Book Review

Ideas Matter: A Review of John Denvir's *Democracy's Constitution*

By MARK NEAL AARONSON*

IN *DEMOCRACY'S CONSTITUTION*,[1] John Denvir's immediate objective is to reclaim the Privileges or Immunities Clause of the Fourteenth Amendment as constitutional grounding for the development of fundamental rights of American citizenship.[2] His intended audience is both professional and general. While he discusses a number of United States Supreme Court cases to present his views, his focus is not on how most persuasively to affect future judicial interpretations or even conventional doctrinal scholarship. His aim is, instead, to resurrect the Privileges or Immunities Clause as an intellectual foundation for legislative and popular action in ways both consistent with American political ideals and responsive to contemporary social reality. Having an impact on court doctrine is, at most, a secondary concern.[3]

Denvir's foray in this concisely written book reflects his commitment to the importance of ideas as a spur to action. He invites others to respond to his positions, which he presents as laying the groundwork for a continuing dialogue. It is in that spirit that I write this review. First, I critically summarize his argument on its own terms. Next, I express some reservations that address several conceptual considerations he has not sufficiently explored as part of his analysis.

What is especially refreshing about this book is Denvir's conscious engagement—both practical and theoretical, both passionate and intellectual—with real world lives and consequences. In this book, he is

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

2. *See id.* at xi.

3. *See id.* at 6–7.

not interested in constitutional ideas for their own sake but rather how they help give concrete expression to democratic political values and social aspirations.

I. Giving Content and Context to the Pursuit of Happiness

A. Denvir's Constitutional Vision

In seeking a textual source for his vision of the American polity and its aspirations, Denvir starts not with the Constitution of 1787 but with the Declaration of Independence, specifically Jefferson's formulation of "the pursuit of Happiness" as a core American political ideal.[4] It is the founders' ringing declaration of freedom, not their second effort at structuring a nation state following the failures of the Articles of Confederation, that atypically roots his constitutional inquiry.

For Denvir, the 1787 Constitution with its acknowledgment of slavery, and absent the Bill of Rights, which was not adopted until four years later, is a stilted source of democratic values, particularly those emphasizing individual rights. He also concludes that what he calls the "first" Constitution provides little textual support for the extent and range of governmental activities characteristic of a modern democratic state.[5] The one thin reed in the first Constitution that he identifies as supporting a potentially expansive role for government, and not merely a set of negative restraints, is the Preamble's prescription "to promote the general Welfare."[6]

This phrase is, however, at best, a vague admonition. It calls attention to a fundamental purpose of government but is in itself insufficient, as Denvir himself describes, to provide constitutionally prescribed direction for governmental action to redress social, economic and political inequities as they may exist. As he reads the text, the 1787 Constitution establishes institutional arrangements for democratic representation and the rule of law but not much else. The 1787 Constitution offers little guidance for the contemporary world on what is required of a government that is substantively responsive to all its citizenry.

Denvir's step back to the Declaration of Independence as a source for a constitutional vocabulary appropriate to the 21st century has some real promise. His pointing to Jefferson's inclusion of the

4. *See id.* at 9.
5. *See id.* at x.
6. *Id.* at 42–43.

pursuit of happiness as an unalienable right along with life and liberty rather than property is, in particular, potentially highly suggestive. Unhappily, however, he neglects to develop a specific understanding of the pursuit of happiness as a political ideal. He invokes the notion several times, unlike his fleeting reference to the Preamble's general welfare provision, but he never addresses its etymology and history to see whether there is additional meaning to be mined in working out a framework for American democratic citizenship. This is a critical oversight, as I discuss later in this review. Rather than exploring fully the idea of happiness, Denvir jumps instead to the Declaration's premise that "'all men are created equal,'" a conviction belied by the 1787 Constitution's acknowledgment of slavery.[7] It is the quest for the realization of equality in the pursuit of happiness that drives Denvir's constitutional inquiry and shapes his interpretation of the Privileges or Immunities Clause.

In short, Denvir's first move in developing his argument is to largely ignore the actual terms of the 1787 Constitution and hearken back to the Declaration of Independence. From the Declaration, he relies on revered ideas—the pursuit of happiness and the equality of all—to establish a fundamental purpose, and to reinforce a critical, underlying premise, regarding the exercise of governmental authority under the Constitution. His principal thematic consideration is justifying an aggressive role for government in overcoming societal inequalities. Only after laying this introductory foundation does Denvir turn to specific constitutional text.

This involves a second move, which constitutes the bulk of the book. It entails a reinterpretation of what he calls the "second" Constitution, by which he means the political regime established by the post-Civil War Amendments, especially the Fourteenth Amendment.[8] His argument principally focuses on the Privileges or Immunities Clause but with important attention given to the Equal Protection Clause and the First Amendment. While his interpretation of the post-Civil War Amendments as representing a substantial break with the constitutional past is not novel, his use of the Privileges or Immunities Clause is innovative.[9]

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7. *See id.* at 1 (citing THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

8. *See id.* at x.

9. *See, e.g.*, Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986).

B. Interpreting the Privileges or Immunities Clause

Denvir begins conventionally with a refutation of the *Slaughterhouse Cases.*[10] There, the United States Supreme Court early on eviscerated the meaning of the Privileges or Immunities Clause by holding that it protected only a narrow category of national rights specifically mentioned in the Constitution, such as the right to use the navigable waters of the United States.[11] The facts of the case involved Louisiana legislation that limited where in New Orleans the slaughtering of animals legally could take place, the practical effects of which were to give a monopoly to a single meat packing corporation and to prevent other butchers from continuing to ply their trade locally. Doctrinally, the Court's majority opinion rejected interpretations that brought within the ambit of the Fourteenth Amendment's Privileges or Immunities Clause either rights of state citizenship or rights of national citizenship not explicitly articulated in the Constitution. Decided just five years after the ratification of the Fourteenth Amendment in 1868, the *Slaughterhouse* decision in upholding the Louisiana legislation spelled the death knell of the Privileges or Immunities Clause as a source of new constitutional doctrine for most of the next 125 years.

With respect to the Fourteenth Amendment's protection of individual rights since the *Slaughterhouse Cases,* judicial attention has focused instead on the scope and meaning of the Due Process and Equal Protection Clauses. By contrast, the Privileges or Immunities Clause has had scant legal or political impact, notwithstanding its position as the first of the three clauses in Section One of the Fourteenth Amendment circumscribing the authority of the states. Recently, however, the Supreme Court turned anew to the Privileges or Immunities Clause in *Saenz v. Roe.*[12] In that 1999 case, the Court surprisingly relied on the Privileges or Immunities Clause to reject California's plan, permissible under applicable federal legislation, to pay lower public assistance benefits to recently arrived state citizens than those paid others for whom California was their permanent place of residence.[13]

10. 83 U.S. 36 (1873). Others cited by DENVIR, *supra* note 1, at 36 n.12, as sharing his view that the case was wrongly decided include CHARLES BLACK, JR., A NEW BIRTH OF FREEDOM (1997); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 558–59 (Foundation Press 2d ed. 1988); and Philip B. Kurland, *The Privileges or Immunities Clause: 'Its Hour Come at Last?'* 1972 WASH. U. L.Q. 405 418–20 (1972).

11. *See* The Slaughterhouse Cases, 83 U.S. at 79–80.

12. 526 U.S. 489 (1999).

