



MEXICO'S 2007 ELECTION REFORMS: A COMPARATIVE VIEW

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ABSTRACT. *This note explores Mexico's 2007 election reforms from a comparative perspective and offers a few cautionary notes on the long-term consequences of Mexico's constitutional choices. It also offers a brief analysis of the electoral system of the USA and the situation which arose in the 2000 Bush vs. Gore election.*

KEY WORDS: *Democracy, constitutional reform, elections, campaign financing.*

RESUMEN. *Este ensayo presenta un análisis desde una perspectiva comparada de la reforma electoral mexicana de 2007 y ofrece algunas advertencias con respecto a las consecuencias a largo plazo de las decisiones constitucionales que ha tomado México. También estudia el sistema electoral de los Estados Unidos de América y la elección de 2000 entre George W. Bush y Al Gore.*

PALABRAS CLAVE: *Democracia, reformas constitucionales, elecciones, financiamiento de campañas políticas.*

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I. INTRODUCTION

It is hard not to be impressed with Mexico’s election reforms during the last two decades. For a scholar who studies the United States, a mature democracy that is often run badly, it is refreshing to see a relatively young democracy run so well. It is also heartening that an “electoral meltdown”¹ can result in serious reform and grassroots engagement. The fiasco that confronted the United States in 2000 prompted Congress to pass the toothless Help America Vote Act, which addressed only the symptoms of the Florida debacle, not its root causes. The 2006 crisis in Mexico, in sharp contrast, resulted in serious and systemic reform. In the United States, election reform is almost entirely an elite enterprise, with little by way of grassroots involvement. In Mexico, election reform is a source of genuine participatory engagement. The failure to pass serious election reform in Mexico after 2006 would have raised serious questions about the legitimacy of the State. The failure to pass serious election reform in the United States after 2000 barely raised an eyebrow.

Because the differences between the two countries are so pronounced, it would be a mistake to insist that lessons learned from the United States necessarily apply to Mexico. For that reason, in this note I will simply draw upon the U.S. experience to raise several questions about the new reforms in Mexico, leaving the answers to those more intimately involved in Mexican politics.

II. CAMPAIGN FINANCE REFORM,
 OSSIFICATION AND LOCK-UP

The 2007 reforms made significant changes to Mexico’s campaign finance system. The new rules prevent individuals and third parties from purchas-

¹ Richard L. Hasen, *Beyond the Margin of Litigation: Reforming Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937 (2005). For an analysis of the Mexican 2006 elections see John M. Ackerman, *The 2006 Elections: Democratization and Social Protest*, in MEXICO’S DEMOCRATIC CHALLENGES (Andrew Selee & Jacqueline Peschard eds., Stanford University Press-Woodrow Wilson International Center for Scholars, 2010).

ing television and radio ads for the purpose of influencing an election, placing restrictions on the content of political speech, and sharply reducing the amount of money available for campaigning. This trio of reforms brings to mind the two main challenges faced by election reformers in the United States: ossification and lock-up.

1. *Two Challenges for Election Reformers*

One perennial problem reformers have encountered in improving U.S. elections is ossification. Law is typically the means used to freeze reforms in place. Its virtue is also its weakness in this regard, as law is often ill-suited for adapting to a changing regulatory environment. Once rules are in place, a set of interests develops around them. As constituencies become invested in the *status quo*, these rules become quite resistant to change. You can see the dilemma for reformers. They want to secure hard-won gains, but the means by which they do so may ultimately prevent regulation from keeping pace with change.

This problem is especially salient for election reformers. For politics to function, it is essential that the rules of the game be fixed in advance. Otherwise, politicians will devote their energies to gaming the system rather than competing on substance. Indeed, because the ruling party will always be tempted to alter the rules of the political game, reform commitments will be perceived as credible only if they are firmly entrenched in the legal system. The problem is that politics, with its fractious energy and entrepreneurial participants, can change quite rapidly, leaving existing regulatory structures behind. Rick Pildes, for instance, has argued that when election law is used to address ethnic discrimination, the need to create “credible institutional commitments” to the minority group can “make it difficult for these institutions... to be adapted down the road as ethnic identifications change.”² He points to the Voting Rights Act in the United States as an example, arguing that the vision of racial empowerment originally embedded in the Act eventually became outdated and was in need of adjustment.³

The second problem for election reformers may be peculiar to elections: avoiding lock-up.⁴ Lock-up occurs when insiders use electoral rules to lock-up the political system. Lock-up can take many forms: the ruling party can lock out its rival, major parties can lock out minor ones, elites can lock out the people. Examples of lock-up abound in the United States. Parties in

² Richard H. Pildes, *Ethnic Identity and Democratic Institutions: A Dynamic Perspective*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION 173, 185 (Sujit Choudhry ed., Oxford University Press, 2008).

