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Constitutional rigidity: The Mexican experiment

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The constitutional amendment mechanism of the Mexican Constitution of 1857 (reproduced in the Constitution of 1917) and Article V of the US Constitution are very similar in design. Both require a two-thirds majority of each of the houses of a bicameral Congress and ratification by the states (half of the state legislatures in Mexico and three-fourths in the United States). Both articles were the result of an experiment aiming at striking the right balance between rigidity and flexibility. Yet, while characterized by similar levels of formal rigidity, these experiments have had the exact opposite effect. While the US Constitution has been described as one of the world's most rigid and has only been amended twenty-seven times, the Mexican Constitution of 1917 has gone through over 700 amendments. Why are the amendment rates so divergent? This article argues that Mexico's amendment practice offers an opportunity to deepen our knowledge about how non-institutional factors condition the way amendment provisions work and, thus, to dispel the idea that amendment difficulty is institutionally determined. In particular, there are at least three lessons that may be drawn from the Mexican case: (i) constitutional scholarship needs to shift its attention to political parties and party systems; (ii) unwritten rules influencing the behavior of party members need further study; and (iii) we must carefully look at the agency of constitutional decision-makers, specifically regarding the choices they make among different means to advance their interests and agendas.

1. Introduction

The constitutional amendment mechanism of the Mexican Constitution of 1857 (reproduced in the Constitution of 1917) and Article V of the US Constitution are very similar in design. Both require a two-thirds majority of each of the houses of a bicameral Congress and ratification by the states (half of the state legislatures

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in Mexico and three-fourths in the United States). Both articles were the result of an experiment aiming at striking the right balance between rigidity and flexibility. Thought against the backdrop of the unanimity requirement to amend the Articles of Confederation, Article V was designed to guard against the "extreme facility, which would render the Constitution too mutable" and the "extreme difficulty, which might perpetuate its discovered faults."[1] The mechanism adopted by the Mexican Constitution of 1857 was designed with the same goals in mind. The original draft of the amendment rule required a two-thirds majority in Congress, two intervening elections, and popular ratification.[2] But some members of the constituent assembly argued that such a process would make popular demands for constitutional change almost impossible to result in amendments.[3] The mechanism eventually approved requires a two-thirds majority approval by Congress and ratification by half of the states.[4]

Although characterized by similar levels of formal rigidity, these experiments have had the exact opposite effect. While the US Constitution has been described as one of the world's most rigid and has only been amended twenty-seven times,[5] the Mexican Constitution of 1917 has gone through over 700 amendments.[6] Despite the institutional design similarities between these constitutions, why are the amendment rates so divergent? In this article, I argue that if we look beyond the United States and focus on the Mexican case, we can gain significant insights into that question. Specifically, Mexico's amendment practice offers an opportunity to deepen our knowledge about how non-institutional factors condition the way amendment provisions work and,

[1] The Federalist No. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

[2] Francisco Zarco, Crónica del Congreso Extraordinario Constituyente (1856–1857), at 765 (1979).

[3] *Id.* at 787.

[4] *Compare* Constitución Política de los Estados Unidos Mexicanos [CPEUM] art. 135 (Mex.) ("This Constitution may be subject to amendments. The vote of two-thirds of the present members of the Congress of the Union is required to make amendments or additions to the Constitution. Once the Congress agrees on the amendments or additions, these must be approved by the majority of state legislatures"), *with* U.S. Const. art. V ("The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution . . ., which, . . . shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states").

[5] As we will see below, amendment difficulty in the United States is associated with normative and practical concerns about democracy. On the one hand, it is considered a threat to the democratic legitimacy of the Constitution. On the other, the impossibility of modifying antidemocratic governmental structures (e.g. the Electoral College) is considered a source of dysfunction in the political system. *See further* Donald Lutz, *Toward a Theory of Constitutional Amendment*, *in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 63, 63–87 (Sanford Levinson ed., 1995); Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It) (2006).

[6] As of December 24, 2020, there have been 244 decrees, i.e. 244 successful uses of the amendment formula since 1921, resulting in 749 changes to the Constitution. *See* Cámara de Diputados, H. Congreso de la Unión, *Reformas Constitucionales por Periodo Presidencial*, www.diputados.gob.mx/LeyesBiblio/ref/cpeum_per.htm (last visited Feb. 7, 2021) [hereinafter Amendments Database: Per Term]; and Cámara de Diputados, H. Congreso de la Unión, *Reformas por Decreto en orden cronológico*, www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm (last visited Feb. 7, 2021) [hereinafter Amendments Database: Chronological].

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thus, to dispel the idea that amendment difficulty is institutionally determined.[7] In other words, that amendment difficulty is less about institutional design than it is about politics.

I will proceed as follows. In Section 2, I briefly discuss the formalistic understanding of constitutional rigidity and its limitations to explain instances in which similar rules produce different amendment rates. In Section 3, I examine the political factors that, under different regimes and in different moments in history, have allowed the Mexican political elite to access the amendment mechanism to change hardwired provisions. In Section 4, I consider the lessons that can be drawn from the Mexican case and suggest it is necessary to rethink the question of constitutional rigidity. Finally, as a conclusion, I offer some thoughts about the implications of accepting the lessons proposed in this article.

2. A tale of two rigidities

The mainstream understanding of constitutional rigidity in the United States is largely formalistic. A well-established proposition argues that formal constitutional amendments are close to impossible due to the hurdles imposed by Article V.[8] Prominently, Sanford Levinson has described Article V as an "iron cage" that prevents needed corrections to structural flaws that are hardwired in the Constitution, even when substantial majorities advocate for an amendment. Levinson considers that the Constitution is both insufficiently democratic and significantly dysfunctional and that substantial responsibility for the defects of the American polity lies in the Constitution itself.[9] Article V, in this context, appears as the main obstacle to fix those deficiencies.[10] From Levinson's perspective, the solution is a Constitutional Convention. For others, it lies in the modification of the amendment rule in order to facilitate corrections to the basic structure of government.[11]

[7] On this line of thought, see, e.g., Richard Albert, Constitutional Amendments: Making, Breaking, and Changing Constitutions 95–138 (2019); Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, *in* Comparative Constitutional Law 96 (Tom Ginsburg & Rosalind Dixon eds., 2011); Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 Int'l J. Const. L. 686 (2015); Vicki C. Jackson, *The (Myth of (Un)amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 Int'l J. Const. L. 575 (2015).

[8] *See, e.g.*, Levinson, *supra* note 5; Stephen M. Griffin, *The Nominee Is . . . Article V*, *in* Constitutional Stupidities, Constitutional Tragedies 51 (Sanford Levinson & William N. Eskridge eds., 1998); Rosalind Dixon, *Updating Constitutional Rules*, 2009 Sup. Ct. Rev. 319 (2009).

[9] *See* Levinson, *supra* note 5, at 9 (arguing that "[w]e must recognize that a substantial responsibility for the defects of our polity lies in the Constitution itself").

[10] *See, e.g.*, Jason Mazzone, *Amending the Amendment Procedures of Article V*, 13 Duke J. Const. L. Pub. Pol'y 115, 118 (2017) ("The difficulty of deploying Article V and its resulting rare usage have some important effects. Politics in the United States proceed as though the Constitution cannot ever be changed. Government representatives operate without threat that their powers could be curtailed or their decisions undone by constitutional amendment").

[11] Timothy Lynch, *Amending Article V to Make the Constitutional Amendment Process Itself Less Onerous Proposed Amendments*, 78 Tenn. L. Rev. 823 (2010). The idea that Article V makes amendments close to impossible is pervasive across the scholarly literature. *See* Jackson, *supra* note 7, at 584.