13. *See id.* at 507–09. Before *Saenz,* the only other case where the Court used the Privileges or Immunities Clause to invalidate state legislation was *Colgate v. Harvey,* 296 U.S. 404

Denvir references the *Saenz* decision in his introductory chapter as indicative of a possible reconsideration by the Supreme Court of the constitutional role of the Privileges or Immunities Clause,[14] but he uses the decision neither to develop his argument about its meaning nor even to bolster significantly the intellectual timeliness of his own inquiry. Although it is too soon to tell whether *Saenz* is an idiosyncratic case or foreshadows a new development in constitutional jurisprudence, it does give credence to taking a fresh look at the Clause's potential ambit.

Denvir's lack of attention to *Saenz* is in all likelihood the result of his disagreement with its underlying theory regarding the Privileges or Immunities Clause. In addition to rejecting the crabbed interpretation of national rights of citizenship found in the *Slaughterhouse Cases*, he also finds unhelpful two other competing theories.[15]

The first treats the Clause as requiring only equality of treatment, specifically intra-state equality with respect to a state's non-discriminatory treatment of its own citizens.[16] It is this theory that the Supreme Court employed in the *Saenz* opinion. The Court rejected California's attempt to pay new residents less welfare than longer term residents because it created a double standard based on length state of citizenship that had nothing to do with the need for benefits.[17] What was unusual was the Court's conclusion that this type of durational residential requirement was invalid because it violated the Privileges or Immunities Clause.[18]

Thirty years earlier, the Court in *Shapiro v. Thompson*[19] had found a similar welfare durational residency requirement, one which barred the receipt of any public assistance benefits for newcomers to a state for one year, on the ground that it constituted an impermissible state

(1935), which was overruled five years later by *Madden v. Kentucky*, 309 U.S. 83 (1940). The issue in both cases involved the constitutionality of taxing state residents at a higher rate on income earned out-of-state than that earned in-state. The reversal during the late New Deal was part of the Court's general retreat from overruling economic legislation on substantive due process grounds.

14. *See* DENVIR, *supra* note 1, at 6 n.4.

15. *See id.* at 6–7.

16. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). Harrison is a strong proponent of this theory, the conceptual framing and historical research in support of which he credits to DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 342–51 (1986). In developing his argument, Harrison presents a comprehensive and detailed summary of various contending theories about the meaning of the Privileges or Immunities Clause.

17. *See Saenz*, 526 U.S. at 505.

18. *See id.* at 502–04.

19. 394 U.S. 618 (1969).

infringement of the right to travel under the Equal Protection Clause. For Denvir, an anti-discriminatory, equal treatment reading of the Privileges or Immunities Clause adds nothing to the kind of developments already spawned by application of the Equal Protection Clause.[20] Indeed, one might speculate that the Court's use of the Privileges or Immunities Clause in *Saenz* is a potential step backwards in that it is yet another judicial turn away from equal protection doctrine as a source of rights protective of relatively weak constituencies.

The second theory of the Privileges or Immunities Clause, which Denvir rejects, is really a cluster of interpretations regarding a "substantive" reading of the Clause's terms. The disputes here involve various content-based theories. Like all scholars, Denvir acknowledges that a major reason for enacting the Fourteenth Amendment was to insure that Congress had the authority to pass the Civil Rights Act of 1866. Where he parts company with most content-based theorists is in confining rights under the Privileges or Immunities Clause to those specifically enumerated in any historical document including the Civil Rights Act of 1866.[21]

In a brief discussion, Denvir readily concludes that the drafters of the Fourteenth Amendment meant to protect constitutionally substantive rights specifically mentioned in the Civil Rights Act of 1866, such as the right to make and enforce contracts, to sue and give evidence in court, and to inherit, purchase and sell property.[22] What he sidesteps is the debate over what that then means regarding the scope and purpose of the Privileges or Immunities Clause. These statutorily referenced rights are generally the subject of state-developed laws. Consequently, a major, underlying conceptual question is whether the Privileges or Immunities Clause represents merely federal recognition of rights already existent under state law, or the advent of new national rights subject to autonomous and superceding federal action. If the former, the Privileges or Immunities Clause would add nothing substantive to existing state law, and the equal treatment theory of the

20. *See* DENVIR, *supra* note 1, at 6.

21. *See id.* at 7–8. Denvir gets to his main points quickly. A number of prominent competing and sometimes complicating theories regarding the Privileges or Immunities Clause are rejected *sub silencia*. An example is the dissent in *Adamson v. California*, 332 U.S. 46, 68–123 (1947), where in arguing that the Fourteenth Amendment incorporates the Bill of Rights, Justice Hugo Black described the Privileges or Immunities Clause as applying the first eight amendments to the states and doing nothing else, a position also endorsed by William W. Crosskey in POLITICS AND THE CONSITUTION IN THE HISTORY OF THE UNITED STATES 1089–95 (1953), *cited in* Harrison, *supra* note 16, at 1394.

22. *See* DENVIR, *supra* note 1, at 7.

Clause's meaning would gain additional plausibility. If the latter, the constitutional stage would be set for the supplanting of state legislation and case law with national legislation and judge-made federal law in all sorts of substantive fields still left to the states. This second prospect would constitute a sea change in the American federal system given its potentially unsettling effects in such legal areas as contracts, torts, property, and family law.[23]

Like John Hart Ely, Denvir construes the phrase "privileges or immunities" expansively as setting out an abstract idea.[24] He rejects not only what he terms the "puny" conception of rights adopted in the *Slaughterhouse Cases* but any similarly drawn, narrow categorization of protected rights.[25] Denvir wants to explore what can be gleaned from the Privileges or Immunities Clause regarding the development of fundamental rights appropriate to the 21st century, whether through judicial interpretation, legislative enactments, or a combination of both. This book is not about the articulation and enforcement of already well-recognized legal rights. It is about effectuating a grand, content-based theory of evolving rights of national citizenship.

Denvir draws his constitutional textual inspiration from two sources: Justice Bushrod Washington's statement regarding fundamental rights in *Corfield v. Coryell*,[26] an early decision interpreting the meaning of "privileges and immunities" as used in Article IV of the Constitution, and Justice William Brennan's interpretive posture regarding constitutional text.[27]

For Denvir, the co-joining of the terms "privileges" and "immunities" in both Article IV and the Fourteenth Amendment suggests a common understanding.[28] Article IV is usually referred to as the Comity Clause, and it affords protections to citizens of American states who are temporarily in other states.[29] The Privileges or Immunities Clause of the Fourteenth Amendment is directed at the rights of citizens in the states in which they permanently reside.[30] Given that *Corfield* was a well-known case, Denvir has no reservations in subscribing to the

23. *See* Harrison, *supra* note 16, at 1392.

24. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980), *cited in* DENVIR, *supra* note 1, at 7–8.

25. *See* DENVIR, *supra* note 1, at 6–7.

26. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

27. *See* William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 25 S. TEX. L. REV. 438 (1986).

28. *See* DENVIR, *supra* note 1, at 7.

29. *See Saenz v. Roe*, 526 U.S. 489, 501 (1999).

30. *See id.* at 502–03.

framers of the Fourteenth Amendment Justice Washington's definition of privileges and immunities.[31] That definition is "those privileges and immunities which are, in their nature, fundamental; which belong of right, to citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union."[32] The key for Denvir is Justice Washington's emphasis on "fundamental."