³ *Id.* at 195-97.

⁴ Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lock-ups of the Democratic Process*, 50 STAN. L. REV. 643 (1983).

control of the redistricting process use that power to help their own members and hurt their rivals. Campaign finance reform is often thought to be a tool for entrenching the power of incumbents.

Here again, the dilemma for reformers is clear. In order to get change passed, reformers must find a way to appeal to those in power. But when politicians regulate themselves, the temptation for self-dealing is intense. Reform is often hijacked for partisan ends. Indeed, even genuine good governance reforms can further entrench existing institutions and power structures.

2. *Campaign Finance Reform*

The question is whether the problems that plague reformers in the United States —ossification and lock-up— might prove equally troublesome to reformers in Mexico. There are grounds for sounding a few cautionary notes about the reforms Mexico has chosen. In raising these issues, I do not mean to question the importance of the reform nor the good faith of the people who passed it. I simply want to flag some of the potential risks associated with each change.

A. *Channeling electioneering through the parties*

One of the most interesting features of Mexico's recent reforms is its decision to prohibit individuals and third parties from buying radio or television advertising time with the intention of influencing an election.⁵ Given the importance of these media for political campaigns, this rule effectively channels most electioneering —at least the most effective sort— through the political parties.

It is not hard to imagine the attractions of such a proposal. As the U.S. experience with 527 organizations has shown, there are genuine costs associated with pushing electioneering outside of the parties' domain. You might think that parties are more likely to electioneer responsibly, or at least that one can hold them responsible for what they do. You might think that it is easier to trace the effects of money on politics if heavily regulated institutions like parties are the main conduits of political advertising. You might think that it is important for parties and candidates to have some control over the messages broadcast on their behalf.

There are, however, potential costs associated with this choice. To begin, there is a potential risk of ossification. Funneling advertising through

⁵ Senate preamble and full text of the 2007 Electoral Reform, Chamber of Senators, Mexican Congress. See "Legal Documents" in this issue of the MEXICAN LAW REVIEW, Vol. II, No. 1.

the parties gives the party leadership leverage over outsiders, dissenters and minorities. Imagine that you wanted to challenge your party's platform on a highly contested issue. The party leadership will presumably have little interest in getting your message out, and the new rule prevents you from deploying the most natural strategy for countering the party's stance. It is not hard to imagine that such a rule might reinforce the dominance of the major parties, shielding them from outside influence or grass roots pressures. After all, the new rule seems to reduce both voice and exit options for party outsiders.⁶ It cuts off an exit option, preventing would-be dissenters from going outside of the party structure to get their message to the electorate. Concomitantly, would-be dissenters might also find themselves with less voice inside the party, precisely because they no longer have a credible threat of exit.

Some might well welcome efforts to prevent would-be dissenters from going outside of the party structure to pursue their goals. Many think that it is useful for political fights to be resolved within the major parties.⁷ The concern, though, is that a rule might contribute to the ossification of the party structure, protecting it from outside influence and making it more resistant to challenge. Whether ossification occurs, of course, will depend not just on this rule, but also on its interaction with the other features of Mexico's party system.

The lock-up problem may also lurk beneath the surface of this rule. There are many perfectly sensible reasons to channel electioneering through the parties, all consistent with a good-faith view about reform. But one might have a nagging worry that the one thing on which the leadership of all the parties can agree is that they should be the sole conduits for the most important forms of electioneering. Sensible reform strategies can and do coincide with the self-interest of incumbents, of course, but one should nonetheless be aware of the potential problem of self-interest at stake in these reforms.

B. *Restrictions on the content of political appeals*

Mexico has also decided to prohibit political parties from denigrating institutions and parties and from slandering individuals.⁸ This restriction on the content of political speech would seem intriguing to at least some U.S.

⁶ See generally ALBERT O. HIRSCHMAN, *EXIT VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (Harvard University Press, 1970).

⁷ Nate Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 NYU L. REV. 750 (2001); Bruce Cain & Nate Persily, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775 (2000).

⁸ Ackerman, *supra* note 1.

campaign finance advocates. Many bemoan the quality of political discourse in the United States, arguing that it is filled with invective and fails to promote a deliberative ideal.

