

Review Essay

Toward a People's Constitution

How Democratic Is the American Constitution?

By Robert A. Dahl†

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Reviewed by Gene R. Nichol‡

The U.S. Constitution occupies a special place in the American heart. We see the two-century-old document as defining, perfect, and talismanic. All that is good and just is thought to be found within its borders, while all that degrades and diminishes falls outside. The Constitution is not quite as potent a symbol to us as the flag, but it occupies a close second. Anyone who chose to burn a copy of this defining document in open protest would likely engender wrath similar to that experienced by Mr. Johnson after his famous flag burning in Texas.¹ It has been said that "to be an American is an ideal, while to be a Frenchman is a fact."² For many of us, the American ideal is embodied in the U.S. Constitution.³

Despite our tremendous constitutional affection, there exists a rather substantial gap between Americans' love for the Constitution and our understanding and implementation of it. As anyone who has spent much time in the public arena can attest, Americans seem to know precious little about what the Constitution actually says or how it has been interpreted.⁴ I would

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1. See *Texas v. Johnson*, 491 U.S. 397 (1989) (During the 1984 Republican National Convention, Johnson burned an American flag as a protest of the policies of the Reagan administration. The message was not well received by the assembled Texans and Republicans. Johnson was arrested and convicted of violating Texas's flag-desecration statute. The U.S. Supreme Court invalidated the conviction.).

2. Lance Morrow, *Who's in Charge? The Nation Calls for Leadership and There's No One Home* (*The Crash*), *TIME*, Nov. 9, 1987, at 18.

3. See, e.g., PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* xiii (1999) (discussing "the genius of the Constitution").

4. See generally COLUMBIA LAW SURVEY, *AMERICANS' KNOWLEDGE OF THE U.S.*

guess that relatively few of us have ever read the brief charter. And of those who have read it, many would not willingly risk submitting its individual provisions—particularly the Bill of Rights and the Civil War amendments—to a present-day plebiscite.⁵ Our great constitutional fondness appears to be less than fully informed. The tensions triggered by the rending tragedies of September 11 have likely augmented our rhetorical loyalty to the Constitution, just as they have increased our dedication to all things American. At the same time, those tensions also have undoubtedly expanded our willingness to violate its strictures.

Robert Dahl's marvelous little book, *How Democratic Is the American Constitution?*, explores one of the clearest distinctions between the real and the imagined in American constitutionalism. He easily concludes that our purported democratic cornerstone, the constitutional charter, is not all that democratic. Rather, it cabins and disables majority sentiments as it embraces them, restricts the implementation of public preference as it nods to them, and retains antiquated compromises and processes that inappropriately thwart majority will. Dahl employs "democratic standards" to explore whether our constitutive charter is the best we can design to "enable politically equal citizens to govern themselves" (pp. 3-4). America's most accomplished political scientist responds solidly that the answer is "no" (pp. 110-39).

Part I of this Review Essay outlines Dahl's impressive efforts to explore and criticize various antidemocratic features of the Constitution. Democratically speaking, he demonstrates, we are not all that we claim to be. Dahl's arguments, however, at least suggest criticisms of our charter that move well beyond the democratic deficiency of the Constitution. Part II addresses the crushing problems of unequal condition that swamp our claims to equal citizenship. The Constitution's silence in the face of debilitating economic disparities leaves it surprisingly uncongenial to the interests of many, or even most, Americans. If the Constitution is modestly antidemocratic, it is dramatically antipopulist. In Part III, therefore, I take

CONSTITUTION (May 2002), at http://www.law.columbia.edu/news/surveys/survey_constitution ("Almost two-thirds of Americans think Karl Marx's maxim, 'From each according to his ability, to each according to his needs' was or could have been written by the framers and included in the Constitution, according to a national survey commissioned by the Columbia Law School.")

5. Only 16% of Americans claim a "detailed knowledge" of the Constitution according to a recent Knight-Ridder poll. Steven Thomas, *Most Americans Admit They Don't Have Detailed Knowledge of Constitution*, KNIGHT-RIDDER WASHINGTON BUREAU AND WISCONSIN STATE JOURNAL, Sept. 17, 2002, at A1. Interestingly, 65% responded that the "rich and powerful have more rights than others." *Id.* Freedom of the press is reported to be the least popular right guaranteed by the Constitution, with 43% responding that the Founding Fathers went too far. *Id.*; see also NAT'L CONSTITUTION CTR., NEW SURVEY SHOWS WIDE GAP BETWEEN TEENS' KNOWLEDGE OF CONSTITUTION AND KNOWLEDGE OF POP CULTURE (Sept. 2, 1998), at <http://www.constitutioncenter.org/sections/news/releases/teen.asp> ("[M]ore American teenagers can name three of the Three Stooges than can name the three branches of government.").

up Dahl's call to explore new ways of thinking about the Constitution. To that end, I conclude by proffering a Populist Bill of Rights.

I

HOW DEMOCRATIC IS OUR CONSTITUTION?

Making the case that the Constitution has powerfully antidemocratic features is not difficult. The original charter embraced our greatest national sin. Not only were slaves described as three-fifths human, but the political power of those who held them in bondage was multiplied as a result of the transgression (pp. 15-16).⁶ The 1789 text included no explicit guarantee of suffrage (p. 16). It assumed a baseline of White, male privilege (p. 16). The electoral college was meant to filter and moderate majority opinion, and bicameralism was designed to cool democratic "passions" (pp. 16-18). Nor did our founders trust the selection of senators to direct election, believing that state legislative choice would be more apt to assure an effective aristocracy (pp. 17-18). Various economic interests were explicitly placed beyond the reach of government, and life-tenured judges were expected to assure their essential protection (pp. 18-19). "A substantial number of the framers believed," as Dahl puts it, that they were required to "erect constitutional barriers to popular rule because the people would prove to be an unruly mob, a standing danger to law, to orderly government and to property rights" (pp. 24-25).

