

Book Review

Overruling Democracy: The Supreme Court v. The American People

By Jamin B. Raskin. New York: Taylor and Francis Books, Inc., 2003.

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I. INTRODUCTION

In *Overruling Democracy*, Professor Jamin Raskin discusses how the Supreme Court has failed to enforce basic political rights by subordinating democratic principles inherent in the Constitution.¹ The Court tolerates the usurpation of popular sovereignty through the manipulation of the electoral process. The Court also fails to protect the functioning of democratic principles in our everyday lives in cases dealing with schools and corporations. Throughout the book, Raskin offers several solutions to the democracy deficit, including several proposed constitutional amendments to clearly enshrine democratic rights. However, the issues are presented in such a manner that may undermine the book's effectiveness as a tool for building support for a democracy reform movement.

II. MANIPULATION OF THE ELECTORAL PROCESS

A. Bush v. Gore's *Twister Take on Democracy*

Raskin begins with a discussion of *Bush v. Gore* as a recent and blatant example of the Court's (mainly the conservative justices') hostility to democratic principles. He states that "the Court's decision expressed perfectly its paramount commitment to the political rights of conservative majority-white factions in each state, its hostility to potential electoral majorities comprised of African Americans and Hispanics, its perplexing eagerness to show favoritism towards certain political parties over others, and its readiness in the crunch to substitute

¹ JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT V. THE AMERICAN PEOPLE* (2003).

its political will for that of the people.”² The Court found that the Equal Protection clause was violated because there was no uniform standard for manually counting the ballots. Therefore, the Florida Court had to articulate the standard, yet the deadline for choosing the electors was too imminent for this to be possible.³ Raskin finds that the Court’s decision “was utterly result-oriented and unprincipled” much like many of its other decisions concerning the processes of democracy.⁴ He explains that the decision was result-oriented because the conservative majority refused to apply several of its own legal precedents that were relevant to the case. The Court ignored its own views on the political question doctrine,⁵ the requirement of a personal injury in order to have standing to assert an Equal Protection claim,⁶ the application of strict rather than “rational basis” scrutiny in a case concerning no fundamental right or suspect class,⁷ and its choice of an inappropriate remedy to conclude the election.⁸

² *Id.* at 11.

³ *Id.* at 12 (citing *Bush v. Gore*, 531 U.S. 98 (2000)).

⁴ *Id.* at 12-13.

⁵ *Id.* at 13-14. Raskin cites Rehnquist in *Nixon v. United States* to demonstrate his lapse in *Bush* on the political question doctrine. In *Nixon*, Rehnquist wrote that judicial review is improper where there is a “textually demonstrable constitutional commitment of the issue” to another branch. *Id.* (citing *Nixon v. United States*, 506 U.S. 224, 227 (1993)). Raskin argues that this was not applied by the majority in *Bush* perhaps because they knew it would have prevented the Court from considering the case since Article II and the Twelfth Amendment give Congress the primary role in counting electoral college votes. He raises this issue not to say that, under the political question doctrine, the courts lack the ability to review matters concerning election law. He mentions this to show the conservative majority’s bias and hypocrisy in failing to apply their own rules to their own candidate.

⁶ *Id.* at 14. The Court also failed to consider, again under its own holdings, whether Bush had standing to make an Equal Protection claim against Florida over the ballots of some unidentified voters. In *Allen v. Wright*, in an opinion by Justice O’Connor, the Court required the plaintiff to show that they suffered a personal injury traceable to the government and redressable by the courts. *Id.* at 14 (citing *Allen v. Wright*, 468 U.S. 737 (1984)). The Court failed to discuss (or possibly even consider) whether Bush was personally injured or whether the Court could issue a remedy. This partially leads to Raskin’s disbelief over their chosen remedy: “how could stopping the vote count sufficiently redress these third-party injuries?” *Id.* at 15.

⁷ On the merits of the decision, the Court misapplied the standard of review required by the Equal Protection Clause. Raskin argues that the Court should have applied “rational basis” because no suspect class was involved and no fundamental right was burdened. *Id.* at 17. The Florida “intent of the voter” standard should then easily pass minimal “rational basis” scrutiny. *Id.* at 18.

⁸ Raskin notes that the Court’s remedy is the greatest affront of all. The Court ordered “disfranchisement as the remedy for hypothetical disfranchisement” because of an

Raskin then speculates how the case would have been resolved had the parties been reversed: with Gore seeking to overturn the Florida Court's recount. He predicts that the conservative justices would have declined to hear the case. To support this assertion he points to the Court's refusal to hear a voting rights case, *Alexander v. Daley*, a few weeks earlier.⁹ He states that this indicates the Court's indifference to political rights. However, Raskin rejects the idea that the liberal judges would have stretched their reasoning to obtain a favorable outcome for Gore. "The liberals would not have dared to invent a dramatic new Equal Protection right in those circumstances to favor a Democratic candidate. They almost certainly never would have taken the case and if they had, almost certainly would have left the case to the Florida Supreme Court."¹⁰

He ends the chapter by concluding that the justices have not embraced the protection of democracy as a central (or even important) value in the Constitution. The judges freely subordinate the constitutionally mandated tenets of democracy in order to protect other values that they hold dear.¹¹

imminent deadline they "found" in the Electoral Count Act of 1887. *Id.* at 18. However, the Court overlooks that this is not a rigid deadline. The "safe harbor" provides only that a dispute over the choice of electors settled by a state before the specified date cannot be challenged by Congress. Raskin explains that it does not mean that electors must be chosen before that date. In fact, in 1961 Hawaii certified its electors on January 4—several weeks after this safe harbor period. Therefore, Raskin writes, the Court improperly interpreted an issue of state law: whether Florida law mandates that its electors be chosen before the expiration of the safe harbor period. *Id.* at 19.

⁹ *Id.* at 21 (citing *Alexander v. Daley*, 90 F. Supp. 2d 35 (D.D.C. 2000)).

¹⁰ *Id.* at 22. To support this he explains that liberals are inherently committed to abstract principles of fairness and freedom. *Id.* at 22-23 (quoting Jerry Z. Muller, *IN CONSERVATISM: AN ANTHOLOGY OF SOCIAL AND POLITICAL THOUGHT FROM DAVID HUME TO THE PRESENT* 16 (Jerry Z. Muller ed., 1997)). He says that conservatives were more aware of the effects the outcome would have in the larger picture (while oddly assuming that liberals are unaware of the same facts). He correctly points out that the conservatives "reason[ed] backward . . . from the result they wanted to reach (the political good)? There can be little doubt about it." *Id.* at 23. Finally, to support the theory that the liberal side would not have done the same thing he states "in the bewildering maze of litigation that took place in the 2000 election, every judge described in the press as conservative decided in favor of Bush while a number of liberal Democratic appointees decided against Gore." *Id.*

¹¹ *Id.* at 29 ("We clearly need more Justices with a commitment to democratic reading of the Constitution. . . . Why was our constitutional language so pliable and malleable that the *Bush* majority could arrive at this profoundly antidemocratic resolution? Why is democracy such a weakly embodied constitutional value?").

B. *America's Mythical Right to Vote*

Raskin opens the third chapter by stating that the Court has continued to assume that there is no right to vote in the Constitution. Yet textual silence has not prevented the Court from recognizing other rights such as the right to choose an abortion or the right to marry, as well as several exceptions to the Fourth Amendment's warrant requirement.¹² Raskin argues that the recognition and enforcement of the right to vote would prevent manipulation of the electorate including incidents such as the purging of names from voter lists without giving the voter notice.¹³ Raskin explains how the illusive right to vote has enabled the continued unwarranted disenfranchisement of large groups of people in America.¹⁴

Raskin then offers a broader look at the state of democracy in America by comparing how other democratic nations grant voting rights. The right to vote is expressly included in at least 125 countries, including every new Constitution created in the last ten years.¹⁵ The failure to establish and protect a right to vote can also be seen as contrary to several international agreements such as the Universal Declaration of

¹² *Id.* at 31. In fact, voting is mentioned specifically in several amendments. Raskin explains that this high regard for voting combined with the Ninth Amendment providing that "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" creates a strong argument that the people *already* have a constitutional right to vote. *Id.* at 32.

¹³ *Id.*

¹⁴ A section discussing disenfranchisement of residents of Washington, D.C. indicates the missing federal constitutional right to vote for senators and representatives. He describes the decision in *Alexander v. Mineta* where a U.S. District court ruled specifically against recognizing a right to vote. *Id.* at 33-36 (citing *Alexander v. Daley*, 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd*, 531 U.S. 941 (2000)). In the next section he discusses how the same fate met the residents of U.S. territories Puerto Rico, American Samoa, Virgin Islands, and Guam. *Id.* at 36-37.

Finishing the list of legally, yet wrongly, disenfranchised groups he highlights the 3.9 million convicted felons who have lost their voting rights in eight states. *Id.* at 38-39 (citing THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *available at* <http://www.sentencingproject.org/brief.html>). The court has upheld the constitutionality of the practice by citing Section 2 of the Fourteenth Amendment, which allows states to eliminate voting rights "for participation in rebellion, or other crime." *Id.* at 39 (citing *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974)). Raskin notes that this was enacted for the purpose of permitting states to punish ex-Confederate rebels. *Id.* at 40.

