

# A DEMOCRACY FOR THE PURSUIT OF HAPPINESS

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Review of John Denvir, *DEMOCRACY'S CONSTITUTION: CLAIMING THE PRIVILEGES OF AMERICAN CITIZENSHIP*, Urbana and Chicago, Illinois: University of Illinois Press (2001).

## INTRODUCTION

A career in the law can be politically and intellectually narrowing. Lawyers, judges, and law professors can dig deeper and deeper into a legal subject matter and in the process lose any sense of social justice and willingness to think critically. The “answer” becomes not a section of the Uniform Commercial Code but rather the reigning interpretation of a sub-section of the section within a specific jurisdiction. The “issue” becomes not the need for faithful post-divorce child support but instead the way support is calculated on a monthly basis given the particular published guidelines of a selected county. In the end, the taste for political debate and fresh ideas is lost. The buoyant legalist becomes a tired technician.

John Denvir's *Democracy's Constitution: Claiming the Privileges of American Citizenship* illustrates that the legalist's development need not follow this path. A senior professor at the University of San Francisco Law School, Denvir has specialized in constitutional law and jurisprudence, and he has both published an influential volume and edited a website concerned with the interrelationships of law and film.<sup>1</sup> In *Democracy's Constitution* he seems a scholar whose career in the law has made him broader and more optimistic rather than narrower and more cynical. After twenty-five years of teaching constitutional law, he still subscribes to “constitutional hope”—a faith that in the long run the American people will want a government that reflects their highest political ideals.”<sup>2</sup>

Denvir's willingness to base his “constitutional hope” on the recognition and expansion of rights contrasts with the reservations about emphasizing rights in such recent scholarly works as Lawrence Friedman's *The Republic of Choice: Law, Authority and Culture* and Mary Ann Glendon's *Rights Talk: The Impoverishment of Political Discourse*.<sup>3</sup> Friedman, one of the nation's most distinguished historians, looks at the way new individualism in America insists

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1. LEGAL REELISM: MOVIES AS LEGAL TEXTS (John Denvir ed., 1996); *Picturing Justice: The On-line Journal of Law & Popular Culture*, at <http://www.usfca.edu/pj>.

2. JOHN DENVIR, *DEMOCRACY'S CONSTITUTION: CLAIMING THE PRIVILEGES OF AMERICAN CITIZENSHIP* 127 (2001).

3. LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY AND CULTURE* (1990); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

on a zone of choice.<sup>4</sup> This emphasis on choice, in turn, leads to a pronounced "rights-consciousness" because choices are "meaningless unless a citizen can convert the choices into entitlements."<sup>5</sup> For her part, Glendon is concerned with the impoverishment of contemporary American politics. Virtually every controversy is framed as a clash of rights.<sup>6</sup> Yet, this "rights talk" is harmed by "its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities."<sup>7</sup>

Rather than warning about a "rights-consciousness" or "rights talk," Denvir proposes that we recognize overlooked or completely new rights.<sup>8</sup> In particular, he discusses the rights to earn a living, to receive a first-rate education, to engage in political speech, and to cast meaningful votes. While placing each of these rights into a constitutional law context, he suggests affirmative legislative actions which could buoy each of the rights.<sup>9</sup> Recognizing these rights, he argues, would create the type of democracy in which people could truly pursue happiness.<sup>10</sup> In the end, *Democracy's Constitution* is an inspiring example of how one might achieve political and intellectual self-actualization within the constitutional law discourse.

### I. WHAT IS THE CONSTITUTION?

Denvir begins *Democracy's Constitution* by asking readers to contemplate the very nature of the Constitution. On one level, he says, the Constitution is an "icon."<sup>11</sup> We should not overlook this point. In general we might think of icons as religious. The carvings and paintings of the Byzantine faith spring to mind, as does the crafted image of Jesus Christ on the cross. However, as Denvir implies, icons may also be secular.<sup>12</sup> In the context of the American civil faith, the Constitution serves as an especially powerful mindmark of Americanism.<sup>13</sup> Both staunch defenders of Americanism and its critics refer to the iconic and symbolic Constitution.<sup>14</sup> In the context of the American secular or civic faith the Constitution, to borrow from the quirky yet prescient Marshall McLuhan is, "an

4. See FRIEDMAN, *supra* note 3, at 2.

5. *Id.* at 97.

6. GLENDON, *supra* note 3.

7. *Id.* at x.

8. DENVIR, *supra* note 2, at xi.

9. *Id.* at 11.

10. *Id.* at 8-9.

11. *Id.* at ix.

12. *Id.*

13. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 5 (1988).

