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Toward a People's Constitution

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Toward a People's Constitution

Gene R. Nichol¹

Robert A. Dahl, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?

Yale University Press, 2001. 198 pages. \$19.95

Americans' love of their Constitution is unique. The more than two centuries old document, for us, is defining, perfect, talismanic. All that is good and just is thought to be found within its borders. All that degrades and diminishes, falls outside. It is not the flag. But it occupies a close second in our collective heart. I'm guessing that anyone who chose to burn a copy of "We the People" in open protest would engender much the same brand of wrath that Mr. Johnson provoked, famously, in Texas.² It has been said that to be an American is an ideal, to be a Frenchman is a fact. And, for many, or perhaps most, the American ideal is thought to be embodied in the United States Constitution.

But as anyone who has spent much time in the public arena can attest, Americans, ironically, seem to know precious little about what the Constitution actually says or how

¹ Dean and Burton Craige Professor of Law, University of North Carolina.

² See *Texas v. Johnson*, 491 U.S. 397 (1989)(conviction invalidated in flag desecration case as part of protest at Republican National convention; overturning statute prohibiting any person from defacing, damaging or physically mistreating a flag.).

it has been interpreted. Relatively few of us, I'm guessing, have ever read the brief charter. And many of those who have read it would not willingly risk submitting its individual provisions--particularly the Bill of Rights and the Civil War amendments-- to a present-day plebiscite.³ Our tremendous constitutional affection, then, is less than fully informed. The tensions triggered by the rending tragedies of September 11 have likely augmented our rhetorical loyalty to the Constitution -- as we have become increasingly dedicated to all things American. But those same tensions, no doubt, have also expanded our willingness to violate its strictures. There is a rather substantial gap between Americans' love for their Constitution and their understanding and implementation of it.

Robert Dahl's marvelous little book, "How Democratic Is the American Constitution?"⁴, 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 itself— is not unabashedly democratic. Rather, it cabins and disables majority sentiment as it embraces it. It restricts the implementation of public preference as it nods to it. It retains antiquated compromises and processes that inappropriately thwart majority will. Dahl employs "democratic standards" to explore

³ One recent reported poll bears this out. According to its findings 49% of Americans believe that the First Amendment goes too far in protecting freedom of speech. Forty-six percent think that the Constitution should be amended to allow prosecutions for flag burning. And forty percent support restricting academic freedom to stop professors from commenting on American war policy. See, www.SACBEE.com/24hour/nation/story/516894p-4102578c.

⁴ Robert A. Dahl, *How Democratic is the American Constitution?* (Yale University Press, 2001).

whether our constitutive charter is the best we can design to enable “politically equal citizens” to govern themselves”.⁵ America’s most accomplished political scientist responds solidly that the answer is “no”.⁶

Of course making the case that the federal constitution has powerfully anti-democratic 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.⁷ The 1789 text included no explicit guarantee of suffrage. It assumed a baseline of white, male privilege. The Electoral College was meant to filter and moderate majority opinion. Bicameralism would work to cool democratic “passions” as well. Nor did our founders trust the selection of Senators to direct election. State legislative choice would be more apt to assure an effective aristocracy. Various economic interests were explicitly placed beyond

⁵ Dahl, *How Democratic is the American Constitution?* at p.3, 119 [hereafter “Dahl”].

⁶ Dahl at 110-139.

⁷ Gouveneur Morris made this point forcefully at the time of the convention: “The inhabitant of Georgia or South Carolina goes to the coast of Africa, and in defiance of the most sacred laws of humanity tears his fellow creatures from their dearest connections and damns them to the most cruel bondages, shall have more votes in the government instituted for the protection of the rights of mankind than the citizens of Pennsylvania or New Jersey who views with a laudable horror so nefarious a practice.” *The United States Constitution: 200 Years of Anti-Federalist, Abolitionist, Feminist, Muckraking, Progressive, and especially Socialist Criticism* [NYU Press, 1990][Bertrell Ollman & Jonathan Birnbaum, editors] p. 302. See also, Hendrick Hertzberg, *Framed Up*, *The New Yorker*, July 25, 2002 (reviewing, Dahl, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?*).

the reach of government. Life tenured judges were expected to assure their essential protection. 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.”⁸

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 the people. The federal judiciary was looked to, with its virtually permanent membership, to hold the entire structure of national politics in a nice balance, whether of popular impulse or 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.”⁹

⁸ Dahl at p. 24-25.

⁹ See, *The United States Constitution: 200 Years of Anti-Federalist, Abolitionist, Feminist, Muckraking, Progressive and Especially Socialist Criticism*, pp. 297 [Bertrell Ollman & Johnathan Birnbaum, eds., New York University Press, 1990][reprinting Woodrow Wilson, *Division and Reunion* [New York, Longman & Green, 1906].

Of course, we have fought, struggled, demonstrated, bargained, campaigned and amended our way out of many of these shortcomings. 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. The framework of government that our founders envisioned is no longer the one that guides and bounds our decision-making. They would likely be happy that this is so. Surely we are.