¹⁵ *Id.* at 42. Raskin lists the only fifteen countries not to mandate universal suffrage in their constitutions. The United States is present on the list next to such countries as Chechnya, Iran, Libya, and Saddam Hussein's Iraq. *Id.* at 42.

Human Rights, International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man.¹⁶

It is clear that the United States is falling behind the rest of the world in providing (and protecting) the right to vote. A right to vote must be incorporated into the Constitution to protect it from actions taken by legislatures and tolerated by courts. Raskin concludes the chapter by offering a Right-to-Vote amendment designed to strengthen American democracy.¹⁷

C. How the Electoral College Fails Voters

Next, Raskin explains that creating universal suffrage is not enough to restore America's democracy. As the 2000 election showed ("the popular vote-winner lost, the popular vote-loser won"), the right to vote is meaningless if the will of the majority of voters does not rule.¹⁸ Raskin suggests the first step to protect majority rule would be to abolish the Electoral College.¹⁹

Under the Electoral College system, the citizens' votes are not counted in a way that ensures majority rule and equal voting rights. The

¹⁶ *Id.* at 42-43.

¹⁷ *Id.* at 43. The text of Raskin's proposed amendment states:

Section 1. Citizens of the United States of at least eighteen years of age have the right to cast an effective vote in primary and general elections for President and Vice President, for electors for President and Vice President, for their State or District Representatives and Senators, and for executive and legislative officers of the or state and local legislatures. Such right shall not be denied or abridged by the United States or by any State.

Section 2. The right of citizens to vote, participate and run for office on an equal basis shall not be denied or abridged by the United States or by any State on account of political party affiliation, wealth or prior condition of incarceration.

Section 3. The District constituting the Seat of Government of the United States shall elect Senators and Representatives in such number and such manner as to which it would be entitled if it were a State.

Section 4. The Congress shall have power to enforce this article by appropriate legislation. Nothing in this Article shall be construed to deny the power of States to expand further the electorate.

¹⁸ *Id.* at 45.

¹⁹ The Electoral College "has the magical power to frustrate majorities at the national level and roll over minorities at the state level." *Id.*

“winner take all” feature of the electoral college depresses turnout and the value of votes cast in states that are lopsidedly Democratic or Republican.²⁰ Therefore, under our Electoral College system, contrary to the intent of its creators, campaigns are tailored to focus on issues chosen to activate select portions of the voters in the contested states.²¹ Raskin explains how difficult it is for most people to accept this fact, given our idealized notions of American democracy.²² Raskin argues that, without the Electoral College, in a truly national presidential election, every voter will have an equally effective vote and the majority will always choose the winner.²³

Raskin continues his argument against the Electoral College by explaining its roots in white supremacy.²⁴ He explains that the Constitution’s House apportionment, with its “Three-Fifths” provision, combined with having the number of senators added to the Electors created a “pro-slavery, small state tilt” to the system – a bias that is compounded for elections decided in the House. He solidifies this by noting that 13 southern states control 163 Electoral College votes – more than half needed to reach 270 necessary to win the election.

²⁰ *Id.* at 45-46. By a recent estimate, this is the case in 41 states and the District of Columbia. See STEVEN HILL, *FIXING ELECTIONS* 28 (2002). In 2000 this finally led to a small popular revolt against the Electoral College in the form of a vote trading plan. Raskin himself introduced the vote pairing strategy in an article published in the online magazine *Slate* on October 25, 2000. See Jamin Raskin, *How to Save Al Gore’s Bacon: Gore and Nader Can Both Win*, *SLATE*, Oct. 25, 2000, <http://slate.msn.com/id/91933/>. In order to make their votes more effective, Gore supporters trapped in heavily Republican states would vote for Nader in exchange for Nader supporters living in swing states voting for Gore. This was intended to help defeat Bush in swing states (and thus the whole election) while helping Nader get the five percent necessary for the Green Party to qualify for federal funding for its presidential candidate in 2004. RASKIN, *supra* note 1, at 48. Several websites were created with the most popular, NaderTrader.org experiencing more than 650,000 visits in two weeks. *Id.* at 50. The popularity of the vote pairing strategy shows the frustration with the current electoral system.

²¹ RASKIN, *supra* note 1, at 46.

²² *Id.* at 45 (“It is sometimes hard for us to see this point because we instinctively identify what is democratic with whatever happens to be in our Constitution. But an institution that works quite naturally to defeat the will of the national majority is sharply at odds with democracy. The job of small-d democrats is not to pretend that our Constitution is perfectly democratic but to make it more so.”).

²³ *Id.* at 47.

²⁴ *Id.* at 56 (“Because the argument for the electoral college hinges on the presumptive weight we should attach to history, it is important to see how the history of the Electoral College is intertwined with the institutions and movements of political white supremacy.”).

Raskin argues that the Electoral College should be abandoned because it causes millions of votes to become almost meaningless. As an example he uses the African American community's support for Gore that was rendered ineffective because 58 percent of African Americans lived in states that Bush won.²⁵ Raskin concludes that "[t]his is the basic reason to get rid of the Electoral College today: each person's vote should count equally in a presidential election, regardless of geography, and the winner should actually *win*."²⁶

In the next section he deftly refutes the arguments commonly asserted to support the Electoral College. Some argue that the Electoral College should be retained because it is our tradition. It is what the framers intended, so that is how we should elect presidents – regardless of how obsolete the method is.²⁷ Raskin believes that this is no excuse. "We have often replaced the handiwork of the Framers when it has thwarted popular control over government."²⁸ For examples he cites the Thirteenth, Fourteenth, Fifteenth, Seventeenth and Nineteenth Amendments.

Another argument commonly asserted in favor of the Electoral College is based on principles of federalism. The Electoral College should be retained because it gives small states protection by giving them a greater influence on the elections than an at-large system would. Raskin explains that in practice the small states, as such, are not protected. Candidates focus their efforts on a very few swing states—both small and large—and ignore "uncontested states" that come in all sizes.²⁹

To replace the Electoral College, Raskin offers a "Popular Election of the President Amendment" that states:

²⁵ *Id.* at 59. Also consider that African-Americans were not the only group effectively disenfranchised by the Electoral College. For example, the same fate was suffered by more than two million Bush voters in New York and more than four million in California. See NEW YORK STATE BOARD OF ELECTIONS, PRESIDENT AND VICE PRESIDENT ELECTION RETURNS 2000, available at <http://www.elections.state.ny.us/elections/2000/wpres2000.pdf>, and California Secretary of State, Statement of Vote, 2000 General Election, available at http://www.ss.ca.gov/elections/sov/2000_general/su m.pdf. Of course, all 3.9 million people who voted for candidates outside the two-party system were also effectively disenfranchised by the Electoral College. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002 23 (2003), available at <http://www.census.gov/prod/2003pubs/02statab/election.pdf>.

²⁶ RASKIN, *supra* note 1, at 59-61.

²⁷ *Id.* at 61.

²⁸ *Id.* at 62.

²⁹ *Id.*

The President and Vice President shall be elected by direct popular vote of all U.S. Citizens eighteen years of age and older; but no person shall be elected President who has not attained at least 50 percent support among the votes cast. Whenever there are three or more candidates listed on the ballot, the ballot shall ask voters to rank their choices in order of preference. If no candidate receives at least 50 percent of the first-place votes cast, the last-place candidate's ballots shall be redistributed to the second-choice candidates of these voters. This instant runoff method shall continue until a candidate has achieved a majority of all votes cast.³⁰

Raskin explains that this amendment will have several effects. First, this amendment would unite the nation into one electoral district that directly votes for the president rather than having 51 separate jurisdictions vote for electors. Second, it would also finally allow citizens living in U.S. territories to participate in presidential elections.³¹ Third, the amendment's instant runoff method would help ensure majority rule and temper the negative tone of campaigns because candidates "want to become a group of voters' second favored choice even if they cannot be their first."³²

D. Ass-Backwards Democracy: How American Candidates Choose Their Voters

In the fourth chapter Raskin discusses the Court's historical treatment of congressional districts drawn to create districts where a majority of registered voters are members of a racial minority. These cases show how the Court allows incumbents to tailor democratic process to their advantage even at the expense of lessening the political efficacy of certain classes.³³ He begins by explaining how the Civil Rights movement sought to restore African-Americans' right to vote.³⁴

³⁰ *Id.* at 64-65.

³¹ *Id.* at 65.

³² *Id.* at 66. For an analysis of the constitutionality of instant runoff voting see Brian P. Marron, *One Person, One Vote, Several Elections?: Instant Runoff Voting and the Constitution*, 28 VT. L. REV. 343 (2004).