14. For a wide range of responses to the Constitution, see *THE UNITED STATES CONSTITUTION: 200 YEARS OF ANTI-FEDERALIST, ABOLITIONIST, FEMINIST, MUCKRAKING, PROGRESSIVE, AN ESPECIALLY SOCIALIST CRITICISM* (Bertell Ollman & Jonathan Birnbaum eds., 1990) [hereinafter *THE UNITED STATES CONSTITUTION*].

audile-tactile form of resonant interface."<sup>15</sup>

Denvir also suggests that the Constitution may be conceived as a "contract."<sup>16</sup> Presumably, he has in mind a "social contract," that is, the type of agreement on how to live together which has engaged philosophers ranging from the Greek Sophists to Enlightenment figures such as Hobbes, Locke, Rousseau, and Montesquieu.<sup>17</sup> The drafters of the Constitution were in fact influenced by Enlightenment social contract theorists, and the resulting document is a social contract in both a metaphorical and an actual sense.<sup>18</sup> The framers intended the Constitution to be the compact for American government.<sup>19</sup>

On a third and ultimately preferred level, Denvir invites us to think of the Constitution as a "blueprint for the American political community."<sup>20</sup> The Germans seem close to Denvir's conceptualization with their notion of *Verfassungsrecht*. The German noun *Verfassen* derives from the verb *verfassen*, meaning to draft or tie together. *Recht*, of course, means law. A *Verfassungsrecht* is therefore a composing law, a legal drafting up.

Denvir reminds us that we might look to the Declaration of Independence for help in making sense of the blueprint.<sup>21</sup> Others before Denvir have also made this suggestion, and even the venerable U.S. Code includes the Declaration of Independence as one of the nation's four organic laws.<sup>22</sup> For Denvir, the Declaration of Independence is crucial because it guides our efforts to determine which principles distinguish the American political and legal culture.<sup>23</sup> He says that American democracy "requires the guarantee to all its citizens of a realistic opportunity to pursue happiness as they define it."<sup>24</sup>

With the Declaration of Independence as a guide, Denvir argues, citizens can and should interpret the Constitution.<sup>25</sup> "[I]f the Constitution is seen as a blueprint for the American political community," he says, "all citizens, not just

15. Marshall McLuhan, *Further Thoughts on Icons*, in *ICONS OF POPULAR CULTURE* 37 (Marshall Fishwick & Ray B. Browne eds., 1970).

16. DENVIR, *supra* note 2, at ix.

17. For an introduction to social contract theory, *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU* (Ernest Parker ed., 1960).

18. See Gore Vidal, *The Second American Revolution*, in *THE UNITED STATES CONSTITUTION*, *supra* note 14, at 169.

19. See Herbert Aptheker, *On the Bicentennial and the Constitution: A Marxist View*, in *THE UNITED STATES CONSTITUTION*, *supra* note 14, at 249.

20. DENVIR, *supra* note 2, at ix.

21. *Id.* at 1.

22. U.S.C. XLIII (2000). I am thankful to Professor Lash LaRue of the Washington and Lee University School of Law for pointing this out to me. The four published organic laws are the Declaration of Independence (1776), the Articles of Confederation (1777), the Northwest Ordinance (1787), and the Constitution of the United States of America (1787).

23. See DENVIR, *supra* note 2, at 2.

24. *Id.* at 126.

25. *Id.* at x.

lawyers, must be involved in making it work.”<sup>26</sup> Citizens must ensure that the Constitution is followed and that it is administered faithfully. “We the People of the United States,”<sup>27</sup> to use the first words of the Constitution itself, have the responsibility to take our constitutional controversies to the courts, to urge our legislatures to fund projects in keeping with the Constitution’s promise, and more generally to look after the interests of the nation sketched out by the blueprint.

## II. WHAT IS CONSTITUTIONAL LAW?

Having shared his understanding of the Constitution as a “blueprint,” Denvir is hardly finished theorizing about the Constitution. Like other constitutional law scholars, he has a preferred part of the Constitution and a preferred way of interpreting that part. While some scholars share Denvir’s fondness for the Fourteenth Amendment, few would embrace his emphasis on the Privileges and Immunities Clause in the first section of that amendment. Even fewer would be prepared to make it the centerpiece of constitutional law.