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The Mexican and the US Constitutions not only share a similar amendment mechanism, but also other key institutional features. Both are presidential systems and federal states with written and old constitutions. Despite these similarities, their amendment rates vary widely. Even though the wide array of modifications to the Mexican Constitution vary in scope and nature, they include changes to politically salient and/or hard-wired basic governmental structures comparable to those present in the United States. For instance, the amendment granting statehood to the former Federal District (now, Ciudad de México) in 2016 is a good example of a change that, in the United States context, was for a long time considered as nearly impossible (and not even requiring a formal amendment, i.e. the statehood of the District of Columbia[12] and Puerto Rico[13]). Another example are the amendments creating *Órganos Constitucionales Autónomos* (Constitutional Autonomous Agencies)[14] to depoliticize processes like the organization and oversight of elections. There are also the amendments that stripped the Supreme Court of Mexico of its jurisdiction to adjudicate interstate border disputes in 2005, and those reestablishing that power in 2012.[15]

How are those kinds of changes much easier to achieve in Mexico than in the United States if the actors with the legal power to activate the amendment mechanisms face very similar institutional restrictions? Given the similarity of the amendment mechanisms in both countries,[16] the explanation of the major difference in the amendment rate cannot be found in the institutional design alone. Recent comparative constitutional studies have challenged the conventional wisdom regarding the impact of amendment mechanisms on constitutional rigidity, pointing toward non-institutional factors like the "amendment culture," to better understand constitutional change

[12] *See, e.g.*, Larry Mirel & Joe Sternlieb, *Chosen by the People of the Several States: Statehood for the District of Columbia Symposium: Rethinking DC Representation in Congress*, 23 Wm. & Mary Bill Rts. J. 1 (2014); Mary M. Cheh, *Theories of Representation: For the District of Columbia, Only Statehood Will Do Symposium: Rethinking DC Representation in Congress*, 23 Wm. & Mary Bill Rts. J. 65 (2014); Heather K. Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle Symposium? Rethinking DC Representation in Congress*, 23 Wm. & Mary Bill Rts. J. 11 (2014); Johnny Barnes, *Towards Equal Footing: Responding to the Perceived Constitutional, Legal and Practical Impediments to Statehood for the District of Columbia*, 13 D.C. L. Rev. 1 (2010); Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. Pa. L. Rev. 1659 (1991).

[13] On the status of Puerto Rico, see Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution (Christina Duffy Burnett & Burke Marshall eds., 2001).

[14] On the proliferation of these bodies in Mexico, see Cristopher Ballinas Valdes, Political Struggles and the Forging of Autonomous Government Agencies (2011).

[15] Constitución Política de los Estados Unidos Mexicanos, CPEUM, arts. 46, 73 §§ IV, X, XI, XII, 76,105 § I, Diario Oficial de la Federación [DOF] 12-08-2005; Constitución Política de los Estados Unidos Mexicanos, CPEUM, arts. 46, 76, 105, Diario Oficial de la Federación [DOF] 10-15-2012. *See also* Mariana Velasco-Rivera, *The Political Sources of Constitutional Amendment (Non)Difficulty in Mexico*, *in* Constitutional Change and Transformation in Latin America 243, 262–3 (Richard Albert, Carlos Bernal & Juliano Zaiden Benvindo eds., 2019).

[16] At first glance, one could argue that differences in ratification requirements in the Mexican and the US Constitutions should explain the differences in the amendment rate. However, studies have found that ratification requirements (whether involving state legislatures or a popular referendum) have no significant impact on constitutional rigidity. *See* Jackson, *supra* note 7, at 578; John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 Law & Soc. Inquiry 501, 523 (1997).

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dynamics.[17] In particular, in the United States, Vicki Jackson convincingly argues that claims about amendment difficulty are overstated: if attitudes toward the idea of formal amendment changed, constitutional rigidity would be reduced.[18] Among other things, Jackson refers to the relative frequency of congressional overrides of presidential vetoes (approximately 110 since 1789), which, like amendment proposals, require two-thirds of both houses of Congress.[19] In Jackson's view, this evidence shows that overcoming high voting thresholds on substantive matters is far from impossible and that sociocultural beliefs in the difficulty of amendment may be contributing to constitutional rigidity today.[20]

Jackson's analysis goes a long way to dispelling the idea that amendment difficulty can be read off the constitutional text and invites us to rethink how sociocultural beliefs influence constitutional rigidity. Yet there is an often overlooked and even more powerful insight to be drawn from her work: the fact that when it comes to presidential veto overrides, Congress has often been capable of meeting the two-thirds threshold underscores the crucial role that members of legislative bodies and political parties (who as a general rule have the legal power to activate the amendment mechanisms) may have in conditioning how amendment provisions work and, thus, in determining how constitutions change.[21] Given the frequency in which its Constitution has been amended, Mexico poses an ideal case to deepen our knowledge of how those actors affect the way in which amendment provisions work. The Mexican case, as noted earlier, suggests that amendment difficulty is less about the design of the amendment rule than it is about politics.

3. The politics of constitutional amendment in Mexico

In Mexico, the amendment mechanism has been consistently used across constitutional history. At least since the fall of the Second Mexican Empire (1864–7), constitutional law has had a prominent role in political discourse and in justifying regimes and state action. For instance, between 1884–1910, President Porfirio Díaz used it several times to enable his six reelections. In 1934 President Lázaro Cárdenas achieved what, in the United States, Roosevelt could not: an amendment, among other things, to overhaul the federal judiciary and pack it "with members with firm revolutionary

[17] *See, e.g.*, Ginsburg & Melton, *supra* note 7; Jackson, *supra* note 7.

[18] Jackson, *supra* note 7.

[19] *Id.* at 579.

[20] *Id.* at 576.

[21] Political parties and relevant political stakeholders have drawn attention in the comparative constitutional law literature analyzing democratic backsliding. However, these actors and their acts are rarely treated as an essential part and main operators of constitutional change. *See, e.g.*, David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013); Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)*, 23 Transnat'l L. & Contemp. Probs. 51 (2014); Tom Gerald Daly & Brian Christopher Jones, *Parties Versus Democracy: Addressing Today's Political Party Threats to Democratic Rule*, 18 Int'l J. Const. L. 509 (2020).

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convictions,"[22] protecting his policies from judicial review. In 1977, López Portillo sought to make the electoral system more competitive through an amendment introducing a degree of proportional representation.[23] This was part of an attempt to cope with the erosion of legitimacy and popular support for the Partido Revolucionario Institucional (PRI) during the late 1970s (reflected in the negative public perception of the government and in a steady decline in voter participation) and the emergence of opposition political parties.[24] Zedillo's judicial reform in 1994–5, which involved giving the Supreme Court new constitutional review powers, also gave the president the chance to replace all sitting members of the Court at once.[25] More recently, a set of amendments stripping the Court of its jurisdiction to adjudicate interstate border disputes prevented the adjudication of a number of cases still pending resolution today.[26] Díaz's, Cárdenas's, and López Portillo's administrations illustrate the use of the amendment mechanism during authoritarian times, and the Zedillo administration onwards, in democracy (or during the transition to democracy).[27]

The easy access to the constitutional amendment mechanism during authoritarian times is relatively simple to explain, as one person or a single party effectively controlled all branches of government.[28] Constitutional decision-making during the PRI's hegemonic era was centralized in the figure of the President and party's leader; whether an amendment was adopted depended on the President's will.[29] However,

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[22] José Ramón Cossío Díaz, La Teoría Constitucional de la Suprema Corte de Justicia 40 (2008).

[23] Paul Gillingham, *Mexican Elections, 1910–1994: Voters, Violence, and Veto Power*, *in* The Oxford Handbook of Mexican Politics 54, 61–2 (2012).