As a scholar of the U.S. Constitution, it is hard to resist the impulse to focus entirely on the First Amendment implications of such a reform. Much of the First Amendment is built around the assumption that the government should play little or no role in regulating the content of political speech. Because the constitutional regimes of the two countries are so different, however, it seems more productive to focus on the institutional problems this rule might create, and here again ossification and lock-up come to the fore.

To begin, one might worry that this reform risks stultifying politics. It might seem perverse to worry about tamping down on the rough-and-tumble elements of political debate and eliminating the admittedly disgusting personal attacks that sully so many races. But it is a perfectly sensible concern if you believe that what energizes the electorate is the odd fusion of high and low politics that we often see during election season. The drama of the race focuses people's attention on the issues, and candidates provide human stand-ins for abstract policy proposals. In the words of one commentator:

Popular politics has always been like a waterfall, graspable only in motion, always in descent, and yet never quite falling. Politics is not simply a matter of issues — at least not as we generally understand the term today. In a democratic society, politics is not just a means to governance but a form of public spectacle and drama. It is filled with rooting for your side; the joys of partisanship; the camaraderie of shared beliefs; the reveling in political talk; the pleasure of invective... There is no such thing as an engaged politics that does not to some degree derive its vitality from antagonism.⁹

Consider, for instance, the stark divide between electioneering and governing in the United States. A candidate might electrify voters and still find it hard to keep them engaged when he turns to the workaday project of governing. Note, for instance, how hard it has been to convert Obama for America into an equally muscular Organizing for America. Without the drama of the campaign and the excitement generated by personal rivalries, voters tend to fall away. They stop participating. They sometimes even stop paying attention.

If you think politics is what happens when policy gets personal, then you might worry about the effects of a prohibition like Mexico's. Heated electioneering may be both a symptom and source of vibrant participatory activity, and efforts to tamp down on those outbursts may dilute political en-

⁹ Josh M. Marshall, *Tough Chat*, in *THE AMERICAN PROSPECT* Sept-Oct. 1998, at 15.

ergy. I am thus quite sympathetic to Professor Ackerman's claim that the *uncivil* elements of 2006 were signs of vibrant, grassroots organizing that can be very good for the system in the long run.¹⁰ The worry about efforts like Mexico's is that that civilizing politics may deaden it.

Finally, even setting aside the worry about ossification, one might be concerned that the prohibition on political invective fits a bit too easily with the interests of incumbent politicians. After all, it is not hard to imagine that most political name-calling is directed at those in power by those outside of it, if only because challengers need these types of dramatic appeals to get political traction. Justice Scalia made precisely this argument about Congress's decision to restrict the ability of corporations and political parties to fund issue ads. By preventing these institutions from "fund[ing] 'issue ads' that incumbents find so offensive," he insisted, the legislation would "mute criticism of [congressional] records and facilitate reelection."¹¹

C. *Reducing funds available for campaigning*

One might have a similar set of worries about Mexico's decision to cap the amount of money political parties can raise from private sources while reducing the public funds available for campaigning.¹² Campaign finance advocates in the United States inevitably want to pull money out of politics. Indeed, they often argue that taking money away from politicians will drive them toward volunteers and the grassroots rather than the wealthy and the airwaves.

Even setting aside the regulatory challenges involved in reducing money's influence on politics,¹³ the question is whether it's the right strategy for the long haul. The Obama campaign has posed a challenge to reformers in the United States, suggesting that the relationship between money and participation is more complicated than reformers typically suggest. While it clearly does not take \$745 million to run a campaign, Obama was able to energize and organize so many people precisely because of the money he raised. Running a vibrant grassroots campaign turns out to be expensive. Moreover, the Obama campaign suggested that money was not just a means to encourage participation; it was a *form* of participation. Small donors to the Obama campaign became more and more invested in the candidate and gradually began to take part in other activities, like getting out the vote.

¹⁰ Ackerman, *supra* note 1.

¹¹ *McConnell v. FEC*, 540 U.S. 93, 248, 262 (2003) (Scalia, J., dissenting).

¹² Ackerman, *supra* note 1.

¹³ Pamela S. Karlan & Samuel Issacharoff, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

The question for Mexican reformers is this: how much money is needed to run a vibrant political campaign? It makes perfect sense to deny politicians a political feast. But one must also be sure to avoid political famine, starving campaigns of the resources they need to energize the electorate.¹⁴

This worry leads, in turn, to the lock-up question. There is a lively debate in the United States as to whether spending limits make it harder for challengers to take down political incumbents.¹⁵ The concern is that the only way to overcome the power of incumbency is a well-funded campaign. Here again, one might have a lingering worry that political incumbents can always agree upon campaign finance rules that make life more difficult for their challengers.