There is some irony in Denvir's use of this famous legal definition. In *Corfield*, Justice Washington, sitting on circuit, rejected the claim of the Delaware plaintiff, whose boat had been seized by New Jersey because subleasees had used it to rake oysters in a part of Delaware Bay claimed by New Jersey. Justice Washington construed the dispute as not involving a fundamental right, and thus a protected privilege, but as state regulation of commonly owned property, that is, oysters. The boat had been legally seized as a penalty, even though New Jersey citizens were not subject to the same penalty.[33] Neither the right to fish in another state's waters nor ownership of a boat was a fundamental interest. This conclusion, especially regarding the ability to earn a living as a non-state resident, is directly at odds with Denvir's view of the type of rights that most warrant protection under the Privileges or Immunities Clause.

Because he seeks to develop a progressive interpretation of the Constitution, one which is responsive to changing social circumstances and the needs of a post-industrial urban society, Denvir not surprising cites favorably Justice Brennan, who during the second half of the 20th century was pivotal in the development of constitutional doctrine that sought to address glaring social and political inequities. He quotes Justice Brennan as follows:

> [T]he ultimate question must be: What do the words in the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.[34]

It is to this task, as set by Justice Brennan, that Denvir directs his attention in this book, not to provide the definitive word but to make a provocative contribution.

From where then does Denvir get his specific ideas regarding the substantive content of the Privileges or Immunities Clause? They do

31. *See* DENVIR, *supra* note 1, at 7.

32. *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (1823), *cited in* DENVIR, *supra* note 1, at 7.

33. *See id.*

34. Brennan, *supra* note 27, at 438, *quoted in* DENVIR, *supra* note 1, at 8.

not come from received case doctrine. Such doctrine is useful for him only insofar as it underscores its own inadequacies and limitations. Nor does he much rely or build on the views of other contemporary scholars. Instead, his ideas are rooted in practical observations regarding what is needed to overcome the disjunctures between existing social, political and economic realities and the actualization of broad and meaningful democratic participation.

Denvir's goal is to define and refine a core set of rights that can be invoked both politically and legally, thereby facilitating opportunities for all individuals to develop fully their talents. At the end of the book, he characterizes his vision as a program of "democratic individualism."[35] The rights that he emphasizes call for affirmative governmental action, not governmental restraint. While his key constitutional touchstone is the Privileges or Immunities Clause, his project is the explication of certain positive rights fundamental to contemporary democratic citizenship, the realization of which depends upon government initiative and support. Immunities or negative liberties that limit the extent and control the character of governmental action are largely outside Denvir's purview. Unlike the framers of the 1787 Constitution who focused on the dangers of government, his worries begin with inequities and imbalances within American society-at-large. The central issue for him is how to shape and enforce an effective and responsible governmental role in the prevention and curtailment of social injustices.

Though not offered as an exclusive list, Denvir regards four fundamental privileges as pivotal in the 21st century, if the promise of the Declaration of Independence is to be realized. They are "the opportunity to earn a living, the right to a first-rate education, the right to a voice that is heard, and the right to a vote that counts."[36] The first two he terms social rights; the latter two, political rights. He devotes a chapter to each, explaining what it entails and why it is critical to American democracy. These four chapters are bracketed by a chapter where he discusses the shortcomings of existing Supreme Court doctrine in each area, and a chapter on the Equal Protection Clause, which he views as serving a complementary purpose to the Privileges or Immunities Clause. Before discussing specifically Denvir's four privileges, I address briefly his handling of the Equal Protection Clause.

35. DENVIR, *supra* note 1, at 126 (emphasis omitted).
36. *Id.* at 8.

C. An Equal Protection Clause Quandary

Since Denvir looks to the Privileges or Immunities Clause as a new, pivotal constitutional source for basic rights of citizenship, he finds that he has to reconfigure the jurisprudential role that was played by the Equal Protection Clause for much of the 20th century. Rather than seeking to accommodate a host of substantive issues under equal protection doctrine, something which he considers a conceptual stretch, he favors reserving the Equal Protection Clause to its initial, historical purpose of remedying discriminatory treatment against African Americans and, analogously, other minorities.[37] With respect to this role and contrary to the thrust of current Supreme Court decisions, Denvir is a proponent of race-sensitive remedies. For him the key question is "how to devise forms of affirmative action that respect the rights of white citizens."[38]

His own response here is tepid, declaring that affirmative action always requires a contextual balancing of competing factors. While specific factual circumstances are critical, ad hoc balancing is rarely sufficient in itself. Some principled guidance is needed if there is to be even a modicum of predictability. In this instance, the question that Denvir poses raises a theoretical dilemma that requires conceptual consideration.

The quandary is this: A crucial feature of Denvir's interpretation of the Privileges or Immunities Clause is his incorporation of a master principle of equality. What he hopes to accomplish through his specification of fundamental privileges is to provide an intellectual justification for the kind of affirmative and substantive governmental action needed to help level an unequal social playing field. The overarching function of the fundamental privileges is to foster realistic opportunities for all individuals to pursue happiness and thrive in ways that they themselves define.[39] In this formulation, Denvir does not posit that there is one standard in implementing these privileges for whites and another for people of color.

How, then, does one reconcile a white person's opportunity to earn a living with an understanding of the Equal Protection Clause that mandates affirmative action remedies for minorities who have historically been discriminated against? As Denvir has refashioned these concepts, the two clauses, contrary to his intention, are not necessarily

37. *See id.* at 109.
38. *Id.* at 124.
39. *See id.* at 126.

functionally complementary for all people. One person's sense of right still can be pitted against another person's claim of impermissible discrimination. If anything, the likely effect of constitutionalizing a right to earn a living is to give added weight to arguments against affirmative action remedies in employment and contracting. Thus, while Denvir wants to preserve a place for the Equal Protection Clause in the practical eradication of historical and institutional racism, it is not at all clear that the logic of his commitment to the Privileges or Immunities Clause allows him to do so consistently.

D. The Opportunity to Earn a Living

From an historical and legal perspective, the opportunity to earn a living, Denvir's first fundamental right, is the most problematic. He sums up this best when he posits the following seemingly rhetorical question: "Does the unemployment of millions of Americans raise an issue of constitutional significance?"[40] If one were to ask ordinary citizens, a high proportion would probably answer yes. For them constitutional significance is likely to be understood as fundamental importance. It is with that in mind that Denvir builds his case for the recognition of the opportunity to earn a living as a fundamental right under the Privileges or Immunities Clause.

Yet if one were to ask the same question to American constitutional scholars, the conventional answer, as Denvir points out, is no.[41] Constitutional law as interpreted by the courts provides no persuasive support. The *Slaughterhouse Cases* and the holding in *Corfield v. Coryell* are but two prominent examples. Moreover, the predominant view of the Constitution as a whole is that it is, in Denvir's paraphrase, "a charter of negative liberties that may sometimes protect citizens from government action but never requires government to act affirmatively."[42] While Denvir argues against these interpretations, he finds little in standard constitutional doctrine to support his position. He therefore turns to Congress for support for his concerns.

Here, too, the record is slim. Denvir optimistically points to New Deal programs, like the Public Works Administration.[43] He also subsumes under the right to earn a living an ancillary right to a sufficient income for those who earn very little or are unable to work. With respect to government income subsidy programs, he cites the under-

40. *Id.* at 41.
41. *See id.*
42. *Id.*
43. *See id.* at 45.

acknowledged Earned Income Tax Credit (EITC), which Congress enacted in 1990 and expanded in 1994.[44] The EITC provides low-income workers with tax credits that can result not only in reduced tax liability but also a cash refund if the credit exceeds the actual tax liability. For those who apply and qualify based on their earnings and family size, the receipt of benefits is automatic.