³³ Raskin explains how the Civil Rights movement sought to restore African-Americans' right to vote. *Id.* at 70. The Voting Rights Act eliminated such obstacles as literary tests, character exams, constitutional law quizzes. Though this reform increased blacks' ability to cast votes, the white majority soon implemented changes to

For a time the Justice Department was able to use the Voting Rights Act to protect black effective by suing under a theory of vote dilution. The utility of this approach became limited after the Supreme Court held in *Mobile v. Bolden* that plaintiffs were now required to show a racially discriminatory purpose behind the act that created the dilution.³⁵ In response, Congress enacted an amendment to the Voting Rights Act that prohibited voting standards that resulted in racial minorities having “less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.”³⁶ This applied to states with a history of discrimination and polarized racial voting. As a result, the 1990 reapportionment included several majority-minority districts. These districts soon were challenged on Equal Protection grounds.³⁷

In *Shaw v. Reno*, white plaintiffs challenged two North Carolina districts because they believed the Equal Protection Clause forbids oddly shaped districts drawn to segregate the races in voting. They sought a “color blind” electoral process. Raskin notes that the Court had previously never required districts to be of any certain shape or compactness.³⁸ He states that “[t]he white plaintiffs were actually contending that they had a right under Equal Protection not to live in a majority-African American district, a claim that was logically absurd even if fairly reflective of the way many white voters felt.”³⁹ Many decisions followed *Shaw*, each striking down majority-minority districts.⁴⁰

Later, the Court in *Miller v. Johnson* refined the standard by finding that Equal Protection is violated not merely by strange shape, but only when racial considerations subordinate other race-neutral criteria.⁴¹ Thus, the racial motivation must be the dominant consideration in order

minimize the impact of the vote. Raskin gives as examples runoff requirements (preventing black candidates winning by a plurality because the white vote was split between two or more white candidates) and at large, single-member districts drawn to split up potential black majorities. *Id.*

³⁴ *Id.* at 70.

³⁵ *Id.* at 71 (citing *Mobile v. Bolden*, 446 U.S. 55 (1980)).

³⁶ *Id.* (quoting 42 U.S.C. § 1973 (2006)).

³⁷ *Id.* at 72. Raskin notes that there was considerable backlash from conservatives over the shift in political power. *Id.* at 73. (citing Jim Sleeper, *Rigging the Vote by Race*, WALL ST. J., Aug. 4, 1992, at A14; *America's 'Segremanders'*, WALL ST. J., Apr. 2, 1992 at A14; *Against "Political Apartheid"*, WALL ST. J., June 30, 1993.).

³⁸ *Id.* at 73.

³⁹ *Id.* at 74.

⁴⁰ *Id.*

⁴¹ *Id.* 74-75 (citing *Miller v. Johnson*, 115 S. Ct. 2475 (1995)).

for an irregularly shaped district to be found unconstitutional. Raskin summarizes that the Court now allows the state to draw districts in any shape and use race as long as there is no vote dilution or disenfranchisement.⁴²

While the Court is hostile to efforts to enhance the power of minority communities, it openly embraces redistricting schemes intended to protect incumbents and parties. Irregularly shaped districts are found permissible if drawn for incumbent protection and partisan entrenchment.⁴³ Raskin finds this “a far greater affront to democratic principles to build a congressional district around the political career of a single person than it is to shape a district to enable hundreds of thousands of citizens belonging to a long-gerrymandered-out racial group to take a turn at being in an electoral majority.”⁴⁴

E. America's Exclusionary Ballots

In the fifth chapter Raskin explains how the Court further subverts democracy by allowing a “gerrymandering” of the ballot, suppressing participation of persons outside of the two largest parties. He begins by showing how the vast majority of the public wants to consider alternatives to the Democrats and Republicans.⁴⁵ In spite of the public's thirst for choice, the Court upholds laws that discriminate against third parties by keeping their candidates off the ballot and out of debates. Raskin explains that the Court has been unable to apply democratic principles found in the Constitution in cases deciding the rights of alternative parties and candidates.⁴⁶

⁴² *Id.* at 75. Raskin notes that by this line of cases, the conservative majority on the Court has added “racial double standards to the heart of Equal Protection law.” Strict Scrutiny thus applies to majority-minority districts, but not intentionally-created majority white districts. *Id.* He also stumbles upon the most likely intent of redistricting plans, winning elections: “After all, majority white legislatures tend to create majority-white districts whenever they can, not for reasons of explicit racism necessarily, but simply because state legislators want to go to Congress or help their (white) friends and family get there.” *Id.* at 77.

⁴³ *See id.* at 78.

⁴⁴ *Id.* at 79. He explains that because representatives are still disproportionately white, incumbent protection measures have a definitive racial subordinating effect. *Id.*

⁴⁵ *Id.* at 91 (citing a CNN/Gallup/USA Today poll finding 67 percent of respondents supported “having a third political party that would run candidates for President, Congress, and state offices.”).

⁴⁶ *Id.* at 92 (“The First Amendment's free speech clause creates a political anti-establishment principle that corresponds to the ban on state endorsement of religion in the Establishment Clause.”). For a fuller exploration of this theory see, Brian P.

He notes that similar to religious free exercise, one has the right to say or think anything in politics and not be discriminated against by the government because of it. The Court stated in *Texas v. Johnson* that “[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁴⁷ However, the Supreme Court has not remained neutral among participants in the political arena. It has disrespected the political freedom of the people by endorsing two political parties against all others. Under a democracy, “the government is not permitted to manipulate the sovereignty of the people over the continuing reconstitution of their political leadership.”⁴⁸

Raskin first mentions how the Court has occasionally shown some ability to remain neutral—and keep the government neutral—by rejecting efforts to keep certain candidates, namely incumbents, off the ballot. In *U.S. Term Limits v. Thornton*, the state of Arkansas sought to deny incumbents a printed line on the ballot if they had served a number of terms in Congress.⁴⁹ The Court invalidated the law by specifically applying the principles “embodied in the Constitution that ‘the people should choose whom they please to govern them’” and “the egalitarian concept that the opportunity to be elected” must remain “open to all.”⁵⁰ The Court was able to remain neutral again in *Cook v. Gralike*, where Missouri attempted to place a statement next to incumbents names on the ballot describing how they voted on term limits. The Court struck down the law as having the impermissible “intended effect” of “handicap[ping]” certain candidates.⁵¹

In the next section, Raskin explains how the Court somehow loses its ability to remain neutral when the issue concerns candidates and parties outside of the two party system. After distinguishing common interpretations of the term “two-party system,” Raskin concludes correctly that the “two-party system” actually means the cooperative effort of the Democratic and Republican parties to “make their joint

Marron, *Doubting America's Sacred Duopoly: Disestablishment Theory and the Two-Party System*, 6 TEX. F. ON C.L. & C.R. 303 (2002).

⁴⁷ RASKIN, *supra* note 1, at 92 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

⁴⁸ *Id.* at 93.

⁴⁹ *Id.* (citing *U.S. Term Limits v. Thornton*, 514 U.S. 779, 779 (1995)).

⁵⁰ *Id.* at 93-94 (quoting *Thornton*, 514 U.S. at 783, 794).

⁵¹ *Id.* at 95 (citing *Cook v. Gralike*, 531 U.S. 510, 510 (2001)). The Missouri law required one of the following statements next to the name of certain candidates on the ballot: “Disregarded voters’ instruction on term limits” or “Declined to pledge to support term limits.” *Id.*

dominance public policy and the central goal of election law” for the purpose of “guard[ing] their ... market shares in votes and ... drive out any effective competition from other parties.”⁵² For the remainder of the chapter Raskin explains how the law is deftly manipulated to this end by ignoring basic democratic principles.

The most obvious way the “two-party system” limits competition is by keeping its competitors off the ballot.⁵³ Initially taking advantage of the public’s fear of the Communist Party in the mid-twentieth century, Republicans and Democrats in state legislatures began to pass strict ballot access requirements “demand[ing] that outsider parties show” a certain level of support in the prior election or “petition signatures from a certain percentage of registered voters.”⁵⁴ When the signature threshold eventually proved so low as to allow new parties on the ballot, the two party system responded by raising the number required.

In 1971, a constitutional challenge to these restrictive signature requirements reached the Supreme Court in *Jenness v. Fortson*.⁵⁵ In that case, to effectively qualify to be on the ballot for the office of Governor of Georgia, the plaintiff had to collect over 100,000 signed petitions. Raskin explains just how difficult this can be:

For anyone who has tried to get the autograph of a celebrity, a document notarized by a notary public, or members of a family living in different places to sign a birthday card, you will recognize what an astounding thing it is to require [one] . . . to collect from one hundred thousand citizens . . . their signatures, including printed names, addresses and zipcodes.⁵⁶

The Court upheld the Georgia statute by 1) finding petitioning to be no more burdensome to a candidate than winning a primary; and 2) recognizing the state’s interest in “avoiding confusion, deception, and frustration of the democratic process at the general election.”⁵⁷ Raskin analyzes each of these justifications and concludes that they are either

⁵² *Id.* at 98, 99.

⁵³ *Id.* at 100. Raskin begins with a brief discussion of the history of election ballots that concludes with the widespread use of standard, government-printed ballots. Since then, laws have governed whose names were to be printed on the official ballot and up until the 1940s all that was required was a payment of a fee. *Id.* at 100-01.

⁵⁴ *Id.* at 101.

⁵⁵ 403 U.S. 431 (1971).