But as Dahl demonstrates in some detail, all the anti-democratic shadows did not disappear. Even in its much-amended form, the United States Constitution demands or allows practices that should rile democrats.

Two of the features that Dahl highlights have been, in recent months and years, much on our minds. The Electoral College enables, as we have seen, a popular vote loser to become President of the United States. In 1876, the losing candidate won 51% of the votes cast. Al Gore may not have won Florida, but clearly a half-million more Americans voted for him than for our present incumbent. Indefensibly, a Wyoming citizen has four times the electoral clout that a Californian carries. And ever, one supposes, will it be so.

Nor is our present acquiescence in aggressive forms of judicial review easily squared with democratic theory. Law professors have labored mightily to justify and legitimate first one version of activism, and then another. We have even switched sides in the debate

in response to altered fortunes and court personnel. But as Professor Dahl concludes, empowering five unelected judges to ultimately determine fundamental state and national policies, without honest textual warrant, may be called many things—but democratic is probably not one of them.¹⁰

Dahl's book also concentrates on two measures that we don't debate much—that most of us simply take for granted, untroubled. The first is the dramatic departure from political equality reflected in the makeup of the United States Senate. We all know, of course, that as the result of a compromise between the large and small states at Philadelphia, each state is represented by two senators, regardless of population. South Dakota and New York march in majestic equality through the halls of our high chamber.

Dahl, however, puts this democratic departure in pointed perspective. An Alaskan, for example, enjoys 54 times the representation of a Californian in the Senate.¹¹ Wyoming residents surpass even that, weighing in at 70:1.¹² This level of inequality in representation is exceeded only by Brazil among the major democracies—a victory that can give us but little consolation.¹³ Small wonder that “among the countries most comparable to us, where democratic institutions have existed without breakdown, not one has adopted” our form of representation.¹⁴

¹⁰ Dahl, at p. 55.

¹¹ Dahl, at p. 49.

¹² Dahl, at p. 50.

¹³ Dahl, at p. 49.

¹⁴ Dahl, at p. 41-43.

It is curious as well, Dahl concludes, that we accept this continuing “small state privilege” without seeming objection. “Do people in the smaller states possess additional rights that are entitled to protection from policies supported by national majorities?”¹⁵ Given our complex and often tragic history, it is easy to proffer 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.

And it is not as if the inequality embodied in the United States Senate has not had an ample impact on our ability to govern ourselves. The evils of slavery were essentially immune from political redress as a result of the disproportionate clout of the southern states in the Senate. Civil rights gains were also long delayed by Senate obstruction. So 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 United States Senate.¹⁶ 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.¹⁷

¹⁵ Dahl, at p. 52.

¹⁶ Dahl, at P. 53.

¹⁷ Dahl, at p 51-55.

Next, and finally, Dahl effectively calls us to task for our long cemented and apparently irrevocable tradition of strictly majoritarian, or first-past-the-post, elections.¹⁸ It is difficult, no doubt, 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 believe, with adequate cause, that a ballot cast for anyone other than the two major party candidates is wasted. Proportional representation frameworks, on the other hand, tend to lead to vibrant multi-party systems.¹⁹ Our traditional practices, therefore, may work to the advantage of the Republican and Democratic parties. But it is understandable that they leave many of us feeling unrepresented. It is likely for this reason that we are now in only 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.²⁰ But, as the brief political career of Lani Guinier thunderously demonstrated, we don't seem anxious to change.

Of course Robert Dahl is no firebrand. He doesn't claim, as did William Lloyd Garrison, that the United States Constitution is a "covenant with death and an agreement with

¹⁸ Dahl, at p. 57-60.

¹⁹ Dahl, at p. 57-58.

²⁰ Dahl, at p. 58-60.

hell.”²¹ Nor does he unabashedly embrace Charles Beard’s view that “the constitution is essentially an economic document based upon the concept that the fundamental rights of property are anterior to government and morally beyond the reach of popular majorities.”²² He might well agree with Justice Thurgood Marshall’s bicentennial observation that he didn’t “find the wisdom, foresight, and sense of justice exhibited by the framers to be particularly profound.”²³ But Dahl would put it differently: our understanding of and commitment to “democratic ideals and institutions...has now progressed considerably beyond”²⁴ that of the framers. 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.”²⁵ He calls, then, for a “public discussion that penetrates beyond the Constitution as national icon.”²⁶ A “strategy designed to achieve greater political equality”²⁷ would serve us more effectively than uninformed framer worship.

A. The Problem of Unequal Condition.

²¹ See, *The United States Constitution: 200 Years of Anti-Federalist, Abolitionist, Feminist, Muckraking, Progressive and Especially Socialist Criticism* [NYU Press, 1990][Bertrell Ollman and Jonathan Birnbaum, editors], at page 96.

²² *Id.* at 59.

²³ *Id.* at 300-301.

²⁴ Dahl, at p. 10.

²⁵ Dahl, at p. 119.