Woodrow Wilson reached the same conclusion even more forcefully a century ago:

The federal government was not by intention a democratic government. In plan and structure it had been meant to check the sweep and power of popular majorities. The Senate, it was believed, would be a stronghold of conservatism, if not of aristocracy and wealth. The President, it was expected, would be the choice of representative men acting in the electoral college, and not of the people. The federal Judiciary was looked to, with its virtually permanent membership, to hold the entire structure of national politics in nice balance against all disturbing influences,

6. Gouverneur Morris of Pennsylvania made this point forcefully at the time of the convention: [T]he inhabitant of Georgia [or] South Carolina who goes to the coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages, shall have more votes in a Government instituted for protection of the rights of mankind, than the Citizen of Pennsylvania or New Jersey who views with a laudable horror, so nefarious a practice.

J. Thurgood Marshall, Address Before the San Francisco Patent and Trademark Law Association (May 6, 1987), reprinted in BERTELL OLLMAN & JONATHAN BIRNBAUM, *THE UNITED STATES CONSTITUTION: 200 YEARS OF ANTI-FEDERALIST, ABOLITIONIST, FEMINIST, MUCKRAKING, PROGRESSIVE, AND ESPECIALLY SOCIALIST CRITICISM* 302 (1990) (quoting Gouverneur Morris, in *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 222 (Max Farrand ed., 1911)); see also Hendrick Hertzberg, *Framed Up; What the Constitution Gets Wrong*, *NEW YORKER*, July 29, 2002 (reviewing ROBERT DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001)).

whether of popular impulse or of official overbearance. Only in the House of Representatives were the people to be accorded an immediate audience. . . . The government had, in fact, been originated and organized upon the initiative and primarily the interest of the mercantile and wealthy classes.⁷

Of course, we have fought, struggled, demonstrated, bargained, campaigned, and amended our way out of many of these shortcomings (pp. 26-31). A burgeoning democratic culture, an expanding sense of human dignity, an unfolding logic of and demand for equality, and repeated battles against the darkest forces of human nature have generated inspiring results. As such, the framework of government that our founders envisioned no longer guides and bounds our decision making.

But as Dahl demonstrates in some detail, all the antidemocratic shadows did not disappear. Even in its much-amended form, the U.S. Constitution demands or allows practices that should rile democrats. Two of the features that Dahl highlights are much discussed. First, the electoral college enables a popular-vote loser to become president of the United States. In 1876, the losing candidate won 51% of the votes cast (p. 80). In the 2000 election, Al Gore may not have won Florida, but a half-million more Americans voted for him than for our present incumbent.⁸ And, indefensibly, a Wyoming citizen has four times the electoral clout that a Californian carries (p. 81).

Second, our present acceptance of aggressive forms of judicial review is not easily squared with a democratic theory. Law professors have labored mightily to justify and legitimate first one version of activism and then another.⁹ We have even switched sides in the debate in response to altered fortunes and changes in court personnel. But as Dahl concludes, empowering nine unelected judges ultimately to determine fundamental state and national policies, without honest textual warrant, may be called many things—but democratic is probably not one of them (pp. 54-55).

Dahl's book also concentrates on other measures that most of us simply take for granted, untroubled. One is the dramatic departure from political equality reflected in the makeup of the U.S. Senate (p. 46). We all know, of course, that as the result of a compromise between the large and small states at the Philadelphia convention, two senators represent each

7. WOODROW WILSON, *DIVISION AND REUNION* (1906), reprinted in OLLMAN & BIRNBAUM, *supra* note 6, at 297.

8. See U.S. DEPT. OF COMMERCE, ECON. & STATISTICS ADMIN., U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 2001, at 233 (121st ed. 2001).

9. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 104-24 (Harvard University Press 1980) (arguing for judicial activism to open the processes of political change); KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER AND RELIGION* 173-87 (Yale University Press 1993) (advocating use of judicial power on behalf of the excluded); Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695 (arguing for a sharply cabined view of judicial power).

state, regardless of population. South Dakota and New York march in majestic equality through the halls of our high chamber. Dahl puts this democratic departure in pointed perspective. An Alaskan, for example, enjoys fifty-four times the representation of a Californian in the Senate (p. 49). Wyoming residents surpass even that, weighing in at seventy times the representation of California residents (p. 50). This level of inequality in representation is exceeded only by Brazil and Argentina among other federal democracies—a status that can give us but little consolation (p. 49). Small wonder that “among the countries most comparable to the United States and where democratic institutions have long existed without breakdown, not one has adopted our American constitutional system” (p. 41).

It is curious as well, Dahl concludes, that we accept this continuing “small state privilege” seemingly without objection. “[D]o people in the smaller states possess *additional* rights or interests that are entitled to protection from policies supported by national majorities?” (p. 52). Given our complex and often tragic history, it is easy to develop a ready and sensible list of candidates for affirmative action in the United States. The residents of Maine and Montana, however, would not be on it.

These observations are not much ado about nothing. The inequality embodied in the U.S. Senate has had an ample impact on our ability to govern ourselves. The evils of slavery essentially were immune from political redress as a result of the disproportionate clout of the southern states in the Senate (pp. 53-54). Civil rights gains were also long delayed by Senate obstruction. Two of our most relentless and tragic departures from the democratic aspirations of human dignity have been powerfully aided and abetted by the curious and unacceptable makeup of the U.S. Senate (p. 53). But, as Dahl records, the advantage provided to small states in the upper chamber, when coupled with the supermajority requirements and pointed hurdles of the amending clauses in Article V, renders the Constitution virtually democracy proof (pp. 52-54).

Finally, Dahl effectively calls us to task for our long-cemented and apparently irrevocable tradition of strictly majoritarian, first-past-the-post elections (pp. 56-60). It is undoubtedly difficult to commend a system in which a political party winning every election by a one-vote plurality would obtain 100% of the seats in the legislature—leaving almost half of the electorate unrepresented. A first-past-the-post scheme, Dahl shows, is apt to produce and maintain a two-party system. Voters justifiably believe that they waste a ballot cast for anyone other than the two major party candidates. Proportional-representation frameworks, on the other hand, tend to lead to vibrant multiparty systems (pp. 57-58). Our traditional practices, therefore, may work to the advantage of the Republican and Democratic parties, but they understandably leave many of us feeling unrepresented. This discrepancy likely explains why we now stand in very limited

company in clinging to purely majoritarian elections. All the major democracies except England, Canada, and the United States embrace some form of proportional or consensus-based electoral system (pp. 58-59). But, as the brief political career of Lani Guinier thunderously demonstrated, we do not seem anxious to change (p. 60).