Denvir neglects to mention, however, other Congressional initiatives that started ambitiously but have fallen far short of achieving their initially intended objectives. For example, both the Employment Act of 1946[45] and the Full Employment and Balanced Growth Act of 1978 (the "Humphrey-Hawkins Bill")[46] sought to make full employment a national reality. In each case, the final statutory language was exhortatory, not binding, and ultimately ineffective. Neither enactment, though much trumpeted, had any significant impact on creating and guaranteeing job opportunities for all those willing and able to work.[47] It is not at all obvious that the added symbolism of a constitutional right lessens in any meaningful way the multitude of problems, legislatively and practically, that can complicate and frustrate even the most concerted effort to provide for full employment.

Denvir also fails to acknowledge a recent, key setback in the legislative recognition of social rights generally. One of the most regressive provisions in the welfare reform legislation enacted by Congress at the behest of President Bill Clinton in 1996 explicitly declares that public assistance benefits under the Temporary Assistance to Needy Families Program (TANF) are not statutory entitlements.[48] This provision ap-

44. *See id.* at 47.

45. *See* Employment Act of 1946, Pub. L. No. 304 (1946).

46. *See* Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-523, 92 Stat. 1887 (1978).

47. The course of the 1946 legislation began with directly promising full employment but ended with watered down language that promised to equally promote "free competitive enterprise" and "maximum employment." Employment Act of 1946 § 2. The Humphrey-Hawkins Bill set a legislative goal of three percent unemployment within five years (15 U.S.C. § 1022a(b)(1)) but left its implementation to the discretion of the President to act administratively and seek further legislation as deemed appropriate. 15 U.S.C. §§ 1022a–1022d. *See* William P. Quigley, *The Right to Work and Earn a Living Wage: A Proposed Constitutional Amendment*, 2 N.Y. CITY L. REV. 139, 153–161 (1998). Though the Humphrey-Hawkins Bill is still good law, I am aware of no arguments that link its enactment in a direct way to the relatively low unemployment rates of the late 1990s, which appear to have been mainly attributable to favorable market conditions and a lack of serious mistakes in governmental fiscal and monetary policy generally.

48. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, tit. I, § 103 (1996) (codified at 42 U.S.C. §§ 601–603). TANF is the successor welfare program to Aid to Families with Dependent Children ("AFDC"). States receive a federally funded block grant and have considerable program-

pears to be an explicit attempt by Congress to undercut the continuing, constitutional vitality of the landmark case of *Goldberg v. Kelly*,[49] which treated eligibility for public assistance as a statutory right and a form of property entitled to the full procedural protection of the Due Process Clause. Denvir relies on *Goldberg* to provide a glimmer of support for a constitutionally acknowledged right to earn a living because it too invokes the institutionalization of a social right.[50] At least so far, rather than inspiring the kind of legislation Denvir wants to encourage, *Goldberg* has had the opposite effect. Congress has chosen not to endorse but to curtail, even reverse, any recognition of welfare benefits as legally enforceable social rights.

In industrial and post-industrial society, economic considerations are especially dominant. For most of us, attachment to the work force is both a financial necessity and a sign of one's worth socially and politically. Employment lies, as Judith Sklar argues and Denvir endorses, at the very core of modern democratic citizenship.[51] The person who does not work and is expected to work is socially and politically stigmatized. A persistent example is the negative stereotyping of welfare recipients. Yet within American legal and political culture, the institutionalization of social rights, which can lessen such vulnerability, has had an especially difficult course.

Denvir recognizes that he has an uphill battle. In the end, with respect to the right to earn a living he offers only a hope: "Once Americans as a political community take full-employment as a constitutional responsibility rather than merely a policy option, the dynamic for reform should gain momentum."[52] What Denvir is expressing is a faith in constitutional symbolism as a legislative catalyst. The history of social welfare legislation during the last fifty years offers little support for such optimism. No matter how one characterizes the underlying interest, the political and economic obstacles to achieving and maintaining full employment permanently have been and remain daunting.

matic discretion in providing time-limited, public assistance to needy families. The provision in question states the following: "No Individual Entitlement—This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part." 42 U.S.C. § 601(b).

49. 397 U.S. 254 (1970).

50. *See* DENVIR, *supra* note 1, at 43–44.

51. *See* JUDITH SKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 64 (1991), *quoted in* DENVIR, *supra* note 1, at 33 ("[A] citizen is neither an aristocrat or a slave, but an economically productive and independent agent.").

52. DENVIR, *supra* note 1, at 48.

E. The Right to a First-Rate Education

The prospect for making constitutional headway regarding Denvir's second fundamental privilege, the right to a first-rate education, is not as bleak. The right to an elementary and secondary education is already a statutorily recognized social right. All states are required to provide a free public education for their youth. Although the United States Supreme Court has rejected the argument that the right to an elementary and secondary education constitutionally prohibits inequalities in public school funding, it came much closer to endorsing a constitutional right to an education when it held that public school districts have a duty to provide a free education even to children of undocumented aliens.[53] Some state supreme courts, in interpreting their own constitutions, have gone even further in acknowledging the fundamental importance of a right to an education.[54]

The ultimate difficulty for Denvir, both constitutionally and as a matter of legislative policy, is not the notion of a right to an education but his emphasis on a "first-rate" education. The problems that he foresees are threefold: Establishing appropriate funding levels for schools in different communities; reaching agreements about what constitutes a first-rate education; and insuring fair access to educational programs.

As to the first, Denvir favors a standard that would "provide equal funding to each child's education unless an inequality in expenditure can be justified on educational grounds."[55] While this kind of standard can deal with gross disparities in funding and the need for supplemental funds for hard-to-teach students, it does not guarantee an appropriate level of funding. It also does not prevent private fund raising for public schools, which has the effect of reintroducing significant disparities in educational opportunities. The effectiveness of such fund raising usually depends on the relatively high economic status of a district's or school's parent body.

Denvir's discussion of the content of a first-rate education mainly consists of short examples of what he has observed or regards as good education. However, he avoids addressing whether a standard such as "first-rate" is reasonably enforceable. The tortured history of federally mandated, special education programs for children with disabilities strongly suggests that it is not. There the applicable term of art is a

53. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Plyler v. Doe, 457 U.S. 202 (1982).

54. *See, e.g.*, Serrano v. Priest, 18 Cal. 3d 728 (1976), *cert. denied*, 432 U.S. 907 (1977).

55. DENVIR, *supra* note 1, at 59.

"free appropriate public education."[56] A combination of reasons, including insufficient funding, deficient knowledge about different disabilities and their treatment, lack of trained personnel, and general administrative ineptness, has meant that the implementation of such programs has fallen far short of legislative expectations. Court monitoring of appeals from administrative decisions has not been effective or consistent. In particular, there is no substantive agreement over what "appropriate" means other than that the education provided need not be the best.[57] The result is ad hoc administrative and judicial decision making, often at its worst, about what constitutes an appropriate education. The concept of "first-rate" would is even more elusive.

