Article: **“Reform Studies: Political Science on the Firing Line”**
Author: Bruce E. Cain
Issue: October 2003
Journal: ***PS: Political Science & Politics***

This journal is published by the American Political Science Association. All rights reserved.

APSA is posting this article for public view on its website. APSA journals are fully accessible to APSA members and institutional subscribers. To view the table of contents or abstracts from this or any of APSA’s journals, please go to the website of our publisher Cambridge University Press (http://journals.cambridge.org).

This article may only be used for personal, non-commercial, or limited classroom use. For permissions for all other uses of this article should be directed to Cambridge University Press at permissions@cup.org .

Reform Studies: Political Science on the Firing Line

by
Bruce E. Cain,
University of California, Berkeley and University of California Washington Center

Political science has a long tradition of research into topics such as campaign finance and redistricting, but these separate efforts have only recently merged into something resembling a recognizable sub-field of political reform. One impetus for this new-found coherence has been the emergence of recent reform concerns regarding such matters as U.S. election administration, primary election procedures, conflict of interest situations, ballot restrictions on minor party candidates, and the need for transparency. The addition of the new on top of the still-unresolved, ongoing problems has yielded plenty of grist for the political science mill.

Political scientists have been drawn into a number of real world, legal, and legislative skirmishes over political reform in the last few years. The legal arena, however, presents both opportunities and problems. On the plus side, expert witnessing directs more empirical research toward topical and sometimes newsworthy problems. Also, it supplements incomes in a profession that normally lags behind the natural sciences and economics in remuneration. However, the adversarial format of legal contests tests and strains the basic norms of social science objectivity and balance. Being a good witness requires supporting one side's arguments and downplaying evidence, as opposed to seeking the right answer and accepting what the data reveal. And on a personal level, testifying on opposing sides in hotly contested legal disputes can exacerbate and artificially heat up scholarly rivalries.

Political reform is best defined as attempts to improve the quality of democratic representation through changes in norms, rules, and institutions. This encompasses efforts to adjust how representatives are chosen (i.e., how votes are apportioned and counted, the fairness of elections systems, how campaigns are conducted and financed, etc.), and also to monitor and control what they do in office (i.e., conflict of interest, bribery, transparency, lobbying reform, etc.). A complete discussion of political reform is necessarily both normative (i.e., what should the desired goals and behavior be) and descriptive/analytical (i.e., how do people in the system behave, what are their incentives, how might those incentives change). The usual intellectual division of labor assigns the former to law professors and the latter to empirical political scientists, but political theorists have sometimes played a part as well.

The emergence of this new field raises some questions. First, given the proliferation of reform concerns, how do we assign priority to them? Are some reforms more essential to a democratic system than others, or are they all equally important? Second, since almost all significant reforms end up in court, and decades of legal rulings based on the First Amendment have significantly limited the scope and nature of permissible changes, how much can we realistically expect to accomplish given an expansive reading of the First Amendment? Third, the legal format and the natural resistance of political actors to changes imposed on them by others lead to wild counter-claims about both problems and solutions. Is this cycle of distortion unavoidable, or can political scientists play a moderating role in the public debate? Last, as the courts have been increasingly drawn into these political reform disputes, is there a danger of excessively "judicializing" politics, and if so, what can be done to limit the courts foray into the political sphere?

Finding Priorities in Political Reform

One of the ironies of contemporary politics is that even though American government is by any measurable standard more open, equal, and non-corrupt than it was 150 years ago, it does not always feel that way. That is in part because of greater transparency and higher expectations. Political coverage from the mainstream media, and now the blogs, is much more intense than it was in earlier historical periods, and the attendant demystification has fed the public's appetite for reform. As the government extends its reach and control over the private sector and civil society, the potential for corruption and improper manipulation of public policymaking also increases. And every time Congress, the president, or state governments delegate to commissions, boards, and other authorities, they create more governing activity to be watched.

Much of this monitoring is done by groups with opposing self-interests. This motivates them to be vigilant, to be sure, but also to exaggerate claims and adopt shrill tones. The average citizen struggles to make sense of all of this: so much dirt is unearthed by professional opposition researchers, and then fed to the press or used in political ads, that there is hardly a public official who has not faced some allegation of malfeasance during his or her career. Sorting the signal from the noise gets harder for the diligent citizen with every passing year.