Robert Dahl is no firebrand. He does not call the U.S. Constitution, as did the abolitionist William Lloyd Garrison, a "covenant with death and an agreement with hell."¹⁰ Nor does he unabashedly embrace Charles Beard's view that "the Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities."¹¹ He might well agree with Justice Thurgood Marshall's bicentennial observation that he did not "find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound."¹² Dahl would put it differently, though: our understanding of and commitment to democratic ideas and institutions have gone far beyond that of the Framers (p. 10). It is neither necessary nor helpful to chastise our forebears for these shortcomings. It is essential, however, to "stop thinking of our Constitution as a sacred text and begin to think of it as nothing more, or less, than a means for achieving democratic goals" (p. 119). He calls for a "[p]ublic discussion that penetrates beyond the Constitution as a national icon" (p. 156). A strategy "designed to achieve greater *political* equality" (p. 156) would serve us more effectively than uninformed Framer worship.

II

THE PROBLEM OF UNEQUAL CONDITION

One criticism that could be lodged against *How Democratic Is the American Constitution?* is perhaps an unfair one—Dahl does little to suggest or elucidate specific reforms. A reader might reasonably expect that Dahl's appealing effort would conclude with an equally persuasive and specific call to arms. But it never comes. By concentrating so effectively on specific constitutional shortcomings, like the makeup of the Senate or the operation of the electoral college, Dahl goes a good distance toward at least implicitly proffering more egalitarian alternatives. Still his goal, quite explicitly, is not to recommend particular changes but to encourage new ways to think about the Constitution (p. 4). He is not, at least in this book, drawn into arguments over new, hypothetical, and contested blueprints.

10. WILLIAM LLOYD GARRISON, RESOLUTION OF THE MASSACHUSETTS ANTI-SLAVERY SOCIETY (Jan. 1843), reprinted in OLLMAN & BIRNBAUM, *supra* note 6, at 96.

11. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913), reprinted in OLLMAN & BIRNBAUM, *supra* note 6, at 58-59.

12. Marshall, *supra* note 6, reprinted in OLLMAN & BIRNBAUM, *supra* note 6, at 300-01.

Although Dahl does not propose revisions, he hints at the direction in which he thinks we should look. His closing paragraphs suggest, without elaboration, that meaningful democratic reform in America requires a reduction of "the vast inequalities in the existing distribution of *political resources*" (p. 156). Earlier on he indicates similarly that "citizens must . . . possess the minimal *resources* in order to take advantage of the opportunities and to exercise their rights" (p. 152). He reports a missive from James Madison aimed at reducing "extreme wealth towards a state of mediocrity, and rais[ing] extreme indigence toward a state of comfort" by "withholding [the] . . . unmerited . . . accumulation of riches" (p. 34). And Dahl pointedly echoes Alexis de Toqueville's descriptive claim that "[t]he more I advanced in the study of American society, the more I perceived that the equality of condition is the fundamental fact from which all others seem to be derived, and the central point at which all my observations constantly terminated" (p. 23).

The substantive evils Dahl identifies to demonstrate the weaknesses of our constitutional structure also are often markers of the unequal conditions caused by economic injustice. Dahl writes:

When the United States is ranked with other established democracies on such matters as the rate of incarceration, the ratio of poor to rich, economic growth, social expenditures, energy efficiency, foreign aid and the like, its performance is something less than impressive. . . . Two areas in which our country ranks highest are hardly achievements of which we can be proud. On the percentage of the population we incarcerate, we come out a clear winner, while our ratio of rich to poor is higher than that of most other countries. We rank in the bottom third—and on some measures close to the bottom of the bottom third—on voter turnout, state welfare measures, energy efficiency, and the representation of women in the national legislature. What is more, in spite of our good showing on economic growth, we are almost dead last in our social expenditures. Finally, even though many Americans believe that we are too generous in our economic aid to other countries, among nineteen democratic countries we are at the very bottom (p. 117).

It is somewhat surprising that Dahl emphasizes economic privation, since it is unclear whether a link readily can be drawn between the antidemocratic provisions of the U.S. Constitution that he highlights and the perils over which he rightly frets. Dahl's book almost entirely focuses on what could be deemed procedural democratic failings. The makeup of the Senate diminishes the franchise of the residents of the larger states. The electoral college directly thwarts majority will. First-past-the-post elections deter the progress of third parties. Judicial review sometimes supplants majority

preference. A well-oiled democracy, he argues, would likely seek other paths. I think he is right.

Imagine, though, that tomorrow we amended the Constitution to abolish the electoral college in favor of the direct election of presidents. Assume further that we realigned the Senate to comply with "one person, one vote" standards. To make the sweep clean, fantasize also that we developed a broad-ranging scheme of proportional representation and abolished judicial review. Would the economic inequalities that Dahl highlights begin to disappear? I think we could reasonably doubt it. We systematically disadvantage the bottom third in the United States, but it is probably not because we are paying too much attention to Maine and Wyoming.¹³

The "vast inequalities in the existing distribution of *political resources*" Dahl decries (p. 156) likely result more from the way the Constitution has been interpreted and the sorts of protections that it pointedly omits than from the remaining antidemocratic measures the text contains. The Constitution is an amazing document. It embraces an even more amazing history. But, it is not a great charter for the protection of those lodged at the bottom of our economic pecking order. Dahl is likely right that the Constitution is insufficiently democratic. But fixing its lingering democratic transgressions will not get us where he wants us to go. Our charter may be marginally undemocratic, but it is strongly antipopulist.

We may be the richest nation in human history, but almost one of every five of our children lives in wrenching poverty,¹⁴ as if any theory of justice or virtue could explain this exclusion of innocent children from the American dream. The percentage is even higher for Black and Latina/o kids.¹⁵ We apparently lead the industrial world in wealth disparity.¹⁶ The

13. Admittedly, the case might be more compelling with regard to proportional representation. It is at least possible that the ascendancy of vibrant political parties beyond the traditional two would lead to greater protection of the interests of those at the bottom of the economic ladder. However, it is also possible, of course, that the opposite would occur.