Denvir's last problem pertains to access to higher education, where he focuses upon admissions policies. While not opposed to neutral admissions policies, he calls for their careful structuring and monitoring so as to prevent exclusionary effects based on race or class. Recognizing the grave disparities that now exist in our public education system, he also supports "bridge"[58] programs to help prepare students from disadvantaged backgrounds to compete successfully at the college level.

In conceptualizing his understanding of a right to education, Denvir adds the idea of "first-rate" to give a qualititative and substantive cast to both its formulation and implementation. He adopts a similar approach with respect to his other two fundamental privileges—a voice that's heard, and a vote that counts. In the educational arena, the result is a discussion principally directed at a slew of public policy concerns. It is not obvious what is to be gained by framing most of these concerns as constitutional matters.

Constitutional understandings are much less subject to change than legislatively enacted policies. Moreover, the requirements for a quality education are not settled and not free from unpredictable, even counter-productive interpretations and applications. Acknowledging constitutionally a generalized right to an education may not be sufficient on its own to promote quality equal educational opportuni-

56. Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401(8) (2000).

57. The leading United States Supreme Court case is Board of Education v. Rowley, 458 U.S. 176 (1982). The Court construed the legislation minimally as providing only a basic floor of educational opportunities, thereby leaving its implementation in individual cases to the relatively unfettered discretion of the states and local school districts. *See id.* at 199–202.

58. *See* DENVIR, *supra* note 1, at 70.

ties. It certainly has not been in California.[59] But including the notion of "first-rate" as part of a constitutional standard is not likely to change things much and potentially may do more harm than good. Under either framing, the practical problems of educational funding and school performance are no different. The additional risk is that Denvir's aspirational modifier winds up being interpreted narrowly and rigidly in ways that foreclose legislative initiatives.

When courts have the final word, as under our regime of judicial review, constitutional doctrine has a tendency to develop an analytic life of its own. Indeed, a major premise of Denvir's book is that the judiciary has not been constitutionally responsive to changing social needs and circumstances. Why, then, risk giving the United States Supreme Court the final say on what it means to provide a "first-rate" education? The adoption of a right to an education as a federal constitutional right is an ambitious enough goal. Struggles over what policies and practices constitute a first-rate education are best left to legislation, notwithstanding myriad disappointments past and present. If "first-rate" is a statutory standard, Congress and state legislatures retain the authority to reverse a poor judicial decision.

Though providing Americans with a "first-rate" education is a worthy policy goal, its conceptualization as a constitutional standard is likely to be far more troublesome than helpful. Unfortunately, Denvir's analysis too quickly glosses over the institutional consequences of what he proposes. Our system of government is complicated. Shifting responsibilities from one branch to another and from one level of government to another has potential costs as well as benefits. There is sound reason in our legal tradition for distinguishing what is good policy from what is constitutionally required.

F. Promoting a Voice and a Vote That Matters

In putting forth his analysis of the conditions necessary for meaningful democratic citizenship, Denvir appreciates that he has something of a chicken-and-egg problem. His main agenda is to promote the constitutionalization of a strong concept of social rights. His pur-

59. The results of the 2001 Base Academic Performance Index for California public schools indicate that only twenty-one percent of elementary schools, fifteen percent of middle schools, and five percent of high schools met the targeted baseline numeric index for student standardized testing performance (800 on a scale of 200 to 1000). *See* California Department of Education News Release, REL #02-03 (January 16, 2002). Student standardized test results offer a comparative profile of school performance but are neither comprehensive nor uncontroversial measures of educational quality.

pose is to forge a culturally acceptable, ideological handle to help counter the effects of the unequal distribution of resources and various other structural imbalances and inequities within society-at-large. Because constitutional rights are due greater deference than statutory rights, there is important symbolic value and considerable potential practical value in what Denvir proposes. Nonetheless, social rights under either characterization are not self-executing. They invariably require the enactment and administration of fairly substantial governmental programs. What those programs are depends on who participates politically.

For Denvir, needed educational and social welfare reforms are unlikely to occur without accompanying political reforms affecting both rights of free speech and the structuring of the right to vote. If voices and votes are to be effective, the opportunities for participation have to be real and not skewed to favor some classes and groups over others. To avoid deciding which comes first, he characterizes the two types of rights as synergistic: "[H]aving full political rights increases the likelihood of gaining legislation that implements social rights; and a realistic possibility of enacting social legislation provides the incentive for the broad political participation necessary for legislative success."[60] With this in mind, he discusses as fundamental privileges of citizenship measures that he concludes must be taken to level the political as well as social playing field.

Denvir disavows any intention to provide a comprehensive theory of free speech and concentrates instead on two issues. The first concerns the speech rights of citizens in a public forum or public place, such as a street, a sidewalk or a park. His main worry concerns governmental regulations that prevent poor people from effectively speaking and being heard.[61] The second issue pertains to campaign finance reform. Here his concern is that the voices of the rich are heard too much.[62]

With respect to both these issues, he abandons any reliance on the Privileges or Immunities Clause as a source of new constitutional developments and directly focuses his discussion on First Amendment doctrine itself. He links the two constitutional provisions only in an early aside that the Supreme Court's incorporation of free speech safeguards applicable to the states under the Fourteenth Amendment could have been accomplished more appropriately under the Privi-

60. DENVIR, *supra* note 1, at 73.
61. *See id.* at 74.
62. *See id.*

leges or Immunities Clause than as a liberty protected by the Due Process Clause.[63]

Denvir's dissatisfaction with current First Amendment doctrine is principally directed at facially neutral rules and tests that ignore social and political reality. He rejects, for example, distinctions based on whether the government has suppressed speech for good or bad motives. He is especially troubled by a case like *Clark v. Community for Creative Non-Violence*,[64] where the Supreme Court upheld the National Park Service's refusal to permit a temporary "tent city" to be set up in Lafayette Park across from the White House. The permit applicants wanted to dramatize the plight of the homeless by having demonstrators sleep in the tents overnight. The Park Service denied the permit on the ground that sleeping would constitute "camping" in violation of park regulations, and maintained that there was no intention to suppress the protestors' message. As the regulation prohibiting camping in an urban park was content neutral, the Court accepted the Park Service's explanation and, in doing so, disregarded the regulation's impact on the group's ability to attract public attention and raise public consciousness. There was no meaningful attempt to determine whether the protestors' preferred method for advancing their political agenda could be reasonably accommodated.

Similarly, in the area of campaign finance reform, Denvir strongly criticizes the Supreme Court's decision in *Buckley v. Valeo*,[65] which upheld congressionally enacted contribution limitations, but overturned on First Amendment grounds legislative limits on campaign expenditures. He finds the distinction between permissible contribution limits and impermissible expenditure limits unworkable in practice, as there is always a way around contribution limits.[66] The real problem is the amount of money needed to buy television time and to mount sophisticated campaigns. The high cost of campaigning favors independently wealthy candidates and candidates who are able to attract wealthy supporters, often because of the positions the candidate takes. Rather than count on the courts, Denvir looks to Congress for a long term solution. To weaken the impact of monied interests on the political process, his preference is the public financing of elections.[67]

63. *See id.* at 10.
64. 468 U.S. 288 (1984).
65. 424 U.S. 1 (1976).
66. *See* Denvir, *supra* note 1, at 84.
67. *See id.* at 88.

Any campaign finance reform legislation is, of course, a potential target for judicial challenge.

