

Democracy & Judicial Review Revisited

THE NEW OLD CRITIQUE OF JUDICIAL POWER

ROBERT H. BORK

COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES
AMERICAN ENTERPRISE INSTITUTE 2003

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OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE
ROUTLEDGE 2003

ROSS SANDLER & DAVID SCHOENBROD

DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT
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INTRODUCTION

THE CLAIM THAT judicial review undermines democracy is one of the oldest and most common attacks on judicial power. To academics, the argument is known as the “countermajoritarian difficulty.”¹ As

Alexander Bickel famously put it in his classic *The Least Dangerous Branch*,² “the root difficulty is that judicial review is a countermajoritarian force in our system.”³ For Bickel and innumerable later writers, “judicial review is a deviant institution in American democracy” because it enables an unelected judiciary

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¹ For a useful recent history of the debate over the countermajoritarian difficulty, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

² It was Bickel who coined the phrase “countermajoritarian difficulty” in 1962. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

³ *Id.* at 16.

to override the decisions of majoritarian legislatures.⁴

At least since the days of the Warren Court, the countermajoritarian difficulty has been deployed by conservatives against “activist” liberal courts. In recent years, the rise of a more conservative Supreme Court has led prominent liberals to join the chorus of denunciation. In the 1990s, both conservative jurist and legal scholar Robert Bork and prominent liberal constitutional law professor Mark Tushnet published books advocating the abolition of judicial review as an affront to democracy.⁵ Others on both sides of the political spectrum have also called for restricting – even if not abolishing – judicial power on similar grounds.

This Article reviews three recent contributions to the literature arguing for constraining judicial review in order to protect democracy: *Coercing Virtue: The Worldwide Rule of Judges*, by Robert Bork, Jamin Raskin’s *Overruling Democracy: The Supreme Court vs. the American People*, and Ross Sandler and David Schoenbrod’s *Democracy by Decree: What Happens When Courts Run Government*. The three books are written by ideologically diverse authors and focus on differing areas of law.

Bork, of course, is a well-known conservative legal scholar and former federal judge; Sandler and Schoenbrod are moderately liberal legal academics and former public interest lawyers for the left of center Natural Resources Defense Council who have become disillusioned about judicial power; Raskin is a well-known and staunchly liberal scholar of constitutional law who has represented

presidential candidate Ralph Nader in election litigation.

The subjects of the three books are no less divergent than the authors’ backgrounds. *Coercing Virtue* expands Bork’s previous critique of the supposedly anti-democratic nature of US courts to include foreign and international courts. *Overruling Democracy* is an attack on the Rehnquist Court’s “stifling of political democracy” (9). Finally, *Democracy by Decree* expands the “countermajoritarian difficulty” critique of judicial review from its traditional focus on constitutional issues to encompass statutory interpretation decisions that allow courts to control public policy by means of consent decrees.

Despite these seeming differences in ideology and focus, the recent works of Bork, Raskin, and Sandler and Schoenbrod share important common weaknesses. These shortcomings are endemic to much if not all the literature criticizing supposedly undemocratic excesses of judicial review. In this Article, I focus on two major unaddressed weaknesses of the literature attacking judicial review on countermajoritarian grounds.⁶ I use the works of Bork, Raskin, and Sandler and Schoenbrod to show how these problems pose serious challenges to those who seek to restrict judicial review on the ground that it is anti-democratic.

Part I shows how critiques of judicial review often fail to deal adequately with what John Hart Ely called “representation-reinforcement,” the possibility that judicial review might actually strengthen democratic control of government rather than diminish

4 *Id.* at 18.