For Denvir, the Fourteenth Amendment and its Privileges and Immunities Clause are parts of the “second” Constitution.<sup>28</sup> The “first” Constitution is the document drafted during the summer of 1787 in Philadelphia and then ratified after tumultuous campaigns during 1787-88.<sup>29</sup> This Constitution replaced the unsuccessful Articles of Confederation and, in the opinion of most, brought to the nation a stronger national government. The “first” Constitution also, in the opinion of some, sanctioned slavery, weakened farmers’ relative power, and slowed the development of true democracy.<sup>30</sup> Charles A. Beard, in what remains even today one of the most debated works of American history, argued that commercial and property interests had directed the drafting of the Constitution and unduly profited from it.<sup>31</sup>

After the Civil War, the victorious North changed the Constitution by adding the Thirteenth, Fourteenth, and Fifteenth Amendments. These are the heart of the “second” Constitution. The Thirteenth Amendment eliminates slavery and other forms of involuntary servitude.<sup>32</sup> The Fourteenth Amendment makes anyone born or naturalized in the United States a citizen of both the nation and a state and warns that the individual states may not deny the fundamental

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26. *Id.*

27. U.S. CONST. pmbi.

28. DENVIR, *supra* note 2, at x.

29. *Id.* See generally RICHARD BEEMAN ET AL., BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY (1987); THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION (Bernard Bailyn ed., 1993).

30. See, e.g., John Patrick Diggins, *Class, Classical, and Consensus Views of the Constitution*, 55 U. CHI. L. REV 555 (1988).

31. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

32. U.S. CONST. amend. XIII, § 1.

national rights of citizens.<sup>33</sup> The Fifteenth Amendment says citizens' right to vote should not be denied because of race, color or earlier enslavement.<sup>34</sup> "The people who drafted those amendments believed they were necessary because the Civil War had shown the southern states unwilling to protect the fundamental rights of free men, black or white."<sup>35</sup>

The most important of these amendments in *Denvir's* opinion is the Fourteenth.<sup>36</sup> Its five sections allow the courts to protect citizens against hostile state action and also authorize the Congress to take steps and spend monies which support the goals of the Fourteenth Amendment.<sup>37</sup> More specifically, the Fourteenth Amendment imposes three prohibitions on the states.<sup>38</sup> First, the amendment forbids any law that "shall abridge the privileges or immunities of citizens of the United States."<sup>39</sup> Second, states may not "deprive any person of life, liberty, or property, without due process of law."<sup>40</sup> And third, the states may not "deny to any person within its jurisdiction the equal protection of the laws."<sup>41</sup>

The amount of scholarship generated by the Due Process and Equal Protection Clauses is truly staggering, but, as noted previously, *Denvir* is unusual if not quite unique in emphasizing instead the Privileges and Immunities Clause. The chief reason other theorists and scholars have paid less attention to this clause is that it was eviscerated by the United States Supreme Court in the *Slaughterhouse Cases*,<sup>42</sup> a decision handed down in 1873, only five years after ratification of the amendment. The litigation was prompted by a law passed by the carpetbag Louisiana legislature limiting the area in which New Orleans livestock might be slaughtered and providing that all the slaughtering should be done by one company.<sup>43</sup> Historians agree that the law was secured through the bribery of legislators, the governor, other state officials, and even two newspapers.<sup>44</sup> The effect of the law was virtually a monopoly, and "other New Orleans butchers were understandably outraged by this invasion of their occupational freedom."<sup>45</sup> The butchers turned to the Honorable John A. Campbell, a former justice of the Supreme Court and one of the most successful and prominent lawyers of his era.<sup>46</sup> Campbell argued that the Fourteenth

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33. U.S. CONST. amend. XIV, § 1.

34. U.S. CONST. amend. XV, § 1.

35. *DENVIR*, *supra* note 2, at 5.

36. *Id.*

37. U.S. CONST. amend. XIV.

38. U.S. CONST. amend. XIV, § 1.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Slaughterhouse Cases*, 83 U.S. 36 (1873).

43. *See id.* at 36-43.

44. *See* BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 159 (1993).

45. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 118 (1960).

46. *Id.* at 119. In the era there was a saying in Louisiana: "Leave it to God and Mr. Campbell." *Id.*

Amendment had revolutionized the American constitutional system by extending national protection to the rights of man, including the right to occupational freedom.<sup>47</sup>

The Court gave serious consideration to the argument, but in the end, five of the nine justices rejected it.<sup>48</sup> Writing for the majority, Justice Miller said the Privileges and Immunities Clause did not secure against state action the great rights which the Bill of Rights secured against federal action.<sup>49</sup> Instead, the clause referred only to a smaller, less grand set of rights such as freedom to travel from state to state, to use seaports, and to be protected on the high seas.<sup>50</sup>

