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# Making Representative Democracy Work

Political Theory

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Andrew Rehfeld (2005). *The Concept of Constituency: Political Representation, Democratic Legitimacy, and Institutional Design* New York: Cambridge University Press. 259 pp. \$88 (cloth).

Kevin O'Leary (2006). *Saving Democracy: A Plan for Real Representation in America* Stanford, CA: Stanford University Press. 290 pp. \$22.95 (paper).

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Andrew Rehfeld examines familiar questions in democratic theory through the unusual lens of constituency. He grounds his analysis in a concrete recommendation (cautiously characterized as a thought experiment): we should randomly assign Americans to permanent, nonterritorial districts. (pp. xii, 177) Rehfeld recognizes that such an approach will produce a politically homogenous House, but he thinks that is mostly to the good, as the House will produce legislation that enjoys majority support. (pp. 223–27). Whether one is ultimately convinced by Rehfeld's argument, he offers a fresh take on well-worn debates.

Most democratic theory is preoccupied with the legislative level. Rehfeld, in sharp contrast, privileges the constituency over the legislature, the micro over the macro. By “turning our view from what goes on within the legislature, and instead asking what happens to those who remain outside of it” (p. 6), Rehfeld highlights the deliberations occurring *within* districts. Districts that mirror the polity, argues Rehfeld, allow us to pursue a trustee and delegate model of representation “simultaneously” (p. 200). At the very least, self-interested House members will have to “act *as if* they care about the common good” (pp. xiv, 204).

Rehfeld's other innovation is to appeal to an intuition that prevails outside of districting—the notion that governing bodies should mirror the polity—and unexpectedly insist that it applies to districts. Because theorists tend to focus on the macro, they seek mirroring at the legislative level and treat districts simply as a means to that end. Rehfeld presses hard on that excuse,

insisting that *districts* should mirror the polity, even if the result is a homogenous legislature. Representatives, he writes, should be “forc[ed] . . . to justify themselves before a heterogeneous population” (p. xii). In one sense, Rehfeld’s idea is quite daring, running against traditional understandings of districting. In another, he is applying the conventional wisdom about institutional design to one of the rare places where it has yet to catch hold.

Indeed, while Rehfeld’s self-proclaimed target is territorial districting—a conventional target within the academy if not outside of it—if anything his arguments have more sting for proportional-representation (PR) systems, the darling of scholars. It is not merely that Rehfeld argues in favor of a permanent, forced constituency, while scholars praise PR because it enables citizens to choose their own, temporary constituencies. The challenge runs deeper. As academics ranging in their sensibilities from Charles Beitz to Ken Shepsle have pointed out, the choice between territorial districting and PR is a choice about where compromise takes place. In a PR system, citizens vote with their hearts, leaving the task of compromise to the elites in the legislature. In a territorial system, in contrast, voters must move at least partly to the middle because the logic of single-member districting pushes candidates to the center. The move is partial, however, because districts are drawn around interest groups, so the “middle” is usually farther to the left or right than the national average. On Rehfeld’s view, legitimacy requires that compromise take place all but entirely at the district level, leaving little for the legislature to do but enact the preferences of the median voter.

Some will be tempted to play the “legislatures are what really matter” trump card in response to Rehfeld. They might worry that politically homogenous legislatures are presumptively illegitimate or institutionally risky. Or they might insist that a strong variant of majoritarianism will not produce healthy democratic practices, or reject Rehfeld’s equation of the “common good” (pp. xiv, 204) with the position of candidates who appeal to the swing voter. Still others will reject Rehfeld’s claim that legitimacy requires that any departure from district-level mirroring be justified by a morally weighty argument (p. xii). They might, for instance, subscribe to Bruce Ackerman’s view that the House, Senate, and Presidency represent the polity in different ways, thus preventing any institution from claiming to be the “true” representative of the People. On this view, House districts that fail to mirror the polity are a feature, not a bug.

But let me offer a brief sketch of a response to Rehfeld on his own terms, taking up two conventional questions in democratic theory—how to foster a vibrant marketplace of ideas and how to treat minorities fairly. First, if we take seriously Rehfeld’s idea that the debates within districts matter, we might doubt the utility of running 435 identical conversations to tee up a

national debate. To be sure, Rehfeld's approach guarantees a dissenting voice within every district. But voice is different from political muscle, and the resolution reached in districts with few dissenters might differ from that reached where would-be dissenters enjoy substantial voting power. If we think—as Rehfeld does—that the composition of the constituency affects the content of the conversation, the marketplace of ideas might be better served by having varying constituencies producing varying content. Rehfeld argues that “we promote diversity of voice within a representative body by denying it within the constituency” (p. 27), but that is incorrect. We promote diversity of voice within the representative body by creating differently composed constituencies, diversity of a second-order sort. These districts are not homogenous; they are simply heterogeneous in different ways, with some dominated by members of the majority and others dominated by members of the minority. The question is whether we ought to value that second-order diversity.