5 ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH* 117 (1996); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

6 A third common weakness of this literature is its neglect of the problem of widespread voter ignorance, which casts doubt on the claim that legislation overruled by the judiciary is truly a product of majoritarian preferences. I do not address this issue here because I have analyzed it extensively elsewhere. See Ilya Somin, *Political Ignorance & the Countermajoritarian Difficulty: A New Perspective on the “Central Obsession” of Constitutional Theory*, IOWA L. REV. (forthcoming 2004).

it.⁷ Bork, Raskin, and Sandler and Schoenbrod follow earlier scholars in failing to consider important ways in which the decisions they attack might actually promote democracy rather than undermine it.

Part II shows that all three books also exemplify a second weakness of the counter-majoritarian difficulty literature: attacking as undemocratic judicial decisions the author disagrees with, without considering other decisions whose outcomes were favorable to the author's ideology. The problem here is not one of hypocrisy but rather a conceptual failure to consider the implications of strictly limiting judicial power for the full range of decisions that would be affected.

I. REPRESENTATION-REINFORCEMENT & THE ATTACK ON JUDICIAL REVIEW

The theory of "representation-reinforcement," a term coined by John Hart Ely,⁸ is perhaps the most obvious rebuttal to the claim that judicial review undermines democracy. Even some of the staunchest critics of the courts concede that judges can sometimes reinforce democracy rather than weaken it.⁹ In some cases – notably the protection of political speech and the right to vote – the link between judicial review and representation-reinforcement is obvious. More common, however, are situations where its presence or absence is contestable. Debates over representation-reinforcement are complicated because their resolution depends on both empirical judgments about the impact of judicial decisions and normative claims

regarding which people have a "right" to be represented and how much.¹⁰

A complete theory of representation-reinforcement cannot be developed without a parallel complete normative theory of democracy itself – a task beyond the scope of this Article. I limit myself to emphasizing that much of the literature attacking judicial review as undemocratic either ignores the question of representation-reinforcement entirely or fails to give it adequate consideration. Bork and Sandler and Schoenbrod mostly fail to address representation-reinforcement issues at all. Professor Raskin relies on representation-reinforcement arguments to support his critique of the Rehnquist Court, but does not address important representation claims on the other side.

A. Representation-reinforcement in international perspective.

The main contribution of Robert Bork's *Coercing Virtue* is his extension of the counter-majoritarian difficulty debate, previously centered primarily on American law, to international and foreign legal institutions. Bork argues forcefully that international judicial review by such organizations as the International Court of Justice, the European Court of Human Rights, and the International Criminal Court undermines democracy by taking power away from elected legislatures (ch. 1). He warns of the dangers posed by the dominance of these institutions by often unaccountable legal elites (id.). Bork also criticizes domestic judicial review in the United States, Israel, and Canada, but his

7 JOHN HART ELY, *DEMOCRACY & DISTRUST* chs. 4-5 (1980).

8 *Id.*

9 See, e.g., Robert H. Bork, *Neutral Principles & Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971) (noting that judicial protection of political speech strengthens democracy). Bork reiterates this view in *Coercing Virtue* (57-60).

10 See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 80 *YALE L.J.* 1063 (1980).

critique of international courts is his most distinctive contribution.

Unfortunately, Bork's argument is undermined by neglect of several important representation-reinforcement issues. Perhaps the most obvious is the fact that some 75 of the world's 192 governments are not electoral democracies.¹¹ Some 35% of the world's population – 2.2 billion people – resides in “Not Free” societies in which “basic political rights are absent and basic civil liberties are widely and systematically denied.”¹² Many other nations have very dubious democratic credentials. To the extent that international legal institutions constrain the power of non-democratic governments, there is no counter-majoritarian difficulty involved at all, since electoral majorities do not control those governments' actions in any case.

