

THE TWENTY-FIRST ANNUAL FRANKEL LECTURE

INTRODUCTION

*D. Theodore Rave**

Professor Samuel Issacharoff delivered the twenty-first Frankel Lecture on Friday, November 4, 2016. Four days later, in a surprise to pollsters, pundits, and perhaps even the candidate himself, Donald J. Trump was elected forty-fifth President of the United States. Had a few thousand votes gone the other direction in a few key states, it might have been tempting to dismiss Professor Issacharoff's warning that there is something "deeply remiss" about the current state of American political parties as alarmist.¹ Ultimately "the party decides," we might have reassured ourselves.² Bernie Sanders put on an admirable showing on the Democratic side, but everyone knew that it was Hillary Clinton's turn and the nomination was hers from the start, especially with her firewall of super delegates. And the fact that a real-estate developer/reality-TV star/political neophyte was able to capture the Republican nomination? Well, we might have told ourselves, that outcome just reflects the failure of Republican elites to coalesce soon enough around any one of the numerous credible candidates in a nomination process that ran on too long and had too many televised debates. Sure, we might have admitted, the Republican Party will have to do some soul

* Assistant Professor, University of Houston Law Center. Thanks to Jessica Roberts for helpful comments.

1. Samuel Issacharoff, *Outsourcing Politics: Political Parties and the Theory of the Firm*, 54 HOUS. L. REV. 845, 847 (2017).

2. MARTY COHEN, DAVID KAROL, HANS NOEL & JOHN ZALLER, *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM* (2008).

searching on whether a large chunk of its rank-and-file voters actually support the economic and social policies endorsed by its elites, but everything worked out as expected in the end.

Trump's victory forces us to grapple with the phenomenon that Issacharoff identifies: Political parties have weakened to the point that their leadership appears impotent to resist what essentially amounts to a hostile takeover by outsider candidates with no prior connection to the party.³ It also forces us to acknowledge that there is broad public support for those outsiders. And they can win elections, even when matched up against a candidate with the full support of the other party. Party loyalty, it seems, has decreased, even as ideological polarization has increased.⁴

As he has done so many times and so effectively in the past, Issacharoff takes insights from private law and economic theory and applies them to the political arena to help us understand this phenomenon.⁵ He draws together two foundational strands of thinking in economics and political science: Ronald Coase's theory of the firm and V.O. Key's conception of political parties.⁶ Issacharoff's central insight is that the various constituencies within the parties have decided to outsource functions that they used to perform in-house—in Coasean terms, to “buy” instead of “make”—leaving the party organizations weaker, more susceptible to takeover by outsiders, and less able to play their historical moderating role in American politics.⁷ And he discusses three legal changes that he argues have contributed to the party apparatus losing control over the party brand: campaign finance reforms, state-mandated primary elections, and restrictions on patronage.⁸

Issacharoff is careful not to make a strong causal claim that these legal changes are the only, or even the most important, factors contributing to the current parties' weakness.⁹ Nor does he

3. Issacharoff, *supra* note 1, at 848.

4. See, e.g., Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804 (2014).

5. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998). Issacharoff is also the master of the converse move, drawing on insights from public law to better understand problems in private law. See, e.g., Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165 (2013); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337.

6. See V. O. KEY, JR., *POLITICS, PARTIES AND PRESSURE GROUPS* (5th ed. 1964); R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

7. Issacharoff, *supra* note 1, at 860–61.

8. *Id.* at 861.

9. See *id.*

lay out a set of prescriptions for addressing the pathologies he identifies. But his readers will inevitably take that next step and ask what prescriptions his diagnosis calls for. In their Commentaries, former White House Counsel Robert F. Bauer and Professor Heather Gerken (it's hard to think of two better people to comment on this lecture) consider whether legal changes aimed at strengthening the parties would be effective.

Bauer argues that we need to consider the parties as they are, not as they were at some time in the past or as some idealized version that we wish they would be.¹⁰ Only then, he says, can we ask what can be done. Bauer's key move in response to Issacharoff is to recenter the debate around candidates instead of parties. Candidates are the ones making the "make-or-buy" choice.¹¹ In seeking the best package of support to win an election, candidates may want to use the parties, their internal campaigns, and external actors like Super PACs for different functions. Legal rules that force candidates to buy from one source rather than another (or many others)—rules that artificially favor the institutional party apparatus—can have a distorting effect on the political market and undermine candidates' core goal of winning elections.¹² And Bauer goes on to lay out an intriguing and important roadmap for "market-based" campaign finance regulation instead of the corruption- or equality-based systems that reformers have been pushing since *Buckley v. Valeo*.¹³

Even accepting Bauer's caution against attempting to restore parties to their former glory by tweaking the law, one might reasonably ask how we figure out what an undistorted political market looks like. And here, Issacharoff's descriptive claim—his marriage of Coase and Key—is most helpful. Under one set of legal rules and social circumstances, the various constituencies that make up the parties gravitated towards centralized functions and economies of scale. Under another, they have moved toward outsourcing, in part—as Issacharoff points out—to avoid legal restrictions on the activities of institutional parties. Neither state of affairs is "natural" or undistorted; they simply reflect different tradeoffs on the make-or-buy question when the social and legal circumstances present different forms of transaction costs. And this holds true whether you accept Issacharoff's view that legal changes substantially contributed to the parties' weakness or believe the real reason lies in more fundamental societal changes.

