are the same ones who sold over half of our territory to the foreign invader, they are the same ones who brought a European prince to govern us, they are the same ones who established the dictatorship of the Porfirian científicos, the same ones who opposed the Oil Expropriation, the same ones who massacred railroad workers in 1958 and students in 1968, the same ones who today take form us everything, absolutely everything.

To avoid this and as our last hope, after having tried everything to put into practice legality based on our Magna Carta, we appeal to it, our Constitution, to apply Constitutional Article 39 which literally states:

. . . [article quoted] . . .

Therefore, in adherence to our Constitution, we send this [declaration] to the federal Mexican army, fundamental column on which the dictatorship we endure rests, monopolized by the party in power and headed by the federal executive which today has as its highest and illegitimate chief, Carlos Salinas de Gortari.²³²

All the familiar tropes are there: the Reaction, the Revolutionary Tradition, the immediacy of the Popular sovereignty, national identity rooted in our Indian past and shared through miscegenation, rebellion against an illegitimate government that turns its back on its own law in the name of a (betrayed) constitution, and resistance. At the center, the Right to Revolution, ready for the popular sovereign to respond to the call and exercise it. The Declaration closes with a direct address to the “People of Mexico”, explaining that the war they declare is “a last, but just measure,”and closing with an invitation: “Join the

²³² Comandancia General del Ejército Zapatista de Liberación Nacional [General Command of the Zapatista Army of Nat'l Liberation], *Declaración de la Selva Lacandona* [Declaration of The Lacandon Jungle], CARTAS Y COMUNICADOS DEL EZLN (1993), <http://palabra.ezln.org.mx/comunicados/1994/1993.htm> [https://perma.cc/9R62-M2SR] (last visited Oct. 28, 2018).

Insurgent Forces of the Ejército Zapatista de Liberación Nacional.”²³³ This closing call is important for two reasons. First, it makes it clear that the *Zapatistas* do not claim to speak *for* the People, but rather *to* the People, who they expect will awaken and take over the struggle. Second, having exhausted legal channels, the *Zapatistas* claim their rebellion is, like that of 1810, the last resort when facing an illegal and illegitimate government.

Later declarations (the Second and Fourth) insist on activating Article 39, but instead of treading the master narrative of national history, the *Zapatistas* attempted an original, though unsuccessful turn in discourse.²³⁴ In the Second Declaration, in which they call for the assembly of National Democratic Convention, the *Zapatistas* equate the People with “Civil Society:”

“It is CIVIL SOCIETY in whom our sovereignty resides, it is the people who can, at all times, alter or modify our form of government and it has undertaken to do so. . . [The people] to whom we call upon. . .”²³⁵

It may have been a risky bet (at the time) to call upon Civil Society to participate in the National Democratic Convention “to organize civil expression and defend popular will,” taking into consideration the success with which the EZLN had captured the imagination of citizens worldwide and NGOs.²³⁶ The result, however, was not to move the popular sovereign to action, but to consolidate the support of increasingly narrow and specific sectors of nationals and foreigners. The *Zapatistas*’ capacity to capture the political imagination would sputter in the months and years to come, without any semblance of the Sovereign appearing. This should not be surprising, for the idea of “Civil Society” is far too rational and organized to mobilize the political imagination in ways that “The People” can. Civil Society is not an erotic community, but a rational agglomeration of efforts with different orientation, intentions and understandings.

The second recent example of invocation of Article 39, with its complex cluster of politically charged concepts and narratives, has been deployed to question a government nearer to us.²³⁷ Throughout

²³³ *Id.*

²³⁴ *Id.*

²³⁵ COMITÉ CLANDESTINO REVOLUCIONARIO INDIGENA – COMANDANCIA GENERAL DEL EJÉRCITO ZAPATISTA DE LIBERACIÓN, *supra* note 1.

²³⁶ *Id.*

²³⁷ Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 39, *Díario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-08-2018 (Mex.)*.

the summer, following a highly controversial and questioned presidential election in 2006, the losing presidential candidate of the Coalition For the Good of All, Andrés Manuel López Obrador, gathered his supporters in massive protests in downtown Mexico City demanding a recount of the vote.²³⁸ He was at the time a former PRI member and co-founder of the Party of the Democratic Revolution (PRD), which had grouped a left-leaning faction of the PRI and a cluster of small left-wing parties in 1989 around Cuauhtémoc Cárdenas, President Lázaro Cárdenas's son. López Obrador grew up in the revolutionary rhetoric and finds himself comfortable in it.