⁵⁶ RASKIN, *supra* note 1, at 103.

⁵⁷ *Id.* at 104 (quoting *Jenness*, 403 U.S. at 440, 442).

invalid or could be served through other effective means that impose fewer burdens on the democratic rights of the people.

1. *The Petitioning Burden: The Court Compares Apples to Oranges*

On the Court's assertion that petitioning for ballot access is "no more burdensome" for a candidate than winning a major party primary, Raskin explains that it is not a useful comparison.

The proper comparison is thus not between how hard it is for *any* SWP candidate to get on the ballot (very hard) and how hard it is for a *specific* Democrat or Republican to emerge from a competitive primary battle (very hard). The proper comparison is between the chances that *any* Democratic or Republican nominee will be placed on the general election ballot (100 percent) and the chances that *any* SWP candidate will be placed there (miniscule under Georgia's laws).⁵⁸

Recognizing this party-centered analysis, it is obvious how the Court manipulates the Constitution to permit states to discriminate against alternative parties and ignore basic democratic principles.

2. *"Too Many Names! Oh, How Can I Possibly Choose?"*

Raskin next turns to the other state interests the Court somehow recognized as "important" enough to justify ballot exclusion. "Avoiding confusion," "voter confusion," and preventing "ballot overcrowding" are frequently asserted as state interests being pursued by ballot access laws that work to exclude third parties.⁵⁹ Raskin points out that this concern about the number of names on the ballot is weak if not pretextual. "In the secret code of the two-party system, 'avoiding confusion' simply means avoiding choice."⁶⁰ He points out that the states have never offered empirical evidence "of voter confusion or specific documentation of the point at which voters lose their ability to understand a ballot."⁶¹ He concludes that the government should be forced to prove this claim of

⁵⁸ *Id.* at 105.

⁵⁹ *Id.* at 106.

⁶⁰ *Id.* at 107.

⁶¹ *Id.*

confusion before recognizing it as even a legitimate interest on which to base a restriction on a candidate or party's right to run for office.⁶²

3. *Beware the Ballot Manipulation Conspiracy*

Next Raskin examines the state's asserted justification of preventing deception. "Deception" refers to the highly imaginative scenario where a major party secretly creates a third candidacy designed to draw votes away from the opposing major party.⁶³ Raskin explains that it is absurd to believe that if such a scheme existed that it would not be exposed in the media followed by a severe backlash against the perpetrators. Such an outlandish and unlikely scenario should not be sufficient to create an important interest used to justify such harsh ballot access restrictions.

4. *A "Modicum" of Democracy*

Next, he turns to the sometimes-directly asserted interest in requiring third parties to show "a modicum of support." Usually this showing is merely a means to pursue other state interests such as limiting the number of names on the ballot to avoid confusion. Sometimes the Court seems to describe it as an interest in itself. Raskin explains that if it is an independent interest, requiring a showing of "a modicum of

⁶² *Id.* at 180. He also points out the hypocrisy of states then believing that major party "primar[ies] with upwards of eight or ten candidates running" does not raise the same concern about voter confusion based on the number of candidates listed on the ballot." *Id.* at 180.

To strengthen this point Raskin (and the minor parties' attorneys) should have mentioned that the confusion justification is severely undermined by the fact that very few people come to the polls undecided. Face-to-face with a ballot, people are not presented with a new decision among the candidates printed; they merely have to read the list until they find the name (or party designation) they have already decided on. One study found that in the 2000 election five percent of the voters decided on election day. *Time of Presidential Election Vote Decision 1948-2000*, in NATIONAL ELECTION STUDIES, CENTER FOR POLITICAL STUDIES, UNIVERSITY OF MICHIGAN. THE NES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR (2001), at http://www.umich.edu/~nes/nescguide/toptable/tab9a_3.htm. But the study did not say exactly when on election day they decided, i.e., how many of that five percent waited until they entered the voting booth and saw the ballot. On election day the remaining "undecideds" are probably more likely to stay home rather than enter the voting booth and make a decision on the spot. The number of names printed on the ballot, for decision making purposes, is inconsequential.

⁶³ *Id.* at 109.

support” does not seem to have any purpose at all.⁶⁴ In fact, it would usurp the purpose of the election itself – that support is supposed to be measured on election day. This would have the effect of shortening the “campaign” season for one class of candidates compared to another. Minor party and independent candidates would have to win support by the deadline for submitting petitions rather than being able to campaign fully up until election day alongside the major party candidates.

Raskin also explains that the common method required to show this “modicum of support” (petitioning) does not necessarily reflect actual support for the candidate.⁶⁵ A signature on a petition usually does not mean that you intend to vote for the petitioning candidate. It merely means that the signer approves of additional candidates on the ballot. A more effective method of determining the “modicum of support” the Court wants to require would be a petition that includes a statement that the signer intends to vote for that person. Again this seems to usurp the purpose of the election.

F. *The Court’s Fusion Confusion*

Raskin next examines the Court’s rejection of the strategy of “fusion,” a process where a party nominates the candidate of another party. In *Timmons v. Twin Cities Area New Party*, the Court upheld the ban on fusion because candidates and parties might “exploit fusion as a way of associating his or its name with popular slogans and catch phrases.”⁶⁶ This highly speculative scenario is not reflected in the history of states that allow fusion such as New York.⁶⁷ The Court diminishes the democratic rights of alternative parties based on this fictional danger. Like the “deception” justification, this unlikely fraud, were it to actually occur would be exposed and punished through the natural functioning of competitive politics – there is simply no need to have the government impair rights based on this unlikely scenario. Raskin points out that Rehnquist’s opinion in *Timmons* revealed the real justification was to protect a “healthy two-party system” by allowing

⁶⁴ *Id.* at 110.

⁶⁵ *Id.* at 114.

⁶⁶ *Id.* at 113 (*quoting* *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365 (1997)).

⁶⁷ *Id.*

Minnesota to ban a tactic that might help third parties gain recognition and popularity.⁶⁸

Raskin ends the chapter by summarizing the current standard for determining the constitutionality of election restrictions. In *Anderson v. Celebrezze*, the Court requires “first, to assess the magnitude of the injury to the rights . . .; second, to measure the legitimacy and strength of the state’s asserted interests . . .; and, third, to determine whether protecting the state’s interests actually requires burdening the injured party in this way.”⁶⁹ Raskin concludes that under this test signature requirements do not serve any important interests that justify their severe burden on the alternative candidates and parties. In fact, he continues, they impose an additional qualification for office along the lines of the ones struck down in *Thornton* and *Cook*.⁷⁰ The signature requirements “effectively ban those that lack the resources or status of incumbents” and in essence “confers a kind of title of political nobility on those officials and candidates aligning themselves with the two-party system.”⁷¹

G. *Debating Democracy*

In the sixth chapter Raskin examines how the Court has upheld the practice of excluding third party candidates from debates. In *Forbes v. Arkansas Educational Television Network (AETN)*, the Court held that government exclusion of a third party candidate did not violate the First Amendment.⁷² The Court reasoned that the public television station sponsoring the debate made individual determinations about whether to invite a particular candidate. Therefore, Justice Kennedy wrote, the debate was a nonpublic forum and the government could make reasonable exclusions so long as they were not viewpoint based. He held that Forbes was excluded “not because of his viewpoint but because he had generated no appreciable public interest.”⁷³

Raskin rightly objects: “The constitutional rights of candidates . . . in public fora do not depend on their political popularity, estimated favor

⁶⁸ *Id.* at 114 (“The Constitution permits the Minnesota legislature to decide that political stability is best served through a healthy two-party system.” (quoting, *Timmons*, 520 U.S. at 367)).

⁶⁹ *Id.* at 115 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

⁷⁰ *Id.*

⁷¹ *Id.* at 115-16.

⁷² 523 U.S. 666 (1998).

⁷³ RASKIN, *supra* note 1, at 123 (quoting *Forbes*, 52 U.S. at 682).

with the media or fund-raising prowess.”⁷⁴ He explains that the court failed to apply the objective test for viewpoint discrimination found in *Rosenberger*.⁷⁵ In that case, the Court found the First Amendment was violated when the University funded secular student publication but not religiously themed publications. Raskin notes, like the religious publication in *Rosenberger*, the purpose and effect of excluding Forbes from the debate was to prevent the presentation of “political viewpoints deemed unpopular by a candidate deemed unpopular.”⁷⁶

In the next section Raskin discusses how the presidential debates, perhaps the most significant single event of the campaign, is run by a “bipartisan” cadre fueled with multi-million dollar corporate donations. The Commission on Presidential Debates (CPD) obstructs free democracy by excluding ballot qualified candidates contrary to the popular will. Since taking over the presidential debates in 1988 the CPD has sought to exclude third party candidates from debates applying an inconsistent and arbitrary “viability” screen in order to prevent what they see as potential “cacophony.”⁷⁷

Raskin then explores how the viability test amounts to unconstitutional viewpoint discrimination. Viability, in essence, means popularity.⁷⁸ Discriminating between popular and unpopular candidates violates basic constitutional principles. Each should have the equal opportunity to present his or her views. Raskin points out that “the First Amendment protects equally the political speech of popular citizens with mainstream views and unpopular citizens with minority (and mainstream views) views.”⁷⁹

⁷⁴ *Id.*

⁷⁵ *Id.* at 124 (citing *Rosenberger v. Rectors and Visitors of University of Virginia*, 515 U.S. 819 (1995)).

