
DÉJÀ VU ALL OVER AGAIN: COURTS, CORPORATE LAW, AND ELECTION LAW

*Heather K. Gerken** and *Michael S. Kang***

Professor Theodore Rave's article *Politicians as Fiduciaries* is thoughtful, well-argued, and sophisticated. It identifies the right endgame and works its way to what we think are some of the most promising proposals out there for addressing the difficult problem of gerrymandering. It also provides the best proof that this debate in election law has run its course.

We should first say a word about the article's strengths. The critical insight at the heart of Rave's article is a parallel between corporate law and election law. The parallel is nonobvious. One of us has spent a good deal of time telling skeptics why it makes sense for him to teach both business associations and election law. As Rave recognizes, both corporate and election law are defined by the agency problem between a diffuse group of principals, on the one hand, and the officials they elect to serve their interests, on the other.¹ In corporate law, the principals are shareholders who elect a board of directors to manage their corporate entity. In election law, the principals are citizens who elect public officeholders to run the government. These two superficially dissimilar bodies of law are thus unified by the same basic regulatory dilemma. Both pivot off the challenge of governance, public and private.

Both corporate law and election law must therefore confront the unavoidable problem of self-entrenchment. Corporate directors and public officeholders can use the power with which they are entrusted to insulate themselves from removal. Rave correctly suggests that this similarity breeds opportunity for intellectual arbitrage. He argues that election lawyers can borrow from corporate law by relying on the notion of fiduciary duty to think about problems like redistricting. To spell out his approach, Rave suggests that courts assessing gerrymandering claims should either (i) apply "entire fairness" review in which courts scrutinize whether a redistricting scheme is politically fair; or (ii) offer certain procedural safe harbors borrowed from corporate law, including the use of an independent redistricting commission or a public vote ratifying the scheme.²

* J. Skelly Wright Professor of Law, Yale Law School.

** Professor of Law, Emory Law School.

¹ See D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 676 (2013).

² See *id.* at 725–39.

What is most striking about the article is that it reveals just how much of this terrain has already been charted. Election law is already premised on the notion that the task of reform is addressing the principal-agent problem. The notion is so deeply embedded into the field's DNA that the tribe's most famous "but see" citation is Professor Nate Persily's contrarian defense of the "foxes guarding the henhouse" (the phrase we all use to describe the principal-agent problem to laymen).³ The idea may be expressed through different paradigms, the solution may be modeled on different areas of the law, but for the last two decades the field has devoted itself to the same task to which Rave devotes this article. So, too, the field has come up with the same types of solutions as Rave does. Virtually all election law scholars worry about the principal-agent problem. Almost all look to the courts to solve it. And most ask the courts to intervene on Elysian, representation-reinforcing grounds. Any problem, of course, looks similar when cast at a high level of abstraction. But even when one digs down into the specifics, Rave's arguments are familiar.

Professor Samuel Issacharoff's seminal article on partisan gerrymandering, published by this journal in 2002, makes the same kinds of arguments and proposes an almost identical solution to Rave's.⁴ Rave's subsidiary suggestions also represent familiar moves in the field. Even Rave's suggestion that we borrow from the corporate law practice of shareholder approval to waive conflicts of interest by requiring popular ratification of legislative redistricting was proposed back in 2006.⁵

None of this is meant as a rebuke. It merely confirms just how difficult reform is in the electoral context. The people who know and care the most about electoral reform are the politicians who oppose reform. This, of course, pushes most academics to do just what Rave does here — look away from the political process and appeal to the courts for salvation. Rave's novel insight — and we don't wish to downplay it in any way — is to draw on corporate law regarding fiduciary relationships rather than antitrust law⁶ or political theory⁷ or common sense.⁸ He argues, at base, that we require politicians not be so self-interested by imposing a fiduciary duty upon them. It's a smart, provocative suggestion, and perhaps Rave's piece will be the

³ See Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002).

⁴ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

⁵ See Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667 (2006).

⁶ See Issacharoff, *supra* note 4.

⁷ See Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601 (2007).

⁸ Everyone else.

breakthrough article that (finally) convinces the judiciary to act. Redistricting reformers haven't yet hooked a judicial fish, and maybe Rave's lure will be more appealing. Or maybe it won't. After all, the problem has been around for a while,⁹ the basic concern is deeply intuitive, the solution is well within the ambit of what courts do (at least if John Hart Ely is to be believed¹⁰), and litigants have offered courts nearly every doctrinal hook under the sun.