14. Over 16% of Americans under age eighteen live in poverty. Twenty-two percent of Black and Latina/o children live in poverty. Children make up 37% of the poor but only 26% of the population. Daniel Weinberg, Chief, Housing and Household Econ. Statistics Div., U.S. Census Bureau, Press Briefing (Sept. 25, 2001), at <http://www.census.gov/hhes/income/income00/prs01asc.html>; see also ROBERTO MANGABEIRA UNGER & CORNEL WEST, *THE FUTURE OF AMERICAN PROGRESSIVISM* 67 (1998) (discussing high child-poverty rates and public policy).

15. JOSEPH DALAKER & BERNADETTE D. PROCTOR, U.S. DEPT. OF COMMERCE, 1999 POVERTY IN THE UNITED STATES, 2000 U.S. CENSUS BUREAU, at vi, available at <http://www.census.gov/prod/2000pubs/p60-210.pdf> (Sept. 2000); Gene R. Nichol, *Law's Disengaged Left*, 50 J. LEGAL ED. 547, 550 (2000).

16. See James Lardner, *The Rich Get Richer: What Happens to American Society When the Gap in Wealth and Income Grows Larger?*, U.S. NEWS & WORLD REP., Feb. 21, 2000, at 38; see also DEREK BOK, *THE STATE OF THE NATION: GOVERNMENT AND THE QUEST FOR A BETTER SOCIETY* 334-56 (1996); THOMAS I. PALLEY, *PLENTY OF NOTHING: THE DOWNSIZING OF THE AMERICAN DREAM AND THE CASE FOR STRUCTURED KEYNESIANISM* (1998) (government policies contributing to income disparity); KEVIN PHILLIPS, *WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH* (2002).

concentration of resources at the top of the economic ladder has reached a historic high.¹⁷ We have allowed tremendous wealth and privilege to become concentrated in the hands of a relative elite that pays itself proportionately more, and pays its workers proportionately less, than is the case in other major industrial democracies.¹⁸ Franklin Roosevelt thought that "[t]he test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little."¹⁹ By this measure, we have little about which to boast.

The gulf in economic resources between those at the top and those at the bottom leads to an almost endless cascade of other, consequential disparities. With each passing decade, we become increasingly polarized along economic lines. More of the poor are consolidated in impoverished neighborhoods,²⁰ and larger numbers of the wealthy separate themselves in exclusive suburbs or gated compounds.²¹ Rich and poor share fewer neighborhoods, parks, social services, school districts, local governments, and civic obligations. We occupy divergent communities—separate, nonintersecting spheres. Wealthier citizens seemingly have a diminished stake in the quality of life in impoverished communities. The poor experience the marvels of a consumer-driven, high technology, information-based economy only through the distant lens of fantastic television programming. Every year it is harder to remember that we are "one nation, under God."

Despite our high-flown rhetorical commitments to equality, the United States stands alone among industrial nations in failing to assure universal access to health care.²² Over forty million Americans have no health care coverage.²³ Among households earning under \$25,000 a year,

17. See PHILLIPS, *supra* note 16, at xi-xx. In 1999, the average after-tax income of the middle 60% of Americans was lower than in 1997. The 400 richest Americans between 1982 and 1999 increased their average net worth from \$230 million to \$2.6 billion, over 500% in constant dollars. Molly Ivins, *Class Warfare v. Class Warfare*, RALEIGH NEWS & OBSERVER, Aug. 14, 2002, at 23A; Paul Krugman, *For Richer: How the Permissive Capitalism of the Boom Destroyed American Equality*, N.Y. TIMES MAG., Oct. 20, 2002, at 62-64 ("We are now living in a new Gilded Age, as extravagant as the original . . . [T]he 13,000 richest families in America now have almost as much income as the 20 million poorest households; those 13,000 families had incomes 300 times that of average families.").

18. UNGER & WEST, *supra* note 14, at 34.

19. David M. Kennedy, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR* 287 (1999).

20. See Richard Morin, *The New Great Divide: More and More, Where You Live Depends on What You're Worth*, WASH. POST, Jan. 18, 1998, at 14. ("In 1970, barely half of the urban poor lived in poor neighborhoods—defined as neighborhoods where at least one in five residents live in households below the poverty line. By 1990, two out of three lived in these impoverished neighborhoods.").

21. EDWARD BLAKELY & MARY SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 7 (1997).

22. BOK, *supra* note 16, at 236-37 ("In the other [industrial nations] either everyone is covered, or those who remain outside are a small minority of well-to-do people who prefer to purchase their own health care in the private market.").

23. Earl Lane, *No Insurance Bad for Health*, NEWSDAY, May 22, 2002, at A22 (outlining massive risks to health for the forty million uninsured); Kennedy *Offers Plan for Health Care for All*,

almost a quarter remain uninsured.²⁴ A third of Hispanics have no health care coverage.²⁵ Most Americans without coverage are employed, often working more than one job.²⁶ The comparison with other industrial nations is galling. We spend more per capita on health care than any nation in the world.²⁷ But we stand alone in leaving so many of our fellow citizens outside the health care system.²⁸ As Paul Kennedy wrote a few years ago, the United States "'occupies last place among the industrial countries . . . in child mortality, life expectancy, and visits to the doctor,' although it probably leads the world in politicians who talk about 'family values.'"²⁹

What, then, of "the existing distribution of *political resources*," the equalization of which Dahl finds essential to democratic government (p. 156)? Here the disparities are similarly stark. Education, for example, is rife with inequality. All across the nation, we countenance rich and poor schools; not just private schools, mind you, but rich and poor public schools. Constitutionally, it seems, government may treat some of our children as second- or third-class citizens. In *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court found it untroubling that the ten wealthiest districts reviewed spent three times as much per pupil as the four poorest districts.³⁰ The equal protection clause, apparently, demands little more than that "every child has a building called a school."³¹

Since *Rodriguez*, over forty states have faced serious challenges to unequal public school funding schemes.³² In *Leandro v. State*, for example, the North Carolina Supreme Court found low-wealth schools plagued by poor physical facilities, inadequate space and lighting, small and outdated book collections, nonexistent technology, substandard labs, sparse

PROVIDENCE J. BULL., Nov. 22, 2002, at A11 (forty-one million uninsured); *Researchers Confirm Lack of Insurance Is Harmful to Your Health*, S. BEND TRIB., June 16, 2002, at A6; see also BOK, *supra* note 16, at 235-55; U.S. DEPT. OF COMMERCE, ECON. & STATISTICS ADMIN., U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE: 2001, at 2 (2002), available at <http://www.census.gov/prod/2002pubs/p60-220.pdf>.