⁷⁶ *Id.*

⁷⁷ *Id.* at 125. Raskin states that Ross Perot was able to participate in 1992 because both the Bush and Clinton campaigns saw his presence as an advantage and insisted that the CPD allow Perot to debate. *Id.* (citing News from the Democratic and Republican National Committees (Feb. 18, 1987)(on file with Texas Law Review)).

⁷⁸ Even more accurately, the candidate is probably “unknown” rather than “unpopular” because the array of views that the person holds may in fact be quite popular.

⁷⁹ RASKIN, *supra* note 1, at 132. In fact it is one viewpoint in particular that is the basis for the distinctions – the candidate’s association with (or preference) for a political party. The affiliation is a viewpoint—a belief that neither the Republican nor the Democratic Party sufficiently reflects one’s array of viewpoints and/or interests. That belief then forms the basis of an association outside of the two party system. It is that viewpoint that leads to the ‘unpopularity’ label that is the basis for discrimination in electoral laws. Increasingly this viewpoint forming the basis of the association cannot

Raskin then states how the “viability” screen is a double standard because debate sponsors never ask whether the Democratic or Republican candidates are viable even in the most lopsided districts. As an example he cites a heavily Democratic Congressional district in Arkansas that automatically invites the Republican candidate to debate. In that district, historically, Republicans have consistently lost by an average margin of two to one.⁸⁰ Yet the Republican candidate is always assumed to be “viable.”

Raskin next examines the other main justification for debate exclusion: a fear that too many participants would cause a “cacophony.”⁸¹ Raskin points out that opening the debates would not crowd the stage because for the past 25 years in House elections there has been an average of one Independent or third party candidate running in each district.⁸² It is also clear that another double standard is at work because the presidential primary debates have had several candidates participate, for example six in both the Republican debate in 1988 and the Democratic debate in 1992.⁸³

Raskin also mentions that the very use of “cacophony” as a justification to limit the speech rights of some and not others violates the First Amendment. As the Court stated in *Cohen v. California*, “that the air at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.”⁸⁴ Raskin explains that there are feasible neutral means to address the concern about cacophony in debates consistent with the Court’s statement in *Rosenberger* that it is “incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle.”⁸⁵

In the last section of this chapter, Raskin proposes a truly neutral standard to determine who can participate in presidential debates.⁸⁶ The first debate should include all presidential candidates on enough state ballots to make it mathematically possible to win the 270 electoral votes needed to win the election. In the last several elections this standard would have included four candidates. Subsequent debates would require

be truthfully described as “unpopular” as two-third of Americans desire alternatives to the major parties. *See supra* note 45.

⁸⁰ RASKIN, *supra* note 1, at 134.

⁸¹ *Id.* at 137.

⁸² *Id.*

⁸³ *Id.* at 138.

⁸⁴ *Id.* (quoting *Cohen v. California*, 403 U.S. 15 (1971)).

⁸⁵ *Id.* at 139 (quoting *Rosenberger v. Rectors and Visitors of University of Virginia*, 515 U.S. 819, 835 (1995)).

⁸⁶ *Id.* at 141.

the candidate meet two additional criteria: register five percent in a national opinion poll and at least 50 percent in a poll asking people who should be included in the next debate. This standard provides a more inclusive and democratic debate than any scheme provided thus far by the bipartisan CPD—especially its shameful 15 percent “viability” rule.⁸⁷

III. PROTECTING DEMOCRACY IN EVERYDAY LIFE

Democracy is not limited to the electoral process. Democratic freedoms are becoming less respected and protected within the institutions that people interact with every day. In the last third of the book, Raskin examines how democratic standards are impaired in our society’s institutions other than the electoral process. Their internal operation often tramples basic democratic liberties. Raskin shows how the Court has failed to protect democracy in these institutions.

A. *Democracy in Public Schools*

In the seventh chapter Raskin discusses the state of democracy in our public schools. In a democratic society, schools should allow students and teachers to express themselves freely, bounded only by the school’s mission to educate. Raskin also explores the school system’s democratic duty to equip students with the skills necessary to effectively participate as citizens in a healthy democracy.⁸⁸ He exposes Court decisions that have maintained unequal and inadequate school systems, thus creating a class of ill-prepared, second-class citizens.

1. *Free Expression in the Classroom*

Raskin first notes that the Supreme Court has held that democratic freedoms do exist in the schoolhouse.⁸⁹ In *West Virginia v. Barnette*, the Court invalidated a *mandatory* flag salute and Pledge of

⁸⁷ See *id.* at 129-30.

⁸⁸ Raskin explains why it is important to maintain democratic freedoms within institutions such as schools:

If democracy means that whoever holds state power can act however he or she wants, then what we have is not democracy but a continuing succession of elective tyrannies. The Court should allow expressive freedoms to be pushed aside only if our institutions, which are themselves the product of constitutional powers, will actually be thwarted in their work.

Id. at 149.

⁸⁹ See *id.* at 147.

Allegiance because it forced the students to participate despite their own views.⁹⁰ In *Tinker v. Des Moines School District*, the Court articulated the standard that the expression must “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school” meaning a “material[] disrupt[ion] of classwork, substantial disorder or invasion of the rights of others.”⁹¹

However, the Court soon departed from the *Tinker* standard. In 1986 in *Bethel v. Fraser*, the Court created a lewdness exception to the *Tinker* standard by upholding the sanctions against a student for delivering an “offensively lewd and indecent” speech.⁹² As a result schools no longer have to show actual disruption of the educational mission in order to restrict speech.

Later, in *Hazelwood School District v. Kuhlmeier*, the Court upheld a principal’s censorship of a school newspaper’s article on teen pregnancy because it might invite controversy.⁹³ The Court ruled that because the speech occurred as part of a school-sponsored forum the principal could censor it for “any reasonable educational purpose” that was viewpoint neutral.⁹⁴ Since the *Hazelwood* decision, censorship has risen on campus because principals are more able to exert their power to control the flow of ideas and expression.⁹⁵

2. *Schools as the Womb of Democratic Citizenry*

In the next section Raskin explains how the Court has come to tolerate the unequal and inadequate distribution of education—our society’s prominent means of producing a robust and effective democratic citizenry.⁹⁶ *Brown v. Board of Education* was a promising

⁹⁰ *Id.* (citing *West Virginia v. Barnette*, 319 U.S. 624 (1943)).

⁹¹ *Id.* at 148 (quoting *Tinker v. Des Moines School District*, 393 U.S. 503 (1969)).

⁹² *Id.* at 151-52 (quoting *Bethel v. Fraser*, 478 U.S. 675, 685 (1986)).

⁹³ *Id.* at 152-53 (citing *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)).

⁹⁴ *Id.*

⁹⁵ *See id.* at 153.

⁹⁶ To make this section of the book more effective Raskin should have explained more fully and clearly the vital importance of education to the individual citizen and the democracy as a whole. Under a democracy the people are supposed to exercise power. How is a democratic government legitimate when significant numbers of the people who are responsible for governing (through elections) are easily manipulated or choose not to participate (i.e., vote) because they are ignorant to the importance of democratic participation? A person must be educated in order to realize an effective citizenship—a minimal level of intellectual skills and motivation is required. For example, consider that an attempt to enhance or protect the general welfare involves addressing a number of complex issues that cannot be fully understood by an adult with an eighth grade

start to recognizing the importance of education to our democracy. It stated that citizens cannot be denied an equal right to an education based on race. Since then the Court has upheld state actions that create and maintain systems of unequal and inadequate delivery of education across different populations.

In *Milliken v. Bradley*, the Court slowed racial integration by overruling a remedy based on students crossing district lines.⁹⁷ In *San Antonio Independent School District v. Rodriguez*, the Court upheld a state's school funding system that resulted in a vast discrepancy between the amounts raised for different school districts.⁹⁸ In order to do so, the Court held that wealth is not a suspect class and education is not a fundamental right.⁹⁹ The Court gave more weight to values of federalism than providing all citizens an equal ability to participate in their democratic government.

In *Freeman v. Pitts*, the Court held that district courts could end their role in enforcing desegregation decrees despite the fact that the state system still resembles the one it had using *de jure* segregation.¹⁰⁰ The Court refused to see present disparities as vestiges of past discrimination that would warrant continued judicial oversight.¹⁰¹

Then in *Missouri v. Jenkins*, the Court struck down a Missouri District Court plan to significantly upgrade the schools in Kansas City because the Supreme Court suspected the effort was designed to lure suburban white students to cross district lines.¹⁰² Therefore, under the *Milliken* holding it was an impermissible interdistrict remedy. In his opinion, Justice Thomas cites the importance of federalism and separation of powers to limit the remedial power of district courts.¹⁰³ Raskin points out that Thomas didn't seem so concerned about separation of powers when he used his own judicial authority to strike down state legislation in *Richmond v. Croson*, *Shaw v. Reno*, and *Miller v. Johnson*, each designed to favor African Americans.¹⁰⁴

education listening to a thirty second soundbite or two-minute infotainment television news story.