[24] Kevin J. Middlebrook, *Political Change in Mexico*, 34 Proc. Acad. Polit. Sci. 55, 58–9 (1981):

> One of the principal goals of the 1977 political reform was to reverse this trend toward voter apathy. The emergence of a number of minority, opposition political parties constituted a second major motivation for the López Portillo administration's political reform. . . . The emergence of these opposition parties was perhaps the most significant indication that the existing 'official' mass-based organizations and political parties had grown increasingly incapable of incorporating important segments of the population.

[25] For an overview of this reform and its implications *see, e.g.*, Héctor Fix-Fierro, *La reforma judicial en México: ¿De dónde viene? ¿hacia dónde va?*, 1 Reforma Judicial Revista Mexicana de Justicia 251 (2003); Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After Presidencialismo*, 4 Int'l J. Const. L 411 (2006).

[26] Suprema Corte de Justicia de la Nación [SCJN], Controversia Constitucional [CC] 9/1997 *(Quintana Roo v. Campeche)* (pending) (Mex.); Suprema Corte de Justicia de la Nación [SCJN], Controversia Constitucional [CC] 13/1997 *(Quintana Roo v. Yucatán)* (pending) (Mex.); Suprema Corte de Justicia de la Nación [SCJN], Controversia Constitucional [CC] 3/1998 *(Jalisco v. Colima)* (pending) (Mex.).

[27] María Amparo Casar & Ignacio Marván, *Pluralismo y Reformas Constitucionales en México 1997–2012*, *in* Reformar sin mayorías: La dinámica del cambio constitucional en México: 1997–2012, at 13, 25–8 (Maria Amparo Casar & Ignacio Marván Laborde eds., 2014).

[28] Benito Nacif, *The Fall of the Dominant Presidency: Lawmaking under Divided Government in Mexico*, *in* The Oxford Handbook of Mexican Politics 234, 234 (Roderic Ai Camp ed., 2012); Casar & Marván, *supra* note 27, at 13; Jorge Carpizo, *La reforma constitucional en México: Procedimiento y realidad*, 44 Boletín Mexicano de Derecho Comparado 543, 575, 578 (2011).

[29] Carpizo, *supra* note 28, at 575–6; Beatriz Magaloni, *Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico*, *in* Rule by Law: The Politics of Courts in Authoritarian Regimes 180, 184 (Tom Ginsburg & Tamir Moustafa eds., 2008); Jeffrey Weldon, *Political Sources of Presidencialismo in Mexico*, *in* Presidentialism and democracy in Latin America 225 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997).

less has been done to explain the extensive use of the amendment mechanism since 1988, and more specifically during divided governments (1997–2018).[30] In 1988, the PRI lost its supermajority in the Chamber of Deputies for the first time in history and thus its ability to amend the Constitution on its own. Moreover, the empowerment of the Supreme Court, in combination with the electoral reforms that took place between 1990 and 1996 (eventually resulting in an era of divided government), led the conventional wisdom of the time to expect that the system of separation of powers would start working properly.[31] Delivering what Nacif calls "policy shocks" through constitutional amendment would thus become more difficult and, together with a lower amendment rate, we would see a shift from formal to informal constitutional change.[32] Yet, Figure 1 shows that the frequency of amendments actually increased since 1988.

Figure 1 shows the number of constitutional provisions amended by presidential term between 1921 and 2018. These modifications were adopted through 233 amendment decrees, 116 of which took place after the PRI lost its supermajority in the Chamber of Deputies and represent 428 modifications (against 279 between 1921 and 1988) from the total 707 modifications in that period.[33] That is to say, half

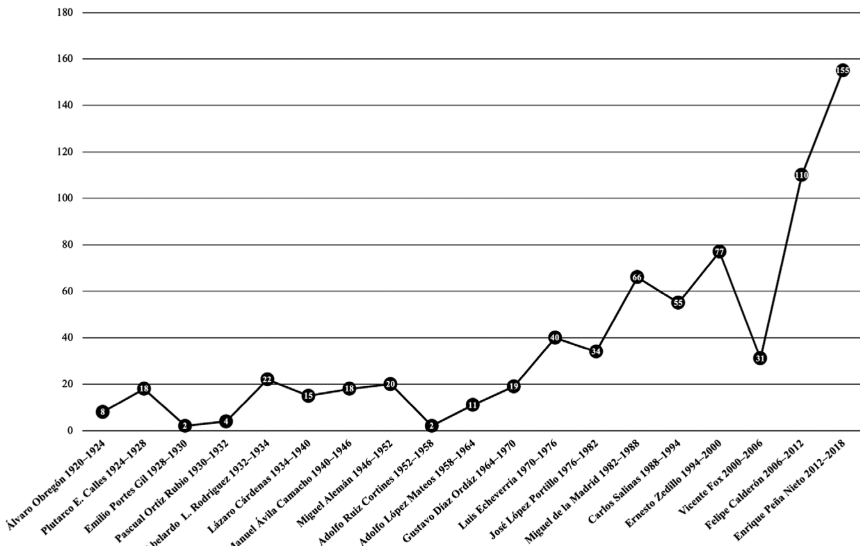

Figure 1. Number of constitutional provisions amended per presidential term 1921–2018.
Source: Prepared by author, based on *Reformas Constitucionales por Periodo Presidencial*, Camara de Diputados (last updated May 28, 2021), www.diputados.gob.mx/LeyesBiblio/ref/cpeum_per.htm.

[30] *But see infra* notes 37 and 40

[31] *See, e.g.*, Weldon, *supra* note 29; Maria Amparo Casar, *Executive–Legislative Relations: The Case of Mexico (1946–1997)*, *in* Legislative Politics in Latin America 114, 142 (Scott Morgenstern & Benito Nacif eds., 2002).

[32] Nacif, *supra* note 28, at 234; Zachary Elkins, Tom Ginsburg, & James Melton, The Endurance of National Constitutions 198 (2009).

[33] Amendments Database: Per Term, *supra* note 6; Amendments Database: Chronological, *supra* note 6.

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of the decrees and 60.54% of the modifications to the Constitution have taken place in a period where no party has had the ability to amend the Constitution on its own. How is this possible? The scholarship on the topic sometimes attributes the cause to a "constitutional fetishism"—a magical thinking driving reformers to believe that changing the constitutional text will solve real life problems.[34] Others see the increasing amendment rate as a product of a "national culture" that has little respect for the Constitution.[35] These approaches fall short of explaining the role of concrete political actors and the circumstances that may condition constitutional rigidity across time.[36] For instance, the very idea of "constitutional fetishism" obscures the self-interest, political, and partisan motivations of the actors that have the legal power to activate the amendment mechanism. By contrast, Elkins, Ginsburg, and Melton offer an explanation of the endurance (and de facto flexibility) of the Mexican Constitution during the PRI hegemonic rule that takes into account such factors.[37] In their view, constitutional amendments during that time allowed the co-optation of interest groups and created the necessary loyalty to make bargaining possible.[38] However, they do not explain why, after the fall of the PRI hegemony, frequent amendments continued.[39] In

[34] Casar & Marván, *supra* note 27, at 51 ("[T]he Mexican political elite has a lot of faith in the [Constitution's] ability to transform reality and, in that sense, reformers are moved by what may be called "constitutional fetichism." Translation by author).

[35] Carpizo, *supra* note 28, at 584–5.