24. U.S. DEPT. OF COMMERCE, *supra* note 23, at 6.

25. *Id.* at 4; Keith Snider, *U.S. Minorities Have Less Access to Health Care, Study Says*, BLOOMBERG NEWS, June 19, 2002 (citing survey by Center for Studying Health System Change, funded by Robert Wood Johnson Foundation).

26. *Uninsured Americans: Hearing on H.R. 781-3 Before the House Comm. on Ways and Means*, 106th Cong. 1 (1999) (testimony of John Shields).

27. According to the World Health Organization, the United States ranks thirty-seventh in the quality of health care among the nations of the world, though we spend more per capita than any other country. WORLD HEALTH ORG., 2000 WORLD HEALTH REPORT, annex (2000), available at <http://www.who.org> (last visited Dec. 1, 2002).

28. BOK, *supra* note 16, at 237.

29. PAUL KENNEDY, PREPARING FOR THE TWENTY-FIRST CENTURY 303 (1993).

30. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); see also JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 214, 223-33 (1991).

31. KOZOL, *supra* note 30, at 212.

32. Gen. Accounting Office, *School Finance: State Efforts to Equalize Funding Between Wealthy and Poor Districts*, 71 SPECTRUM J. ST. GOV'T 20, 20 (1998).

advanced placement offerings, large classes, and underpaid teachers.³³ Jonathan Kozol has captured the separation in stark terms:

The nation is hardly "indivisible" where education is concerned. It is at least two nations, quite methodically divided, with a fair amount of liberty for some, no liberty that justifies the word for many others, and justice—in the sense of playing on a nearly even field—only for the kids whose parents can afford to purchase it.³⁴

Our discriminatory public school funding scheme serves to hobble the children of poor parents at the gate. It also protects the kids of privileged parents from competition from below. It thus helps to assure rigidity of social class and frustrate the natural potential of economically disadvantaged children. Using local control and taxation to determine school funding allows wealthy parents to seek to guarantee their children's ascendancy.³⁵ This profound sin against equality is amplified because the advantage is proffered by the state.³⁶ Higher education, unfortunately, augments the trends initiated in primary and secondary schools. In 1979, children from families in the top economic quarter were four times more likely to get a college degree than those in the bottom quarter.³⁷ This gap has widened considerably over the intervening decades, with children in the economically advantaged group now ten times more likely to finish college.³⁸

The American legal system, sadly, may be the most unequal of all. Our adversary system is premised on "an equal contest of contrary interests."³⁹ We carve "equal justice under law" on our courthouse walls. For decades, we have announced as a fundamental principal of our constitutional law that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."⁴⁰ But our actions speak louder than our words, and they bear little resemblance to our stated ideal.

The complexity of our legal system makes representation essential to protecting one's rights. Legal services are prohibitively expensive for a

33. *Leandro v. State*, 488 S.E.2d 249, 252 (N.C. 1997).

34. KOZOL, *supra* note 30, at 212.

35. *Id.* at 223.

36. *Id.* at 206-07. In *Brown v. Board of Education*, the Court emphasized that since government imposed the segregation challenged, the injury to schoolchildren was increased. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

37. RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* 86-89 (1998).

38. *Id.*

39. See Joseph M. McLaughlin, *An Extension of the Right to Access: The Pro Se Litigant's Right to Notification of the Requirement of the Summary Judgment Rule*, 55 *FORDHAM L. REV.* 1109, 1124 (1987).

40. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); see Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785 (2001) (documenting failure to meet constitutional standard of equal justice); see also DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

large portion of the population, however, and only a small percentage of meritorious legal disputes are likely to generate a significant contingent fee. Yet unlike many industrial nations, we recognize no general right to representation in civil cases.⁴¹ Less than 1% of our total national expenditure for lawyers goes toward services for the poor.⁴² Legal aid budgets are capped at amounts making effective representation of the poor a statistical impossibility. Even these inadequate funding levels effectively have been cut by about a third over the last decade.⁴³

What passes for civil justice among the economically deprived is stunning. The United States has one lawyer for every 380 people generally, and one legal services lawyer for every 4,300 persons living in poverty.⁴⁴ We disadvantage the impoverished even further by creating categories of unworthy poor and placing restrictions on the most efficient avenues for representation.⁴⁵ Study after study shows that about 80% of the civil legal needs of the poor are unmet.⁴⁶ We leave the poor unrepresented in the most crushing problems of human life—divorce, child custody, domestic violence, housing, and benefits disputes.⁴⁷ Americans seem untroubled by the fact that a commercial dispute between wealthy corporations can take years to try, while the fate of a battered child is determined in moments. Law “is least available to those who most need help.”⁴⁸ A legal framework that excludes a large percentage of the populace from participation cannot be meaningfully called a system of justice.

Economic inequalities are also deeply imbedded in the operation of our political system. The private financing of political campaigns systematically skews the outcomes of our political processes toward the interests of the economically powerful. Campaigns for major offices begin with a

41. See Rhode, *supra* note 40, at 1787-88; Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199 (1994); see also Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH. U. J.L. & POL'Y 1, 3 (2001) (“On the civil side, there is no federal right to an attorney.”). “In the 1990’s, U.S. per capita government spending on civil legal services for poor people ranged around \$2.25. New Zealand spent three times as much . . . ; the Netherlands four times as much; . . . and England . . . more than eleven fold.” *Id.* at 11.

42. Rhode, *supra* note 40, at 1787-88.

43. “It’s sort of incredible to me that at the dawn of a new millennium, the Legal Services Corporation is funded at half the level it was in 1981.” Sen. Ron Wyden, *quoted in* 1 LSC’s EQUAL JUST. MAG., 2002, at 18. In 1980, the Legal Services Corporation’s budget was \$300 million. In 2002, it was \$329 million, which “equals rough half of LSC’s 1980 funding in real dollars.” *Id.* at 19.

44. Rhode, *supra* note 40, at 1785, 1788.

45. *Id.* at 1786-87.

46. *Id.* at 1785-87; see also LEGAL SERVS. CORP., *SERVING THE CIVIL NEEDS OF LOW-INCOME AMERICANS: A SPECIAL REPORT TO CONGRESS* 12b (2000); Candace Crowley, *Access to Justice Development Campaign 2000: The Case for Support*, 71 MICH. BAR J. 370, 370 (2000).