The effect of the opinion on the Privileges and Immunities Clause was devastating. According to the venerable constitutional law scholar Edward Corwin, the decision rendered the clause "a practical nullity."<sup>51</sup> Alfred H. Kelly and Winfred A. Harbison found the interpretation "about as narrow a one as the Court could possibly extract from the language of the section. It came close to nullifying the apparent intent of the amendment."<sup>52</sup> In Denvir's opinion, the decision "defies common sense."<sup>53</sup>

Denvir does not discuss the matter, but the Supreme Court's reading of the Privileges and Immunities Clause also bewildered those who had actually drafted the amendment. The congressional debates on the Fourteenth Amendment indicate that its framers, especially Representative John Bingham and Senator Jacob Howard, placed particular emphasis on the clause, fully intending it to make something comparable to the Bill of Rights binding on the states.<sup>54</sup> Senator George F. Edmunds, another member of Congress and drafter of the Fourteenth Amendment, thought the Court's interpretation of the clause "radically differed in respect both to the intention of the framers and the construction of the language used by them."<sup>55</sup>

In making his case for according greater substantive meaning to the Privileges and Immunities Clause, Denvir does note that the phrase "privileges and immunities" appears in Article IV of the Constitution.<sup>56</sup> Denvir also points to the often overlooked 1823 decision in *Corfield v. Coryell*,<sup>57</sup> which attempts to define the privileges and immunities protected by Article IV. According to Justice Bushrod Washington, who authored the opinion, the privileges and

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47. *Id.*

48. *Slaughterhouse Cases*, 83 U.S. at 83.

49. *Id.* at 78-79.

50. *Id.* at 79.

51. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 965 (Edward S. Corwin ed., 1953).

52. ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 508 (1970).

53. DENVIR, *supra* note 2, at 6.

54. SCHWARTZ, *supra* note 44, at 159.

55. 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 541 (1937).

56. DENVIR, *supra* note 2, at 7.

57. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

immunities at issue are those “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union.”<sup>58</sup> This broad understanding, this attaching of significance to the phrase, Denvir says, is most likely what members of Congress had in mind when they drafted the Fourteenth Amendment.<sup>59</sup>

Overall, Denvir’s emphasis on a particular part of the Fourteenth Amendment is less idiosyncratic than it is imaginative. His use of the Privileges and Immunities Clause is less deceptive than it is bold. He wants to discuss the possibility of a democracy for the pursuit of happiness, and he has chosen and established his vehicle for doing so.

### III. WHAT IS CONSTITUTIONAL JUSTICE?

With his constitutional blueprint in hand and the Fourteenth Amendment’s Privileges and Immunities Clause circled in red, Denvir goes on in the bulk of *Democracy’s Constitution* to explain what American privileges and immunities should be. He points to the rights to earn a living, to receive a first-rate education, to have a voice that is heard, and to cast a vote that counts. These, in Denvir’s opinion, are substantive rights and therefore different than equal protection guarantees which are more comparative in nature.<sup>60</sup> He wants the courts to recognize and protect rights guaranteed by the Privileges and Immunities Clause, and he also offers suggestions about how the legislatures could also protect such rights through appropriate legislation and funding. If the courts and legislatures could truly extend and protect the rights discussed, citizens might in fact be better able to pursue happiness.

#### A. *Earning a Living*

Denvir begins his discussion of the right to earn a living by asserting that “[w]ork has always been an essential component of the American Dream . . . .”<sup>61</sup> It then follows, according to his argument, that an inability to earn a living would constitute a significant deprivation, even a humiliation.<sup>62</sup> He invokes the gripping image of the Joads and other Oakies in the novel *The Grapes of Wrath*.<sup>63</sup> These unfortunate souls flee the Dust Bowl for California, hoping desperately to find work and thereby shed their feelings of personal worthlessness. Had the Joads been familiar with the writings of Judith Shklar, they might have joined Denvir in quoting her: “We are citizens only if we ‘earn.’”<sup>64</sup>

58. *Id.* at 551-52.

59. *See* DENVIR, *supra* note 2, at 7.

60. *See id.* at 8. The author does devote a chapter of his study to equal protections concerns. *See id.* at 108-24.

61. *Id.* at 33.

62. *Id.* at 33-34.

63. JOHN STEINBECK, *THE GRAPES OF WRATH* (1939).

64. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 67 (1991).

Denvir is of course correct about the importance of work and employment in our culture, and Americans should not be fired for arbitrary or biased reasons. However, Denvir's leap from work to gainful employment is a bit hasty. When we say someone is "out of work," we do not mean that person has no opportunity for work but rather that he or she has no relationship with another who controls and directs one's productive effort for pay.<sup>65</sup> Employment, in other words, has more to do with a socioeconomic relationship than with work itself.<sup>66</sup> Employment takes on a specialized meaning in the context of a capitalist economy, and, alas, it is more likely to be draining and exploitative than it is exhilarating and empowering.

