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TRANSLATING FIDUCIARY PRINCIPLES INTO PUBLIC LAW

*Ethan J. Leib, David L. Ponet & Michael Serota**

It is encouraging to see scholars like D. Theodore Rave take an interest in the project of understanding the fiduciary foundations of public authority.¹ What might be called “fiduciary political theory” can indeed provide us with insight into institutional design within liberal democracies, and *Politicians as Fiduciaries* is an important addition to the scholarly work in this burgeoning field.² Rave breaks new ground by exploring fiduciary political theory’s potential applicability to the field of election law and crystallizes this application through concrete prescriptions directed toward the treatment of partisan gerrymandering cases by our federal courts. But while we are sympathetic to the basic fiduciary rendering of democratic representation at the heart of Rave’s project, we are less sanguine about his rendering of the private fiduciary model into redistricting law.³ Something gets lost in translation.

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

² See EVAN FOX-DECENT, SOVEREIGNTY’S PROMISE (2012); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. (forthcoming 2013); Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POL. PHIL. 178 (2012); David L. Ponet & Ethan J. Leib, *Fiduciary Law’s Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249 (2011); see also Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006); Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN’S L.J. 259 (2005); Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 245 (2007); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004). Much of this work was foreshadowed in Paul Finn, *The Forgotten “Trust”: The People and the State*, in EQUITY: ISSUES AND TRENDS 131 (Malcolm Cope ed., 1995); and Paul Finn, *Public Trust and Public Accountability*, 3 GRIFFITH L. REV. 224 (1994).

³ Nothing in this essay should be taken as an argument against redistricting law reform efforts, or even against the potential applicability of fiduciary political theory to support such efforts. We only offer an analysis of Rave’s attempt at translating fiduciary principles into a particular redistricting law reform agenda. We do not, alas, have the room to develop an affirmative argument setting forth the best way to undertake a translation of fiduciary political theory into redistricting law.

The central claim of *Politicians as Fiduciaries* is that courts should treat “political representatives . . . as fiduciaries, subject to a duty of loyalty, which they breach when they manipulate election laws to their own advantage.”⁴ From this idea flows Rave’s proposal that, “[j]ust as the remedy for breach of the duty of loyalty in agency or corporate law is invalidation of the conflicted transaction, the remedy for a law passed in breach of representatives’ duty of loyalty should be [judicial] invalidation of” redistricting plans voted upon by “conflicted” legislators.⁵ Together, these propositions evidence Rave’s views that the analogy between private and public fiduciaries is not only tight but also that identical duties and immunities should accrue to corporate and political fiduciaries.⁶ He argues not only that the standard of loyalty is the same among private and public fiduciaries but also that the duties should be enforced in the same way by the same institutional actors: judges.

In general terms, there is much to like in Rave’s commitment to the politicians-as-fiduciaries framework. Because public office is a public trust, fiduciary architecture can help orient us in figuring out how political power should be exercised legitimately. As we have previously argued, “seeing political representation as a form of fiduciary representation heightens sensitivity to policing the exercise of discretion, the trust reposed in the representative, and the vulnerabilities created by the relationship.”⁷ Part of the appeal of conceiving the political relationship between representative and represented in fiduciary terms is that it regards politics in more realistic and textured ways — as a constellation of power relationships in a web of trust and vulnerability — rather than as a mere social contract no one ever signed. Thinking of legislators as public fiduciaries tells us much about the nature of the relationship between the governed and their governors and it can also provide some normative benchmarks for evaluating the political morality of elected representatives and for designing the institutions that channel and control their conduct.

And yet, although *Politicians as Fiduciaries* rightly taps fiduciary theory for a fresh look at the problem of partisan gerrymandering, we believe that important aspects of Rave’s execution miss their mark. Rave’s straightforward application of private law fiduciary duties to acts of political representation — in addition to his proposal for judicial enforcement of such duties — overlooks the relational dimensions of the fiduciary principle. Fiduciary law is not unitary in how it identifies relationships and imposes duties — a fact not made clear by

⁴ Rave, *supra* note 1, at 677.

⁵ *Id.* at 719–720.

⁶ *See id.* at 723–724.

⁷ Leib & Ponet, *supra* note 2, at 186.