47. VICTOR MORRERO, COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES: FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, *reprinted in* 19 HOFSTRA L. REV. 755, 768 (1996).

48. RHODE, *supra* note 40, at 208.

wealth primary, in which candidates must demonstrate funding prowess in order to establish credibility.⁴⁹ Once politicians overcome this hurdle, a relentless money chase begins. Both incumbents and challengers spend a huge percentage of their waking hours asking people for money.⁵⁰ The centrality of this undertaking substantially affects the behavior of the participants. Political competitors avoid measures that complicate raising money and embrace measures that facilitate it. Politicians taking positions congenial to powerful economic interests are rewarded, while those opposing such interests are punished. Accordingly, our economic system exercises disproportionate influence over our political system. The impact of money on our politics may explain why dramatic disparities in public education, health care, income, and legal protections are largely ignored in our political deliberations.⁵¹

Taken together, these fundamental inequities reveal a seemingly inexorable trend toward economic apartheid. The stunning disparities in the distribution of American resources sweep aside our rhetorical claims to equal citizenship. Despite our constitutive aspirations, we grant the greatest opportunities to those who are already blessed. Barriers preventing the progress of the disadvantaged stand unmolested. We refuse to grant many of the core components of human dignity to our fellow citizens that other nations manage to provide without debilitation. We offer only a feigned justice, opening the judicial doors to those who cannot afford to walk through them while celebrating an illusory commitment to legal equity.

49. See Vincent Blasi, *How Campaign Spending Limits Can Be Reconciled with the First Amendment*, 7 THE RESPONSIVE CMTY. 1336 (1996) (arguing that high costs of campaigns and distractions due to candidates' relentless fundraising efforts justify campaign spending limits).

50. See PAUL SIMON, WE CAN DO BETTER: HOW TO SAVE AMERICA'S FUTURE—AN OPEN LETTER TO PRESIDENT CLINTON 19-31 (1994); Vince Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994) (arguing that the distraction of elected officials from their public obligations by fundraising demands constitutes a substantial governmental concern).

51. See LARRY J. SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES (1984); FRANK J. SORAU, MONEY IN AMERICAN ELECTIONS 307-17 (1988); Brent A. Fewell, *Awash in Soft Money and Political Corruption: The Need for Campaign Finance Reform*, 36 DUQ. L. REV. 107 (1997); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interest and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797 (1990); Kenneth V. Levit, *Campaign Finance Reform and the Return of Buckley v. Valeo*, 103 YALE L.J. 469, 496 (1993) (noting that war chests are used to frighten away competition); Daniel Hayes Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 322-29 (1989); Burt Neubourne, *One Dollar, One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L.J. 1 (1997). The impact of campaign-finance rules presents only part of the picture. One of the most disheartening lessons of the 2000 Florida electoral scandal was the realization that the poorest among us can not only expect the worst housing, schools, health care, and living quarters, but also the worst voting machines and the worst democratic infrastructure. These inequalities persist. See Allen G. Breed, *Lost Faith Follows Lost Votes*, RALEIGH NEWS & OBSERVER, Sept. 15, 2002, at A10 (quoting Christopher Edley: "My fear is that officials haven't taken the necessary steps to counter these traditional patterns, starving poor communities and minority communities of the resources they need for the democratic infrastructure.").

Political channels are often closed to those without significant resources. Dramatic economic inequality impairs our ability to see each other as peers. The skills and sustenance necessary to assure meaningful political participation are ignored. As Franklin Roosevelt put it, "[n]ecessitous men are not free men."⁵² The aspiration of equal citizenship is fundamentally removed from our public lives. Generally speaking, Americans have a strong sense of fair play. But across a broad array of enterprises, we have allowed the cards to become stacked. Any meaningful notion of equality has collapsed.

In the face of these powerful egalitarian transgressions, our Constitution, as written and as interpreted by our highest Court, stands untroubled. Implicitly at least, Dahl views its ineffectiveness as linked to the document's frequent and substantial departure from the norms of democracy—departures rooted in the Framers' concern for the dangers of popular majorities. Woodrow Wilson asserted, on the other hand, that the Constitution's weaknesses were based in the Framers' overarching embrace of the interests of the "wealthy and mercantile classes."⁵³ Wilson likely had it right. The deliberations of 1787 included no meaningful debate between the haves and the have-nots. The charter was designed, principally, to secure an existing order of liberties. Those without power and privilege were left largely unrepresented.⁵⁴

Lincoln thought that the central idea of America was that the weak would gradually be made stronger, and, ultimately, all would have an equal chance.⁵⁵ Bernard Bailyn described the great themes of American revolutionary ideology as including "the belief that through the ages it had been privilege—artificial, man-made and man-secured privilege, ascribed to some and denied to others . . . that . . . had crushed men's hopes for fulfillment."⁵⁶ These sentiments may be essential to our nation's self-concept, but they are not reflected in our Constitution. Two centuries of

52. DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945*, at 280 (1999) (quoting President Roosevelt, Address from Philadelphia's Franklin Field (June 27, 1936)).

53. See WILSON, *supra* note 7.

54. The intent of the Framers of the Constitution was to contain democracy rather than give it free rein, and dilute the democratic will rather than mobilize it. In addition, their goal was to construct a centralized power to serve the expanding interests of the manufacturing, commercial, landowning, and financial classes, rather than the needs of the populace. MICHAEL PARENTI, *THE CONSTITUTION AS AN ELITIST DOCUMENT*, reprinted in OLLMAN & BIRNBAUM, *supra* note 6, at 141.

55. That "central idea" in our political public opinion, at the beginning was, and until recently has

continued to be, "the equality of men." And although it was always submitted patiently to whatever of inequality there seemed to be as a matter of actual necessity, its constant working has been a steady progress towards the practical equality of all men.

PAUL M. ANGLE & EARL SCHENCK MIERS, *THE LIVING LINCOLN* 198 (1955) (quoting the Lincoln-Douglas debate, Springfield, Illinois, Feb. 20, 1857).

56. BERNARD BAILYN, *FACES OF REVOLUTION: PERSONALITIES AND THEMES IN THE STRUGGLE FOR AMERICAN INDEPENDENCE* 220 (1990).

amendments have weakened, but not fundamentally altered, that uninspiring reality.