What especially raises Denvir's ire about the *Buckley* decision is "its cavalier dismissal of the [challenged] statute's goal of furthering political equality between citizens."[68] He quotes the Court's majority opinion as follows:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify [this expenditure limitation]. But the concept that the government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[69]

For Denvir, the Court's position turns the First Amendment on its head.

The purpose of the First Amendment is to advance the free speech rights of all. In supporting the status quo, the Court's opinion discounts the effects of social and economic imbalances on the exercise of such rights. Though presented as neutral in theory, the Court's reasoning serves only to solidify the ability of the rich to influence disproportionately public discussion and decision making. In Denvir's view, this preclusion by the Court of legislative intervention to rectify glaring inequalities in the opportunities for all citizens to participate as equals in their governance is perverse. The *Buckley* decision is for him "the low point in modern American constitutional law."[70]

Denvir is not an absolutist about the First Amendment. He accepts the necessity for reasonable free speech regulations, whether judicially or legislatively developed. What he does insist upon is a strong presumption in favor of maximizing speech opportunities and careful consideration of practical consequences.[71] Denvir's constitutionalism is result-oriented. With respect to political speech, his mission is to identify distortions in democratic participation based on wealth. His aim is to encourage meaningful political opportunities, on terms of relative parity, for all to be heard regardless of class.

Denvir approaches the right to vote in a similar fashion. He addresses structural biases that affect whether someone's vote really matters. The chief culprit for him is the gerrymandering of legislative

68. *Id.* at 85.

69. *Buckley*, 424 U.S. at 48–49, *quoted in* DENVIR, *supra* note 1, at 85–86.

70. DENVIR, *supra* note 1, at 86.

71. *See id.* at 80.

districts.[72] Redistricting is an intensely political process. The results most frequently produce electoral districts that protect incumbents and favor candidates from one particular party. Another issue that recurringly arises and has been the subject of significant legislation and constitutional review by the courts is the impact of redistricting on voting by members of minority groups.[73] The main concerns have been whether a particular redistricting plan, on the one hand, has the effect of diluting minority representation or, on the other, impermissibly takes race into account.

Denvir's solution lies outside the conventional legislative and constitutional debate. He argues for a system of proportional representation, which he considers a constitutionally permissible option for the selection of members of the House of Representatives and state legislatures.[74] Rather than running in a specific geographical district, candidates would be part of a statewide party slate. After an election, the state delegation in the House of Representatives and the makeup of a state legislature would be determined by the percentage of statewide votes received by a particular party. Denvir anticipates that proportional representation would dramatically change the American two party system and would lead to an increase in third party representation.[75] To limit a profusion of splinter parties in a legislative body, he proposes that a party would have to receive a certain percentage of the total to qualify for a legislative seat.[76] To account for local representation, he suggests that an alternative would be a mixed system where some legislative members would be selected proportionately and some from geographical districts.[77]

Denvir supports a system of proportional representation because he thinks it is more likely than our current electoral system to lead to the reforms he wants in employment and education.[78] He fails to provide, however, any empirical evidence or even much of a logical argument in support of his position. Instead, he offers an assertion: Proportional representation "commands my support for the simple

72. *See id.* at 92.

73. *See* Thornburgh v. Gingles, 478 U.S. 30 (1986); Mobile v. Bolden, 446 U.S. 55 (1980).

74. *See* DENVIR, *supra* note 1, at 104–107.

75. *See id.* at 104–05.

76. *See id.* at 106.

77. *See id.*

78. *See id.*

reason that it is more democratic."[79] This bald statement brings to the fore a fundamental weakness in Denvir's overall approach.

In this short book, Denvir tries to do too much. He wants to establish a constitutional basis for social rights in the United States, and he wants their legislative embodiment and implementation to be fully responsive to the needs of most Americans. What most perplexes him is that his agenda is unlikely to be accomplished without significant political reforms. While he may be correct in underscoring this connection, his presentation is too shrift on too many issues.

Though not used in the United States, proportional representation is not a new idea. If Denvir wants to present a serious argument in support of its adoption here, he must confront such issues as how this type of system would work as part of a non-parliamentary form of government; what accounts for the persistence of a two-party system in the United States and what would be lost if it were to be replaced; and what needs to be done to avoid legislative paralysis if there were to be significant multi-party representation in American legislatures. Furthermore, it is not obvious that a system of proportional representation would accomplish what he wants. Social rights are a much more integral part of the European than American political fabric.[80] Why this is so is discussed briefly in the next section of this review. It is unlikely, however, that given the variety of European governments past and present, the answer has much to do with the representative structure of democratic institutions in Europe, as compared to here. The reasons reflect instead deep differences in political and cultural history, particularly in the late 18th and throughout the 19th centuries.[81] To make his case for proportional representation, Denvir has to be much more of a political scientist and historian than he intends here. An argument that ends with a mere assertion of belief does not go far enough.

My concern is that in addressing structural biases in the American political system, whether they involve voting or speech activities, Denvir has abandoned the main theme of his book, which is to give meaning to the Privileges or Immunities Clause as a constitutional

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79. *Id.* at 107.

80. *See* MAURICE ROCHE, RETHINKING CITIZENSHIP: WELFARE, IDEOLOGY AND CHANGE IN MODERN SOCIETY 77–80 (Polity Press 1992).

81. *See* HANNAH ARENDT, ON REVOLUTION, ch. 1 (Viking Press 1965). The main cataclysmic event for Europe was the French Revolution—a social revolution where class issues were dominant. The American Revolution, which marks our country's beginning, was a uniquely political revolution where the preoccupation was the establishment of a new form of government, and where class (but not race) issues were relatively insignificant.

touchstone for the development of social rights. Neither his chapter on free speech nor his chapter on voting invokes the Privileges or Immunities Clause. Instead, he criticizes several Supreme Court decisions involving political speech under the First Amendment, and voting rights as developed pursuant to the Equal Protection Clause. He then proposes some alternative legislative solutions, namely the public financing of elections and proportional representation. These are meaty topics in their own right. While free speech and voting are, in a generic sense, privileges of American citizenship, Denvir's discussion of these issues in this book is tangential to his central and most provocative insight, that is, his effort to transform the Privileges or Immunities Clause into a source of social democratic, constitutional thought for the 21st century.

Whatever the need for accompanying political reform to make social rights a reality, one does not have to turn to the Privileges or Immunities Clause as a constitutional wellspring. At this juncture, though one may disagree with specific court decisions and legislative policy choices, the body of constitutional law regarding speech and voting is mature. There are worthy First Amendment and Equal Protection traditions upon which to build and which Denvir himself uses and can continue to use in support of proposals for change. Both the origins of his analysis and his proposed solutions regarding political rights are very different from what is at issue in an analysis of social rights in the United States.

With respect to the development of social rights, much more has to be said both to set the terms of debate and to make a persuasive argument. Denvir expresses his policy preferences, but he has not anchored his thoughts. He rejects existing court doctrine and has little interest in narrow scholarly discussions regarding the Privileges or Immunities Clause. Given his interest in reaching a general, not just professional audience, those are understandable choices. Nonetheless, having chosen not to do a tight legal analysis, Denvir still has to find an ideological foothold that resonates broadly. Rather than having detoured to a discussion of specific political rights, he would have better served his practical objectives had he retained his initial focus, and explored more fully support for and resistance to the idea of social rights in American legal and political culture generally. Ideas that make a difference practically must be culturally grounded. Denvir points us in a certain direction but does not provide a sufficient, overarching, historical and political analysis. As a result, one's confidence about the prospects for the meaningful recognition of social rights in

the United States is no greater at the end of the book than it is at the beginning.