Even with respect to international judicial review of the policies of democratic governments, the possibility of representation-reinforcing effects often exists. By definition, many actions undertaken by governments in the international arena affect not only those governments' own domestic political constituencies, but also citizens of foreign nations. Obvious examples include decisions on the waging and conduct of war, and trade policy. With notable exceptions, citizens of foreign nations are not represented in the political processes of either democracies or dictatorships, so there is a danger that their interests will be neglected or abused. International legal institutions can help reduce this risk by forcing states to take greater account of

the impact of their actions on foreigners. For example, the creation of the World Trade Organization was meant to enable international institutions to prevent protectionist constituencies at the national level from undermining broader global interests in free trade, thus forcing nations to “internalize” the effects of their protectionist policies on others.¹³

The resulting “world trade constitution” has advanced the interests of groups that tend to be unrepresented or underrepresented in the political process, most notably the “poorest of the poor” of the Third World, who generally have little voice even in their own countries, much less in the wealthy nations of the West.¹⁴ International trade institutions provide them with a degree of representation by aligning their interests with those of politically powerful exporters in the West, who can be relied upon to use the WTO system to combat protectionism in order to advance their self-interest.¹⁵

A related but distinct representation-reinforcement effect of international judicial review is the possibility of assisting underrepresented constituencies *within* democratic nations. A well-known example is the systematic underrepresentation of consumer interests that benefit from free trade relative to producer interests that have incentives to support protectionism. Because of collective action problems and ignorance, many consumers who benefit from free trade lack incentives to organize politically and often don't even know that they are harmed by

11 FREEDOM HOUSE, *FREEDOM IN THE WORLD 2004 5-6* (2004) (available at www.freedomhouse.org – visited February 18, 2004).

12 *Id.* at 3.

13 See, e.g., John O. McGinnis & Mark Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 522-30 (2000) (explaining how the WTO seeks to overcome protectionist power at the national level by transferring decision-making power to international legal institutions).

14 For a brief summary, see John O. McGinnis, *World Trade Agreements: Advancing the Interests of the Poorest of the Poor*, 34 IND. L. REV. 1361 (2001).

15 *Id.* at 1362-63.

protectionist policies.¹⁶ Intervention by international legal institutions such as the WTO helps diminish the representational advantages of organized protectionist interests.

Taking account of representation-reinforcement issues might in some cases strengthen Bork's argument against international judicial review as well as weaken it. For example, on many international courts, judges representing authoritarian regimes hear cases involving the policies of liberal democratic governments.¹⁷ Such "representation" of dictators in international legal institutions is unlikely to reinforce democracy, particularly since the governments that appoint these judges have an incentive to avoid precedents that might later be used to expand the political rights of their own citizens. While not all of Bork's claims are invalidated by representation-reinforcement considerations, his analysis would be much stronger if it had systematically addressed these issues.

B. Representation-Reinforcement & Judicial Consent Decrees.

Bork's neglect of representation-reinforcement issues in international and comparative law is replicated by Sandler and Schoenbrod in their analysis of the very different area of judicial consent decrees in the United States. As Sandler and Schoenbrod point out, judicial use of consent decrees to resolve statutory lawsuits often gives courts broad policymaking power (chs. 2-5). Courts often use consent decrees to

obtain extensive authority over schools, prisons, and other public institutions. For example, the authors describe in detail *Jose P. v. Ambach*, a case in which a federal district court used a lawsuit under the 1975 Education for All Handicapped Children Act to acquire control over the education of thousands of allegedly learning disabled children in the New York school system. A series of consent decrees has allowed the court to control "special education" throughout the New York City school system from 1979 until the present day, making education policy decisions on behalf of over 160,000 children enrolled in special education classes (96-97). Sandler and Schoenbrod argue with some force that such exercises of judicial power undermine "the right of the people to a democratically accountable ... government" (172). As in the case of Bork, there is some merit to their claims, but their force is diminished by ignoring issues of representation-reinforcement.

John Hart Ely famously argued that courts could further the cause of representation-reinforcement by intervening on behalf of groups that have the right to participate in the political process, but are systematically disadvantaged within it – most notably African-Americans and women.¹⁸ Whatever the merits of Ely's claim, the representation-reinforcement issues in the cases examined by Sandler and Schoenbrod are actually much *more* severe than those Ely had in mind when he coined the term.