On the day the Electoral Tribunal ruled against López Obrador's petition to annul the elections, before hundreds of thousands of his supporters, López Obrador proclaimed:

This situation of institutional violence and the upsetting of our institutional, for millions of Mexicans, is offensive and unacceptable.

Thus, since the 15th of August, foreseeing this confabulation against popular will, we called for a National Democratic Convention For the Good of All that, with representation of the towns, communities, neighborhoods, counties, social organizations, non-governmental organizations, trade unions and political groups from all throughout the country, will gather on the 16th of September. . .[the anniversary of the *Grito de Dolores*]. . . to decide what role we will take up in Mexico's public life.

Article 39 of the constitutions literally says:

. . .[quotes article 39]. . .

Accordingly, through pacific civic resistance we are carrying out, and based on this article, I submit to your analysis, discussion and, if such is the case, approval of the National Democratic Convention, the following [plan].²³⁹

²³⁸ James C. McKinley, *Leftist Plans Sit-Ins to Challenge Mexico Vote*, N.Y. TIMES (July 31, 2006), <https://www.nytimes.com/2006/07/31/world/americas/31mexico.html> [<https://perma.cc/AE28-5WPY>]. The difference between López Obrador and the winning candidate was less than one percentage point.

²³⁹ Andrés Manuel López Obrador, *Discurso en apoyo de Proyecto de Resolución que presenta Andres Manuel López Obrador al Pueblo de Mexico para su análisis, discusión y, en su caso, para su Aprobación en la Convención Nacional Democrática* [Speech in support of draft resolution presented by Andres Manuel López Obrador to the people of Mexico for analysis, discussion and, where appropriate, for approval at the Democratic National Convention] (Aug. 28, 2006)

The appeal to the sovereign is immediate: the People are there, and will be there, with him, in Mexico's central square. The speeches pronounced by López Obrador at the time, and since, are many, but the narrative and rhetoric is common. Unlike the Zapatistas, López Obrador does not pretend to speak *to* the People, but *with* the People, present and counting in the central square. Masses, in the hundreds of thousands gathered in the public square, at the foot of the national flag *were* the People. A few weeks later, López Obrador and his followers gathered on the anniversary of the *Grito de Dolores* and decided to proclaim a Legitimate Government on the anniversary of the Revolution. A little over a month later, on the 20th of November, López Obrador was sworn in as "Legitimate President" of Mexico and announced his cabinet. Through congress people loyal to him, in the years that followed, he proposed initiatives to Congress and blocked legislation from being approved. He was again a candidate for a left-wing coalition in 2012, when he came in at second place.²⁴⁰ He has since formed a new, more militant, left-wing party which he heads and which is the core of a still broadening coalition that endorsed him in the 2018 election, which he won by a significant margin.

In his rhetoric we see familiar tropes: a government that is a travesty because it undermines institutions (notably, what is offensive is the upsetting of institutions, not laws) and a sovereign people that is present and can be consulted. The symbols he invokes are explicit: the dates of major decisions are chosen to fit the master narrative of The Revolution. He is speaking to the political imagination of "the Nation." Whether the people will actually materialize around López Obrador, and whether the People can make a direct nonviolent appearance is yet to be seen. What is certain is, within the Mexican political imagination, it could be that the popular sovereign appears in the central square, and not only through the Party or the government.²⁴¹

<http://rcci.net/globalizacion/2006/fg632.htm>.

²⁴⁰ *Mexico's Pena Nieto's Presidential victory Confirmed*, BBC NEWS (July 7, 2012), <https://www.bbc.com/news/18736492> [<https://perma.cc/9VJP-AK9K>].

²⁴¹ López Obrador ran for president in 2012 and chose a less combative discourse, proposing a "Loving Republic" and national reconciliation. The electoral politics and the loving republic held throughout the 2012 campaign, but after a second defeat, his rhetoric vamped up denunciation of the government and was more aggressive until, nearing the 2018, national reconciliation became his insistent trope. Both these electoral turns seem to shun revolution. The place of revolution in an eventual López Obrador government is yet to be defined. With López Obrador's landslide victory in 2018 election and his frequent reference to the people and the revolutionary tradition, we may see a narrative emerge for the first time, through which the People materialize through elections. He speaks of his election being Mexico's