II. Social Rights: An American Constitutional and Cultural Dilemma

In putting forth his argument in support of social rights, Denvir underestimates the power of the intellectual currents against which he has chosen to swim. Few Americans probably disagree with his basic objectives regarding employment and education. Who wants to argue against having everyone employed who wants to be employed or having every child receive a "first-rate" education? The difficulty is in persuading others regarding the means to achieving these objectives. Conflicts arise because individuals disagree over their perception of costs, not just in financial terms, but in terms of the values and ideas they hold most dear. The realization of important human objectives involves tradeoffs. Decisions have to be made about what takes priority.

Denvir employs the notion of social rights so as to heighten the deference given in public deliberation and enforcement to the kind of policies that he finds have not been given sufficient due, if all individuals are to have an equal opportunity to thrive in our society.[82] To get us on the path he wants to take, he has to show us how it might be done. There is a double dilemma here: Not only is there little in our constitutional tradition that supports the idea of social rights as constitutional, there is also little in our political culture in support of the idea of social rights.

In my view, Denvir missteps in making his case for social rights in two ways. First, he has not sufficiently accounted for the reasons for the relatively undeveloped state of social rights in the United States. Here, he might have taken into account the recent course of analyses regarding the concept of "social citizenship" and the idea of "civil society." Second, as I noted at the beginning of this essay, he does not independently examine the constitutional roots for the pursuit of happiness as a political ideal. Such an inquiry might have given collateral support to his effort to read social rights into the Privileges or Immunities Clause. In this review, I only illustrate briefly what topics might be covered in this kind of expanded approach. While not providing

82. Bill Simon, who has written extensively on welfare rights, perceptively notes: "Appeals to right occur only when activities and goals conflict; their function is to determine whose side the state will take." *See* William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 29 (1985).

solutions in themselves, such inquiries place more fully in perspective what needs to be overcome and what cultural resources may exist for ideas, such as the ones Denvir proposes, to take realistic hold.

A. Social Citizenship and Civil Society

The concept of social citizenship focuses on the social welfare of individuals as a condition for democratic participation and the importance not only of rights, but also duties, as defining characteristics of the relationship of the individual to society-at-large and the state. Maurice Roche puts it this way: "'Social citizenship' refers to those rights and duties of citizenship concerned with the welfare of people as citizens, taking 'welfare' in a broad sense to include such things as work, education, health, and quality of life."[83] Denvir's interest in guaranteeing an opportunity to earn a living and a right to a "first-rate" education falls squarely within the intellectual discourse over social citizenship. This discourse has, however, both a progressive and a conservative cast.

On the progressive side, the ideas largely flow from the thought of the post-World War II British sociologist, T. H. Marshall, and his classification of rights as civil, political, and social rights.[84] Civil rights are those rights that acknowledge what interests or activities have a protected status within the society and economy and for whom they have protected status. They include such substantive rights as a right to own property, a right of privacy, as well as various procedural safeguards that limit how and when the state may take action against an individual. Transplanted to our constitutional vocabulary, civil rights in Marshall's framework include what we tend to consider conceptually as aspects of due process of law, substantively and procedurally. Alternatively, they include what is referenced under the Privileges or Immunities Clause as immunities of citizenship—the negative liberties that set constraints on government. Political rights pertain to the creation of opportunities for participation in public affairs, for example, the right to vote and to hold public office. These rights also include the political speech guarantees encompassed by the First Amendment. In other words, political rights delineate the extent to which government processes are open to the claims and aspirations of different individuals. Social rights address issues of social equity and economic security. In contrast to civil rights, which seek to curb the

83. ROCHE, *supra* note 80, at 3.

84. *See* CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT: ESSAYS BY T. H. MARSHALL 78–81 (1965).

arbitrariness of governmental actions, and political rights, which define accessibility to governmental processes, social rights aim to provide measures of insurance against societal and economic uncertainties.

Rights are not self executing. Their invocation requires individuals to do something. If someone owns real property and abandons it, another individual may lay claim to its ownership after a certain period of time by adverse possession. All adult citizens have a right to vote, but it is not effective unless exercised. While the notion of rights carries great symbolic importance, the practical realization of a specific right entails corresponding duties either to lay claim to the right or to avoid its loss.

A key distinction between civil rights and political rights, on the one hand, and social rights, on the other, is that with respect to the latter the corresponding duties tend to involve explicit state coercion. The government not only offers assistance but also compels compliance or conformity. The clearest example is the right to an elementary or secondary school education. Both parents and children are subject to sanctions if a child does not attend school. Thus, there is not only a right to an education but also an enforceable duty to participate in an educational program.

Whereas the exercise of civil rights and political rights primarily depends on individual initiative, social rights require as a precondition costly and complex governmental programs. There is, therefore, a tendency of social rights to broaden both benefits and obligations of the citizenry.[85] When government directly provides a benefit, the legislature almost invariably enacts and effects some kind of *quid pro quo*.[86]

Responding to the mid-20th century development of the social welfare state in Great Britain and Western Europe, Marshall viewed the institutionalization of social rights as largely accomplished and as an important step in the evolution of modern democratic citizenship. For him the notion of social citizenship embraced a strong concept of social rights. However, it was one rooted in "the superstructure of le-

85. *See* REINHARD BENDIX, NATION-BUILDING AND CITIZENSHIP 107 (1969).

86. This is true not only in the provision of elementary and secondary education, but for social welfare programs generally. American public relief programs routinely require low-income beneficiaries to comply with a variety of program conditions, ranging from monthly reporting of personal information to stringent requirements regarding seeking and retaining employment. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105, tit. I, § 103 (1993) (codified at 42 U.S.C. §§ 601–603).

gitimate expectations" of the citizenry, not the specific legal enforceability of those rights.[87] Marshall counted on broad cultural support for social welfare programs as universal entitlements to sustain their integrity as instruments for democratic citizenship and to check unreasonable governmental encroachments on individual autonomy. While not denying the tendency of social rights to expand the duties expected of individuals, he believed that such duties would not become overly burdensome and onerous. His confidence derived from his sense of the evolutionary nature of individual rights in modern British and Western European societies. The democratic expansion of civil and political rights in these societies had involved substantial internal social upheaval in the 18th and 19th centuries and had been directly imperiled by Naziism and fascism in the 20th century. From Marshall's sociological standpoint, the hard-won and deeply felt sense of entitlement of the citizenry for the whole panopoly of rights, including social rights, would curb the potential for abusive state authority.

Though sharing much, the American political cultural experience is, as I have noted previously, significantly different from the European experience. The main epiphenomenon is the relative absence of class consciousness as a political factor. Although America went through the violent divisiveness of the Civil War in the 19th century, like the American Revolutionary War, it too was largely a political struggle, in this instance, between those favoring national institutions of government and those seeking to preserve regional autonomy. Most importantly, the cultural horror of slavery that led to the Civil War was a racial, not class phenomenon. Class differences exist and matter in the United States, but it is the persistence of racial prejudice, not unfairnesses resulting from class distinctions, that most tries the American political soul. In America, where almost all people consider themselves middle class, we have not had the level of cohesive, mass working class support that occurred in Britain and Europe to initiate and sustain a broad institutionalization of social rights politically and legally.[88] One of the consequences of American exceptionalism in this regard is the absence of a viable, progressive concept of social citizenship.[89]

87. CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT, *supra* note 84, at 114.

88. *See* FRANCES FOX VIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE, 424–27 (1993).