 DOI: 10.1017/S1049096507071016

Still, the reform frontier moves forward. The traditional corruption paradigm (e.g., the use of public office for private gain) has increasingly given way to a conflict of interest paradigm (e.g., the perceived potential for using public office for private gain). Transparency extends to deliberation and not just to outcomes. Campaign finance reform aims to offset economic inequalities, not just to prevent quid pro quo corruption. Redistricting no longer simply equalizes population and preserves the rights of under-represented minority groups; it is now supposed to facilitate competition. And so forth.

But are all reforms equal in importance? Are some critical to democratic systems and others more a matter of taste? I would argue so. Reforms fall into two broad categories: laws that preserve the basic logic and integrity of democratic systems, and those that are refinements of other values within equally democratic systems. Democratic electoral systems require that the competition for power be decided by the preferences of the electorate. Thus, reforms that deal with the integrity of the balloting system, the secret ballot, non-intimidation of the voters, the right of opposition candidates to compete for seats, and franchise restrictions and such are critical to determining whether a political system is democratic. Democratic governance also requires protections against the private exploitation of public power in the form of prohibitions against bribery, extortion, and using public office for self-enrichment. Such measures ensure that the interests of the public expressed through elections are not perverted by private interests. All OECD nations have protections of this sort (Cain 2002).

This gives priority to the research agenda that has emerged since the 2000 presidential election assessing different methods for counting the vote and ameliorating election administration. If the U.S. cannot count votes accurately, or worse, if there are biased errors that undercount the votes of particular groups or individuals, it will erode confidence in the integrity and the fairness of the electoral system. The empirical work in this area has uncovered the error rates associated with different technologies (punch card, machine, optical scan, etc.) and informed the debate over the optimal technology (e.g., Caltech/MIT Voting Project 2001; Brady, Buchler, Jarvis, and McNulty 2001). Ongoing work by researchers such as Karin MacDonald, Bonnie Glaser, and Thad Hall will reveal much about the importance of poll worker assistance and training.

What we have learned from this is that higher technology does not always equate with progress, errors are hard to avoid, and socio-economic biases may stem from the local basis of election funding. For instance, it is quite possible that poorer, less well-educated communities are more prone to voting problems because their jurisdictions use older technologies and provide less useful assistance at the polling place. Remedying such discrepancies, where documented, is a critical reform challenge.

Another broad type of reform addresses questions that distinguish between different types of democracies rather than between democratic and non-democratic forms of government. To be sure, some of these issues have aspects of both types, depending upon how the reform debate is framed. For instance, extreme mal-apportionment can undermine the democratic principle that the preferences of the many should be preferred over the preferences of the few. But most of the current redistricting debate is about competing values that equally democratic systems might choose to emphasize differently (Mann and Cain 2005). Should redistricting aspire to proportional fairness, or more competitiveness and higher electoral responsiveness? Should formal compactness be preferred to socio-economic homogeneity?

Advanced democracies take very different approaches to redistricting, campaign finance, freedom of information, sunshine laws, direct democracy, and the like. Proposals in these areas do not enjoy the kind of consensus that the first category of reforms do, so the debates are often as much about whether they are desirable as they are about how to implement them. How far these reforms proceed can also vary with the institutional and historical (i.e., path dependent) context within which they occur. For instance, conflict of interest regulation has proceeded more slowly in the British parliament than in the U.S. Congress, because MPs have far less power to influence general government actions than do their congressional counterparts. Where the problems have arisen is in the smaller areas of legislative action, such as question time. Transparency is more rampant in the U.S. than in Britain because of the prospect of divided government and America's stronger First Amendment press tradition. And so forth.

In sum, priority should go to the first type of reform, and to those aspects of the second category of reform that come closest to the first tier concerns. While work on the mechanics of ballots and poll worker training will likely never get the professional recognition that it deserves, its public service value is indisputable.

Reform in America Often Means Finding Second-best Solutions

Baker v. Carr (1962), in retrospect, did far more than open a path into the redistricting thicket. The Supreme Court has been much more active during the last 40 years in considering a number of potentially "political" questions about the constitutionality of different reform laws. These include litigation on the validity of anti-fusion laws, blanket primary rules, minor party ballot access restrictions, term limits, various aspects of direct democracy, the Voting Rights Act, the Electoral College, and campaign finance reform. Most of these cases have been decided on the basis of the First and Fourteenth Amendments, and of these, many have been struck down or substantially modified because they conflicted with the Court's reading of First Amendment rights.