III

A POPULIST BILL OF RIGHTS

Robert Dahl's book highlights the powerful discrepancy between the overarching American assumption that the U.S. Constitution is the font of all things democratic and the reality of the charter's frequent antidemocratic textual turns. Most Americans likely believe, as well, that their Constitution offers powerful protections for the interests of average citizens. It embodies, we assume, our pledged allegiance to "liberty and justice for all." Its majestic phrases surely place it strongly on the side of the ordinary citizen. In reality, though, our vaunted charter is hardly a driving standard for those locked at the bottom. If economic privation relegates large numbers of Americans to a marginalized status of less-than-full citizenship, the Constitution rarely intervenes. It is hardly a populist document.

This outcome is neither inevitable nor unalterable. It remains possible to reimagine our politics and to revitalize our foundational commitment to equality. It is surely within our ken to conclude that a society in which millions are locked out and marginalized penalizes us all. It robs us of our best selves, casting aside our highest aspirations. It represents a failure not of charity, but of democracy—a defeat of justice. It is surely possible to govern as if, literally, every person mattered.

The Constitution's bow to privilege, then, need not be our final say. We could, for example, mitigate some of the advantages that have inured to the most powerful members of our community. We could give greater constitutional pedigree to the needs and interests of average Americans as well. It would be possible to craft a constitution that is not agnostic about the debilitating features of unequal condition.

Dahl calls for an invigorated "public discussion that penetrates beyond the Constitution as a national icon." (p. 156). In that spirit, I offer the following Populist Bill of Rights. Some of the proffered amendments seek to eliminate privileges bestowed on entrenched economic interests—corporations, political financiers, international commercial enterprises, and the like. Others attempt to carry forward, expand, and energize existing principles of democratic participation and constitutional accountability. Still others seek to assure, in positive terms, fundamental modern components of human dignity; or to restrict the rankest forms of discrimination against vulnerable members of society; or to require that even some exercises of private power be subject to constitutional constraint. As a package, the amendments would mark a dramatic alteration in our constellation of constitutive values, taking more seriously our relentlessly repeated

rhetorical commitments to "liberty and justice for all." They would take a significant step toward placing the U.S. government more profoundly on the side of the bottom third. They would, quite literally, adopt a different theory of political power: that government exists primarily for those who need it most.

In this brief Review Essay, I make no effort to probe deeply the historical challenges and tensions that lead to the various suggested alterations. Each could justify very substantial attentions. Nor do I meaningfully explore the massive implications of the proposed changes. But for a nation so powerfully invested in a defining system of constitutional accountability and so seemingly self-satisfied with its egalitarian credentials, it could be remarkably instructive to consider what we do not do. If the suggestions seem radical and naïve, they perhaps demonstrate how comfortable we have become with a constitutional regime tilted against the interests of ordinary citizens. It could be illuminating to ponder what a constitution might look like if it were drafted with average Americans in mind.

A. *Populist Bill of Rights*

1. This Constitution is the supreme law of the land and cannot be modified, restricted or abridged by any international treaty, agreement, or tribunal.⁵⁷
2. The rights and liberties set forth in this Constitution shall not be construed to apply to corporations or other artificial entities.⁵⁸
3. Every person has the right to seek judicial redress, in law and in equity, for violations of the Constitution of the United States.

57. In theory, of course, this provision should be unnecessary. Treaties and executive agreements are said to be subject to the demands of the U.S. Constitution now. See *Reid v. Covert*, 354 U.S. 1, 16 (1957) ("[N]o agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free from the restraints of the Constitution."); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 273 (1997). The relatively recent dramatic expansion of international commercial agreements and tribunals, with the consequent threat to democratic decision making and authority at the national level, likely demands reemphasis and reiteration. Consider, for example, the World Trade Organization's mandate to make trade matters supreme over worker, consumer, and environmental safeguards—even if that collides with democratic standards and claims of justice. Ralph Nader, *WTO Means Rule by Unaccountable Tribunal*, in *THE RALPH NADER READER* 202, 203 (2000).

58. This amendment is offered in tribute to Justice Hugo Black's dissenting opinion in *Connecticut General Life Insurance Co. v. California*, 303 U.S. 77, 83 (1938) (Black, J. dissenting), arguing that corporations are not persons under the Constitution. Commentators also argue that under present constitutional principles, corporations are given greater legal protections than real people:

The Framers certainly knew about corporations but chose not to mention these contrived entities in the Constitution. For them, the document shielded living beings from arbitrary government and endowed them with the right to speak, assemble and petition. . . . [W]e need a constitutional amendment that declares that corporations are not persons and that they are entitled only to statutory protections conferred by legislatures and through referendums.

Ralph Nader & Carl J. Mayer, *Corporations Are Not Persons*, in *THE RALPH NADER READER*, *supra* note 57, at 77, 79.

Sovereign immunity, asserted by either state or federal authorities, shall not serve as a defense to such claims.⁵⁹

4. To assure rights of equal political participation, the United States and the various states shall be empowered to regulate the financing of political campaigns.⁶⁰

5. In the U.S. House of Representatives and in the state legislatures, all political parties gaining more than 5% of the vote in a general election shall be represented proportionally.⁶¹ The rights to initiative and referendum shall be secured against the several states.⁶²

6. The states shall assure every person the right to a free and equal public education.⁶³

59. This amendment would eliminate the necessity of the analysis in *Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), constitutional causes of action that equate federal and state constitutional accountability, and rejects, at long last, an American notion that the king cannot be sued. See generally Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damage Claims*, 75 VA. L. REV. 1117 (1989) (exploring inconsistency of Supreme Court's *Bivens* methodology and tensions with constitutional accountability); Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959 (1987) (arguing for parity in constitutional damage claims whether defendants are state or federal officials). See also *Hans v. Louisiana*, 134 U.S. 1 (1890) (recognizing state sovereign immunity in federal-question cases in federal court). The proposed amendment would overturn both state and federal sovereign-immunity defenses to federal constitutional claims, assuring constitutional accountability in the courts and employing a theory similar to that espoused by Justice Brennan in *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184, 239-40 (1964). "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Id.* Both the state and federal governments "surrendered" any inherent sovereignty to violate the Constitution of the United States.