The “transition to democracy” that became tangible when the PRI lost the Presidency in 2000 has not produced a driving historical narrative. The government’s discourse has since focused on the virtues of democracy, understood in its minimal expression as free, competitive elections. Not being able to renounce The Revolution and its centrality to Mexican national identity, the PAN governments, the party historically linked to The Reaction in the revolutionary narrative, downplayed the revolutionary origins of the constitution under which they ruled and exalted Madero’s limited electoral concerns as the key inheritance of The Revolution. Yet, they did not offer a dense, alternative national narrative to capture the collective imagination of Mexicans. Socially conservative, they could at most move toward a liberal discourse, but liberalism has not historically engendered identity by itself in Mexico. And here, they failed where Kahn tells us liberal theory fails: “They are likely to see popular sovereignty as a voting mechanism, rather than as an expression of a faith in a trans-temporal, plural subject.”²⁴²

But Mexican identity and commitment to the trans-temporal polity, was not forged in the deployment of reason, not in the procedural exercise of participating in elections; rather, it was forged through the existential experience of violent, massive revolt; it was built on sacrifice of both self and foe in acts of resistance. Neither the Federal Electoral Institute nor Civil Society can incarnate the popular sovereign. The People, the sovereign people, present in the *Grito de Dolores*, in the mountains around Apatzingán and in the killing fields of The Revolution, does not discursively or electorally manifest itself (at least not yet). Communion comes through the experience of uprising or resistance:

The revolutionary explosion is a marvelous feast in which the Mexican, drunk with himself, discovers at last, in a mortal embrace, the other Mexican.²⁴³

A present sovereign may not provide a solid foundation for building the rule of law, but it is fertile ground for capturing the collective imagination to think it possible to correct social injustice and growing inequality in what is still a post-colonial country in more than one way.²⁴⁴

“Fourth Transformation”, in reference to Independence, Reform and Revolution as the preceding three. The transformation he headed, in this narrative, is the first to succeed with the ballot and not the bullet.

²⁴² KAHN, LIBERALISM, *supra* note 8, at 152.

²⁴³ PAZ, *supra* note 118, at 180.

²⁴⁴ I cannot close this piece without a word of warning. Political and legal

Much will depend on the narrative that stems from the 2018 landslide election. The winning candidate, Andrés Manuel López Obrador, speaks of his victory and his party/movement, known as MORENA, as Mexico's "Fourth Transformation." His personal past and his rhetoric seem poised to seamlessly revive the post-revolutionary narrative. Yet, unlike the three preceding "transformations," this one has achieved power through the ballot box, not bullets. López Obrador campaigned on an anti-corruption platform. His election was the result of much hammering and defending legality in elections. Could this be the beginning of the reconciliation of social justice and rule of law in Mexico?

Paraphrasing Mexico's soccer icon, Javier "Chicharito" Hernández when speaking prior to Mexico's historic victory over World Cup Champion, Germany, in Russia 2018: in order to win, we need to allow ourselves to imagine great things.²⁴⁵

discourse seems to be quickly changing in recent years. Constitutionalism and human rights discourses have gained ground both among public officials and vocal citizens (i.e. media, academics and NGOs) as never before in recent years. In 2011, the Constitution was amended to incorporate human rights treaties into a "constitutional block", and the Supreme Court has since closed its 9th "Epoch" and opened its 10th, signaling it deems the change as historic. *See* Noticia Histórica de la Publicación y Difusión de la Jurisprudencia [Historical Notice of the Publication and Dissemination of Jurisprudence], Suprema Corte de Justicia de la Nación [Supreme Court of Justice of the Nation], últimas reforma 08-2018 (Mex.) formato HTM, <https://sjf.scjn.gob.mx/sjfsist/Paginas/wfContenido.aspx?control=Contenidos/ucNoticia&file=NoticiaHistorica&Info4=Info4> [<https://perma.cc/2WXT-KXCH>]. The first half of the Peña Nieto Administration managed to pull through more constitutional amendments—including the privatization of the iconic national oil industry, which had long been a tangible symbol of the permanence of the Revolution—than any other Administration in the first two years, before his numbers plummeted in the polls. If López Obrador refrains from actively reinforcing the grand narrative of the Revolution, and instead underscores a commitment to elections, aggregated with the other trends mentioned here may signal deep transformations are being nurtured in Mexican political and legal imagination. Then again, maybe not: revolutions, including discursive ones, tend to change less than they pretend. Militarization has also deepened. The narrative that will trace Mexico's range of imaginative possibilities in generations to come seems up in the air.

²⁴⁵ BBC NEWS, *supra* note 3.