III. THE IFE AS ÜBER-REGULATOR

Mexico's effort to extend the regulatory authority of the Federal Electoral Institute (IFE) to campaign finance offers a quite different set of regulatory puzzles. Here again, the U.S. reform perspective suggests several questions about the long-term implications of this strategy.

The IFE represents a markedly different approach to election administration than we see in the United States, and most of those differences strongly favor Mexico's approach. The IFE represents a central regulatory authority shielded from politics. In the United States, elections are highly decentralized and often run by partisans. Most academics and reformers strongly favor an approach like Mexico's. There are many advantages to scale in the elections context, and centralization ensures at least rough uniformity in the way elections are run. And precious few defend the U.S. practice of allowing partisans to run elections. We generally do not allow people to referee the game they are playing, and with good reason. It creates too many opportunities for partisan mischief.

It is thus easy to see the reasons for granting IFE additional regulatory authority. It has a relatively good track record in handling even heated political controversies. Moreover, it should be easier to build on IFE's success rather than try to create a robust campaign finance regulator from scratch.

While the IFE reforms have much to recommend them, the U.S. experience suggests at least two kinds of risks that IFE may face in the future, both

¹⁴ With apologies to Justice Souter, who used this phrase to far greater effect in *Johnson v. DeGrandy*, 512 U.S. 997 (1992).

¹⁵ For analysis along these lines, including surveys of the social science literature, see Michael S. Kang, *To Here from Theory in Election Law*, 87 TEX. L. REV. 787, 802-05 (2009); Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31 (2004); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 130-53 (2004).

associated with centralization. The first is the risk of regulatory capture. Capture is always a risk with any agency, but as the IFE's influence grows, so do the incentives for influencing it. One of the few benefits associated with the high level of decentralization in the United States is that the benefits associated with regulatory capture are smaller and thus less likely to be worth the effort. As IFE takes on more regulatory power, reformers and policymakers will need to be even more attentive to maintaining IFE's status as a neutral arbiter of Mexico's elections.

Second, and relatedly, as the IFE's portfolio expands, it may well face more significant challenges to its legitimacy. Challenges to the legitimacy of the decisionmaker in an elections controversy are exceedingly familiar in the United States. When an election fiasco occurs in the United States, even purportedly neutral arbiters are quickly accused of having partisan biases. Judges, for instances, are constantly described as Democrats or Republicans by party elites and the media. Even the Supreme Court, a revered institution in the United States, was tarred with accusations of partisanship when it intervened in the 2000 presidential election.

What may have shielded the IFE thus far from many (but not all) such accusations is that it has dealt only with the nuts-and-bolts issues of election administration. While decisions on basic details inevitably have political consequences, the decisions themselves are generally not politically loaded. As IFE is drawn into issues that are more contestable, however, there is a risk that political elites will have not just more reasons to challenge its judgments, but more tools for doing so. Judgments on how to administer an election tend to be fairly technocratic, reasonably objective, and often dull. It is hard to get voters riled up over them. Judgments on the content of political ads, in sharp contrast, are likely to involve more subjective judgment calls on issues about which everyday citizens will have an opinion. That means that a party or candidate unhappy with an IFE ruling will find it reasonably easy to challenge that judgment publicly and, in doing so, raise questions about IFE's legitimacy.

In sum, IFE's expanded portfolio poses several risks for the institution. The more heavily involved it is in political regulation, the more incentives political elites will have to try to influence it... and attack it. As IFE's portfolio expands beyond arcane election administration issues to controversies that might excite political debate, it will be more vulnerable to those attacks. Neither of these reasons, standing alone, is a reason not to grant IFE additional authority, but they do provide a cautionary note about efforts to expand IFE's authority.

IV. CONCLUSION

Mexico has much to celebrate in the progress it has made in running its elections. This note simply introduces a few, cautionary notes on the long-

term consequences of Mexico's choices, all drawn from the U.S. experience with election reform. Because the United States and Mexico possess markedly different democratic systems, it would be foolish to suggest that the U.S. experience necessarily translates directly into sound advice for Mexican reformers. The point of this essay is simply to raise a set of questions that Mexican reformers and policymakers may wish to consider as the country continues to refine and develop its regulatory approach.