16 McGinnis & Movsesian, *supra* note 13 at 523-26. For evidence of extensive citizen ignorance of the benefits of free trade, see Bryan Caplan, *Systematically Biased Beliefs About Economics: Robust Evidence of Judgmental Anomalies from the Survey of Americans & Economists on the Economy*, 112 *ECON. J.* 433, 436-38 (2002). See especially questions, 16, 22, and 25 on Caplan's analysis comparing public attitudes towards the economy and those of professional economists.

17 For example, in the current International Court of Justice litigation on the construction of a security fence by the democratic government of Israel, the President of the Court is a judge appointed by the authoritarian government of China, while five other members represent the authoritarian or dubiously democratic governments of Egypt, Jordan, Madagascar, Sierra Leone, and Russia. See the ICJ's website at <http://212.153.43.18/icjwww/generalinformation/igncompos.html> (visited February 20, 2004).

18 ELY, *supra* note 7 at chs. 4-5.

Unlike Ely's examples, the groups protected by the judicial consent decrees analyzed by Sandler and Schoenbrod generally *do not have the right to vote at all*. The plaintiffs in *Jose P.* were learning disabled children, a group that surely does not have the right to vote or participate in the political process. Other consent decrees criticized by Sandler and Schoenbrod include decisions imposing judicial control over the management of prison conditions (124-25, 183-92). Convicted felons are disenfranchised in nearly all states, in some jurisdictions even after they have completed their sentences.¹⁹

The exclusion of children and prisoners from the franchise may well be justified on normative grounds. But the existence of the exclusion undercuts the claim that judicial intervention on behalf of these groups is necessarily undemocratic. To the extent that they are excluded from the political process, the judiciary may sometimes be the only forum in which their interests are represented at all.

To be sure, as Sandler and Schoenbrod point out, the protection that courts provide for the interests of children and prisoners is far from ideal. Often the agendas of judges and those of the activists who bring suits on behalf of children or prisoners fail to coincide with the interests of their ostensible beneficiaries. Sandler and Schoenbrod cite a class action case in which public interest lawyers sought to alleviate "unconstitutional conditions" in a Manhattan prison by having the inmates moved to a new facility on Rikers Island; most of the prisoners themselves opposed such a change because their families might not be able to visit them at such a distant location (124).

The existence of these sorts of problems does not, however, prove that consent decrees cannot advance the cause of representation-reinforcement. The decrees must be compared not to an ideal world but to the real world conditions likely to exist in their absence. In such circumstances, even the seriously flawed representation provided by institutional litigation might be superior to the near total absence of representation that might otherwise exist. For example, institutional litigation may have succeeded in significantly improving prison conditions in a number of states.²⁰

Sandler and Schoenbrod try to address the comparative dimension of the problem by arguing that courts can vindicate plaintiffs' legal rights without imposing consent decrees that lead to large-scale judicial control of policymaking (204-13). The suggestion that judges should, "to the greatest extent practicable ... leave policy making to elected policy makers" is one that few will disagree with. But there is certainly room for disagreement with Sandler and Schoenbrod's conception of what is "practicable," given their own recognition of the need to protect the plaintiffs' rights (*id.*).

The issue of representation-reinforcement sheds light on some of the reasons why it may be difficult to minimize judicial control while simultaneously vindicating legal rights. To the extent that many of the plaintiffs lack power in the political process, public officials will have little incentive to advance their interests. As standard economic principal-agent theory suggests, the greater the incentive agents have for "shirking" on their obligations, the greater the level and intrusiveness of monitoring necessary to prevent it.²¹ In order to force compliance upon recalcitrant officials, courts

19 ALEX KEYSSAR, *THE RIGHT TO VOTE* 302-08 (2000).

20 MALCOLM FEELEY @ EDWARD RUBIN, *JUDICIAL POLICY MAKING @ THE MODERN STATE: HOW COURTS REFORMED AMERICA'S PRISONS* (1998).