[36] Pou Giménez and Pozas-Loyo recognize the role of political parties in formal constitutional change after the PRI hegemonic rule, yet they do not seek to explain the causes of the frequency of amendments. Instead, they focus on how what they call hyper-reformism has served as an obstacle for the consolidation of democracy and the rule of law. *See* Francisca Pou Giménez & Andrea Pozas-Loyo, *The Paradox of Mexico's Constitutional Hyper-Reformism: Enabling Peaceful Transition While Blocking Democratic Consolidation*, *in* Constitutional Change and Transformation in Latin America, *supra* note 15, at 221, 234–6. *See also* Micaela Alterio, *La relación entre rigidez y supremacía constitucional: Un análisis a la luz de las reformas constitucionales en México*, 4 Revista del Centro de Estudios Constitucionales 209 (2017); Roberto Niembro, *Conceptualizing Authoritarian Constitutionalism*, 49 Verfassung und Recht in Übersee 339 (2016).

[37] Elkins, Ginsburg, & Melton, *supra* note 32, at 193–9.

[38] *Id.* at 195, 197 ("[C]onstitutional amendment during the PRI regime was frequent, and amendments provided political goods. The PRI used the Constitution to incorporate social insurgencies and political dissidents while limiting their effective power").

[39] Rivera León acknowledges the role of political factors in formal constitutional change during the PRI hegemonic rule. However, his account of the causes of the frequency of amendments after that period falls short of explaining the factors that allow access to the amendment mechanism. In an essentialist fashion, Rivera León argues that the causes of amendment frequency in Mexico after the PRI hegemonic rule lie in the constitution itself—namely, the regulatory nature of constitutional provisions and the design of Article 135 of the Mexican Constitution, which only requires a two-thirds majority of the members present and voting, which in his view diminishes amendment difficulty. Moreover, Rivera León notes that constitutional amendments tend toward the centralization of governmental power (i.e. amendments to Article 73 to increase federal legislative powers) and identifies this tendency as an important cause of amendment frequency. This argument is circular in that, by itself, the centralization tendency does not explain what factors allowed it to take place through formal amendments despite party fragmentation. Similarly, he argues that the conception of the Constitution as a political instrument, as opposed to a juridical one, is another factor that may explain amendment frequency. Yet, like the centralization argument, on its own, the political conception of the constitution cannot explain the factors that facilitate access to the amendment formula. *See* Mauro Arturo Rivera León, *Understanding Constitutional Amendments in Mexico: Perpetuum Mobile Constitution*, 9 Mex. L. Rev. 3, 18–27 (2017).

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fact, in a judicialization of politics fashion, Elkins, Ginsburg, and Melton assume that "with the decline of the PRI supermajority, the primary mechanism of constitutional change . . . shifted from a formal constitutional amendment toward informal judicial amendment through interpretation."[40]

Like Elkins, Ginsburg, and Melton's, most explanations of the endurance and the de facto flexibility of the Mexican Constitution during the PRI hegemonic rule hinge on the presence of unwritten rules that enabled the President to exercise unchecked power[41] (e.g. the *dedazo*, which allowed the President to choose his successor but required the fluctuation among factions within the party[42]) and very strong party discipline.[43] The expectation was that, with democratization, those unwritten rules would disappear and the Constitution would effectively constrain power.[44] Even though the informal institutions that allowed the President to exercise unchecked political power mostly disappeared as the PRI hegemonic rule unraveled,[45] the patterns of amendment in the decades that followed suggest that new ones (inevitably influenced by old ones) emerged. One in particular: what I call the rule of cooperation. This unwritten rule is crucial to understanding why the amendment mechanism remained accessible in the following decades.

3.1. The emergence of the rule of cooperation 1988–97

As noted above, in 1988, the PRI lost its ability to amend the Constitution on its own. The party now needed the cooperation of the opposition (and vice versa). This mutual need, in combination with the right incentives, allowed cross-party cooperation to become a norm that, since then, has shaped the patterns of constitutional politics in Mexico.[46] The rule of cooperation operates through party discipline, which facilitates

40 Elkins, Ginsburg, & Melton, *supra* note 32, at 198; Magaloni, *supra* note 29, at 182.

41 The notion of unwritten rules may include political norms, constitutional conventions, and more generally, in Helmke and Levitsky's terms, "socially shared rules, usually unwritten, that are created, communicated, and enforced outside officially sanctioned channels." In the present article, the notion of unwritten rules is understood in the latter sense. I use the terms "unwritten rules," "informal institutions," and "norms" interchangeably. *See* Gretchen Helmke & Steven Levitsky, *Introduction* to Informal Institutions and Democracy: Lessons from Latin America 1, 5 (Gretchen Helmke & Steven Levitsky eds., 2008). For a discussion of the notion of political norms and conventions, see Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 Ind. L.J. 177 (2018); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States Symposium: Constitutional Traditions: Akhil Amar's America's Unwritten Constitution*, 2013 U. Ill. L. Rev. 1847 (2013); A.V. Dicey, Introduction to the Study of the Law of the Constitution 422 (1889).

42 Elkins, Ginsburg, & Melton, *supra* note 32, at 194–5. *See also* Jorge Carpizo, El Presidencialismo Mexicano (16th ed. 2002); Joy Langston, *The Birth and Transformation of the Dedazo in Mexico*, *in* Informal Institutions and Democracy: Lessons from Latin America, *supra* note 41, at 143.

43 *See, e.g.*, Weldon, *supra* note 29, at 254; Magaloni, *supra* note 29, at 184; Casar, *supra* note 31.

44 Elkins, Ginsburg, & Melton, *supra* note 32, at 192; Weldon, *supra* note 29.

45 Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, *in* International Handbook on Informal Governance 85, 92 (Thomas Christiansen & Christine Neuhold eds., 2013).

46 Mariana Velasco-Rivera, Why Mexico Keeps Amending Its Constitution: Secrets of a Cartel Democracy 169 (Dec. 2019) (J.S.D. dissertation, Yale University) (on file with author).

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bargaining among party leaders, and makes constitutional decision-making highly centralized and efficient. In Mexico, the rule of cooperation manifests in the form of fast-track adoption of amendments (measured by the time that it takes for an amendment initiative to go through each of the steps of the amendment process) and rubber-stamping ratification.[47] Both fast-track processes and rubber-stamping ratifications suggest that, like in the hegemonic PRI era, political parties remain extremely disciplined and constitutional decision-making highly centralized.[48] In short, the amendment mechanism has remained easily accessible in a context of political plurality because, even though the political system became a competitive one, its unwritten norms largely resemble old ones, including the strong party discipline that historically characterized the PRI.

The emergence of the rule of cooperation was also facilitated by the embracement of the idea of consensus (as a necessary element for the realization of democracy) by political actors. Despite its electoral loss in 1988 and the social and political landscape between then and 1997, the PRI maintained the ability to block amendments, influence the narrative of the time, and dictate the pace, terms, and conditions for regime change.[49] Even though at the level of Congress the PRI did not have the supermajorities required by the amendment mechanism, it controlled the majority of state legislatures (and the majority in Congress to pass ordinary legislation).[50] This put the PRI in a privileged bargaining position: should the opposition parties have wanted to transform their long-standing demands into constitutional law they would have needed to cooperate with the PRI. The privileged position of the PRI during this period, in combination with the legitimacy crisis of the government after the 1988 presidential election fraud debacle, the instability created by the Zapatista Army of National Liberation's (EZLN) uprising against Salinas's economic agenda,[51] and the political assassinations that occurred in 1994, allowed the government to influence the narrative setting the future norms of political interaction. Such events were taken as opportunities to call for unity among parties and to champion the idea of consensus (as a shorthand for the absence of conflict/confrontation) as a necessary element for the realization of democracy. As explained below, the patterns in which amendments were adopted suggest that the strategy worked, and its effects have lasted into our days.

In his inauguration and against the backdrop of widespread and credible allegations of electoral fraud, President Salinas embraced the notion of consensus, declaring:

[47] Velasco-Rivera, *supra* note 15, at 249–61.