The exploitativeness of employment is disguised by the Nineteenth Century "free labor" ideology which Denvir discusses and champions.<sup>67</sup> As he points out, the ideology achieved its greatest power at roughly the same time the Fourteenth Amendment was drafted, and the ideology was especially popular within the same Republican Party which was primarily responsible for the Fourteenth Amendment.<sup>68</sup> For free-labor ideologues, honest, sober, diligent labor led to independence. It produced a society of happy farmers, artisans and business proprietors.<sup>69</sup> However, during the same years in which the ideology took hold, more and more Americans settled into lives of wage labor in the industrial sector.<sup>70</sup> With corporate control of the sector increasing, the laborer did not have autonomy and independence. He or she was paid little, bossed around, and released when the employer chose. The powerful ideology of "free labor" obscured all this. We find the likes of George Pullman, who employed thousands in his railroad car plants, saying and apparently believing his relationship with each worker was a voluntary meeting of the minds.<sup>71</sup> If workers perceived better opportunities elsewhere, he thought, they could simply terminate their employment contracts and move on.<sup>72</sup>

The problem with Denvir's endorsement of a right to employment, in short,

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65. Think, for example, of homemakers. Surely they have a great deal of productive work to do, but since they do not have a formal employment relation for pay, we often characterize them as "not working."

66. See RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 282 (1976).

67. DENVIR, *supra* note 2, at 34.

68. *Id.*

69. Works exploring the free-labor ideology include but are not limited to: ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (2d ed. 1995) (1970); JONATHAN A. GLICKSTEIN, *CONCEPTS OF FREE LABOR IN ANTEBELLUM AMERICA* (1991); ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870* (1991).

70. See Richard Oestreicher, *Labor: The Jacksonian Era Through Reconstruction*, in 2 *ENCYCLOPEDIA OF AMERICAN SOCIAL HISTORY* 1447 (Mary Kupiec Cayton et al. eds., 1993).

71. See DAVID RAY PAPKE, *THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIAL AMERICA* 15 (1999).

72. *Id.*

is not its fit within the protections of the Privileges and Immunities Clause. Denying workers their chosen way to earn a living, as was the case with New Orleans butchers in the *Slaughterhouse Cases*,<sup>73</sup> could have been seen as a violation of constitutional rights. Arbitrary twentieth-century dismissals of workers could also be seen as violations of the Fourteenth Amendment's substantive promises. But in a capitalist context, how likely is it that employment will be the foundation of happiness? How much of our "constitutional hope,"<sup>74</sup> as Denvir calls it, should be invested here?

### B. A First-Rate Education

Denvir admits at the start of his discussion regarding the right to a first-rate education that the drafters of the Fourteenth Amendment could not have had this right in mind.<sup>75</sup> This contrasts with the previously discussed right to earn a living which, given the drafters' subscription to a "free-labor ideology," could have been envisioned under the "privileges and immunities" rubric and which four of the nine justices in the *Slaughterhouse Cases* seem to have accepted.<sup>76</sup> In the area of education, however, only northern whites had access to free public schools by the 1870s, and many members of even that part of the population did not take advantage of the free educational opportunities for religious and/or financial reasons.<sup>77</sup>

In the South . . . the existence of slavery generated some nervousness about widespread popular education, even for poor whites. The northern middle-class program of property taxes to support free public schooling was not adopted in the South until the end of the nineteenth century, and then only within the context of separate and unequal schools for black children.<sup>78</sup>

Hence, Denvir must look not to a plausibly preexisting interpretation of the Privileges and Immunities Clause but rather to a sense that it is a "dynamic concept."<sup>79</sup> He seconds John Hart Ely,<sup>80</sup> who has argued that "privileges and immunities" was an intentionally abstract and dramatic phrase.<sup>81</sup> The framers hoped and believed that later generations would imbue the phrase with more precise content. Were they alive today, argue Ely and Denvir, the framers of the amendment would agree that the right to an education should be a fundamental

73. 88 U.S. 36 (1872).

74. See DENVIR, *supra* note 2, at 127.

75. See *id.* at 51-52.

76. See *Slaughterhouse Cases*, 83 U.S. 36 (1873).

77. Carl F. Kaestle, *Public Education*, in 3 ENCYCLOPEDIA OF AMERICAN SOCIAL HISTORY 2495 (Mary Kupiec Cayton et al. eds., 1993).