21 See, e.g., Armen Alchian @ Harold Demsetz, *Production, Information Costs, @ Economic Organization*, 62 *AM. ECON. REV.* 777 (1972).

may have to engage in intrusive monitoring of their policies.

The degree to which lack of plaintiff representation in the political process creates a need for intrusive judicial intervention is likely to vary from issue to issue. The overriding point, however, is that representation-reinforcement considerations must be taken seriously in any analysis of the possible anti-democratic impact of judicial consent decrees. This is particularly true in cases involving the interests of groups that are largely barred from participation in the political process.

C. Representation-Reinforcement & the Rehnquist Court.

In contrast to Bork and Sandler and Schoenbrod, Jamin Raskin tries to take account of possible representation-reinforcement effects of judicial decisions. He argues that courts must interpret the Constitution to “embody values of ... progressive democracy” (241). In particular, Raskin wants courts to invalidate government policies that inhibit the democratic process and political participation, because “government must remain neutral and stand aside when the people are forming their political will” (93). On these grounds, Raskin criticizes the Supreme Court’s decisions upholding laws that bias the political process in favor of the two major political parties, restricting free speech in public schools, and narrowly construing the right to vote (chs. 3, 5, 7).

Unfortunately, Raskin ignores the possibility that some of the decisions he criticizes might strengthen representation as much as undermine it and that many of them involve tradeoffs between different aspects of representation rather than unambiguous conflicts between

“popular democracy” and “the Court’s counter-democratic impulses” (10). This difficulty is evident in several parts of Raskin’s book, most notably in his discussion of corporate speech and his critique of judicial decisions upholding laws that strengthen the two-party system.

1. Representation-reinforcement and the regulation of corporate speech.

Despite his strong commitment to the protection of political speech in other contexts,²² Raskin is highly critical of judicial decisions protecting political speech by corporations (ch. 8). With notable exceptions,²³ the Supreme Court has held that political speech by corporations deserves many of the same protections as that extended to speech by individuals because such speech is “indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual.”²⁴ Raskin rejects this view on the ground that “corporations are not citizens” but rather “state-created artificial entities” established for the purpose of “engag[ing] in business” (190, 197). Therefore, state and federal legislatures have the power to pass whatever legislation they wish in order to constrain corporate influence on elections.

From a representation-reinforcement standpoint, Raskin’s argument is problematic. It provides no principled rationale for distinguishing between speech by business corporations and speech by newspapers, radio and television stations, and labor unions. All of the latter are corporations no less than

22 See, e.g., chs. 7, 9 (criticizing decisions upholding limits on political speech in public schools and attacking the proposed flag-burning amendment).

23 See *McConnell v. Fed. Election Comm’n*, 124 S. Ct. 619, 697-98 (2003) (holding that some campaign finance regulations may legitimately apply to non-media corporations while exempting the media).

24 *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978).

General Motors is, at least in the sense that they too are “state-created artificial entities” with the right of limited liability and other privileges created by state governments. Raskin tries to distinguish unions from corporations because “a union is a voluntary group of citizens recognized under the federal law who have made a choice to bind themselves together for purposes of contract negotiations and political self-empowerment,” while non-union corporations exist merely to “engage in business” (197). But if a union can have a dual purpose that covers both collective bargaining and “political self-empowerment,” there is no reason why other corporations cannot similarly pursue dual purposes as well; for example, they could choose to both seek profits for their stockholders and engage in political speech on issues that affect them.