[48] Fast-track processes are a feature in constitution-amending processes in Mexico: in the period between 1997 and 2017, on average, the chamber of origin took 2.7 days to discuss and pass legislative committee reports on amendment initiatives and the reviewing chamber 1.3 days. *See id.* at 257; Velasco-Rivera, *supra* note 46.

[49] Alberto Diaz-Cayeros & Beatriz Magaloni, *Party Dominance and the Logic of Electoral Design in Mexico's Transition to Democracy*, 13 J. Theoretical Pol. 271 (2001); Velasco-Rivera, *supra* note 46, at 117.

[50] Between 1988 and 2000, the PRI held 52% (1988–91), 64% (1991–4), 60% (1994–7), and 48% (1997–2000) of the seats in the Chamber of Deputies and 94% (1988), 74% (1994), and 59% (1997) of the seats in the Senate, as well as controlling the majority of state legislatures and the majority of governorships. *See* Casar, *supra* note 31, at 136; Casar & Marván, *supra* note 27, at 30–1.

[51] Consuelo Sánchez, *Breve Historia del EZLN*, 32 Boletín de Antropología Americana 127, 127 (1998).

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> [I]t is time to strengthen national unity through the path of dialogue, respect and good faith. That will be the attitude of this government in the new stage that we are starting today. . . I am determined to carry out a democratic reform, I have invited political parties to dialogue; . . . I know that it is a matter of interest to all the political forces of the country . . . let's work together on that task. The depth and pace of reform will be a consequence of the degree of consensus that the various political forces will build.[52]

Shortly after, in early 1990, the Constitution was amended both to create the Instituto Federal Electoral (IFE, an independent agency in charge of the organization and oversight of federal elections and a long-standing demand of the opposition) and to privatize the bank system (an item on Salinas's policy agenda).

Moreover, in his memoirs, Salinas recalls that, in the midst of the EZLN uprising on January 1, 1994 (a presidential-election year and the day the North America Free Trade Agreement came into force), his administration opted for "deepening political dialogue and *consensus as a method*."[53] In just a few days, the EZLN showed its great potential of political and social destabilization: for twelve days, there were attacks on public buildings in different cities in Chiapas.[54] In the wake of these events and reflecting the "method" of consensus, President Salinas convened a negotiation group that included the national leaders of the major political parties (i.e. Partido Acción Nacional, PAN, and Partido de la Revolución Democrática, PRD) to exchange ideas on how to deal with the uprising and ensure the integrity of the elections later that year. As a result of this group's negotiations, on January 27, its members and all presidential candidates signed the National Agreement for Peace, Justice and Democracy, where they rejected violence and committed to, among other things, the adoption of measures to secure the trustworthiness of electoral results—namely, the adoption of constitutional amendments altering the electoral system.[55]

Another significant measure included in this agreement was the commitment to include ordinary citizens in the IFE, which required modifying the composition of its governing bodies to include individuals appointed by the Chamber of Deputies and allow electoral observers during all stages of electoral processes.[56] In April 1994, this and other measures were added to Article 41 of the Constitution.[57] This was a

[52] Carlos Salinas de Gortari, President of Mexico, Discurso de Toma de Posesión [Inaugural Address] (Dec. 1, 1988), http://cronica.diputados.gob.mx/DDebates/54/1er/Ord/19881201.html (translation by author).

[53] Carlos Salinas de Gortari, México, un paso difícil a la modernidad 1585 (2013) (translation by author); Ricardo Becerra, Pedro Salazar, & José Woldenberg, La mecánica del cambio político en México: Elecciones, partidos y reformas 270–1 (2000).

[54] José Woldenberg, Historia mínima de la transición democrática en México 70 (2012).

[55] Jorge Carpizo, *La reforma electoral de 1994*, *in* Elecciones, diálogo y reforma: México 1994, at 85 (Jorge Alcocer, Jorge Carpizo, & Eugenia Huerta eds., 1995); Fernando Orgambides, *Pacto por la paz, la democracia y la justicia*, El País (Jan. 29, 1994), https://elpais.com/diario/1994/01/29/internacional/759798004_850215.html.

[56] Becerra, Salazar, & Woldenberg, *supra* note 53, at 329; Carlos Martínez Assad, *El IFE y la ciudadanización de la política*, Este País (Feb. 1999), https://archivo.estepais.com/site/wp-content/uploads/2010/06/6_ensayo_elife_martine.pdf; Salinas de Gortari, *supra* note 53.

[57] Constitución Política de los Estados Unidos Mexicanos [CPEUM] art. 41, DOF 04-19-1994, www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_131_19abr94_ima.pdf.

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significant amendment that, under conditions of political fragmentation and under a formally rigid constitution, one would expect to be difficult to adopt. Yet, the consensus approach (which made possible the political agreement before activating the amendment provision) allowed the whole constitutional amendment process (from initiative to enactment) to take twenty-eight days.[58]

Similarly, in his inaugural address of December 1, 1994, President Zedillo signaled that he would follow the Salinas administration's approach: "To a great extent, the advancement of democracy depends on the strength of our party system. It depends on our ability to privilege *consensus* over difference, the cohesion of objectives [*propósitos*] over disagreements, unity over confrontation."[59] He also announced his intention to adopt a sweeping judicial reform to strengthen the judiciary and balance the three branches of government.[60] Two weeks later, the Senate passed President Zedillo's amendment initiative to reduce the membership of the Supreme Court from twenty-six to eleven, reestablish the judicial appointment mechanism that gave the president a central role in the judicial appointment process, eliminate mandatory retirement for Supreme Court judges at seventy years of age and replacing it with fifteen-year terms, create new constitutional judicial review mechanisms, and establish a federal judicial council.[61] By December 31, the amendment was already enacted.[62] The Supreme Court now had competence allocation powers and abstract review jurisdiction while all sitting members were to be replaced in thirty days.[63]

Perhaps the best example to illustrate that the rule of cooperation had a lasting impact in Mexican constitutional politics is the more recent example of the Pacto por México (Pact for Mexico)—a written agreement between President Peña Nieto and the (non-democratically elected) leaders of the PRI, PAN, and PRD. The agreement was signed the day after President Peña's inauguration on December 1, 2012. The constitutional amendments adopted between December 2012 and 2017 can only be understood in the context of this pact. The results of the 2012 presidential election were close and not free from allegations of fraud. With 38% of the vote, visible social unrest against his presidency, and without a majority in either of the chambers of Congress, Peña Nieto needed to legitimize his office. Entering into a cross-party agreement to bring forward structural reforms that were portrayed as essential to move Mexico towards progress was the perfect means to that end. The positive international

[58] Carpizo, *supra* note 28, at 576; Carpizo, *supra* note 55, at 13–91.

[59] Ernesto Zedillo, Discurso de Toma de Posesión [Inaugural Address] (Dec. 1, 1994), http://cronica.diputados.gob.mx/DDebates/56/1er/Ord1/19941201.html (emphasis added); Julio Labastida & Miguel Armando López Leyva, *México: Una transición prolongada (1988–1996/97)*, 66 Revista Mexicana de Sociología 749, 787–8 (2004).

[60] Labastida & López Leyva, *supra* note 59, at 787–8; Velasco-Rivera, *supra* note 46, at 143.

[61] Diario de los Debates de la Cámara de Senadores del Congreso de los Estados Unidos Mexicanos [DDCS], LVI Legislatura, Año I, Primer Periodo Ordinario, Sesión 15 (Dec. 17, 1994), www.senado.gob.mx/64/diario_de_los_debates/documento/580; Miguel González Compeán & Peter Bauer, Jurisdicción y democracia: los nuevos rumbos del poder judicial en México 141–87 (2002).

[62] Diario Oficial de la Federación [DOF] 12-31-1994 (Mex.).