78. *Id.* at 2496.

79. DENVIR, *supra* note 2, at 52.

80. See *id.* at 7-8.

81. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 28 (1980).

privilege of the American citizenry.

When Denvir looks for support from the bench, he finds nothing less than the almost sacred *Brown v. Board of Education*.<sup>82</sup> He interprets *Brown* as promising each American child an education as a privilege of national citizenship,<sup>83</sup> and he relies especially on Chief Justice Earl Warren's statement that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."<sup>84</sup> While commending Denvir for his spirited reading of dictum from the opinion, others might choose to read *Brown* as primarily an equal protection pronouncement, that is, an indictment of inequality rather than the articulation of a substantive right.

Be that as it may, Denvir is not finished, and the most interesting feature of this treatment of a right to education is his concomitant insistence that such education be "first-rate."<sup>85</sup> He defines "a first-rate education" as "one that permits the student to compete successfully in the economic marketplace and to effectively participate in the governance of our democracy."<sup>86</sup> Sadly, many American children receive educations which fail to meet this standard. Although class is often "coded" by race in contemporary United States, the chief dividing line in the education sector is actually class itself. A disproportionate percentage of American working-class and underclass children receive something inferior to even "second" or "third-rate education." If there was in fact a recognized right to "first-rate education" under the Privileges and Immunities Clause, lawsuits could be successfully brought against the state and local sponsors of public education. Denvir has a steady read on the problem, and the constitutional law scholar within him proposes a way to attack.

### C. Political Speech

Denvir launches his discussion of enhanced political speech rights by pointing out there is "no realistic chance" that Congress and the state legislatures would support what he has championed regarding employment and education.<sup>87</sup> What can a person do about this apparent roadblock? "Instead of despairing about the wrongheadedness of the current political system," he states, "I say let's reform it."<sup>88</sup> In particular, let's enhance political speech rights in hopes of creating richer political dialogue and, ultimately, desirable action. Denvir is like the apple for which one might bob in a barrel of water. You might for a moment knock him under, but he immediately bounces back to the surface.

As in prior discussions, Denvir argues that a reconceptualization of extant

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82. 347 U.S. 483 (1954).

83. See DENVIR, *supra* note 2, at 56.

84. *Id.* at 54 (quoting *Brown*, 344 U.S. at 493).

85. See DENVIR, *supra* note 2, at 56.

86. *Id.* at 57.

87. *Id.* at 72.

88. *Id.* at 73.

constitutional law is crucial.<sup>89</sup> The present law, in his opinion, is unfortunately influenced by Justice Oliver Wendell Holmes, who derived his understanding of freedom of speech from the thought of John Milton and John Stuart Mill.<sup>90</sup> Holmes took to heart Milton and Mill's insistence that a free and open exchange of ideas is necessary for freedom and social development,<sup>91</sup> and he thought the Bill of Rights enshrined freedom of speech as its core principle.<sup>92</sup> In his famous dissent in *Abrams v. United States*, he articulated a metaphor which has endured: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."<sup>93</sup>

Before long Holmes' dissenting views became dominant, and for decades courts have referred to his marketplace metaphor when considering alleged violations of freedom of speech. Courts exercise great scrutiny when the government attempts to interfere with the exchange of ideas by suppressing speech. However, if the government unintentionally interferes with speech in order to advance some other policy goal, the courts tend to exercise much less scrutiny. A Supreme Court ruling such as *Clark v. Community for Creative Non-Violence*<sup>94</sup> can result. In *Clark*, a non-profit group sought permission to set up a tent city in Lafayette Park in Washington, D.C., in order to dramatize the plight of the homeless.<sup>95</sup> The National Park Service denied their request, reasoning that the tents would violate park rules against camping.<sup>96</sup> The Supreme Court, in turn, supported the National Park Service, saying the Service's goal was to protect grass and bushes and not to suppress political speech.<sup>97</sup>

Presumably, a travesty of this sort would not have occurred if a genuine right to speak out had been recognized under the Privileges and Immunities Clause of the Fourteenth Amendment. Holmes' metaphor and its extension do not help, but in Denvir's interpretation, Justice Louis Brandeis might be a guide.<sup>98</sup> Denvir quotes Brandeis' famous concurrence in *Whitney v. California*:<sup>99</sup> "[T]he greatest menace to freedom is an inert people. . . ."<sup>100</sup> Brandeis thought that public discussion was a duty and that the government had to protect political speech at all cost in order to insure the process of democratic deliberation.<sup>101</sup> This is a more aggressive, affirmative stance than the Holmesian view which bars only

89. *See id.* at 77.