2. Representation-reinforcement ☺ the two-party system.

In Chapter 5 of *Overruling Democracy*, Raskin argues that the Supreme Court erred in upholding a variety of laws meant to strengthen the US two-party system, usually at the expense of third parties.²⁵ Raskin is certainly right to worry that state and federal legislatures dominated by the two major parties are likely to use their power to insulate themselves from competition by third party outsiders (98-99). That said, Raskin does not give adequate consideration to representation-reinforcement concerns on the other side. His case for stronger judicial protection of third

party interests is weakened by his sometimes overly peremptory dismissal of the Court’s rationales for upholding laws that favor the two major parties. For example, Raskin rejects the Court’s “dominant argument for upholding severe restrictions on third-party access to the ballot” (106): the danger of “voter confusion.”²⁶ Raskin denies – without citing any evidence – the possibility that “a ballot with 25 candidates on it for one office” would be “really confusing” (107). He concludes, with some justification, that the government “should be forced to document” its claim that open ballot access for third parties really would confuse voters (107).

Fortunately, the recent California gubernatorial recall election provides us with evidence of the very type that Raskin demands. Under the extremely liberal ballot access regime for California recall elections, 135 candidates for governor were able to get on the ballot.²⁷ Republican Arnold Schwarzenegger easily won the recall election. More relevant to present purposes, the ninth place finisher, with some 0.2% of the vote, was little-known independent candidate George B. Schwartzman.²⁸ Schwartzman’s total of 12,382 votes was only slightly lower than the totals achieved by such celebrity candidates as actor Gary Coleman (14,242, 0.2% of the vote) and *Hustler* publisher Larry Flynt (17,458, 0.3%).²⁹ Schwartzman’s impressive performance was likely due to the similarity between his name and Schwarzenegger’s and the proximity of the two names on the alphabetically ordered ballot.

While the voter confusion that inflated Schwartzman’s vote total did not have any

²⁵ See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (holding that states may adopt election regulations that promote “political stability” by “favor[ing] the traditional two party system”).

²⁶ *Id.* (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986)). Raskin traces the confusion rationale back to *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (holding that states may limit ballot access in order to prevent “confusion [and] deception”).

²⁷ www.california-recall.com/go-candidates.cgi?do=view (visited February 19, 2004).

²⁸ *Id.*

²⁹ *Id.*

impact on the outcome of the 2003 recall election, it is easy to see that Schwartzman's presence on the ballot might have altered the result of a closer contest.

II. THE DANGER OF A ONE-SIDED FOCUS.

The literature on the countermajoritarian difficulty is marred by the fact that authors attacking allegedly "undemocratic" judicial decisions often focus only on those decisions that overrule legislation they favor while ignoring cases that strike down laws that they oppose. Indeed, the history of the countermajoritarian argument shows that it was taken up by conservative commentators during the 1960s and 1970s, when the Supreme Court was generally controlled by liberals; in recent years, it has become more popular among liberal scholars in large part due to the ascendancy of conservatives on the Court.

The one-sidedness of much academic criticism of countermajoritarian judicial decisions leads to a flawed analysis of the causes and consequences of judicial decisions that limit legislative power. Once we acknowledge that "anti-democratic" judicial decisions are not limited to one side of the political spectrum, it becomes more difficult to attribute them solely to the machinations of one's political opponents. The knowledge that limiting judicial power might lead to the reversal of precedents that we approve of might also lead us to temper proposals to curb or eliminate judicial review.

The three works reviewed here all for the most part continue the pattern of focusing on decisions whose results they disapprove of while largely ignoring those that they might support.

Bork's book focuses almost exclusively on cases that he views as liberal judicial activism. As already noted, his chapter on international judicial review completely ignores the WTO, despite the fact that it is by far the most powerful international legal institution. Bork's chapter criticizing allegedly antidemocratic judicial activism in the United States focuses on liberal decisions protecting the interests of women and homosexuals, limiting government endorsement of religion, and protecting nonpolitical speech (73-77, 65-68, 57-65). It does not even mention important Rehnquist Court conservative decisions striking down affirmative action laws, limiting federal power over the states, and protecting property rights. Similarly, Bork's criticism of the Israeli Supreme Court (ch. 4) does not include any consideration of its decisions protecting property rights and economic liberties.³⁰