Rave's too-direct transplantation of private law concepts into the re-districting domain. The private law controlling fiduciaries struggles mightily to calibrate the way it enforces the duties it imposes to the three indicia constitutive of the fiduciary relationship: the fiduciary's discretionary power over the beneficiary's assets or interests, the trust reposed in the fiduciary, and the beneficiary's vulnerability. Private law establishes first that the indicia are met and then develops relationship-specific duty applications that make sense within the relevant relational environments. Rave's analysis would benefit from engaging hard questions about who is really best identified as the public fiduciary, who is the actual beneficiary, and what are the right ways to enforce the constraints of the sui generis fiduciary relationships in the political sphere.

In what follows, we develop two points: Part I elaborates upon why Rave's neat application of private fiduciary law to public fiduciaries should be messier than it is; and Part II interrogates whether his preferred judicial remedies are appropriately calibrated to generate the trust necessary for public fiduciary relationships to function well.

I. PUBLIC FIDUCIARY RELATIONSHIPS

The private law does not apply fiduciary duties without first making an effort to determine whether the relationship at issue is truly a fiduciary one. Although some categories of relationships are presumptively fiduciary — agent-principal, attorney-client, guardian-ward — whenever a breach of fiduciary duty claim is made, judges first seek to establish the nature of the relationship between the plaintiff and the defendant. And, once a particular relationship has been identified as a fiduciary one, judges do not apply a one-size-fits-all approach: the way in which fiduciary obligations are enforced tends to be calibrated in a manner sensitive to the type of relationship at issue. To wit: although an agent, a trustee, a corporate director, a parent, and a lawyer can all be fiduciaries owing a duty of loyalty to their beneficiaries, that duty is enforced differentially, with varying degrees of strictness, according to the characteristics of the particular relationship at issue. This variance makes sense because, although these fiduciaries all exercise discretionary power over a beneficiary's assets or interests, the power structures that inhere in business, familial, and legal relations are qualitatively different.⁸

Politicians as Fiduciaries overlooks the diversity of the relational landscape to which the fiduciary principle applies. Although Rave is principally drawn to the corporate law version of the fiduciary, in which the director is the fiduciary, he speaks loosely about the legisla-

⁸ See generally Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009).

tor as also an agent and a trustee, as if all three are interchangeable because they are all fiduciaries.⁹ Throughout most of *Politicians as Fiduciaries*, however, Rave simply analogizes the legislator to a corporate director and proceeds to a straightforward application of the duty of loyalty as interpreted in the corporate context. But political relationships and corporate relationships are sufficiently different that one should be wary of seamless application from one context to the other.

To apply the duty of loyalty to an elected legislator, one needs a clearer identification of just what sort of fiduciary a political representative is. As we have discussed in previous work, public fiduciaries are *sui generis*:

[I]n pitching public officeholders as fiduciaries, one must take stock of possible differences between private and public fiduciaries. Translation is one thing — but analogizing dissimilar categories can lead to category mistakes. . . . Not all translations will be smooth, . . . and one must remain mindful that while public fiduciaries are morphologically similar, they are not identical to their private law counterparts and ancestors.¹⁰

Accordingly, to establish that public officials are in a meaningful sense public fiduciaries and what sort of duties should be applied to them (and by whom), it is essential to explore the relationships within the political landscape to better map who is the fiduciary for whom and to what degree.

Politicians as Fiduciaries contains some such analysis,¹¹ but Rave explores the relational complexity only lightly and presumes rather than clarifies the nature of the power relationship that triggers fiduciary obligation. Yet this relational ambiguity is a core difficulty associated with applying fiduciary political theory to redistricting law. The following example highlights the practical import of this point.

Consider the cross-cutting relational obligations confronting a New York state legislator for District 77, Assemblywoman X. Assemblywoman X is one of 150 legislators in the New York State Assembly. When she takes her seat in the legislature, her oath of office directs her to uphold the constitution of New York and the Constitution of the United States,¹² both of which empower her, among other things, to draw district lines within her state through redistricting plans. For

⁹ See Rave, *supra* note 1, at 718–719. In previous work, we have explored how the category of the fiduciary supervenes over both agency and trustee conceptualizations of political representation. See Leib & Ponet, *supra* note 2, at 179. Even if both are fiduciaries, the duties are not likely applied in identical fashion as between agent and trustee — and they are not likely to be applied identically between private and public versions thereof.

¹⁰ Leib, Ponet & Serota, *supra* note 2 (manuscript at 14).

¹¹ See Rave, *supra* note 1, at 711–713.