90. *See* SCHWARTZ, *supra* note 44, at 221.

91. *See id.* at 220.

92. *See* FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 78-79 (Atheneum 1965) (1938).

93. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

94. 468 U.S. 288 (1984).

95. *Id.* at 291-92.

96. *Id.* at 292.

97. *Id.* at 299.

98. *See* DENVIR, *supra* note 2, at 77.

99. 274 U.S. 357 (1927).

100. *Id.* at 375, (Brandeis, J., concurring).

101. *Id.*

government attempts to suppress speech.

Beyond protecting speech in the public forum, Denvir also uses his enhanced right of political speech as a basis for addressing the sorry state of campaign contribution and campaign spending law.<sup>102</sup> Denvir is especially critical of the Supreme Court's decision in *Buckley v. Valeo*,<sup>103</sup> which found meaningful campaign financing reform unconstitutional because it would violate the free speech rights of large spenders.<sup>104</sup> "The worst part of *Buckley v. Valeo*[,]," Denvir says, "is its cavalier dismissal of the statute's goal of furthering political equality between citizens."<sup>105</sup> The decision to invoke freedom of speech in order to enable the rich to use their money to dominate elections strikes Denvir "as the low point in modern American constitutional law."<sup>106</sup>

Denvir's enhanced right to political speech, a right moored in the Privileges and Immunities Clause, would produce a quite different result in *Buckley*. Limits on campaign contributions, in his opinion, do not limit speech.<sup>107</sup> To the contrary, limiting the amount the rich might contribute "furtheres the goal of ensuring that all citizens have a realistic chance to be heard."<sup>108</sup> *Buckley* should be overruled, and, furthermore, "[t]he only effective solution is to insulate candidates from this insidious influence and require public financing of elections."<sup>109</sup>

#### D. A Vote That Counts

The fourth major right that Denvir thinks should be guaranteed by the Fourteenth Amendment's Privileges and Immunities Clause is the right to a meaningful vote.<sup>110</sup> As with his rights to a first-rate education and political speech, Denvir admits the right to a vote that was not a fundamental right imagined by the drafters of the Fourteenth Amendment.<sup>111</sup> The drafters were able to imagine a voting right for only *male* former slaves, a decision that greatly angered Elizabeth Cady Stanton, Susan B. Anthony, and other leaders of the Nineteenth Century women's rights movement. Not only radical Republicans in the Congress but also some of Cady Stanton's former colleagues in abolitionist circles thought the new guarantee of voting rights should not be extended to women.<sup>112</sup> When Cady Stanton refused to grant voting rights for freed male

102. DENVIR, *supra* note 2, at 80.

103. 424 U.S. 1 (1976).

104. *See id.* at 143-44.

105. DENVIR, *supra* note 2, at 85.

106. *Id.* at 86.

107. *Id.* at 87.

108. *Id.* at 87.

109. *Id.* at 88.

110. *Id.* at 91.

111. *Id.*

112. *See* DAVID RAY PAPKE, *HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION'S LEGAL FAITH* 68 (1998).

slaves priority over voting rights for women, the great abolitionist William Lloyd Garrison exploded.<sup>113</sup> He called her a “female demagogue,” who was “untruthful, unscrupulous and selfishly ambitious.”<sup>114</sup>

Denvir has little to say about this unfortunate disagreement, and indeed, throughout the book, he rarely discusses women’s rights under his preferred “privileges and immunities” rubric.<sup>115</sup> Instead, Denvir reiterates that the term “privileges” must be taken as “a dynamic term.”<sup>116</sup> That is, he suggests that subsequent interpreters of the term can add to it.<sup>117</sup> “It is axiomatic in a democracy,” he states bluntly, “that adult citizens should have the right to vote.”<sup>118</sup>

So be it, one might say. The Nineteenth Amendment finally gave to women the right to vote,<sup>119</sup> which drafters of the Fourteenth Amendment could not countenance. In addition, during the 1960s, the Supreme Court articulated and applied to the states the “one man, one vote” principle. For example, in *Baker v. Carr*,<sup>120</sup> the Supreme Court held that the federal courts were competent to entertain challenges to the woefully out-of-date systems of state legislative apportionment.<sup>121</sup> Likewise, in *Reynolds v. Sims*,<sup>122</sup> the Court, holding that both houses of a bicameral state legislature must be apportioned on a population basis, laid down an equal population principle.<sup>123</sup> “Chief Justice Warren himself characterized the reapportionment cases as the most important cases decided by the Court during his tenure.”<sup>124</sup> Constitutional law scholars Alfred H. Kelly and Winfred A. Harbison assert that because of these decisions “one man, one vote” became “virtually a pure and intractable rule.”<sup>125</sup>

Nevertheless, Denvir remains dissatisfied. His chief complaint involves the continuing gerrymandering of American political districts.<sup>126</sup> Congress has attempted to address the racial aspects of this gerrymandering through the 1982 Voting Rights Act and its subsequent amendments,<sup>127</sup> but in Denvir’s opinion this

113. *Id.* at 69.