There has been a healthy debate among legal scholars as to whether the Court has taken the right jurisprudential approach. To date, there is only the faintest of signs that the Court might be willing to give a less expansive reading of First Amendment rights in the interests of "better" political processes. *McConnell v. FEC* (2003) gave a stronger reading of equality considerations and the need to avoid the appearance of corruption than did *Buckley v. Valeo* (1976). And in *Timmons v. Twin Cities Area New Party* (1997), the Court held that maintaining a two-party system could be a reason to deny third parties the right to nominate so-called fusion candidates. But the Supreme Court has more often interpreted the First Amendment as a reason to strike down reform efforts, such as limits on campaign expenditures, laws that allowed votes across party lines in primaries, bans on paid petition signature gatherers initiative contests, and contribution limits for initiatives and referenda.

The implication of this for political scientists who study reform is that they must understand the constraints of what can and cannot be done constitutionally. This has been particularly important in the campaign finance reform debate. As many have observed before, the Court's doctrine has left gaping holes in the regulatory framework. The so-called hydrology principle argues that these constitutionally sanctioned holes allow political money to flow around legally permitted barriers, negating their value and significance (Issacharoff and Karlan 1999).

Contribution limits led to PACs and, when PACs did not suffice, to a proliferation of soft money. The McCain-Feingold-Cochran Campaign Reform Bill (commonly, and henceforth in this paper, called simply the McCain-Feingold bill) banned soft

money, leading to more 527 nonprofit activity and "independent" party spending. The exemption for personal expenditures has advantaged wealthy, self-financed candidates. Because public expenditures cannot be mandatory, the system is falling apart at the presidential level as serious candidates ignore the constraints that come with taking public money to raise the private funding they need to gain an edge on their competitors. At the state level, as Ken Mayer and Timothy Werner's research (2007) shows, public financing mostly funds opposing candidates in uncompetitive races. Even enforcement is hampered by First Amendment considerations since the FEC and comparable state agencies are reluctant to take actions that might affect fundamental speech and association rights before the race is decided.

All too often reformers ignore the pink elephant in the room: i.e., First Amendment limitations on what they can do. Some of us have futilely urged a second-best approach that incorporates those constraints and revises goals accordingly. Given the holes, does it make sense to worry a lot about contribution limits? Why not concentrate on a more effective disclosure system that assigns every donor a unique identification number so that the press and others can more easily track the money trail? Or accept the fact that public money will never replace private money and target public money more effectively to help first-time candidates? These steps get overlooked because reformers are in a "state of denial" about the constitutional limits they face.

Hyperbolic Discourse and Political Reform

Because reform is usually made in a politically charged setting, the claims and counter-claims of opposing sides are often exaggerated and simplistic. Campaign finance reformers, for example, often imply that a proposed change will lessen corruption or lower election costs. Redistricting changes promise neutral and fair procedures, or higher levels of competition. New voting technology was supposed to end voter confusion and restore confidence in the electoral process. Reform opponents are no less prone to exaggeration, of course, often playing on the fear that the reform will help one group or party more than another, or that chaos will ensue if the status quo is altered.

In fact, the claims on both sides rarely live up to the hype. The real effects of reform are usually smaller in every direction for a number of reasons, but mainly because of their intermingling with other factors that work in the opposite direction. As Ken Mayer and Timothy Werner point out in this symposium (2007), state public financing has had mixed effects at best. It has encouraged candidates in the noncompetitive seats more than in the competitive ones, because expenditure limitations are more burdensome when the need for money is the greatest. If the real costs of campaigns cannot be controlled, and if candidates will want to spend all that they can in order to win, then, unless the public subsidy equals whatever the candidates think they need, they will opt out when the stakes are highest. As Paul Gronke, Eva Galanes-Rosenbaum, and Peter A. Miller observe in their contribution to this symposium (2007), the effects of mail-in balloting on overall participation rates are modest, because convenience is only one factor in the voting calculus: making voting easier might not be enough to overcome apathy, alienation, or a strong distaste for politics. In short, fixing one factor but not the others may yield modest results at best.

Even worse are the compensating and evasive reactions to every reform action. It is easier to hit stationary than moving targets, but in politics, everything is dynamic. Even as reforms are being hatched, someone in the political system is thinking about how to get around them. In a system with strong First Amendment protections, it is a safe bet that a loophole exists somewhere. Reformers of late are well aware of this problem. The McCain-Feingold bill, for instance, expected that prohibitions on national party soft money would divert the flow to the state parties, and in anticipation, extended the ban controversially to funds raised and used by state parties in conjunction with federal elections. Even so, the overall intent of the law was still subverted by the proliferation of nonprofit soft money activity.