⁹⁷ RASKIN, *supra* note 1, at 160 (citing *Milliken v. Bradley*, 418 U.S. 717 (1974)).

⁹⁸ *Id.* at 161 (citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 163 (citing *Freeman v. Pitts*, 503 U.S. 467 (1992)).

¹⁰¹ *Id.*

¹⁰² *Id.* at 163-64 (citing *Missouri v. Jenkins*, 115 515 U.S. 70, 89-100 (1995)).

¹⁰³ *Id.* at 165.

¹⁰⁴ *Id.*

To overcome the Court's low regard for the importance of education Raskin proposes a constitutional amendment: "All children in the United States have a right to receive an equal public education for democratic citizenship."¹⁰⁵

B. Democracy and the Corporation

In this chapter Raskin explores the extent to which people enjoy democratic freedoms within another set of society's institutions, private corporations. He asks, "whether democratic power must halt when it reaches the borders of the private corporation" and "whether the political power of the private corporation must stop at the borders of public institutions."¹⁰⁶ He argues that under progressive democracy private corporations are in several respects public entities because they are chartered by the state and structured by state law including "limited liability" provisions and state subsidies.¹⁰⁷ Under the *Tinker* principle, all of society's public institutions "must accept all the democracy that is consistent with the basic integrity of their mission."¹⁰⁸ In a private corporation profit making is the mission but, Raskin argues, it should "fit in . . . with the other values of society and not totally supplant and subordinate them."¹⁰⁹ However, the Supreme Court has not fully accepted the idea that democratic values should justify limits on corporate power.

In *Marsh v. Alabama*, the Court upheld the First Amendment rights of a citizen who distributed written material on the grounds of a company owned town.¹¹⁰ The Court held that ownership does not mean "absolute dominion" and that a private corporation could not limit the constitutional rights of the citizen any more than the state could.¹¹¹ This principle was soon applied to shopping malls.

In *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, the Court overturned a state court injunction preventing a grocery union from picketing in the parcel pickup area of a non-union store.¹¹² Raskin found that Marshall's opinion in *Logan Valley* describes the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 171.

¹⁰⁷ *Id.* at 172.

¹⁰⁸ *Id.* at 173-74.

¹⁰⁹ *Id.* at 174.

¹¹⁰ *Id.* (citing *Marsh v. Alabama*, 326 U.S. 501 (1946)).

¹¹¹ *Id.* at 175-76 (citing *Marsh*, 326 U.S. at 506).

¹¹² *Id.* at 176 (citing *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968)).

extent to which democratic values can limit the use of corporate property rights. “Corporations must be willing to surrender their property to the exercise of democratic rights to an extent congruent with their true invitation to the public and the social uses to which the property is put.”¹¹³

However, the Court soon abandoned this democratically centered approach in *Lloyd Corp. v. Tanner*.¹¹⁴ The Court significantly narrowed the holding of *Logan Valley* by requiring that in order for the speech to be protected, the location must be related to the purpose of the speech.¹¹⁵ The Court stated that the anti-war protesters at the mall “could have distributed these handbills on any public street, on any public sidewalk, in any public park, or in any public building in the city of Portland.”¹¹⁶ Further, there was no “open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve.”¹¹⁷ This new standard now makes a person’s First Amendment rights defined by the content of their expression and the “formal character of the corporate invitation.”

Finally, in *Hudgens v. NLRB*, the Court expressly overturned *Logan Valley* stating that it was inconsistent with *Lloyd*.¹¹⁸ Thereafter, in the majority of states shopping malls have become speech-free zones. Raskin finds that this reasoning subordinates communicative political democracy within the hierarchy of social values.¹¹⁹

Later, Raskin examines the influence of corporations in the political sphere. He first explains that corporations are not citizens – they are state-created entities that have no independent constitutional standing outside of the individual rights of the people that carry out its authorized functions.¹²⁰ Raskin states that the Court has not adopted this conception of corporate rights. In *First National Bank of Boston v. Bellotti*, the Court struck down a law forbidding banks and business corporations from making contributions or expenditures to influence the

¹¹³ *Id.* at 177.

¹¹⁴ 407 U.S. 551 (1972).

¹¹⁵ RASKIN, *supra* note 1, at 177 (citing *Lloyd Corp.*, 407 U.S. at 560).

¹¹⁶ *Id.* (citing *Lloyd Corp.*, 407 U.S. at 564).

¹¹⁷ *Id.* at 178 (quoting *Lloyd Corp.*, 407 U.S. at 565).

¹¹⁸ *Id.* (citing *Hudgens v. NLRB*, 424 U.S. 507 (1976)).

¹¹⁹ *Id.* at 179.

¹²⁰ *Id.* at 186. This follows a brief section critiquing the libertarian political ideology and noting the Court’s subordination of democratic value to property and contract rights reminiscent of the *Lochner* era. *Id.* at 180-85.

outcome of a ballot initiative.¹²¹ The Court did not consider whether the corporation had standing to assert a First Amendment right – the basic question of whether such an entity has any First Amendment rights at all. Instead the Court jumped ahead and considered the nature of the speech itself.¹²² Noting that political speech is of the highest value, the Court applied strict scrutiny and found that the state’s asserted interest in protecting the integrity of its democracy was insufficient to justify the restriction of the right. Raskin argues that *Belloti* should be overruled to create a wall of separation between private corporations and public elections.¹²³

IV. ENDANGERED DEMOCRACY

In the ninth chapter Raskin shows the reader that even the core of our democracy, the First Amendment itself, remains vulnerable. As an example he discusses the movement to adopt an amendment to the Constitution that would ban flag desecration. This amendment would explicitly roll back the First Amendment’s protection of a controversial form of expressive conduct. This shows how the First Amendment is not untouchable; it is possible for new amendments to chip away until there is little left.

The debate over the proposed flag desecration amendment shows how extreme patriotism, bordering on nationalism, can promote laws that further weaken democracy.¹²⁴ Raskin states that conservatives have repeatedly proposed a constitutional amendment to overturn the Supreme Court’s *Texas v. Johnson* decision. The amendment states “Congress shall have power to prohibit physical desecration of the flag of the United States.”¹²⁵ Raskin notes that this amendment would in effect send people to jail for thinking evil thoughts. He explains that “desecration” means to “strip something of its sacredness.”¹²⁶ It only targets destruction of the flag for expressive purposes. Raskin then

¹²¹ 435 U.S. 765 (1978).

¹²² RASKIN, *supra* note 1, at 187 (citing *Belloti*, 435 U.S. at 776-77).

¹²³ *Id.* at 193. Raskin also notes that our society’s democratic values are impaired when management interferes in union elections. *Id.* at 196-97. The Court upheld the corporation’s freedom of expression concerning union elections in *NLRB v. Gissel Packing Co.* 395 U.S. 575, 617 (1969) (“[An] employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed.”).

¹²⁴ *Id.* at 199-200.

¹²⁵ *Id.* at 201.

¹²⁶ *Id.* at 202.

discusses the extreme range of conduct that will be prohibited by the amendment.¹²⁷ Desecration will include advertisements using stars and stripes, flag designs on products (including clothing), and artistic use of the colors.

Raskin concludes the chapter by correctly observing “If this amendment passes, the flag—our cherished symbol of freedom—will suddenly become a symbol of political thought control. The banner of freedom turns into a sign of repression.”¹²⁸

V. THE DEMOCRACY REFORM MOVEMENT

In the final chapter Raskin introduces some solutions to the problems identified throughout the book. He states that a widespread reform movement must mobilize to demand the adoption of policies designed to strengthen our democracy.

Raskin explains that some of the solutions require the adoption of new Constitutional amendments such as the ones he has mentioned earlier. Congress lacks the power to effectively reverse the Supreme Court’s (mis)interpretations of the Constitution that rejected democratic values.¹²⁹ In fact, a movement for democratic constitutional change itself can influence the reasoning of the Court. For instance, although the Equal Rights Amendment failed to pass, the Supreme Court apparently took notice of the movement’s principles and began to apply “heightened” scrutiny to cases of gender-based classifications.¹³⁰

Raskin implores the organizations that make up our civil society (such as the League of Women Voters, NAACP, ACLU and labor unions) to take the lead in the movement to reintroduce democratic principles into our Constitution.¹³¹ He also warns that most liberals are generally apprehensive about amending the Constitution. He explains that they fear a weakening of the Supreme Court, therefore they are willing to accept the Court’s assault on democratic values. “[M]any liberals want to treat the Constitution like a sacred and untouchable religious text. They worship the Founding Fathers.”¹³²

He then offers examples of democratic reforms that do not require constitutional amendments. First he explains how a system of

¹²⁷ *Id.* at 217.

¹²⁸ *Id.* at 221.

¹²⁹ *Id.* at 228.

¹³⁰ *Id.* at 225.

¹³¹ *Id.* at 226-27.