[63] The new court was installed on February 1, 1995. On this amendment, see, e.g., Compeán & Bauer, *supra* note 61, at 141–87; Zamora & Cossío, *supra* note 25; Fix-Fierro, *supra* note 25.

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media coverage of the Pact for Mexico was perhaps the clearest proof that the PRI succeeded in selling the party as a brand new one, free from its authoritarian past.[64]

Closely resembling Salinas's "consensus method," the Pact for Mexico was negotiated in a period of two months by seven individuals representing the three main political parties and the presidential transition team.[65] It contained ninety-four points of agreement out of which sixty-three required constitutional amendments. The latter included: (i) the public education reform; (ii) the energy reform; and (iii) granting statehood to the Federal District. These amendments were also consistent with the PRI–PAN and PRD's separate agendas. The negotiations were secret and took place without prior notice to party members.[66] In fact, one of the rules of the negotiating group (publicly acknowledged afterwards) was to work inconspicuously—only after reaching a definitive agreement did the members of the negotiating group turn to work within their respective parties to build the indispensable *consensus* to secure the success of the pact (i.e. the passage of the reforms).[67]

The education reform initiative was presented by President Peña Nieto on December 10, 2012 and it was enacted on February 26, 2013. As for the energy reform, between July and October the major parties presented different initiatives, but it took two days for the amendment to wend its way through both chambers of Congress from the moment the legislative committee presented its report to the Senate, and seventy-two hours to be ratified by the majority of state legislatures.[68] Seven days later, it was ratified by twenty-three out of thirty-two state legislatures. In the case of granting statehood to the Federal District, the amendment's adoption took nine months from the moment the legislative committee presented its report (on different initiatives presented between 2010 and 2014) to the Senate on April 28, 2015 to its enactment on January 29, 2016.[69] Though this might sound like a relatively long time, it must be noted that deliberation and voting occurred in only three legislative sessions (two in the Senate and one in the Chamber of Deputies) and ratification took roughly a month.[70]

These amendments changed hard-wired provisions (e.g. the integration of the IFE, the membership and Supreme Court judges' term limits, and the statehood of the Federal District) through fast-track processes facilitated by the rule of cooperation.

[64] *See, e.g.*, Michael Crawley, *Saving Mexico, How Enrique Peña Nieto's Sweeping Reforms Have Changed the Narrative in His Narco-Stained Nation*, TIME.com (Feb. 24, 2014), http://content.time.com/time/covers/pacific/0,16641,20140224,00.html; *With a Little Help from My Friends*, The Economist (Dec. 8, 2012), https://econ.st/2UMTfHR.

[65] Gustavo Madero and Santiago Creel from PAN; Jesus Zambrano and Jesus Ortega from PRD; and Luis Videgaray and Miguel Angel Osorio Chong, representing the transition team.

[66] Claudia Guerrero, *Fraguan el pacto durante dos meses*, Reforma, Nov. 28, 2012, at 5.

[67] *See ¿Cómo Se Logró?*, Pacto por México, https://web.archive.org/web/20130304194129/http://pactopormexico.org/como (last visited July 20, 2021) (emphasis added).

[68] Velasco-Rivera, *supra* note 15, at 259.

[69] Cámara de Diputados del H. Congreso de la Unión, Decreto por el que se declaran reformadas y derogadas diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia de la reforma política de la Ciudad de México, DOF 29-01-2016, at 1, 2–3 (Jan. 29, 2016), www.diputados.gob.mx/LeyesBiblio/proceso/docleg/63/227_DOF_29ene16.pdf.

[70] *Id.*

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Between 1988 and 1997, the right incentives were in place for political parties to cooperate with each other. The Salinas and Zedillo administrations secured the cooperation of the opposition over time by partially granting long-standing demands. For instance, the IFE (a long-standing demand of the opposition) was created to organize and oversee elections in 1990 but it was not until 1994 that its membership changed to include ordinary citizens.[71] To be sure, from 1988 to 1997, the PRI had the required majorities in Congress to pass ordinary legislation on its own and arguably could have brought its agenda forward without the cooperation of the opposition. However, there were key aspects of the PRI agenda that would not have been possible to implement without constitutional amendments (e.g. privatization of the bank system). Finally, those were also socially, economically, and politically turbulent years that put the PRI regime under considerable pressure. In sum, for different but related reasons, the government needed to legitimize itself and create a sense of political and institutional stability. Cooperating with the opposition would give the PRI just that.

4. Rethinking constitutional rigidity

The Mexican experience shows that key determinants of amendment difficulty are to be found beyond institutional design, and stresses the importance of paying attention to non-institutional and/or political factors to understand constitutional rigidity. This is in line with recent studies that have challenged the conventional wisdom regarding the impact of amendment rules on constitutional rigidity, stressing the need of looking at factors like the "amendment culture" to better understand constitutional change dynamics.[72] In particular, there are at least three lessons that may be drawn from the Mexican case that can deepen our knowledge of the factors that influence constitutional rigidity. First, and taking up Ran Hirschl's call for a strategic-realist approach to understanding the origins of formal constitutional change,[73] constitutional scholarship needs to shift its attention to political parties and party systems. Second, unwritten rules influencing the behavior of party members need further study. Finally, we must carefully look at the agency of constitutional decision makers, specifically regarding the choices they make among different institutional means to advance their interests and agendas.

The need to shift the attention to political parties is based on the crucial role that they have in bringing about formal constitutional change and, by implication, in influencing how amendment rules operate in practice. The Mexican case would be impossible to explain by looking only at the amendment rule without addressing the party system.[74] Given that, as a general rule, those with the legal power to activate

[71] *See* Velasco-Rivera, *supra* note 46, at 132 ("This reform was a partial victory because . . . the executive branch . . . still held a seat on the general council (*consejo general*)").

[72] Ginsburg & Melton, *supra* note 7; Jackson, *supra* note 7; Albert, *supra* note 7, ch. 3.

[73] Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law 151–91 (2014).

[74] *See* Tarunabh Khaitan, *Political Parties in Constitutional Theory*, 73 Current Legal Probs. 89, 90 (2020) ("It is almost impossible to properly understand the functioning of different institutional arrangements without a close attention to the party system in which they operate").

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amendment mechanisms in constitutional democracies are members of political parties, scholarship seeking to understand how amendment rules influence constitutional rigidity must shift its attention to political parties and the systems in which they operate in order to capture the political dimension of formal constitutional change.[75]

This may sound obvious to scholars who have long studied institutions from a social science perspective.[76] Yet, even though social scientists have taken the lead in seeing political parties as a variable in answering questions related to constitutional change and constitutional choice,[77] to date there is still no consensus as to what the determinants of constitutional rigidity are.[78] The panorama in legal scholarship is not better. As discussed in Part I, understandings of constitutional rigidity are still largely formalistic. In the United States, the idea that amendment difficulty stems from Article V is largely taken for granted.[79] Looking beyond the United States and studying those jurisdictions where the use of mechanisms of formal constitutional change is more frequent may prove illuminating to deepen our understanding of the factors that influence amendment difficulty and, therefore, to understand why very similar rules operate so differently. As Tarun Khaitan rightly points out, "[c]onstitutional scholarship that confines itself to institutional analysis alone, without understanding how they are conditioned by political parties, is looking at a seriously distorted picture of constitutional practice."[80]

Shifting the attention to political parties in order to deepen our knowledge of the determinants of constitutional rigidity requires a move from a normative to a *strategic-realist* approach.[81] The literature on comparative constitutional amendment is permeated by normative ideas about constitutional change.[82] For instance, Richard

[75] *See, e.g.*, Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, *in* Democratic Constitutional Design and Public Policy: Analysis and Evidence 319, 342 (Roger D. Congleton & Birgitta Swedenborg eds., 2006) (arguing that the frequency of amendments also depends on "economic, political, and cultural circumstances"); Xenophon Contiades & Alkmene Fotiadou, *The Determinants of Constitutional Amendability: Amendment Models or Amendment Culture?*, 12 Eur. Const. L. Rev. 192, 210 (2016) (noting that explanations of amendability should include accounts of "political conflicts, distrust, polarization, and veto strategies").