Second, we might worry about the constitutive costs of Rehfeld's proposal, particularly to the extent—as is often the case—that one's status as a political minority coincides with one's status as a racial minority. There are costs to assigning any group the role of perpetual political loser. Rehfeld rightly points out that minorities are supposed to lose in a democracy. The question he does not answer, however, is whether it matters *how* the losers lose. The advantage to current districting practice is that even losers get to elect “their guy,” someone who stands in for them in the legislature. That may be little different from presiding over a second-rate empire, but the position of second-rate emperor may be more dignified than that of permanent loser.

In defending his proposal, Rehfeld also calls on a well-established literature on minority empowerment, often grouped under the rubric “the politics of recognition.” These scholars argue that racial minorities offer a distinctive experience or perspective and insist that democratic legitimacy requires institutions to mirror the polity from which they are drawn. The oddity of this theory for “empowering” racial minorities is that it reproduces the same inequalities on governance bodies that minorities experience pretty much everywhere else. The problem is not endemic to Rehfeld's proposal; he just wants to extend the theory's reach to one of the rare institutional sites where the tables are sometimes turned, where the usual losers sometimes win and the presumptive winners sometimes lose. One might well think that this unusual institutional space is worth preserving for reasons that have nothing to do with legislative outcomes. If an African American or a Latina has a sense that whites are able to elect a champion, she might relish the chance to elect a champion of her own for purely dignitary reasons. Racial minorities might like to stand in the shoes of majority, enjoy the same sense of political

efficacy routinely enjoyed by whites, in some part of the system. And we might think it useful for the members of the usual majority, whites, occasionally to experience the sting of defeat. Everyone, to quote our former president, ought to experience a “good thumpin.”

These arguments do not defeat Rehfeld’s claims; they only meet them. What is exciting about Rehfeld’s book is that he forces us to engage with these long-neglected issues, preventing us from reverting to the easy assumption that districts are just a means to achieve legislative mirroring and clarifying the trade-offs involved in this important question of institutional design.

My main quarrel with the book concerns the chapters devoted to Rehfeld’s claim that the Founding Fathers were on his side. Forthrightly admitting that “there was no explicit discussion at the founding” on the subject of territorial districting, Rehfeld proceeds “indirectly,” inferring that the Framers would have rejected territorial constituencies for the House by investigating whether they would have subscribed to the primary normative and empirical justifications for creating them (p. 63). If the Founders were political philosophers working out a theorem, Rehfeld’s methodology would make perfect sense. But the Founders were advocates—intellectually adventurous and deeply thoughtful advocates, but advocates nonetheless. They made arguments on the fly, adapted them to political circumstances, and sometimes held two inconsistent positions at the same time. Consider the Federalists’ take on the separation of powers, which vaunts both separation and integration, autonomy and mutual dependence, as means of ensuring that ambition counters ambition. It’s a pragmatic position. Conceptually, however, the theory is a muddle. You might also wonder what Rehfeld makes of the fact that territorial districts were used in the immediate wake of the Founding to ensure that minority interests were represented in the House. Rehfeld dismisses the practice as stemming from “political manipulation rather than based on principled ideas of representation.” (p. 67n25, 135-37). Here again, if one thinks that the Founders blended principle and pragmatism, one would weigh this evidence differently. Finally, one of Rehfeld’s key claims is that the Framers believed that congressional districts would be “much too large” to be “coterminus with local political interests” (p. 97). One naturally wonders whether the state-based compromises embedded in the Constitution are best understood as efforts to distribute power using even bigger territories as a proxy for interest, something that would undermine that claim. As Rehfeld notes, however, his historical arguments are unnecessary for his broader normative claims, which are fresh and interesting. And that, of course, is more than enough for an excellent book.

Kevin O’Leary’s *Saving Democracy* is, happily, more modest than its title suggests. While Rehfeld blames the composition of our constituencies for our democratic woes, O’Leary faults their size. Because districts for the

House of Representatives are enormous when compared to the Founding (650,000 people instead of 30,000), O'Leary claims there is too much distance between constituent and representative, resulting in a decline in participation and a weakening of democratic ties.