²⁶ Dahl, at p. 156.

²⁷ Dahl, at p. 156.

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. Of course 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.²⁸ He is not, at least in this book, to be drawn into arguments over new, hypothetical and contested blueprints.

But if Dahl does not propose revisions, he does give 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.”²⁹ Earlier on he indicates similarly that “citizens must possess the minimal resources in order to take advantage of opportunities and to exercise their rights.”³⁰ He seems delighted to report a missive from James Madison aimed at reducing “extreme wealth to mediocrity and rais[ing] extreme indigence toward a state of comfort” by the “withholding of ... unmerited accumulation

²⁸ Dahl, at p. 4.

²⁹ Dahl, at p. 156.

³⁰ Dahl, at p. 152.

of riches.”³¹ And Dahl pointedly echoes Alexis de Toqueville’s descriptive claim that “the 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 seemed to derive and the central point at which all my observations constantly terminated.”³²

Perhaps surprisingly, the substantive evils Dahl identifies to demonstrate the weaknesses of our constitutional structure are often markers of economic injustice:

When the US is ranked with other established democracies on matters such as 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 poor is higher than that of most other countries. We rank in the bottom third – and in some measures close to 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.”³³

³¹ Dahl, at p. 34.

³² Dahl, at p. 23.

³³ Dahl, at p. 117.

I say “perhaps surprisingly”, because it is not clear that a link can be readily drawn between the anti-democratic provisions of the United States Constitution that Dahl highlights and the economic perils over which he rightly frets. Dahl’s book is almost entirely focused 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 can supplant majority preference. A well-oiled democracy, he argues, would likely seek other paths. Well it would.

But imagine 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 I don’t think that’s because we are paying too much attention to Maine and Wyoming.³⁴

The “vast inequalities of in the distribution of political resources” Dahl decries likely result more from the way the Constitution has been interpreted and the sorts of

³⁴ I’ll admit that 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. It is also possible, of course, that the opposite would occur.

protections that it pointedly omits than the remaining anti-democratic measures the text contains. The Constitution is an amazing document. It embraces and exudes an even more amazing history. But it is not a great charter for the protection of the interests 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 transgressions won't get us where he wants to go. Our charter may be marginally undemocratic, but it is strongly anti-populist.

To make that case, it is necessary, initially, to remind ourselves that, if anything, Professor Dahl's listing understates our society's overarching acceptance of radical economic inequality.

We may be the richest nation in human history, but almost one of five of our children lives in wrenching poverty—as if any theory of justice or virtue could explain the exclusion of innocent children from the American dream.³⁵ The percentage is even higher for black and Hispanic kids.³⁶ We apparently lead the industrial world in wealth

³⁵ Over 16% of Americans under 18 live in poverty. Twenty-two percent of black and Latino children live in poverty. Children make up 37% of the poor but only 26% of the population. Daniel Weinberg, Press Briefing, U.S. Census, September 25, 2001, available at <http://www.census.gov/hhes/income/income/00prs01asc.html>. See also, Roberto Unger & Cornell West, *THE FUTURE OF AMERICAN PROGRESSIVISM* p. 67 (Beacon Press, 1998)(high child poverty rates and public policy).

³⁶ Joseph Dalaker & Bernadette Proctor, 1999 Poverty in the United States, 2000 U.S. Dept. of Commerce, at vi. U.S. Census Bureau, available at <http://www.census.gov>; Gene Nichol, *Law's Disengaged Left*, 50 *J.Legal Ed.* 547, 550 (2000).

disparity.³⁷ The concentration of resources in those at the top of the economic ladder has reached an historic high.³⁸ 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 the other major industrial democracies.³⁹ Franklin Roosevelt thought that ‘the test of our progress is not whether we add to the abundance of those who already have much; it is whether we provide enough for those who have too little.’⁴⁰ Apparently we don’t think so.

³⁷ See, James Lardner, *The Rich Get Richer: What Happens to American Society When the Gap in Wealth and Income Grows?* U.S. News & World Report, Feb. 21, 2000, at 38. Raleigh News & Observer, August, 11, 2002, A1. See also “Class Warfare v. Class Warfare,” Molly Ivins, Raleigh News & Observer, August 14, 2002, p. 23A; Kevin Phillips, *WEALTH AND DEMOCRACY* (2002); T.I. Palley, *PLENTY OF NOTHING: The Downsizing of the American Dream and the Case for Structured Keynesianism* (Princeton University Press, 1998) (government policies contributing to income disparity); and Derek Bok, *THE STATE OF THE NATION* pp. 334-356 (1996).

³⁸ See, Raleigh News & Observer, August 11, 2002, p. A1; and Kevin Phillips, *WEALTH AND DEMOCRACY: A Political History of the American Rich* pp. xi-xx (Broadway Books, New York, 2002). 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, August 14, 2002, p. 23A.

³⁹ See Roberto Unger & Cornel West, *THE FUTURE OF AMERICAN PROGRESSIVISM*, p. 34 (Boston, 1990).