60. This amendment would overrule *Buckley v. Valeo*, 424 U.S. 1 (1976) (declaring various campaign-finance regulations unconstitutional and equating money and speech), thus returning to both state and federal governments the power to limit expenditures as well as contributions, and forcing full disclosure in political campaigns of all types at all levels of government. The proffered amendment takes seriously the notion of equal political participation. The Supreme Court seems to believe that if Steve Forbes wants to spend \$100 million on a political campaign and regulations, for example, limiting his expenditures to \$5 million equates to denying 95% of his speech. *Id.* If this is so, what of the candidate who does not have \$5 million or even \$5,000 to spend on politics? The Court in the *Buckley* line of cases has said, implicitly, that Congress must be agnostic on this issue—even if the impact of money on politics dramatically distorts the outcomes of the political process. This cannot be the rule in a democracy. A system of government in which those who seek certain policies are allowed to effectively give unlimited amounts of money to those who make the policies may be called many things, but "democratic" and "fair" are not among them.

61. See, e.g., DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 57-58 (2001). See also *supra* note 10 and preceding discussion.

62. In a brief and inconsistent surrender to practicality, given the insurmountable obstacles of Article V, the proffered amendment leaves the Senate alone. Initiative and, less frequently, referendum efforts have served as potent tools, principally in the western United States, to circumvent legislatures captured by special interest or self-dealing. They have also, unfortunately, sometimes provided means to appeal to the worst in the citizenry. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating Colorado antigay initiative, Amendment 2).

63. This amendment would reverse *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which held that extreme differentials in public school funding do not violate the equal

7. Every person, regardless of economic status, shall enjoy an equal and fundamental right to health care services.⁶⁴

8. Access to the systems of justice, state and federal, shall not be denied or abridged on the basis of wealth.⁶⁵

9. No person shall be denied equal protection of the laws, by the United States or the several states, on the basis of sex or sexual orientation.⁶⁶

10. Every person has the right to be free from invidious discrimination in both public and private employment.⁶⁷

protection clause and concluded that education is not a fundamental constitutional right. "The [Constitution] is not addressed to minimal sufficiency It mandates nothing less than that all persons similarly circumstanced shall be treated alike." *Id.* at 89 (Marshall, J., dissenting). Surely no issue comes closer to the core of opportunity than equal education:

[T]here is enough for everyone within this country. It is a tragedy that these good things are not more widely shared. All our children ought to be allowed a stake in the enormous richness of America [T]hey are all quite wonderful and innocent when they are small. We soil them needlessly.

Kozol, *supra* note 30, at 233.

64. See Bok, *supra* note 16, at 237 (noting the percentage of population covered by various public health care systems: Canada 100%, France 99%, West Germany 92.2%, Japan 100%, Sweden 100%, United Kingdom 100%, United States 44%); see also President Franklin Delano Roosevelt, State of the Union Address (Jan. 11, 1944), in OLLMAN & BIRNBAUM, *supra* note 6, at 299; Universal Declaration of Human Rights, art. 25, G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948), reprinted in DAVID WEISSBRODT ET AL., SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 27 (3d ed. 2001). The proffered amendment is ambiguous on state and federal roles in assuring a fundamental right to health care services. It assumes, frankly, joint responsibilities ultimately under federal supervision.

65. See generally RHODE, *supra* note 40, at 1-22 (documenting denial of equal access on the basis of wealth); Ginsburg, *supra* note 41; Rhode, *supra* note 40 (exploring denial of equal justice and suggesting reforms). The proffered amendment would require, as a first step, the recognition of a right to representation in substantial civil cases. It would also eliminate the present degradation of the right to representation in criminal cases.

66. This amendment would overrule the U.S. Supreme Court's sex discrimination and sexual-orientation discrimination cases in methodology, and frequently, result. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating state law discriminating on basis of sex by applying intermediate scrutiny); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (failing to produce opinion for Court applying compelling-state-interest test in a sex discrimination case). Under the proposed amendment all sex classifications would be subject, at the least, to the rigors of the strict-scrutiny and compelling-state-interest tests. See *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating Colorado antigay ordinance as contrary to equal protection clause); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding homosexual sodomy prosecution, refusing to recognize a fundamental right to engage in adult, consensual homosexual conduct). This amendment would overrule *Bowers* outright. Sexual orientation discrimination by public entities, including the "don't ask, don't tell" military policy, thus would be made unconstitutional also. When combined with proffered amendment 10, legal challenges to private employment discrimination on the basis of sexual orientation could be sustained as well.

67. This amendment expands the reach of constitutional accountability in the employment context to exercises of private power. It recognizes that, at least in this limited employment context, the Constitution's bright line between private and public power can be both artificial and outdated. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987). The amendment would trigger the development of a federal constitutional labor law.

Even in my grander moments, I am not sanguine about the political prospects for measures like those set forth in this listing. Not once in American history has the majority actually arisen to stake its claim. Both political parties have taken the demands of economic justice off the table. And even in those rare moments when candidates claim, anomalously, to speak for the “people” against the “powerful,”⁶⁸ no serious suggestions to alter the constitutionally prescribed, and distorted, field of play are made. Still, it is reasonable to assume that it will not always be so. If Dahl correctly observes that our democratic sentiments are now more finely tuned than those of our predecessors, it is unlikely that the economic interests of the majority of Americans will forever be marginalized in our political process. The rhetorical pull of our constitutive commitment to equal justice is not insubstantial. On our best days, it can be felt in our bones. Our future may be better than our present and our past.

In the meantime it is helpful to remind ourselves that, as a society, we are not what we claim to be. The U.S. Constitution is neither sacred nor divine. It was not handed to us on stone tablets or dictated from behind the flames of a burning bush. It is, instead, simply the method by which we order our processes of public decision making. It is the work of our own hands, or at least the work of the hands of the most powerful among us. No unalterable edict mandates that the prerogatives of the already privileged be given such dramatic assurance in the charter. Nor is it required that a constitution be agnostic about the delivery of fundamental human services or the sustenance of actual opportunities for social and political participation. A constitution for us all—a constitution worthy of the human race—would look substantially different than our own.

68. I have in mind, particularly, the refrains from Al Gore's 2000 presidential campaign. I say “anomalously,” because Vice President Gore and President Clinton had done so much in the previous eight years to remove the concerns of the bottom third from the agenda of the Democratic party.