¹² New York State Senate or New York State Assembly Member, Officer or Employee Oath/Affirmation, DOS-1692-f-1 (2011), available at <http://www.dos.ny.gov/forms/corporations/1692-f-1.pdf>.

whom does Assemblywoman *X* serve as a fiduciary? Does Assemblywoman *X* stand in a fiduciary relationship to District 77's constituents? To the entire state's citizenry? To the people of the United States? These questions matter for Rave's core case, which treats Assemblywoman *X*'s participation in drawing District 77's lines — something she is constitutionally authorized to do by two different sovereign charters — as a breach of a fiduciary obligation, rendering her district lines susceptible to judicial invalidation.

A proper relational analysis reveals that Assemblywoman *X* is likely a fiduciary for *both* her district's constituents and the people of New York. To begin with, Assemblywoman *X* surely has some power over the whole state — and a fortiori her district — because she helps control the legal and practical interests of the entire state: she makes statewide criminal law and passes the statewide budget. Assemblywoman *X* must also be trusted by both her constituents and the state's citizenry; she is fairly difficult to monitor (especially by those with absolutely no say in her election), and she keeps the state vulnerable to her possible exploitation or to pursuit of her own private interests at odds with the public welfare.

Along the same lines, Assemblywoman *X* may also be a fiduciary for the *nation's* citizenry, at least in those instances in which the entire country is subject to her authority. For example, if she were redistricting a “swing state” instead of New York — or voting on a statewide voter identification law that could affect the outcome of the presidential race — her duties might flow outward in light of her work's national repercussions. The paradox of much elective political representation, then, is precisely that the representative is selected locally and “represents” her home district in some senses but that she also serves the people and wields power more broadly. Others' interests, vulnerable to her legal power over them, may thus need to be protected both by and against her activities. And the oath of office, which is in no way directed to ensure loyalty to local constituents, casts the unique nature of the public fiduciary relationship into sharp relief by suggesting a fiduciary obligation that begins with the district but extends out to the whole state and even the whole nation.

This analysis has important implications for the viability of Rave's project first and foremost because it complicates his story about the relevant principal. Rave tends to assume it is the voters in District 77. Yet the work of the state legislator really must serve many plausible candidates for principal — and conflicts must be measured relationally. Even if the people of the nation are an occasional (if somewhat attenuated) candidate for the beneficiary role, there are strong arguments to be made that both the members of the district and the citizens of the whole state are the relevant beneficiaries. Canonical political philosophy confirms this point, while further suggesting that the political rep-

representative, in cases of conflict, must be loyal to the *state's citizens as a whole* rather than to her constituents.¹³

And yet, if a state representative's ultimate duty is to be loyal to the state, it is hard to complain that Assemblywoman *X* is self-dealing when she pursues a redistricting plan that she believes to be in the state's best interest. Assemblywoman *X*'s duty to pursue the good of her statewide constituency likely supervenes over the immediate conflict created by her direct interest in a redistricting plan.¹⁴

The difficulty of identifying the relevant principal is not the only challenge facing the fiduciary framework at the heart of *Politicians as Fiduciaries*. Rave's model also poses a basic problem on its own terms within the corporate law context, even if one concedes some conflict with some relevant beneficiary. To wit, Assemblywoman *X* receives special authorization from two different sovereign charters: the Constitution of the State of New York and the U.S. Constitution. Unlike a general authorization to act on behalf of a principal, which would be limited by the common law's fiduciary obligations, legislators engaged in redistricting act in accordance with a (doubly) specific permission and with an exclusion from the charge of self-dealing. It is as if a corporate charter told a director that she may vote on compensation packages for directors as a whole; that permission establishes the scope of the fiduciary relationship and sanctions the specific form of self-dealing at issue there.¹⁵ This type of authorization, which essentially imposes a structural *requirement* of self-dealing, is clearly

¹³ The dual nature of political representation has been observed by several political philosophers who acknowledge, each in their own way, that the representative may be at once partial to one societal segment while also responsible for representing the broader public good. See, e.g., EDMUND BURKE, Speech to the Electors at Bristol, in *SELECTED WRITINGS AND SPEECHES* 186, 186–87 (Peter J. Stanlis ed., 1963); see generally, e.g., JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (London, Parker, Son & Bourn 1861).

¹⁴ Note importantly (as Rave does, but without sufficient concern) that much partisan gerrymandering concerns *congressional* redistricting by state legislators, a domain in which concern about direct self-dealing fades. Whatever indirect benefit Assemblywoman *X* might get from a congressional redistricting plan, voting on such plans simply cannot constitute self-dealing and a clear conflict of interest. Without the stench of self-dealing and conflict, Rave cannot make out the simple case of fiduciary breach that he attempts to establish in a large class of cases that come before the courts.