⁴⁰ David M. Kennedy, *FREEDOM FROM FEAR: The American People in Depression and War* p. 287 (Oxford University Press, 1999).

The gulf in wealth and income 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 live in ways that are increasingly polarized along economic lines. More of the poor are consolidated in impoverished neighborhoods.⁴¹ Larger numbers of the wealthy separate themselves in exclusive suburbs or gated compounds.⁴² Rich and poor share fewer neighborhoods, parks, social services, school districts, local governments and civic obligations. We occupy divergent communities -- separate, non-intersecting 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. Except for the silly lawsuits, it gets harder to remember every year that we are “one nation, under God.”

⁴¹ See Richard Morin, *The New Great Divide: More and More Where You Live Depends on What You're Worth*, *Washington Post*, January 18, 1998, at W. 14. (“In 1970, barely half of the urban poor lived in poor neighborhoods –defined as neighborhoods where at least one in five residents lives below the poverty level. By 1990, two-thirds of the poor lived in impoverished areas.”). See also, *USA Today*, Sept. 23, 1996: “about 70% of the poor live in areas with large pluralities of families below the poverty line, up from 55% a generation ago.”

⁴² Edward Blakely & Mary Snyder, *FORTRESS AMERICA: Gated Communities in the US*, p. 7 (Washington, 1997).

Over 40 million Americans have no health care coverage.⁴³ Among households making under \$25,000 a year, more than a quarter are uninsured.⁴⁴ Almost a third of Hispanic children have no health care.⁴⁵ Most Americans without coverage are employed, often working more than one job.⁴⁶ The comparison with other industrial nations is galling. Despite our high-flown rhetorical commitments to equality, we stand alone in failing to assure universal coverage.⁴⁷ We spend more per capita on health care than any nation in the world.⁴⁸ But we stand alone in leaving so many of our fellow citizens outside the system.⁴⁹ 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

⁴³ Jennifer A. Campbell, 1998 Health Insurance Coverage, 1999 U.S. Dept. of Commerce 10-2, U.S. Census Bureau, P60-208, available at www.census.gov. ; Raleigh News & Observer, January 6, 2002 p. 22A. See also Derek Bok, THE STATE OF THE NATION pp. 235-255 (Harvard University Press, Cambridge Massachusetts, 1996)(“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.”

⁴⁴ Jennifer Campbell, U.S. Census Bureau, supra note 43.

⁴⁵ Id.

⁴⁶ Uninsured Americans, Hearing H781-3 Before the House Ways and Means Committee, 106th Congress 1, 1999)(testimony of John Shields).

⁴⁷ Derek Bok, THE STATE OF THE NATION p.237 (Harvard University Press, 1996).

⁴⁸ According to the World Health Organization, the United States ranks 37th in the quality of health care among the nations of the world, though we spend more per capita than any other country. World Health Report, 2000 World Health Organization, at annex table, available at <http://www.who.org>.

⁴⁹ Derek Bok, THE STATE OF THE NATION p. 237 (Harvard University Press, 1996).

doctor, although it probably leads the world in politicians who talk about family values.”⁵⁰

What, then, of “the existing distribution of political resources” which Dahl finds essential to democratic government? Here the disparities between the haves and have-nots are stark as well. Education is ripe with inequality. All across the nation, we countenance rich and poor public schools; not just private schools, mind you, but rich and poor public schools. As if it were thought acceptable for government to treat some of our children as second or third class citizens. In *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court found it constitutionally untroubling that the ten wealthiest districts reviewed spent three times as much per pupil as the four poorest districts.⁵¹ The equal protection clause, apparently, demands little more than that “every child has a building called a school.”⁵²

Since *Rodriguez*, over 40 states have faced serious challenges to unequal public school funding schemes.⁵³ My own state is not atypical. In *Leandro v. State*, the North Carolina Supreme Court found that low wealth schools were plagued by poor physical facilities, inadequate space and lighting, small and outdated book collections, non-

⁵⁰ Paul Kennedy, *PREPARING FOR THE 21st CENTURY*, p. 303 (New York, Random House, 1993).

⁵¹ 441 U.S. 1 (1973). See also Jonathan Kozol, *SAVAGE INEQUALITIES* pp. 214, 223-233 (Harper, 1991).

⁵² Kozol, *SAVAGE INEQUALITIES* p. 213.

⁵³ *School Finance*, 71 *Spectrum: J.St. Gov't* 20, n. 4 (1998).

existent technology, substandard labs and advanced placement offerings, large classes, and underpaid teachers.⁵⁴ 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.⁵⁵

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 kids. The principles of local control and taxation that dominate school funding determinations allow wealthy parents to seek to guarantee their children an ascendant role.⁵⁶ This profound sin against equality is amplified because advantage is proffered to the children of the successful by the state.⁵⁷ 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. Today it’s ten.⁵⁸

⁵⁴ *Leandro v. State*, 488 S.E. 2d 249, 252 (N.C. Sup. Ct. 1997).