Still, reading as fine an article as Rave's in as fine a journal as the *Harvard Law Review* makes us wish that scholars would devote their energies to something else. Rather than carefully threading our way through well-trod terrain in the hope of finding a slightly better trail, we might do better if we set off into the wild and woolly world outside the courts and charted a brand new path.

We think it's time to move beyond debates about how best to frame the problem of entrenchment for a judicial audience. As we've argued elsewhere,¹¹ courts may have a role to play in mitigating the principal-agent problem, but we think the most likely and promising solutions will come from nonjudicial institutions. The problem with the courts is obvious. Judges aren't particularly adept at adjudicating the inherently structural claims at stake in election law cases. They don't possess the training to judge, let alone manage, politics. Moreover, judges are typically uncomfortable with the relentlessly instrumental analysis demanded by a structural approach. It is a trope in election law cases that courts should not impose their own theory of politics on our democracy. As a result, even when judges do act, they often prefer to render highly formalistic opinions in the language of individual rights.

Rave recognizes these tendencies. He tells us that courts will be more comfortable with his approach because it doesn't require them to venture beyond an individual-rights frame¹² and because it doesn't require them to impose their own judgments about what constitutes a healthy democracy.¹³

We have our doubts that Rave has finally found a way to persuade judges to do the right thing. Rave's "entire fairness" review doesn't do much to shield judges from assessing the health of our democratic process. The safe harbors and prophylactic rules he proposes require judges to make just as normative a judgment as Issacharoff's judicial

⁹ See DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING 17-41 (1992).

¹⁰ JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

¹¹ Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 86 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011).

¹² See Rave, *supra* note 1, at 693.

¹³ See *id.* at 723-24.

default rules or any other process-based intervention,¹⁴ and Rave's effort to claim that politicians owe voters a "duty of loyalty" strikes us as no more or less an individual right than any other doctrinal hook election law scholars have proposed on this front, as Rave acknowledges in passing.¹⁵ It may be that because courts merely need to borrow from corporate law, they will miss the fact that Rave is asking them to do precisely what other election scholars have asked them to do — think structurally about elections and make choices about what constitutes a healthy democracy. But we think Rave's approach largely boils down to a question of framing, not substance. Framing matters, to be sure, and Rave's lawyerly, historically informed approach is surely more likely to tempt judges than Issacharoff's aggressively instrumental approach. Nonetheless, at bottom, Rave is still asking the courts to do essentially what election law scholars have long asked them to do. And when judges start to think hard about Rave's "hypothetical disinterested body,"¹⁶ we wonder how long it will take them to recognize that fact.

There is a world outside the judiciary, however. There are other institutions capable of helping us harness the very elite incentives that currently taint our politics. A burgeoning cohort of scholars has begun to write about these institutions, to map the terrain outside of judicial review. There's been an institutional turn in election law,¹⁷ as academics have begun looking away from the courts to cure what ails us. Instead, they've advocated the creation of process-oriented, self-enforcing institutions that could prove more durable than reliance on courts over the long run.

These new institutionalists, as Professor Bruce Cain calls them,¹⁸ begin with the same basic premise that has undergirded the field's longstanding judge-centered approach. They recognize that the problem of political self-interest is the core problem for the field. However, the new institutionalists recognize that partisanship is a double-edged sword. It's the cause of many of our democratic woes, but it also provides the energy necessary to fuel a vibrant democracy. The key, then, is to figure out how to align the interests of partisans and self-interested politicians with the interests of the public, thereby dissolving the principal-agent problem rather than eliminating it. The key is to

¹⁴ See Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

¹⁵ See Rave, *supra* note 1, at 721.

¹⁶ *Id.* at 726.

¹⁷ See Gerken & Kang, *supra* note 11.

¹⁸ Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012).

figure out how to harness politics to fix politics. Sometimes the courts can help, but more often than not, the solution lies outside the courts.

The new institutionalists, to be sure, haven't figured out how to solve all of our problems, but at the very least, they have found something new to say. If courts ever get in the mood for engaging in serious reform, we have a remarkable number of proposals at the ready, with Rave's article nicely topping off the pile. But there's a lot more room to write where the new institutionalists are heading.