¹⁵ Another example of an act that could give rise to a claim based upon breach of the fiduciary duty of loyalty unless explicitly permitted in the charter is usurpation of corporate opportunities. Under the common law, directors were prohibited by the fiduciary duty of loyalty from taking business opportunities that belonged to the corporation. See, e.g., *Guth v. Loft, Inc.*, 5 A.2d 503, 511 (Del. 1939). But as of 2000, section 122(17) of the Delaware General Corporation Law permits a corporation to “[r]enounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or 1 or more of its officers, directors or stockholders.” DEL. CODE ANN. tit. 8, § 122(17) (2000).

permissible.¹⁶ Similarly, the U.S. and state constitutions tell legislators that they may self-deal in this limited way.

Moreover, in corporate law, statutes specifically permit conflicted transactions to stand, so long as they are adequately disclosed and approved by a majority of disinterested directors.¹⁷ A shareholder, accordingly, does not have a winning suit for breach of the duty of loyalty if the nonconflicted directors vote to approve the transaction. Applied to the context of redistricting, this principle suggests that, so long as the rest of the legislature goes along with drawing District 77 as District 77's representative prefers, the "taint" is essentially removed and the plan is neither void nor voidable for a breach of fiduciary duty. This result holds true because the "conflicted" legislator's act is deemed cleansed through the legislature's vote: so long as that legislator is not the deciding vote, the legislator did not taint the deliberations, and the conflict was disclosed to all. And, even if the representative from District 77 is considered conflicted with respect to District 77's line-drawing (a proposition complicated by the two charters that define the scope of the fiduciary relationship), the other 149 members of the New York Assembly are not directly conflicted with respect to District 77 in the same way. Thus, a majority of their votes in support of the redistricting plan would effectively immunize our hypothetical Assemblywoman X from any breach of loyalty claim; no other safe harbors are required.¹⁸

This point is only reinforced by the fact that "[m]ost states require the Governor to approve the redistricting plans" and "give the Governor the power to veto any redistricting plan introduced by the Legisla-

¹⁶ See *Lewis v. Vogelstein*, 699 A.2d 327 (Del. Ch. 1997). Indeed, it seems to be the statutory default rule that directors can vote on their own salaries even if the charter does not specifically authorize it. See *Marx v. Akers*, 88 N.Y.2d 189, 203 (N.Y. 1996) ("Many jurisdictions, including New York, have since changed the common-law rule by statute providing that a corporation's board of directors has the authority to fix director compensation unless the corporation's charter or bylaws provides otherwise. Thus, the allegation that directors have voted themselves compensation is clearly no longer an allegation which gives rise to a cause of action, as the directors are statutorily entitled to set those levels."). See also CAL. CORP. CODE § 310(a) (West 1977); DEL. CODE ANN. tit. 8, § 141(h); N.Y. BUS. CORP. LAW § 713(e) (McKinney 1998). That kind of self-dealing — which is permitted by corporate law — does not seem too different from legislators voting on redistricting plans once every ten years, or so one could argue.

¹⁷ See CAL. CORP. CODE § 310(a); DEL. CODE ANN. tit. 8, § 144(a)(1); N.Y. BUS. CORP. LAW § 713(a)(1).

¹⁸ Of course, some adjacent districts are affected by the hypothetical District 77's contours — and the two-party system renders the redistricting plan a much more complex transaction with a cluster of potential indirect conflicts. But corporate law's approach to conflicts is to be particular about what qualifies as a true conflict. Courts sniff for something that smells rotten — and they are quite hands-off when it comes to subtle inter-director ties, focused as they are on finding clear conflicts. See MODEL BUS. CORP. ACT § 8.60 (2011). Even then, the safe harbor and the clear authorization seem to give legislators the same immunity from breach claims that their corporate sisters would get.

ture for any reason.”¹⁹ Such procedures involve yet another so-called “independent” director, the state’s chief executive officer; which may further cleanse the potential taint of self-interest. Alternatively, the governor’s role in overseeing redistricting plans in many states might also be viewed as being the direct voice of her state’s “shareholders,” given that the governor is directly elected from the entire state by popular vote and without being tethered to the districting process.²⁰ From this perspective, the governor’s approval of a particular redistricting plan is like the second, shareholder-approval prong of corporate safe-harbor statutes. Either way, the requirement of gubernatorial approval in the context of redistricting can provide another layer of cleansing.