⁵⁵ Jonathan Kozol, *SAVAGE INEQUALITIES* p. 212 (Harper paperback, 1991).

⁵⁶ Jonathan Kozol, *SAVAGE INEQUALITIES* p. 223 (Harper, 1991).

⁵⁷ *Id* at 206-207. In *Brown v. Board of Education* the Court emphasized that since government imposed the segregation challenged, the injury to schoolchildren was increased. 347 U.S. 483 (1954).

⁵⁸ Richard Rorty, *ACHIEVING OUR COUNTRY*, pp. 86-89 (Harvard University Press, 1999).

The legal system, sadly, may be the most unequal of all. Our adversary system is premised on “an equal contest of competing interests.”⁵⁹ We carve ‘equal justice under law’ on our courthouse walls. It is the cornerstone of our system of justice. We swear fealty to it every day. For decades, we have announced as a fundamental principal of our constitutional law “that there can be no equal justice where the kind of trial a person gets depends on the amount of money he has.”⁶⁰ But what we do has little in common with what we say.

Lawyers cost money. Some have it. Lots don’t. Only a small percentage of meritorious legal disputes present the realistic possibility of a significant contingent fee. Yet unlike many industrial nations, we recognize no general right to representation in civil cases.⁶¹ Less than 1 percent of our total expenditure for lawyers nationally goes toward services

⁵⁹ See Joseph McLaughlin, “An Extension of the Right to Access: The Pro Se Litigation Right to Notice”, 55 *Fordham L. Rev.* 1109, 1124 (1987).

⁶⁰ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). See, 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* (Oxford University Press, 2000).

⁶¹ See Deborah L. Rhode, *Access to Justice*, 69 *Fordham L. Rev.* 1785, 1788-89 (2001); and Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 *Md. J. Contemporary Legal Issues* 199 (1994). See also, Ruth Bader Ginsburg, *Access to Justice*, 7 *Wash.U.J.L & Policy* 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.” Ruth Bader Ginsburg, *id* at 11.

for the poor.⁶² Legal aid budgets are capped at levels making effective representation of the poor a statistical impossibility. Even at that, they have been effectively cut by about a third over the last decade.⁶³

We have one lawyer for every 380 people generally, and one legal services lawyer for every 4300 persons living in poverty.⁶⁴ We fence folks out even further by creating categories of unworthy poor; and placing restrictions on the most efficient avenues for representation.⁶⁵ Study after study shows about 80% of the legal need of the poor is unmet.⁶⁶ We leave the impoverished un-represented on the most crushing problems of human life—divorce, child custody, domestic violence, housing and benefits disputes.⁶⁷ If a wealthy, well-educated person can't get a fair trial without a lawyer, we know it is unlikely that a poor person can. But we seem untroubled by the knowledge. We think it

⁶² Rhode, *Access to Justice at 1788-89*.

⁶³ “It is 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.” Senator Ron Wyden, *ABA Journal*, summer 2002, p. 18. In 1980 the Legal Services Corporation’s budget was \$300 million. In 2002 it was \$329 million. (“current funding still equals rough half of LSC’s 1980 funding in real dollars.” *Id* at 19.

⁶⁴ Deborah L. Rhode, *Access to Justice*, 69 *Fordham L. Rev.* 1785, 1785-88 (2001).

⁶⁵ *Id* at 1786-87.

⁶⁶ *Id* at 1785-87. See also, Legal Services Corporation, *Serving the Civil Needs of Low-Income Americans: A Special Report to Congress 12b* (2000); and *Access to Justice Development Campaign 2000: The Case for Support*, *Michigan Bar Journal*, March, 2000, at 370.

⁶⁷ Victor Morrero, *Committee to Improve the Availability of Legal Services: Final Report to the Chief Judge of the State of New York*, reprinted in *Hofstra L. Rev.* 755, 768 (1996).

natural, somehow, 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.”⁶⁸ What passes for civil justice among the have-nots is stunning. A legal framework that excludes a large percentage of the populace from participation cannot be meaningfully called a system of justice.

And the economic inequalities imbedded in the operation of our political system are legion, and well known. The private financial of political campaigns systematically skews the outcomes of our political processes toward the interests of the economically powerful and away from the interests of the economically disadvantaged. Campaigns for major office begin with a wealth primary. Candidates must either be wealthy or have access to wealth in order to establish credibility. If this hurdle is surpassed, a relentless money chase begins. Both incumbents and challengers spend a huge percentage of their waking hours asking people for money.⁶⁹ Any undertaking that is seen as so central to continued viability, of course, will have a substantial impact upon the behavior of the participants. Steps that will make raising money more difficult will be avoided. Steps that will make raising money easier will be entertained. Political leaders who take positions congenial to powerful economic interests are rewarded. Political leaders taking positions

⁶⁸ Deborah L. Rhode, *IN THE INTERESTS OF JUSTICE: Reforming the Legal Profession* p. 208 (Oxford Press, 2000).