10. Robert F. Bauer, *The Parties' Struggles In The Political "Market": Can Regulation Solve This Problem—Should It, and if so, How?*, 54 HOUS. L. REV. 881, 883 (2017).

11. *Id.* at 887.

12. *Id.*

13. 424 U.S. 1 (1976); see Bauer, *supra* note 10, at 898–99, 902–07.

Gerken questions whether giving party leaders more power can effectively combat the polarization and fragmentation that have characterized our politics in recent years. She argues that even if we reversed all of the legal changes that Issacharoff claims weakened the parties, the party leadership still might not be able to reign in the extremists.¹⁴ The forces of polarization and fragmentation may simply be too strong. Alternatively, she suggests that if party leaders did become powerful enough to control the behavior of party members, the forces currently pushing candidates toward the extremes would simply target the party leaders instead.¹⁵ Perhaps the party leaders can resist these polarizing forces because they have greater incentives to moderate than the rank-and-file members or candidates. But perhaps not.

Gerken also at least implicitly questions the causal connection between the legal changes Issacharoff discusses and the parties' reduced ability to control and moderate its members. The sources of political polarization are complex and not well understood, she tells us.¹⁶ Indeed, polarization may be, at least in part, a function of how we receive and process information in the modern world. When social media and internet search algorithms feed people information based on what they have searched for and liked in the past, the result may be self-reinforcing feedback loops.¹⁷ Or, as Kellyanne Conway aptly put it, different people may be operating on "alternative facts" about the world.¹⁸

Given this, Gerken suggests that polarization may be larger than the law regulating the political process. In this regard, she takes a deeply pessimistic view about the power of law to affect politics. A central theme—obsession even—of the law of democracy has been the fear that insiders are rigging the game to entrench themselves and thus we need legal and institutional responses to deal with that risk.¹⁹ But, as Gerken provocatively suggested to the Election Law Section at the 2017 AALS Annual Meeting, she is contemplating cutting her Election Law class down from four

14. Heather K. Gerken, *Playing Cards in a Hurricane: Party Reform in an Age of Polarization*, 54 HOUS. L. REV. 911, 916–17 (2017).

15. *Id.* at 917.

16. *Id.* at 916.

17. *See, e.g.*, HYPERNORMALISATION (BBC 2016).

18. *Meet the Press* (NBC television broadcast Jan. 22, 2017), <http://www.nbcnews.com/meet-the-press/video/conway-press-secretary-gave-alternative-facts-860142147643> [<https://perma.cc/J7TT-4CXT>].

19. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (5th ed. 2016). For my take on this perennial problem, see D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013).

credits to two because it turns out insiders are rigging the game, and it doesn't matter.²⁰ The forces of polarization and fragmentation are stronger than incumbents' ability to entrench themselves through law. Trump's victory is Exhibit A. The Republican elites had the legal authority to change the rules at the Republican National Convention to block his nomination, but they were powerless to do so as a matter of political reality.²¹

In the end, Issacharoff's thought-provoking lecture and his exchange with Bauer and Gerken have revealed a central, and perhaps counterintuitive, tension between anti-entrenchment and moderation. Legal reforms that open up the process to outsiders (e.g., Super PACs, direct primaries, civil service laws, etc.) loosen the grip of self-dealing insiders. But those self-dealing insiders were often forces for moderation. This is particularly true in the context of political parties where maximizing the chances of the party's long-term electoral success means silencing the extremists and competing for the median voter.²² Empowering outsiders helps break up the cartel. But it also unleashes the centripetal forces of polarization and fragmentation.²³

20. Heather K. Gerken, Panel at the Association of American Law Schools 111th Annual Meeting: Lessons from the 2016 Elections (and Implications for the Future) (Jan. 5, 2017).

21. See, e.g., Tal Kopan, *Anti-Trump Movement Quashed in Cleveland*, CNN (July 15, 2016, 10:56 AM), <http://www.cnn.com/2016/07/14/politics/republican-rules-delegates-trump/> [<https://perma.cc/LNU3-WUUL>].

22. See generally MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* (Barbara North & Robert North trans., 1954).

23. There is some tension between this observation and some of Issacharoff's earlier work focusing on the dangers of entrenchment. In *Gerrymandering and Political Cartels*, for example, he argued that bipartisan incumbent-protecting gerrymandering leads to increased polarization in the legislature because incumbents in safe districts don't have to compete for the median voters statewide, only the median voter in their overwhelmingly Red or Blue districts. Issacharoff, *supra* note 5, at 627–29; see also Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415 (2004). So perhaps too much entrenchment can lead to polarization under some circumstances, while too little entrenchment can lead to polarization under other circumstances.