[76] Hirschl, *supra* note 73, at 160, 176. *See also, e.g.*, Douglass C. North, Institutions, Institutional Change and Economic Performance (1990); James M. Buchanan & Gordon Tullock, The Calculus of Consent (1961).

[77] *See, e.g.*, Astrid Lorenz, *How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives*, 17 J. Theoretical Pol. 339 (2005); Gabriel Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 Law & Soc'y Rev. 749 (2012); Gabriel Negretto, Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America (2013); Alexander Hudson, The Veil of Participation: Citizens and Political Parties in Constitution-Making Processes (2021).

[78] *See generally* Cristina Bucur & Bjørn Erik Rasch, *Institutions for Amending Constitutions*, *in* 2 The Oxford Handbook of Public Choice 163 (Roger D. Congleton, Bernard N. Grofman, & Stefan Voigt eds., 2019) (giving an overview of the works that try to measure amendment difficulty and reporting that to date there is no conclusive answer).

[79] *See, e.g.*, Jackson, *supra* note 7, at 584 (noting that the idea that amendment difficulty stems from Article V of the US Constitution is widely echoed in the scholarly literature).

[80] Khaitan, *supra* note 74, at 2.

[81] Ran Hirschl, *The Strategic Foundations of Constitutions*, *in* Social and Political Foundations of Constitutions 157, 163–170 (Denis J. Galligan & Mila Versteeg eds., 2013).

[82] This trend is in line with what Ran Hirschl has identified as the "ideational accounts" of constitutions. *See id.* at 158–61.

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Albert maintains that the continued high amendment rates in some American states, despite the presence of stringent amendment rules, are due to the fact that citizens in those jurisdictions "view amendments as an appropriate means of bringing about changes in governance."[83] While this may be true, it does not explain what the actors and factors directly driving constitutional change are and why frequent amendments are possible despite heightened formal difficulty.[84] Assuming a direct link between constitutional amendments and the popular will conflates the normative and empirical dimensions of constitutional change and obscures its direct drivers: those actors who have the legal power to put in motion the amendment mechanisms, as well as the concrete political, economic, and social conditions within which amendments are adopted.

In contrast, in Hirschl's words, a strategic-realist approach operates on the premise that "constitutions are human-made institutions; their establishment, amendment or abolition is carried out by identifiable actors—not abstract ideas or amorphic organic pressures, but real people who make concrete decisions and choices."[85] It also assumes that, when choosing constitutionalization, those actors act motivated by self-interest rather than altruism.[86] Accordingly, since, as a general rule, members of political parties have the legal power to propose and adopt amendments, to a greater or a lesser extent (depending on concrete contextual conditions) amendments would inevitably respond to the logic of party politics. In this respect, amendments must be understood as having the function of political entrenchment.

To be sure, the strategic-realist approach is present in comparative constitutional law scholarship.[87] Prominently, Hirschl and Ginsburg employ it in their analysis of judicial empowerment.[88] These works are able to explain the use of mechanisms of formal constitutional change as a hegemony-preserving maneuver by those powerholders who fear to lose their hold on political or cultural dominance in the short term. However,

[83] Albert, *supra* note 7, at 114.

[84] Similarly, writing for a symposium on Albert's book, see Mark Graber, *Constitutional and Generational Change*, Balkinization (Apr. 23, 2020), https://balkin.blogspot.com/2020/04/constitutional-and-generational-change.html (arguing "[o]ne distinctive feature of Constitutional Amendments is that . . . Albert rarely uses proper names. Ecuadorians amend the national constitution, not a political faction led by the named persons. For those of us who spent a . . . career attempting to collapse the law/politics distinction, this tendency to speak of actions without actors is problematic") (*Id.*).

[85] Hirschl, *supra* note 81, at 165.

[86] *Id.* at 166.

[87] *See, e.g.*, Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (2003); Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004); Jodi S. Finkel, Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s (2008); Elkins, Ginsburg, & Melton, *supra* note 32; Daniel M. Brinks & Abby Blass, The DNA of Constitutional Justice in Latin America: Politics, Governance, and Judicial Design (2018). This approach is also present in studies of transition to democracy, see, e.g., Guillermo A. O'Donnell & Philippe C. Schmitter, Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies (1986); 2 Transitions from Authoritarian Rule: Latin America (Guillermo A. O'Donnell, Philippe C. Schmitter, & Laurence Whitehead eds., 1986); Adam Przeworski, Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America (1991).

[88] Ginsburg, *supra* note 87; Hirschl, *supra* note 87.

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they are not able to explain why in subsequent periods (after judicial empowerment and in a context of competitive electoral systems) the relevant political stakeholders would continue to opt for formal constitutional change. In this context, the Mexican case suggests that constitutional amendments can serve the function that courts serve in the judicialization of politics model. This is why it is important to develop rational strategic accounts to understand why in some contexts actors opt for formal constitutional change and in others for informal constitutional change through mechanisms such as judicial review.

If we accept that political parties are a key factor to understand constitutional rigidity, the second lesson to draw from the Mexican case naturally follows. Given that political parties are not monoliths but are constituted by rational, self-interested individuals whose actions, preferences, and choices are shaped by the structures and context they operate in, the role of unwritten norms and conventions that influence and drive their behavior becomes relevant.[89] In the Mexican case, the rule of cooperation plays a crucial role in explaining the high amendment rate. But this does not imply that there is something atypical or dysfunctional exclusive to Mexican constitutional politics. In fact, the rule of cooperation may be understood as a manifestation of logrolling (the practice that refers to legislative vote trading), which is an essential feature of any legislative process.[90] Provided that we set aside the normative approach to constitutional amendments, there is no reason to believe that constitutional amendment processes are exempt from these dynamics simply because the procedures regulating them are different from those regulating the ordinary legislative process.[91]

Finally, the third lesson refers to the agency of constitutional decision makers. In the Mexican case, a good example to illustrate this point is Benito Juarez's decision to drop the idea of amending the constitution by popular referendum and to opt for the amendment mechanism in 1867. After the fall of the Second Mexican Empire (1863–7), Juárez called for the election of the President, the Chief Justice of the Supreme Court, and members of Congress. The call also included a referendum on a series of constitutional amendments which, among other things, would reestablish a bicameral system and introduce the presidential veto.[92] The referendum proposal unleashed a heated debate on whether it was legitimate to ignore the constitutional amendment rules.[93] While the government defended the proposal as a legitimate appeal to the

[89] North, *supra* note 76; Helmke & Levitsky, *supra* note 41.

[90] Anthony J. McGann, *Logrolling and Coalitions*, *in* 1 The Oxford Handbook of Public Choice 453 (Roger D. Congleton, Bernard Grofman, & Stefan Voigt eds., 2019).

[91] *See* Ferejohn, *supra* note 16, at 527 ("[C]onstitutional politics is not intrinsically different from ordinary politics and . . . the stakes, while sometimes [though not always] larger, are not entirely different from those of more mundane political life").

[92] Benito Juárez, *Convocatoria a elecciones y a plebiscito sobre reformas constitucionales (14 de agosto de 1867)*, *in* Benito Juárez: Documentos, discursos y correspondencia 363, 363–70 (Jorge L. Tamayo ed., 1974); José Ramón Cossío Díaz, El Senado de la República y las relaciones exteriores 259 (2003); José Fuentes Mares, *La Convocatoria de 1867*, 14 Historia Mexicana 423, 425 (1965).