⁶⁹ See, Paul Simon, *WE CAN DO BETTER* pp. 19-31 (1994); and 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 substantial government concern).

repugnant to powerful economic interests are penalized. Accordingly, our economic system is allowed to exercise disproportionate influence over our political one. This is not the place to rehearse the powerful arguments for campaign finance reform. But the impact of money on our politics readily explains why dramatic disparities in public education, in health care, in income, and in law are largely ignored in our political deliberations.⁷⁰

Taken together, these fundamental inequities reveal an increasing and seemingly inexorable trend toward economic apartheid. The stunning disparities in American

⁷⁰ See, F. Sorauf, MONEY IN AMERICAN ELECTIONS, 307-317 (1988); Larry Sabato, PAC POWER (1984); Burt Neubourne, One Dollar, One Vote: A Preface to Debating Campaign Finance Reform, 37 Washburn L. Rev. 1 (1997); Kenneth Lenst, Campaign Finance Reform and the Return of Buckley v. Valeo, 103 Yale L. J. 469, 496 (1993)(war chests used to frighten away competition); 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. Wyman, Buying Time: Moneyed Interest and the Mobilization of Bias in Congressional Committees, 84 American Political Science Review 797 (1990); and Daniel Lowenstein, On Campaign Finance reform: The Root of All Evil is Deeply Rooted, 18 Hofstra L. Rev. 301, 322-329 (1989). And 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 and schools and health care and living quarters, but even the worst voting machines and the worst democratic infrastructure. These inequalities persist. See, "Lost faith follows lost votes: Raleigh News & Observer, September 15, 2002 p. A10 (Quoting Christopher Edley: "My fear is that officials have not taken the necessary steps to counter these traditional patterns, starving poor communities of the resources they need for political infrastructure". Story following September, 2002 Florida democratic primary vote.)

resources sweep aside our rhetorical claims to equal citizenship. Despite our constitutive aspirations, we grant the greatest opportunities to those who are already blessed. We allow virtually impenetrable barriers to the progress of the disadvantaged to stand unmolested. We refuse to grant many of the core components of human dignity to our fellows, when other nations manage to provide them without debilitation. We offer a feigned justice--opening the judicial doors to those who cannot afford to walk through while celebrating a supposed foundational commitment to legal equity. Political channels are often closed off to those without significant resources.

Dramatic economic polarization damages our possibilities of common venture.

Separation impairs our ability to see each other as peers. The skills and sustenance necessary to assure meaningful political participation are ignored. As Roosevelt put it, “necessitous men are not free men.”⁷¹ The aspiration of equal citizenship is fundamentally removed from our public lives. Generally speaking, Americans have a strong sense of fair play. But that foundational sense of fairness has dramatically eroded in our systems of education, health care, housing, justice and politics. Across this broad array of enterprises, we have chosen to allow the deck to be stacked. Any meaningful notion of equality has collapsed.

The powerful irony in this, of course, is that in the face of these potent democratic transgressions, our constitution, as written and interpreted, is untroubled. The reason for its ineffectiveness, in Dahl’s view, is the document’s frequent and substantial departure

⁷¹ David M. Kennedy, *FREEDOM FROM FEAR: American Politics in Depression and War* p. 280 (Oxford Press, 1999).

from the norms of democracy—departures rooted in the framers’ concern for the dangers of popular majorities. For Woodrow Wilson, though, the Constitution’s weaknesses were based in the framers’ overarching embrace of the interests of the “wealthy and mercantile classes”.⁷² 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.⁷³ Two centuries of amendments have weakened, but not fundamentally altered, this uninspiring reality. 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.⁷⁴ Bernard Bailyn described the great themes of American revolutionary ideology as including “the belief that through the ages it has been privilege—artificial, man-made, man-secured privilege--ascribed to some and denied to others, that has crushed men’s

⁷² See note 7 above.

⁷³ “The intent of the framers was to contain democracy rather than to give it free rein, and dilute democratic will rather than to 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*, *The United States Constitution: 200 Years of Anti-Federalist, Abolitionist, Feminist, Muckraking, Progressive and especially Socialist Criticism*, p. 141 [Bertrell Ollman & Jonathan Birnbaum, eds.].

⁷⁴ “That central idea in our political public opinion, at the beginning was, and until recently has continued to be, ‘the equality of me’. And although it was always submitted patiently to whatever 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.” Paul Angle & Earl Miers, *THE LIVING LINCOLN* p. 198 (Barnes & Noble, 1955)(Lincoln-Douglas debate, Springfield, Illinois, February 20, 1857).

hopes of fulfillment”.⁷⁵ The sentiments may be essential to our nation’s self-concept, but they aren’t reflected in our constitution.

B. A Populist Bill of Rights

Robert Dahl’s book highlights the powerful discrepancy between the overarching American assumption that the United States Constitution is the font of all things democratic, and the reality of the charter’s frequent anti-democratic 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.