¹³² *Id.* at 228.

proportional representation (PR) is more democratic than our current system because it allows a majority of people (rather than merely a plurality) to have their views represented in the legislature.¹³³ Another advantage is that under a statewide PR there would be no battles over redistricting every ten years. Also, contrary to statements by other PR proponents, a “robust and expansive PR need not be defined exclusively or primarily in racial or ethnic terms.”¹³⁴

The next reform Raskin discusses concerns the vast amount of money it takes to run for high political office. He states that the monied interests who “vote” in the wealth primary by giving donations essentially decide “who will have enough money to run for office.”¹³⁵ As a solution we should adopt a publicly financed, “clean money,” campaign system. An important aspect of publicly funded campaigns is the ability to allocate time on the publicly-owned airwaves. Free airtime should be given to all ballot qualified candidates.¹³⁶ This has the effect of reducing the cost of running for office, thus making campaigns less influenced by special interests and more accessible to all potential candidates.

Raskin concludes the book by stating how a widespread movement to restore democratic principles to the Constitution will be a useful backdrop to the coming struggle over Supreme Court confirmations.¹³⁷

VI. ANALYSIS OF *OVERRULING DEMOCRACY*

A. *An Effective Assessment of American Democracy*

Overruling Democracy thoroughly describes how the Court has failed to preserve the democratic values inherent in the Constitution. The Court’s decisions concerning the electoral process have frequently subordinated democracy to allow the system to be manipulated by those in power – a true affront to the principle of popular sovereignty inherent in any democracy. Raskin shows that the Court has conveniently overlooked a right to vote implied in the Constitution; allowed the

¹³³ *Id.* at 229-30.

¹³⁴ *Id.* at 232.

¹³⁵ *Id.* at 234.

¹³⁶ *Id.* at 237. The final reform Raskin briefly mentions is another expansion of suffrage. He argues that noncitizens should be allowed to vote because they are a permanent part of the community that contributes taxes and is affected by the actions of the government. *Id.* at 238.

¹³⁷ *Id.* at 241.

continued minimization of the political power of certain classes of citizens (racial minorities); and, permitted the exclusion of alternative political parties and their viewpoints from effective participation in the electoral process. The book also explains how the Court has failed to protect democratic values in its decisions governing some of our society's most important institutions including schools and corporations. Finally, in his chapter discussing the flag desecration amendment, Raskin demonstrates how even the most protected and evident democratic freedoms we enjoy remain vulnerable to change.

While the book provides an excellent introduction to the defects of and dangers to American democracy, it is less successful as a tool to promote and help define a democracy reform movement.

B. Towards a Broad, Inclusive Democracy Reform Movement

In order to succeed—especially if constitutional amendments are sought—the Democracy Reform Movement needs a broad base of popular support. *Overruling Democracy* explains the flaws in America's democracy well, but has difficulty making the argument without using what would be seen as clear "liberal" slant. This unbalanced approach would have the effect of alienating some people who would otherwise support efforts to restore democratic principles to the Constitution – principles that the majority of Americans already hold dear. The case for democracy reform can and should be made in a more politically objective and balanced tone in order to broaden the base of a democracy reform movement. A democracy reform agenda should not be anchored to one end of the political spectrum.

Raskin's approach is unbalanced in two main ways: placing the blame almost exclusively on conservatives; and discussing the racial aspects of America's defective democracy in an accusatory fashion.

1. Misallocated Blame: It's Only the Conservatives' Fault?

While Raskin effectively makes the case that many conservatives in power are not friends of democracy, he seems to overlook the fact that powerful liberals have not done much better. Raskin frequently assails the decisions of the Supreme Court's "conservative majority." In his analysis of *Bush v. Gore*, he concludes that had the parties been reversed—with Gore suing to stop a recount—the liberal judges would not have stretched their reasoning to reach a favorable outcome for

Gore.¹³⁸ “[T]he liberals would not have dared to invent a dramatic new Equal Protection right in those circumstances to favor a Democratic candidate. They almost certainly never would have taken the case and if they had, almost certainly would have left the case to the Florida Supreme Court.”¹³⁹ To support this, he explains that liberals are inherently committed to abstract principles of fairness and freedom.¹⁴⁰

However, in cases concerning democratic rights, the liberal justices on the Court have not been reliable defenders of democracy. Liberal Justice Breyer joined Rehnquist’s majority opinion in *Timmons*.¹⁴¹ In *California Democratic Party v. Jones*, liberal Justices Souter and Breyer assented to Justice Scalia’s majority opinion containing the outrageous statement that “[t]he voter who feels himself disenfranchised should simply join the party.”¹⁴² Liberals Marshall, Brennan, Douglas were a part of the unanimous Court in *Jenness v. Fortson*.¹⁴³ Liberal Justice Souter joined the majority in *Burdick v. Takushi*, upholding Hawaii’s practice of throwing away ballots with write-in votes.¹⁴⁴ Justice Breyer joined the majority in *Forbes*.¹⁴⁵

The Democratic Party is home to and (arguably) controlled by people and groups who consider themselves liberal. The Democratic Party’s record on democracy can be described as indifferent at best. The Democrats have had ample opportunity to make our electoral system open and free, but democracy has continued to suffer under the party that blasphemes its name.

In the United States, the state legislatures are charged with creating and implementing election law. Between 1975 and 1995 the Democratic Party controlled, on average, approximately 30 state

¹³⁸ *Id.* at 21-23.

¹³⁹ *Id.* at 22.

¹⁴⁰ *Id.* at 22-23. But given liberals’ commitment to these principles would not they have taken the same measure to ensure the election of a president who holds the same principles and would appoint judges who would join them in majority opinions upholding the principles. The greater threat to their cherished principles would be to apply them in this one case (a “mistake” the conservatives did not make) leading to an outcome that would, in the long term, be harmful to a broader range of their values. Liberals would have also made an exception for the perceived greater good in a “Gore v. Bush.”

¹⁴¹ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

¹⁴² 530 U.S. 567, 584 (2000).

¹⁴³ 403 U.S. 431 (1971).

¹⁴⁴ 504 U.S. 428 (1992).

¹⁴⁵ *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998).

legislatures and 30 governorships.¹⁴⁶ Thus liberals in the Democratic Party had ample opportunity to pass measures to strengthen democracy in these states, but opted not to do so. Recently, bills to adopt instant runoff voting were defeated in heavily Democratic states such as Hawaii, Illinois, New Mexico, California, Maine, Maryland, and Massachusetts.¹⁴⁷ Often these bills did not even get out of committee.

The Democratic Party is also active in drawing district lines to its advantage. The Democrats now finds themselves drawing lines that weaken majority-minority districts. For example in New Jersey in 2001, Democrats pursued “unpacking” of the majority-minority districts.¹⁴⁸ They want to support voting rights only to the extent that it does not harm the goal of electing as many Democrats as possible.¹⁴⁹

2. *Risks of Over-Racializing Democracy Reform*

The historical minimization of the political power and influence of racial minorities is perhaps the clearest example of how American democracy is infirm and can be manipulated to the detriment of the people. But Raskin explains this example in a manner that is heavily laden with the inference that the assault on democracy is motivated primarily by racism with the goal of oppressing racial minorities.¹⁵⁰

¹⁴⁶ See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002 251 (2003), available at <http://www.census.gov/prod/2003pubs/02statab/election.pdf>. There are now only seven states where the Democratic Party controls the governors and legislatures: California, Maine, Mississippi, New Mexico, Oklahoma, Tennessee, West Virginia. See National Governors Association, Governors, at <http://www.nga.org/governors/1,1169,,00.html>; National Conference of State Legislatures, 2003 Partisan Composition of State Legislatures, at <http://www.ncsl.org/ncsl/db/elect98/partcomp.cfm?years=2003>.

¹⁴⁷ Hawaii: H.B. 2755 (2002), S.B. 2921 (2002) and S.B. 2546 (2002); Illinois: S.B. 1789 (2002); New Mexico: S.J.R. 21 (2002); California: A.B. 1515 (2001); Maine: L.R. 1256 (2001); Maryland: S.B. 233 (2001); Massachusetts: H.3281 (2001).

¹⁴⁸ HILL, *supra* note 20, at 103.

¹⁴⁹ *Id.*

¹⁵⁰ For example: “The Court’s cavalier decision not even to hear this voting-rights suit fairly exemplifies its stony indifference to the trampling of political rights, especially where African-American majorities are concerned.” RASKIN, *supra* note 1, at 21. “Because the argument for the electoral college hinges on the presumptive weight we should attach to history, it is important to see how the history of the electoral college is intertwined with the institutions and movements of political white supremacy.” *Id.* at 56. “[T]he electoral college has grown up with America’s sordid racial history, and it continues in its underground fashion to embolden the minority voice of white racial conservatism in the multi-cultural America of the new century.” *Id.* at 61. “The *Shaw* doctrine has the quality of a racial slur, and its authors . . . prove themselves not only

Thus, a racist conspiracy is the source of the defects of American democracy.