114. ELISABETH GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* 119 (1984) (quoting William Lloyd Garrison).

115. The author does briefly discuss women’s rights in his chapter on equal protection. See DENVIR, *supra* note 2, at 122-23.

116. *Id.* at 91.

117. *Id.* at 8.

118. *Id.*

119. U.S. CONST. amend. XIX, § 1.

120. 369 U.S. 186 (1962).

121. *Id.* at 237.

122. 377 U.S. 533 (1964).

123. *Id.* at 577.

124. See SCHWARTZ, *supra* note 44, at 279.

125. KELLY & HARBISON, *supra* note 52, at 1022.

126. DENVIR, *supra* note 2, at 92.

127. See *id.* at 106.

legislation "gives relief only to racial minorities, ignoring other citizens."<sup>128</sup> The drawing of political district lines favors incumbents, the two entrenched parties, and the existing balance of power. Many Americans, in Denvir's view, are left with votes which do not really count for much.<sup>129</sup>

His point is well taken, and the gerrymandering of American political districts must surely be a factor in the centrist stagnation of American politics. American citizens are entitled to vote, but often their choices range only from A to B. Stability and national unity are arguable benefits, but political alienation and apathy are two of the costs.

Denvir's solution to the problem is a system of proportional representation, and in the final stages of his discussion he abandons an attempt to work within existing constitutional law arguments and instead puts forward various policy arguments.<sup>130</sup> Congress, he admits, could not change the elections for the presidency and the Senate because of precise constitutional prescriptions. However, Congress does have the power, in Denvir's opinion, to develop some form of proportional representation election for the House of Representatives.<sup>131</sup> In addition, he suggests that individual states could amend their constitutions to adopt proportional representation for state elections.<sup>132</sup> "The major obstacle to the adoption of PR is really the opposition of the two major parties, which rightly fear the openness of proportional representation to third parties."<sup>133</sup>

#### CONCLUSION

While the scholar Sanford Levinson suggests the "'death of constitutionalism' may be the central event of our time,"<sup>134</sup> Denvir finds a way within the constitutional law discourse to propose thoughtful and sometimes stirring solutions for serious societal problems. He shows us the ongoing potential of that discourse to prompt and shape powerful understandings of democracy. Even in a time of alienation and uncertainty, he refuses to treat the Constitution and also law in general as contingent and inevitably biased. Denvir takes the Constitution seriously in his own life, and he demonstrates how we might benefit by doing the same.

This is not to say, meanwhile, that the four substantive rights Denvir finds within the Privileges and Immunities Clause of the Fourteenth Amendment will be endorsed by judges and legislators. It may be some time before the rights to earn a living, to receive a first-rate education, to engage in political speech, and to cast meaningful votes are recognized. In addition to acknowledging predictable opposition to some of Denvir's proposals, we should also note that

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128. *Id.* at 104.

129. *Id.*

130. *Id.* at 104-07.

131. *Id.* at 104.

132. *Id.*

133. *Id.* at 107.

134. LEVINSON, *supra* note 13, at 52.

wartime has not traditionally been the time for expanding and extending constitutional rights. But Denvir also reminds readers of *Democracy's Constitution* that he is proposing more than a novel reading of a phrase in the Constitution. "The title of the book is actually a play on words,"<sup>135</sup> Denvir says. "*Democracy's Constitution* is really an inquiry into what constitutes American democracy."<sup>136</sup> What are the principles that distinguish the United States as a political culture? Denvir's answer is that "democracy requires the guarantee to all its citizens of a realistic opportunity to pursue happiness as they define it."<sup>137</sup>

This position is neither pretentious nor naive. Denvir is honest when he says he wants average citizens as well as legal professionals to be able to read his book, and he writes with simple terms in a straightforward way. He realizes that his interpretations and proposals will strike some as "utopian,"<sup>138</sup> but he takes optimism to be preferable to the self-impressed cynicism which has become so common among legal academics. Consider what I am suggesting, Denvir says, and I think you will see how we might develop a fuller and more empowering democracy.

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135. DENVIR, *supra* note 2, at 125.

136. *Id.*

137. *Id.* at 126.

138. *Id.*