It is not the case that this choice is an inevitable one. It would be possible, for example, to give greater constitutional pedigree to the needs and interests of presently powerless Americans, and to eliminate some of the existing advantages assured to entrenched authorities. Admittedly, we rarely hear such options offered in public debate. Even when political candidates claim to speak “for the people and against the powerful”, no serious

⁷⁵ *Faces of Revolution: Personalities and Themes in the Struggle for American Independence* 220 (New York, 1990).

suggestions to alter the constitutionally prescribed, and distorted, field of play are made. Typically, we don't even contemplate the possibility of change in favor of average citizens. We are clearly used to things as they are. But sometimes we get used to things we shouldn't get used to.

At heart, Professor Dahl calls for an invigorated “public discussion that penetrates beyond the Constitution as a national icon.”⁷⁶ In that spirit,⁷⁷ I offer the following Populist Bill of Rights. Some of the proffered amendments seek to eliminate privileges bestowed on entrenched economic interests—corporations, wealthy political financiers, international commercial enterprises, and the like. Others seek to carry forward and energize existing principles of democratic participation and constitutional accountability. Still others seek to assure, in positive terms, fundamental components of human dignity; or to modify the rankest forms of discrimination against the most vulnerable members of society. As a package, they would take a significant step toward placing the United States government more profoundly on the side of the bottom third. They would adopt a different theory of political power: government exists primarily for those who need it most.

⁷⁶ Dahl, at p. 156.

⁷⁷ “I can envision the possibility...of a gradually expanding discussion that begins in scholarly circles, moves outward to the media and intellectuals more generally, and after some years begins to engage a wider public. I cannot say what the outcome might be. But surely it would heighten understanding of the relevance of democratic ideas to the constitution of a democratic country, and specifically it would heighten understanding of the existing constitution viewed from that perspective and of the possibilities of change.” Dahl, at p. 165.

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.⁷⁸
2. The rights and liberties set forth in this Constitution shall not be construed to apply to corporations or other artificial entities.⁷⁹

⁷⁸ In theory, of course, this provision should be unnecessary. Treaties and executive agreements are said to be subject to the demands of the United States Constitution now. See, *Reid v Covert*, 354 U.S. 1, 16 (1957) (“no agreement with a foreign nation can confer power on the Congress, or any other branch of government, which is free from the constraints of the Constitution.”); and Erwin Chemerinsky, *CONSTITUTIONAL LAW: Principles and Policies* p. 273 (Aspen Books, 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. “WTO Means Rule by Unaccountable Tribunal”, *The Ralph Nader Reader*, p. 202 (Seven Stories Press, New York, 2000).

⁷⁹ In tribute to Justice Hugo Black’s dissenting opinion in *Connecticut General Life Insurance Co. v. California*, 303 U.S. 77 (1938)(Black, J. dissenting)(arguing that corporations are not persons under the Constitution). “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.” Ralph Nader, *The Ralph Nader Reader*, p. 77 (Seven Stories Press, New York, 2000). “See also, Ralph Nader and Carl J. Mayer,

3. Every person has the right to seek judicial redress, in law and in equity, for violations of the Constitution of the United States. Nor shall sovereign immunity, asserted by either state or federal authorities, serve as a defense to such claims.⁸⁰

Corporations Are Not Persons, *The United States Constitution: 200 Years of Anti-Federalist, Abolitionist, Feminist, Muckraking, Progressive and Especially Socialist Criticism* at p. 216] [“We need a constitutional amendment that declares that corporations are not persons and that they are entitled only to statutory protections conferred by legislatures and referendums.”]

⁸⁰ Eliminating the necessity of *Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) analysis [constitutional causes of action], equating federal and state constitutional accountability, and rejecting, at long last, an American notion that the king cannot be sued. See generally, Gene 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); and Gene Nichol, *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 (1964)(“...the States necessarily surrendered a portion of their sovereignty when they granted the Congress power to regulate commerce.”) Both the state and federal governments “surrendered” any inherent sovereignty to violate the Constitution of the United States.

4. In order to assure rights of equal political participation, the United States and the various states shall be empowered to regulate the financing of political campaigns.⁸¹

5. In the United States 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. The rights to initiative and referendum shall be secured against the several states.⁸²

⁸¹ Overruling *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, limit his expenditures to \$5 million, then 95% of his speech has been denied. If this is so, what of the candidate who doesn't have \$5 million or even \$5,000 to spend on politics? The Court in the *Buckley* line of cases has said, amazingly, 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” aren't among them.

⁸² See, for example, Dahl, at p. 57-58. In a brief and inconsistent surrender to practicality, given the insurmountable obstacles of Article V, the listing 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

6. The states shall assure to every person the right to a free and equal public education.⁸³

7. Every person, regardless of economic status, shall enjoy an equal and fundamental right to health care services.⁸⁴

worst in the citizenry. See, for example, *Romer v. Evans*, 517 U.S. 620 (1996)(invalidating Colorado anti-gay initiative, Amendment 2.).