This approach defines the threat to our democracy using language that may be interpreted as being associated with leftist extremism. It may only activate a small portion of the population to join a movement to restore democracy. It would likely alienate the majority of the population to a democracy reform movement.¹⁵¹ Instead, Raskin should have ground his argument firmly in the notion that the defects in our democracy undermine America's widely cherished belief in popular sovereignty. The marketplace of ideas should be reopened to citizens sharing all viewpoints. A much larger group will be appalled and spurred to action when presented with the fact that American democracy—and the power of the citizenry—has been subverted to create a virtual political aristocracy. Democracy is diminished largely because of a series of strategic behaviors to maximize and consolidate power, rather than a racist conspiracy. This better explains how perpetrators come from all ends of the political spectrum.

The racial aspects of America's democracy deficit need to be discussed in a proper context. Again the historical limitation of the political power of minorities proves how American democracy is vulnerable to manipulation, and thus defective. This defective democracy then prevents the progress of American society.

For example, consider how the "two party system" works to subvert progress toward racial peace and equality. In 2000, over 90 percent of African Americans voted for Al Gore¹⁵² and 83 percent

historically disoriented but morally dyslexic." *Id.* at 85. "The fact that the Supreme Court itself invented this double standard in the name of Equal Protection, without any basis in the text, history or doctrine of the Constitution, reflects a historically resilient and protean racial ideology on the Court. . . . The legal doctrines change shape, form, and justification, but the reality of political white supremacy endures." *Id.* at 89. "And yet the Court's conservative majority cannot see that the system of incumbent self-promotion it blesses has a subordinating racial meaning. It does not consider oddly drawn majority-white districts favoring white incumbents to be racial gerrymanders at all. All the burdens of racial association fall on minorities. Whiteness is not seen as racial but as natural. To be white is to rise above race." *Id.* at 79.

¹⁵¹ A recent study found that 44 percent of Americans fall in or between the categories of "slightly liberal" and "slightly conservative" on the ideological scale. *Liberal-Conservative Self-Identification 1972-2000*, in NATIONAL ELECTION STUDIES, CENTER FOR POLITICAL STUDIES, UNIVERSITY OF MICHIGAN. THE NES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR (2001), at http://www.umich.edu/~nes/nesguide/tpable/tab3_1.htm.

¹⁵² U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002 235 (2003), available at <http://www.census.gov/prod/2003pubs/02statab/election.pdf>.

identify themselves as Democrats.¹⁵³ When racial equality is achieved one would expect a more even distribution of African Americans among political parties. Therefore, it is clearly not in the Democratic Party's interest to achieve racial peace and equality. They have strategically moved as slow as possible towards establishing racial justice.¹⁵⁴ "After all," writes Randall Robinson, "we all pretty much know what needs to be done. Blacks know this and whites know this. Trouble is, those who exercise control over our national public policy see no reason why they should care very much about taking steps to fix what America has done to blacks."¹⁵⁵

This shows how our flawed democracy tolerates the phenomenon of electoral capture. In *Uneasy Alliances*, Paul Frymer explains:

Electoral capture [occurs in] . . . circumstances when the group has no choice but to remain in the party. The opposing party does not want the group's vote, so the group cannot threaten its own party's leaders with defection. The party leadership, then, can take the group for granted because it recognizes that, short of abstention or an independent (and usually electorally suicidal) third party, the group has nowhere else to go.¹⁵⁶

Robinson explains the effect of electoral capture on the political empowerment of African Americans. "No segment of the national electorate has given more but demanded and received less from the Democratic Party nationally than African Americans. . . . Our support can be won with gestures. *No quid pro quo* is required."¹⁵⁷ The electoral

¹⁵³ *Party Identification 3-Point Scale 1952-2000, Percent Among Demographic Groups Who Responded 'Democrat (including leaners),'* in NATIONAL ELECTION STUDIES, CENTER FOR POLITICAL STUDIES, UNIVERSITY OF MICHIGAN. THE NES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR (2001), at http://www.umich.edu/~nes/nesguide/toptable/t2a_2_1.htm.

¹⁵⁴ This slightly contrasts with the Republican Party's stationary or reverse direction concerning racial equality.

¹⁵⁵ RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 238 (2000).

¹⁵⁶ PAUL FRYMER, *UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA* 8 (1999).

¹⁵⁷ ROBINSON, *supra* note 155, at 101. He continues, "How could President Clinton help but ruminate, *I can't understand the blacks. There is no apparent reason for their support of me, except that I am not a Republican, which for them appears to be reason enough.*" *Id.*

capture of African Americans (and other groups)¹⁵⁸ and marginalization of important issues such as racial equality are major effects of the subversion of democracy.

The historical and present plight of racial minorities in America is a useful indicator of the condition of our democracy. It provides an important justification for a movement to strengthen our democracy, yet it is not the only justification. Nor, for the success of the movement, should it be the primary or dominant one. Dressing the argument for a democracy reform movement in the terms of a far-left, highly racialized ideology will severely limit the ability to build a broad base. Making the issue of democracy reform primarily about race will divide the people, much to the delight of the opponents of democracy.

Saving democracy should not be an idea tied to one end of the political spectrum. It can and should be embraced by people with a diverse array of beliefs. The movement is severely limited if it is perceived as an issue belonging to the far left. A broad base is especially vital considering the nature of the reforms proposed in *Overruling Democracy*.

C. *Finding the Path to Democracy Reform*

Raskin states that the main strategy of a Democracy Reform Movement would be pursue the adoption of several constitutional amendments.¹⁵⁹ In order for the reader to have an understanding of the magnitude of this task, Raskin should have included a brief description of the politics and process of amending the Constitution. This would start with Article V of the Constitution, which provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three

¹⁵⁸ Frymer devotes an interesting chapter on the capture of homosexuals and Christian conservatives. See FRYMER, *supra* note 156, at 179-206.

¹⁵⁹ See RASKIN, *supra* note 1, at 224.

fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.¹⁶⁰

Therefore, the Constitution requires that the pro-democracy amendments gain the approval of a super-majority of the Senate, a super-majority of the House, and then a majority of the legislators in each of at least 38 states. It is quite an uphill battle to win the support of this many incumbents for a measure that will pose a clear threat to their, and their parties', ability to maintain and maximize power. This is probably more futile (as Raskin documents throughout the book) than expecting at least five Supreme Court justices to consistently enforce democratic values that are *already* present in the Constitution. Given the difficulty of amending the constitution, especially for these purposes, amendments will most likely have to follow a long series of victories of a democracy reform movement.

However, Raskin correctly points out that the movement to pass such amendments is therefore primarily useful as a means to rally and focus support for enforcing basic democratic principles. The experience of the movement to adopt the Equal Rights Amendment is the best example of this phenomenon.¹⁶¹ Amendments should be a key goal but much can be done along the way.

Raskin explains that other "subconstitutional" reforms can be enacted without the need for a constitutional amendment.¹⁶² He suggests the adoption of proportional representation systems, campaign finance reform (including free airtime for candidates), and expanding suffrage to noncitizen residents.¹⁶³ These are good examples of reforms that can seem incremental, yet have a significant effect on the movement to strengthen democracy.

Yet even these incremental reforms will not be possible without a broad base of support from the public. *Overruling Democracy* is a part of the public information effort but it glosses over the importance of building a broad base of support. The public needs to be informed of why these reforms are needed. Americans cherish the ideals and principles of democracy, but are largely oblivious of how badly their nation falls short of these standards. Much like the humanity depicted in the *Matrix* films, they are unaware that the reality (or in this case, democracy) that they are experiencing is an illusion created and

¹⁶⁰ U.S. CONST. art. V.

¹⁶¹ See RASKIN, *supra* note 1, at 225-26.

¹⁶² *Id.* at 229.

¹⁶³ *Id.* at 229-239.

maintained by a force outside their control.¹⁶⁴ Once the public is informed they will form the broad base of support required to enact democracy reform measures. As Raskin explains, the movement can be mobilized and lead by institutions of our civil society.

However Raskin overlooks the fact that some of the groups that he believes will lead the democracy movement may be too aligned with the current system and perhaps hostile to changes that may diminish their influence. Consider the NAACP and ACLU's hostility toward third party candidate Ralph Nader. The NAACP invited Bush and Gore to speak at its annual convention in 2000, but not Nader.¹⁶⁵ The ACLU did not protest Nader's exclusion from attending (in addition to not being allowed to participate) the presidential debates in 2000.¹⁶⁶ Therefore, to effectively lead a democracy reform movement some institutions of civil society must temper their strong allegiance to the Democratic and Republican parties. Perhaps that is too much (or unfair) to expect from organizations that were not created with democracy reform as their defining purpose.

Overruling Democracy offers an excellent explanation of the current defective state of American democracy and introduces some possible solutions. Its major failure is that it sometimes presents the issues in a manner that appeals only to a narrow segment of the political spectrum. This may have the unintended effect of retarding the growth of the base of public support for an effective democracy reform movement.

¹⁶⁴ THE MATRIX (Silver Pictures, Warner Bros. 1999).

¹⁶⁵ RALPH NADER, CRASHING THE PARTY 285 (2002). In the end Nader's request to speak was granted because a timeslot opened up when President Clinton canceled.

¹⁶⁶ *Id.* at 222.