Compensations also lessen the expected negative effects of reforms. Term limits opponents who predicted that the legislature would become completely subordinate to the executive branch discovered that they were only partially right. The impacts of imposing limited terms were more negligible in part-time legislatures. And in the full-time bodies, the upper houses compensated for the inexperience and chaos in the lower bodies. Also, many term-limited legislatures adopted training programs to get legislators up to speed sooner.

In addition to the hype about solutions, sometimes the problems themselves are exaggerated. The widespread notion that money buys elections and legislative votes does not stand up well to empirical study (see Samples 2006 and Ansolabehere, de Figueiredo, and Snyder 2003 for reviews of this long literature). Most studies suggest that the effects of money on elections are not easy to measure exactly due to the simultaneous econometric relationship between money and need, the importance of other factors like party and incumbency, and the varying skill with which money is employed. Similarly, the effect of contributions on votes is hard to measure because money tends to flow along party and ideological lines.

The failure of political science to demonstrate definitively what is apparently obvious to everyone else, especially those in the reform community, has been a long-standing source of frustration and irritation with our profession. This has encouraged some reform groups to move ahead based on their instincts and to downplay the significance of scholarly findings for any reform debate. This is a shame in many senses. It means that the public is being led to believe that the problems are more simple and stark than they actually are. And it has led some foundations to fund only research that supports conclusions that they have already assumed are correct. The latter is particularly disturbing since it has undermined norms of objectivity in our profession.

Then there are those who believe that there is a single solution, or one of over-riding importance. The best recent example of this is the reform community's current obsession with competition (McDonald and Samples 2006). Competition, some would have us believe, is the solution to all our problems. If we had more competition, we would have less polarization. Elections would be more meaningful, and participation would rise. Citizens would be more engaged, and the system would be more responsive. Policies would hew to the sensible middle.

Some of this is true, but much of it is exaggeration. Representatives from competitive seats tend to be more dependent on money, not less. Those from marginal seats rarely have the courage to come forward with innovative ideas: innovations tend to come from the ends of the ideological continuum, not the middle, or from third parties and their candidates. So, yes, of course there needs to be some adequate level of competition in the system, but no, competition is not going to correct all that ails the body politic.

Political scientists need to insist on the freedom to arrive at the conclusions their data and statistical methods lead them to. If the effects of over-hyped reforms are in fact modest, then we need to say so. The temptation to spin the facts in order to move reform along leads inevitably to public disillusionment and a loss of credibility.

The Danger of Judicialization

As the reform frontier moves forward, regulations proliferate. This has two effects. First, it requires that political actors

become more informed about what they can and cannot do. This often means getting professional assistance and legal help, especially for disclosure and conflict of interest rules. It also creates a higher burden for the enforcement agencies that are charged with monitoring the behavior of people in the political system. Since these agencies are rarely funded at an adequate level, they rely heavily on adversarial monitoring: i.e., opposing candidates and interest groups that have an incentive to find violations. This leads to some innocent mistakes being construed in the worse possible light for political purposes, pressures on agencies to take up investigations that might be embarrassing to the opponents, and highly selective enforcement in competitive as opposed to noncompetitive areas.

Inherent difficulties with enforcement of First Amendment activities provoke public frustration and a ratcheting up of the penalties leveled at guilty parties, especially in the area of campaign finance. Assume a candidate wants to hide a donation's source in order to avoid political embarrassment, and either fails to disclose, or worse, chooses to launder the money. Since an enforcing agency can rarely determine guilt in a timely fashion, especially when there is a risk of wrongly prohibiting a constitutionally protected action that might affect an important political outcome, it is sometimes worthwhile for a campaign to violate the law and pay the fine later rather than lose the election. This logic makes enforcement agencies look weak. They respond by increasing the penalties associated with infractions in order to signal their agency's seriousness and to deter future problems. But if there is no distinction between willful malfeasance and unintended mistakes of a clerical nature, the effect can be to chill participation for fear of making mistakes (Cain and Lochner 2000).