⁸³ Reversing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)(holding that extreme differentials in public school funding do not violate the equal protection clause and concluding that education is not a fundamental constitutional right). The constitution “is not addressed to minimal sufficiency... [education, once given] must be available to all on equal terms.” Justice Marshall dissenting in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, ___. Surely no issue comes closer to the core of opportunity than equal education. “There is enough for everyone within this country. It is a tragedy that those good things are not more widely shared. All our children ought to be allowed a stake in the enormous richness of America... They are all quite wonderful and innocent when they are small. We soil them needlessly.” Jonathan Kozol, *SAVAGE INEQUALITIES* p. (Harper, 1991).

⁸⁴ See Derek Bok, *THE STATE OF THE NATION* p. 237 (Harvard University Press, 1996)((percentage of population covered by public health care system—Canada 100%, France 99%, West Germany 92.2%, Japan 100%, Sweden 100%, United Kingdom 100%, United States 44%). See also “The Economic Bill of Rights”, Franklin Delano Roosevelt, 1944 State of the Union Address, reprinted in *The United States Constitution: 200 Years of Anti-Federalist, Abolitionist, Feminist, Progressive, Muckraking and Especially Socialist Criticism*, at p. 299; and Article 25 United Nations Universal Declaration of Human Rights p. 200, *THE HUMAN RIGHTS READER* (Walter Laquer & Barry Rubin, eds. New American Library, 1977). The proffered amendment is ambiguous on

8. Access to the systems of justice, state and federal, shall not be denied or abridged on the basis of wealth.⁸⁵

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.⁸⁶

state and federal roles in assuring a fundamental right to health care services. It assumes, frankly, joint responsibilities ultimately under federal supervision.

⁸⁵ See generally, Deborah Rhode, *IN THE INTERESTS OF JUSTICE: Reforming the Legal Profession* 1-22 (Oxford Press, Oxford, New York, 2000)(documenting denial of equal access on the basis of wealth); and Deborah Rhode, *Access to Justice*, 69 *Fordham L. Rev.* 1785 (2001)(exploring denial of equal justice and suggesting reforms); and Ruth Bader Ginsburg, *Access to Justice*, 7 *Wash.U.J.L & Policy* 1 (2001). The proffered amendment would require, as a first step, the recognition of a right to representation in substantial civil cases. It would also work to eliminate the present degradation of the right to representation in criminal cases.

⁸⁶ Overruling the United States Supreme Court's sex discrimination and sexual orientation discrimination cases in methodology, and frequently, result. See, for example, *Craig v. Boren*, 420 U.S. 190 (1976)(invalidating state law discriminating on basis of sex -- applying intermediate scrutiny); *Frontiero v. Richardson*, 411 U.S. 677 (1973)(failing to produce opinion for Court applying compelling state interest test in sex discrimination case). Under the proposed amendment all sex classifications would be subject, at the least, to the rigors of strict scrutiny and the compelling state interest test. See also, *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); and *Romer v. Evans*, 517 U.S. 620 (1996)(invalidating Colorado anti-gay ordinance as contrary to equal protection clause). *Bowers*, of course, would be overruled outright. Sexual orientation discrimination by public entities, including the 'don't ask,

10. Every person has the right to be free from invidious discrimination in both public and private employment.⁸⁷

Of course, even in my grander moments, I don't anticipate the passage of such a listing of new rights, interests and liberties. Not once in American history has the majority of citizens actually arisen to stake its claim. But it is crucial to recall that the United States Constitution is neither sacred nor divine. It was not handed to us on stone tablets or dictated from within the flames of a burning bush. It is, instead, 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 powerful be given such dramatic assurance. 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-- might look substantially different than our own.

don't tell' military policy, would be made unconstitutional. When combined with proffered amendment 10, legal challenges to private employment discrimination on the basis of sexual orientation discrimination could be sustained as well.

⁸⁷ Expanding the reach of constitutional accountability, in the employment context, to exercises of private power—recognizing 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 Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987). The amendment would trigger the development of a federal constitutional labor law.

ABSTRACT

Robert Dahl's marvelous little book, "How Democratic Is the American Constitution?" (Yale U. Press 2001) 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 itself— is not unabashedly democratic. Rather, it cabins and disables majority sentiment as it embraces it. It restricts the implementation of public preference as it nods to it. It retains antiquated compromises and processes that inappropriately thwart majority will. Applying democratic standards, Dahl concludes that our constitution is not the best that we can design to enable "politically equal citizens" to govern themselves. Thus, he calls for invigorated "public discussion that penetrates beyond the Constitution as a national icon."

In this essay I take Dahl's challenge to offer a Populist Bill of Rights. Some of the proffered amendments seek to eliminate privileges bestowed on entrenched economic interests—corporations, wealthy political financiers, international commercial enterprises, and the like. Others seek to carry forward and energize existing principles of democratic participation and constitutional accountability. Still others seek to assure, in positive terms, fundamental components of human dignity; or to modify the rankest forms of discrimination against the most vulnerable members of society. As a package, they would take a significant step toward placing the United States government more profoundly on the side of the bottom third. They would adopt a different theory of political power: government exists primarily for those who need it most.