Bork's failure to consider judicial intervention upholding conservative goals casts serious doubt on his explanation for anti-democratic judicial activism: the rising power of a "New Class" of left-wing intellectuals who seek to impose a "liberal agenda" (59). According to Bork, the New Class is an "international" movement that "displays its socialist impulse everywhere" (16). Whatever the sins of the New Class, its power cannot account for judicial decisions favoring federalism, property rights, and free trade, among other distinctly non-socialist causes promoted by courts. Consideration of the full range of judicial interventions to curb legislative power would at the very least force Bork to modify his explanation of the growth of judicial power. It might also lead conservative critics of the judiciary to consider the possibility that judicial constraints on legislative power are not uniformly undesirable.

³⁰ See Ran Hirschl, *The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Polities*, 36 STAN. J. INT'L L. 73, 99-100 (2000) (discussing important Israeli Supreme Court decisions protecting property rights and occupational freedom).

Jamin Raskin's critique of anti-democratic judicial power is in many ways a mirror image of Bork's. He attacks the Court's conservative decisions protecting federalism, striking down "majority-minority" congressional districts, narrowly interpreting the right to vote, protecting corporate speech, and of course *Bush v. Gore* (4, ch. 4, ch. 3, ch. 8, ch. 1). Almost entirely absent from Raskin's analysis are liberal Rehnquist Court decisions protecting the right to abortion, extending the constitutional rights of homosexuals, and limiting the application of the death penalty, among others. A few of these cases are at least mentioned by Raskin (e.g., 75), but he does not consider the possibility that any of them may undermine democracy.

Greater consideration of the Supreme Court's important recent liberal decisions might have cast doubt on Raskin's claim that recent Supreme Court "judicial activism" is focused overwhelmingly on "laws expanding the rights of the people or advancing progressive social and economic agendas," and his argument that "progressives have almost always had more cause than conservatives to assail the activism of the Supreme Court" (4, 6). Recognition that current judicial intervention often favors liberal causes as well as conservative ones might also temper Raskin's call for radical constitutional change meant to "out-flank the new system of judicial supremacy and replace it with enduring new rights of political citizenship" (224). Like Bork, Raskin is quick to see the potential anti-democratic implications of decisions he opposes, but ignores very similar criticisms that can be deployed against those he supports. Although these two authors are ideological opposites, their analyses of judicial review are strikingly similar.

Sandler and Schoenbrod's book is much less one-sided than Bork's and Raskin's.

Professors Sandler and Schoenbrod criticize the very sort of institutional reform litigation in which they engaged during their earlier careers as public interest lawyers. Nonetheless, they too feel an impulse to set aside the possibility that democracy might be restricted by decisions they approve of. Although Sandler and Schoenbrod denounce the anti-democratic implications of consent decrees that intrude on policy-making "further than necessary to protect plaintiffs from illegal injury" (200), they do not consider the danger that decrees that *do not* go "further than necessary" might still significantly impinge on legislative power. According to Sandler and Schoenbrod, "[a] judge does no damage to democratic accountability by issuing a decree that prohibits violation of a constitutional right" because "[w]hether to obey the Constitution is not a policy choice in the first place" (204).

This effort to define away the possibility that "necessary" consent decrees might undermine democracy is unpersuasive. Although decrees that prevent violations of constitutional rights are normatively desirable, that does not mean that they never have anti-democratic effects. It is difficult to deny that at least some policies that violate constitutional rights are enacted by legislatures with strong support by popular majorities.³¹

CONCLUSION

The works of Bork, Raskin, and Sandler and Schoenbrod all make valuable contributions to the study of judicial review. They forcefully remind us of the many different ways in which judicial power clashes with democracy. At the same time, they also exemplify major weaknesses of the countermajoritarian critique of

³¹ Prominent historical examples include laws discriminating against racial minorities, violations of the free speech rights of politically unpopular groups, and possibly policies that violate the rights of prisoners.