Another problem is the increasing role of the courts in deciding institutional disputes. Reform battles that start in the legislative or direct democracy arena often end up in the courts. There are even some legal scholars who would like to see the court take a more pro-active role in policing the political system, stamping out anti-competitive and self-serving behavior wherever it crops up (Issacharoff and Pildes 1998). Layering this regulatory approach (i.e., correction by legal intervention) on a Madisonian structure of checks and balances (self correction through structural design) is awkward, to say the least. To be sure, the courts in critical cases have corrected problems that the political system could not fix for itself, or at least not fast enough. The best example would be the courts' actions in ending racial discrimination of the franchise though application of the 14th Amendment and interpretation of the Voting Rights Act. But where should court determination end and political self-correction be given its due?

Encouraging the courts to strike down anti-competitive practices, in my opinion, tramples any sensible division between political and judicial action. While the political question doctrine has rightly been amended to allow the courts to protect individual rights to vote and participate, it would be a mistake to drop it altogether. The courts should not be drawn into institutional disputes that are ultimately about matters of political taste rather than essential democratic values. This returns us to the critical distinction between features of an institution that make it fundamentally democratic versus features that merely distinguish between types of democracies.

Let me illustrate with the example of competition again. A basic democratic feature is the contest between alternatives for control of the government. Thus the distinction between one and two choices is critical. But is a democracy that channels groups and factions into two broad coalitional parties less democratic than one that encourages multiple splinter parties through some proportional allocation system? I would think the consensus in political science would be no. However, rules that suppressed any contestation would clearly be anti-democratic and well within the courts' purview to correct.

The danger with ceding too much institutional design to the courts is that it could lead to constitutional pronouncements about political questions that really are not fundamentally about rights or the preservation of a democratic system. Rather, the courts will become the arena within which people with strong preferences about different types of democracies will seek to prevail. And the cost of this will be the freezing of what should be a dynamic and evolving debate. Particular systems of democratic representation may best be suited for specific times and places. There may be no universal best form of democracy.

In the end, the political system has to be able to find ways to make changes when necessary and to keep all but the most essential democratic issues out of the courts. This, the hardest of challenges in a society prone to rely on litigation, may the most important role political science can play.

References

Ansolabehere, Stephen, John M. de Figueiredo, and James M. Snyder. 2003. "Why Is There So Little Money in U.S. Politics?" *Journal of Economic Perspectives* 17 (winter): 105–30.

Baker v Carr. 1962. 369 U.S. 186.

Brady, Henry, Justin Buchler, Matt Jarvis, and John McNulty. 2001. "Counting All the Votes: The Performance of Voting Technology in the United States." University of California Berkeley: IGS/SRC Report.

Buckley v. Valeo. 1976. 424 U.S. 1.

Cain, Bruce E. 2002. "Political Reform." In *International Encyclopedia of the Social and Behavioral Sciences*, eds. N. J. Smelser and P. B. Baltes. Oxford: Elsevier Science Limited.

Cain, Bruce E., and Todd Lochner. 2000. "The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violations." *Administrative Law Review* 52 (2): 651–55.

Caltech/MIT Voting Project. 2001. "Residual Votes Attributable to Technology: An Assessment of the Reliability of Existing Voting Equipment." Version 2. March 30.

Gronke, Paul, Eva Galanes-Rosenbaum, Peter A. Miller. 2007. "Early Voting and Turnout." *PS: Political Science and Politics* 40 (October): 639–45.

Issacharoff, Samuel, and Pamela Karlan. 1999. "The Hydraulics of Campaign Finance Reform." *Texas Law Review* 77: 1705–38.

Issacharoff, Samuel, and Richard H. Pildes. 1998. "Politics as Markets: Partisan Lockups of the Democratic Process." *Stanford Law Review* 50: 700–7.

Mann, Thomas, and Bruce E. Cain, eds. 2005. *Party Lines: Competition, Partisanship and Congressional Redistricting*. Washington, D.C.: Brookings Institution Press.

McConnell v. FEC. 2003. 540 U.S. 93.

McDonald, Michael P., and John Samples. 2006. *The Marketplace of Democracy: Electoral Competition and American Politics*. Washington, D.C.: Brookings Institution Press and the Cato Institute.

Samples, John. 2006. *The Fallacy of Campaign Finance Reform*. Chicago: University of Chicago Press.

Timmons v. Twin Cities Area New Party. 1997. 520 U.S. 351.

Werner, Timothy, and Kenneth R. Mayer. 2007. "Public Election Funding, Competition, and Candidate Gender." *PS: Political Science and Politics* 40 (October): 661–7.