[93] *See* Charles A. Hale, The Transformation of Liberalism in Late Nineteenth-Century Mexico 70–1 (1989) (noting that the "[a]pproval would mean dispensing with the normal procedure for amending the constitution . . . and would allow instead for the reforms to be decided by majority vote in the Chamber of Deputies").

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people,[94] opposition to it was vast. Journalists described it as a plot against the sovereignty of "the nation" and an artful conspiracy against institutions.[95] Some governors refused to publicize the section containing the referendum to prevent people from voting on it.[96] Eventually, Juárez capitulated, deciding to leave the matter to the "wisdom of Congress" through the ordinary constitutional amendment process.[97]

This episode illustrates that choices made by constitutional decision-makers do not happen in a vacuum but are influenced by the social, political, and economic environment in which they operate. In this case, Juarez's capitulation seems to have been motivated by the political pressure he experienced after issuing the call for elections rather than by the design of the amendment mechanism. In the absence of that political pressure, perhaps the amendments would have been adopted via referendum.

Moreover, choices could also be influenced by particular constitutional doctrines. For example, for more than forty years the Supreme Court of Mexico has refused to substantively review the constitutionality of constitutional amendments based on the notion of a materially unlimited "permanent constituent power."[98] Coined by Felipe Tena Ramirez, this notion posits that once the original constituent power is exhausted, a materially unlimited *permanent* constituent power emerges.[99] According to Tena, the permanent constituent power is located in a two-thirds majority of each chamber of the Federal Congress and in the majority of the state legislatures (i.e. the amendment mechanism). The embracement of this notion by the Court has resulted in what may be called the permanent constituent power (PCP) doctrine—which rejects the possibility of substantively reviewing the validity of constitutional amendments.[100]

The PCP doctrine is likely influencing the choices of political actors to use the amendment mechanism for one simple reason: it works as a form of insurance similar to what Hirschl and Ginsburg propose.[101] It guarantees the insulation of cross-party

[94] Sebastián Lerdo, *Circular del Ministro de Gobernación que explica el objeto de Plebiscito*, *in* Benito Juárez: Documentos, discursos y correspondencia, *supra* note 92, at 370, 370–9.

[95] Hale, *supra* note 93, at 71.

[96] Fuentes Mares, *supra* note 92, at 436.

[97] Hale, *supra* note 93, at 74.

[98] Felipe Tena Ramírez, Derecho constitucional mexicano (28th ed. 1994); *see also* Ramón Sánchez Medal, El fraude a la Constitución y el único amparo en México contra una reforma demolitoria de la Constitución (1988). The cases in which the Court has engaged in this question include: Suprema Corte de Justicia [SCJN], Amparo en Revisión 2696/1996, Feb. 3, 1997; Suprema Corte de Justicia [SCJN], Amparo en Revisión 1334/1998, Sept. 9, 1998; Suprema Corte de Justicia de la Nación [SCJN], Controversia Constitucional [CC] 82/2001, Sept. 6 2002; Suprema Corte de Justicia [SCJN] (Second Chamber), Amparo en Revisión 123/2002, Apr. 10, 2002; Suprema Corte de Justicia [SCJN], Acción de Inconstitucionalidad 168/2007, June 6, 2008; Suprema Corte de Justicia [SCJN], Acción de Inconstitucionalidad 169/2007, June 6, 2008; Suprema Corte de Justicia [SCJN], Amparo en Revisión 186/2008, Sept. 29, 2008; Suprema Corte de Justicia [SCJN], Amparo en Revisión 2021/2009, Mar. 28, 2011; Suprema Corte de Justicia [SCJN] (Second Chamber), Amparo en Revisión 488/2010, 2008/2009, 1989/2009, 1858/2009, 896/2008, Oct. 5, 2011.

[99] Tena Ramírez, *supra* note 98. *But see* Mariana Velasco-Rivera & Joel Colón-Ríos, On the Legal Implications of a "Permanent" Constituent Power (Apr. 23, 2021) (unpublished manuscript) (on file with author); Velasco-Rivera, *supra* note 46, at 237–82.

[100] Velasco-Rivera, *supra* note 46, at 237–82.

[101] Ginsburg, *supra* note 87; Hirschl, *supra* note 87; Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 Int'l J. Const. L. 988 (2017).

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agreements directly entrenched in the constitution, as it removes them from the sphere of judicial oversight.[102] In this context, the PCP doctrine is an additional factor that may be driving the incentives of the relevant actors to use the amendment mechanism as an effective means for political entrenchment and informing their perceptions about its suitability to that end.[103] Should the PCP doctrine be reversed, it is reasonable to believe that this change could impact the perceptions about the suitability of constitutional amendments to advance and entrench political agendas and, thus, reduce the inclination of the relevant political stakeholders to resort to the amendment mechanism as often.

In this way, the Mexican case also sheds light on the importance of gaining knowledge about historical legacies and the constitutional culture of the jurisdiction under study in order to capture what might explain stakeholders' decisions. The fact that choices among different institutional mechanisms to entrench particular interests are context-dependent means that they will vary across jurisdictions and may change across time.[104] Decisions will be taken based on the perceived suitability of the different institutional means provided by a given constitutional order. Those perceptions would be influenced by a myriad of factors, including but not limited to political ones (such as the pressure experienced by Juárez), changes in the distribution of power, or particular constitutional doctrines (as the PCP doctrine).

5. Conclusion

The design similarities between the amendment mechanisms in Mexico and the United States, and their opposite amendment realities, evidence the limitations of focusing on institutional analysis alone to understand amendment difficulty. As I hope the examples analyzed in Section 3 illustrate, once the right incentives for cross-party cooperation (in combination with party discipline) were in place, the institutional design of the amendment rule had a limited impact on constitutional rigidity. The implication of a strategic-realist approach is that when zooming in to the actors that have the legal power to activate the mechanisms of constitutional change, whether formal or informal, one must acknowledge that constitutional change is not necessarily the result of instances of higher lawmaking.[105] Consequently, constitutional change may be understood as largely driven by political actors looking to insulate their interests and agendas through the institutional means available.[106]

[102] Velasco-Rivera, *supra* note 46, at 277–8.

[103] *Id.* at 237–82.

[104] *See* Albert, *supra* note 7, at 125–6 (discussing the sensitivity of constitutional flexibility/rigidity to time in the US context).

[105] *See* Hirschl, *supra* note 73, at 152–3 ("Any attempt to portray the constitutional domain as predominantly legal, rather than imbued in the social or political arena is destined to yield thin, ahistorical, and overly doctrinal or formalistic accounts. . .").

[106] For a similar understanding of constitutional change in the United States that focuses on the judiciary, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045 (2001). *See also* Mark V. Tushnet, Why the Constitution Matters (2010); Mark A. Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. Rev. 611, 626, 644 (2014); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 Yale L.J. 400 (2015).

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The Mexican case suggests that constitutional amendments may provide political actors with a similar kind of insurance to that provided by courts according to the judicialization of politics model. As illustrated in Section 3, constitutional amendments have been a prevalent means of political entrenchment in Mexican constitutional history. Political parties have been able to access the amendment mechanism to deal with various issues and preserve their interests across time. While the normative dimension of formal constitutional change—that is, whether amendments respond to popular demands—is an important question that requires scholarly attention, in the context of the study of constitutional rigidity it tends to obscure the factors that determine amendment difficulty. A strategic-realist perspective requires us to come to terms with the fact that constitutional change is mainly a mediated phenomenon and that the role of political parties must be taken seriously to understand constitutional rigidity.

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