The solution, says O'Leary in this engaging book, is to establish a true "People's House" by creating a citizens' assembly in every House district. The proposal—which builds on the work of Dahl, Fishkin, and others—would use something akin to random assignment to identify one hundred people from each district to "study and debate pressing issues . . . and then offer their opinions." (p. 8). During "Stage 2," the assemblies would be networked via the Internet and granted "the formal power to vote yea or nay on major legislation that has passed the House of Representatives and the Senate" (p. 8). The assemblies would also enjoy the power to initiate bills, offer amendments, and formally instruct Congress (p. 8).

Once one wades through the inevitable cheerleading authors do when writing for a general audience, one discovers an extended, broad-gauged reflection on the current state of our democracy and its relationship to participatory theory, all delivered with a reporter's verve. Given his intended audience, O'Leary's theoretical materials aren't as analytically tight as Rehfeld's, though he does ground his arguments in the republican tradition (Madison and Machiavelli). And O'Leary's arguments are relentlessly sunny, punctuated with generous predictions about how well the citizens' assemblies would function. Still, O'Leary might have empirics on his side here. The citizens' assemblies established after the book was published are certainly promising.

My main quarrel with O'Leary is that he primarily frames his project as a tool for creating a vibrant participatory democracy rather than a more representative one. While representation is the book's minor theme, O'Leary devotes most of the book to trotting out the shibboleths of participatory democrats (albeit with a welcome emphasis on institutions). I am skeptical of his claim that citizens' assemblies will result in more widespread and active democratic engagement, at least for the citizens who are *not* chosen to serve. Perhaps, as O'Leary argues, when there are fewer degrees of separation between citizen and representative, democratic politics will exert a stronger gravitational pull. But that has not been the case with local and state governments. Maybe that's because their jurisdiction is not national in scope, though they certainly preside over issues that matter to voters—education, safety, taxes. Perhaps having one of their own engaged in governance will draw citizens into the process. But it seems as likely to give citizens an excuse not to engage, as they have more reasons to trust the person who stands in for them.

What O'Leary's proposal might achieve is less glamorous but certainly important: improving the workaday machinery of political representation. One of the biggest problems in our democracy is low-information voters who lack the knowledge to evaluate policy debates and hold representatives accountable. Party ID is the usual heuristic voters use, but it fails to serve its purpose when representatives are unduly swayed by special interests or self-interest. While citizens' assemblies may not turn passive, low-information voters into what Justice Frankfurter called a "civically militant electorate," they might give voters a shortcut for figuring out what a civically militant electorate would want. Representation can be had, then, even when elected officials are not inclined to provide it.

Reformers are always on the hunt for such shorthand, but they typically look to bodies composed of experts to provide it. Those institutions, however, are vulnerable to political deflection. Disgruntled politicians trying to stymie reform can argue that expert commissions are undemocratic or insist that political elites aren't really "neutral." Citizen assemblies are virtually immune to such attacks. You can't make political hay by insisting that a representative group of voters is undemocratic or insisting that everyday citizens have a partisan axe to grind. The hope would be that the assemblies' cue would become more powerful over time, pushing legislators to compete for the assemblies' blessings. A cynic might think that Congress is not going to create a competing power base like the assemblies. For purposes of providing a heuristic, however, one need not move past stage 1 of O'Leary's plan, by privately creating assemblies as reformers did in Australia.

My other frustration with O'Leary's book is his failure to dig into the details. While O'Leary engages with institutional design questions writ large, he never answer the narrow question: how do we design an assembly to ensure that citizens aren't captured by interest groups or led by the nose by experts? There are answers to this question, but O'Leary does not provide them.

In many ways, O'Leary and Rehfeld's books could not be more different. Rehfeld's arguments are precise, even lapidary, and he engages deeply with counterarguments. O'Leary's is a sophisticated piece of advocacy, bereft of hand-wringing. Rehfeld's book is self-consciously narrow in focus, whereas O'Leary offers a wide-ranging institutional analysis. What unites the two books is that the authors ground their arguments in specific proposals. Unlike many political theorists, they toggle between principle and practice, the abstract and the particular. The result is not only a sharper set of theoretical contributions, but books whose ideas stick with you long after you've set them aside.

**Bio**

**Heather K. Gerken** is the J. Skelly Wright Professor of Law at Yale Law School. Her recent publications include *The Democracy Index: Why Our Election System is Failing and How to Fix It* (Princeton University Press, 2009), "Second-Order Diversity" in the *Harvard Law Review*, "Dissenting by Deciding" in the *Stanford Law Review*, and "Uncooperative Federalism" in the *Yale Law Journal*. She is currently working on a book on second-order diversity and the benefits associated with minority-dominated governing institutions.