Yet there is little need to import the concept of corporate cleansing into the legislative arena to cast doubt on Rave’s translation: there is a corollary public-law concept that has been a part of liberal political theory for more than two centuries. As James Madison famously phrased his argument in support of a representative democracy in *The Federalist No. 10*, legislative bodies have the unique ability to “pass” private interests “through the medium of a chosen body of citizens.”²¹ In other words, by submitting legislative proposals to the crucible of deliberation and the lawmaking process, there is supposed to be a kind of “filtering” effect that removes different forms of private-interest taint. So, just as Rave avoids identifying the relevant beneficiary adequately, he might also be misidentifying the relevant fiduciary as well — that is, the right level of analysis might be to consider the *legislature* and not the individual *legislator*.²² Although that institutional picture has much going for it (the consequences of which we cannot spell out in this context), it would deeply disrupt the mechanics of Rave’s analysis.

Beyond what we have just said about the way some corporate law could be used to undermine Rave’s ultimate result, our core thesis is that there is an important mismatch between corporations and legislatures. As Rave certainly appreciates, unlike some directors in a corporation, there are exceedingly few meaningfully independent legislators.²³ Almost all legislators are members of national political parties

¹⁹ *State-by-state Redistricting Procedures*, BALLOTOPEDIA, http://ballotpedia.org/wiki/index.php/State-by-state_redistricting_procedures (last visited Sept. 27, 2012).

²⁰ Thanks to Caroline Gentile for this insight.

²¹ THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). Madison did not seek to remove the causes of faction (certainly not with as clunky a tool as judicial review) but rather to control its potentially pernicious effects through institutional design.

²² Professor Evan Fox-Decent, a fiduciary political theorist with an extraordinary book on this subject, tends to see state authority as the right analytical level at which to apply fiduciary norms. See generally FOX-DECENT, *supra* note 2.

²³ See Rave, *supra* note 1, at 680, 685, 724 n.303.

that exert some influence and apply pressure in the redistricting context.²⁴ Thus, the real culprits driving the transactions Rave identifies as self-dealing may be the political parties—a point which would appear to militate against a finding of breach of fiduciary obligation in the average redistricting transaction for the average politician.

To be sure, “fiduciary political theory” might be able to find a way to explore how interconnections between districts and parties actually can be thought to run afoul of the safe harbor conferred by the legislative process. But Rave has not provided a sustained argument tracing these complexities and relationships. At the very least, the fact that political parties may be intervening causes interrupts an easy application of private fiduciary principles to legislators, unless the parties are also fiduciaries and owe something to beneficiaries — an unlikely conclusion, and not one for which Rave argues. Yet, political parties are an essential piece of the puzzle, and simply mapping the private fiduciary role onto state legislators as individuals tells us little about how to constrain *party* behavior, undoubtedly the root cause of *partisan* gerrymandering. Shoehorning fiduciary principles to force them to fit this relational matrix is, we hope we have shown here, an unwieldy affair.

II. JUDICIAL ENFORCEMENT

The overlooked complexities of fiduciary political theory in *Politicians as Fiduciaries* also spill over into the question about whether judicial enforcement is really the best design choice for fiduciary oversight. Rave’s argument in support of judicial resolution of political gerrymandering claims is simple enough: “Just as the remedy for breach of the duty of loyalty in agency or corporate law is invalidation of the conflicted transaction, the remedy for a law passed in breach of representatives’ duty of loyalty should be invalidation of the” redistricting plan.²⁵ Rave contends that “[w]hen legislatures pass laws regulating the political process that might serve to entrench incumbents (such as drawing districts), a conflict of interest exists,” which “should trigger heightened judicial scrutiny, just like a conflict of interest would in the corporate context.”²⁶

To Rave’s credit, when he pivots toward identifying the right judicial remedy, Rave does not argue for a free-standing cause of action for breach of fiduciary duty upon a legislator’s “conflicted” vote for a redi-

²⁴ Of course, the real question is whether the ties supplied by political parties eviscerate the entire legislature’s ability to claim that it is authorized and permitted a safe harbor to redistrict. That is a hard question whose answer cannot be assumed in order to avoid difficult explanations about the mechanics of establishing a valid breach-of-fiduciary-duty claim.

²⁵ Rave, *supra* note 1, at 720.

²⁶ Rave, *supra* note 1, at 723.

stricting plan. Putting aside our skepticism that one could make out a valid and traditional breach of fiduciary duty claim in the relevant relational matrix, Rave is clearly right that a simplistic cause of action against legislators is counterindicated.²⁷ Nevertheless, Rave's conclusion that judges are "institutionally well suited" to evaluate the processes by which redistricting plans are devised seems unlikely to us.²⁸ Indeed, *Politicians as Fiduciaries* proposes an enforcement mechanism deeply at odds with prevailing districting practices, and one insensitive to the moral and institutional ecosystem of the public fiduciary relationship.

On Rave's view, the vast majority of states would not qualify for safe harbors (by his own account most legislatures show no sign of ceding districting control), which means most judges would still be in the business of entire fairness review, the very kind of review he thinks judges ill suited to make.²⁹ Moreover, even if there were significant migration to process review as legislatures responded to the legal incentives to avoid careful judicial scrutiny, there are few helpful guideposts for ascertaining the proper kind of process that judges should treat as providing safe harbor. There is, of course, a danger that judges themselves may be conflicted and partisan, so vagaries in benchmarks for process review invite all the same concerns with which Rave begins.

Rave also ignores, most importantly, that the threat of judicial enforcement is only one blunt mechanism used to deter breaches of fiduciary duties, and it is one that is often inadvisable, especially in the public realm. Fiduciary law — the law of trust, not just the law of trusts — sometimes looks to create room for relationships to breathe to help avoid "crowding out" interpersonal trust by enforcing very demanding standards of behavior.³⁰ Designing an optimal regime for fiduciary oversight involves creating multifarious signals and orientations for fiduciaries to help them in their relationships with beneficiaries. But the law should shy away from judicial micromanagement because public-law relationships — like their private law corollaries — are not generally the sort of relationships that take well to too much judicial meddling.³¹ This essential part of the fiduciary principle disappears in Rave's application.

²⁷ *But see* Complaint at 1–2, *Klein v. Reid*, No. 6:12-CV-1256-ORL-36DAB, 2012 WL 4856743 (M.D. Fla. Oct. 12, 2012) (misunderstanding Ponet & Leib, *supra* note 2, to establish a cause of action against legislators for breach of fiduciary duty in certain circumstances).

²⁸ Rave, *supra* note 1, at 724.

²⁹ *Id.* at 725–26.

³⁰ See Larry E. Ribstein, *Fencing Fiduciary Duties* 91 B.U. L. REV. 899, 905–06 (2011).

³¹ See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1797–98 (2001).

Within the fiduciary field, courts are long on rhetoric precisely because they rarely wield the stick — and extralegal sanctions do much of the work to police compliance.³² In the political sphere, we have many extralegal mechanisms to reinforce fiduciary obligations: elections, civil society, newspapers, and watchdog groups are as much a part of the tapestry of fiduciary governance as courts are. Without strong reinforcement of social norms and institutional design to help nurture such norms (which judicial review could crowd out), these particular fiduciary relationships could be threatened. All of this is to say that “independent” institutions for redistricting might be salutary and supported by some general fiduciary political theory, but fiduciary principles do not easily support specific doctrinal mechanisms of judicial enforcement. Indeed, some measure of judicial abdication may trigger more mobilization for real reform through plebiscites and other innovations than would a faint-hearted process review that does little to cleanse self-dealing behavior.³³ Ultimately, close judicial scrutiny of redistricting may do much to pollute the legitimacy of the judicial branch, which cannot help but seem transparently political when deciding partisan gerrymandering cases.

III. CONCLUSION

Rave should be commended for taking a growing oeuvre of fiduciary political theory and producing a practical doctrinal payoff for public law. Yet *Politicians as Fiduciaries* also serves as an important reminder that one must take great care to consider the limitations of analogy and metaphor in the course of proposing private law solutions for public governance problems. A straightforward importation of private law duties into the unique relationship between represented and representative is not appropriate. Instead, we need a deeper appreciation of the particularities of political relationships so that we can calibrate the fiduciary principle and related enforcement mechanisms to this sui generis public domain. We hope others will take up this project after digesting Rave’s impressive and provocative piece of work.

³² *Id.* at 1796–97.

³³ See also Michael Serota, *Stare Decisis and the Brady Doctrine*, 5 HARV. L. & POL’Y REV. 415, 430 (2011) (noting that episodic instrumentalist judicial decision making “may have the unintended effect of stifling legitimate efforts at leg[islative] reform” because it masks the underlying policy problem).