89. *See* Nancy Fraser & Linda Gordon, *Contract Versus Charity: Why Is There No Social Citizenship in the United States*, 22 SOCIALIST REV. 45 (1992).

To the extent there is in the United States a culturally rooted concept of social citizenship, with notable support, it is a neo-conservative version that emphasizes social duties.[90] This version stresses personal responsibility, duties of accountability, and social obligations.[91] Such neo-conservatism also reflects the strong individualism strain in American political thought. C. B. Macpherson describes this strain of individualism as having a "possessive quality," by which he means that an individual is seen "as essentially the proprietor of his own person or capacities, owing nothing to society for them."[92] Individuals, in short, are seen as primarily responsible for their own fates. The result is that insufficient attention is given in social policy discussions and public debate on how the structural conditions of a society and its dominant preferences affect who has opportunities to achieve personal and social success. Instead, there are strong predilections to blame the individual and to distrust government as a counter-balancing force capable of addressing prudently inequities within the society and the economy. The mainstream in the American political tradition, now as well as in the past, has been largely blind to "the fact that society, just as much as politics, might be a source of evil."[93]

In raising the promise of social rights and an implicit progressive concept of social citizenship, Denvir needs to come to grips with the complicated context and set of relationships that mark divisions between public responsibilities assumed by government and responsibilities left to the operation of private forces in society-at-large. How these divisions of responsibility are shaped and how the responsibilities themselves are carried out are culturally specific. This does not mean that there are not patterns of development and programmatic models to be considered and, potentially, replicated. It does mean that one has to pay very careful attention to the specific legal, political, and societal context.

90. *See* ROCHE, *supra* note 80, at 79–80. In contemporary America, it is hard to distinguish between neo-conservatives and neo-liberals since the orienting ideas of both are rooted in nineteenth century classical liberalism and a deep skepticism about the value and necessity of governmental social and economic intervention.

91. The writings of the American social welfare critic Lawrence Mead are a good example. He emphasizes such social obligations as working in whatever jobs are available; fluency and literacy in English, whatever one's native tongue; learning enough in school to be employable; and "law-abidingness." For Mead these are important informal duties of citizenship because "Americans seem to regard them as mandatory." LAWRENCE MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP 246 (1986), *quoted in* ROCHE, *supra* note 80, at 80.

92. C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 3 (1964).

93. LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 107 (1955).

In the United States, especially now, we have great faith in the generative effects of private markets as catalysts for economic prosperity and social progress, and we are suspicious of centralized governmental planning. We still cede a lot to the private sector that elsewhere in the developed world has become largely a public responsibility. Two ready examples are the lack of universal health care and child care. Our obsession with private markets and our distrust of government also has tended to enhance the power of wealthy economic interests both in areas left to private initiative and in the development and implementation of public policies. Our republican form of government is responsive to the citizenry broadly, but most often in proportion to the influence wielded by the best organized and usually the wealthiest interests, while our political leadership, for the most part, rather than taking the initiative to propose and educate the citizenry about potentially creative solutions, tracks popular polling and fashions political rhetoric accordingly.[94]

This political reality is, of course, a premise of Denvir's book and he wants to alter our political assumptions. It would have been helpful in showing us how to get from where we are to where he aspires to go if he had examined the recent literature on civil society.[95] While the idea of civil society does not have a fixed meaning over time,[96] it is a useful theoretical construct for examining the multi-dimensional relationships of private and public spheres of activities because it helps to highlight in a systematic fashion the ideas behind and the institutional consequences of the public-private boundaries that have been drawn in a particular political culture. These are the boundaries that Denvir seeks to reorder in proposing his reconceptualization of the Privileges or Immunities Clause as a constitutional source for social rights.

In my discussion of social citizenship, I have indicated some of the reasons why social rights have not engendered the same level of popular acceptance in the United States as in other Western democracies. Implicit in what I have said are the beginning strands of a critique of the long-standing American theory of civil society. That theory, which largely relies on the language of Madison[97] and de Toc-

94. An example is the appeal of cutting taxes and avoiding new taxes, positions recurrently advocated without any thoughtful acknowledgement of the impact upon the availability and quality of public services.

95. *See* JOHN EHRENBERG, CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA (1999); JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY (1994).

96. *See* EHRENBERG, *supra* note 95, at xi.

97. *See* THE FEDERALIST NOS. 10 (JAMES MADISON) AND 51 (JAMES MADISON or ALEXANDER HAMILTON).

queville,[98] emphasizes the functional importance of intermediate, often voluntary, associations in insuring liberty and limiting the tyrannical power of political institutions.[99] More than I have done here, Denvir's book needs to have provided an explanation for why that idea of civil society (both in conception and in practice) either fails to advance, or can be practically modified, to meet his expectations for a constitutional democracy. Without such an analysis, his proposals for constitutional innovation and political reforms are left hanging untethered to any structural dynamic for social change.

The pivotal problem is that a redefinition of constitutional rights is rarely enduring without significant societal impetus and cultural resonance outside the legal order. A good example of this is the case of *Goldberg v. Kelly* cited by Denvir as support for a constitutional right to earn a living. Earlier, I indicated that, if anything, *Goldberg* has had an adverse effect legislatively in terms of securing the entitlement to public assistance as a social right. Here, I want to emphasize its conceptual irrelevance.

The majority opinion in *Goldberg* heavily relies on a seminal law review article, which analogized modern forms of governmental largess, such as licensing and public benefit entitlements, to traditional concepts of property.[100] A government benefit is, however, not the same thing as owning a piece of real property or even a copyright. Traditional property interests are civil rights. They establish protected areas of activity, where individuals are free to initiate action and make claims often in spite of, rather than with the support of the state. In contrast, entitlement to public assistance requires governmental action in the very establishment of the claim. This means that the financial and ideological stakes in promoting social rights are very different from those concerning civil rights. Their establishment requires substantial public expenditures and a broadly shared recognition of human worth, which transcends the differential impact of societal conditions on individual opportunities and aspirations.

As a result of deft legal reasoning by analogy, *Goldberg* became a landmark procedural rights case. Intellectually, it fits comfortably within the American legal tradition of protecting property interests and extending procedural safeguards. The decision, however,

98. *See* ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA, Vol. II, Second Book, ch. V (1954).

99. *See* EHRENBERG, *supra* note 95, at ix, xv.

100. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

portends little for the eventual constitutional recognition and cultural acceptance of social rights.

It is highly unlikely that legal argumentation alone ever can carry the day politically on an issue as novel and weighty as the constitutionalization of social rights. The path by which ideas become deeply engrained and are sufficiently compelling to shape cultural perceptions and affect actual social change is far too contingent and circuitous. For new constitutional concepts to take root practically, there needs to be much more pre-existing and pervasive institutional and structural support than Denvir acknowledges. While we emphasize greatly individual rights, we have, at best, only an inchoate conception of social rights. It would have been especially enlightening had Denvir directly confronted and comprehensively considered the reasons for the historical and political under-development of social rights in the United States. The circumscribing conditions that he does address, mainly as part of his discussion of political rights, only scratch the surface.

B. Happiness As a State Constitutional Right

While the notion of social rights does not have much historical currency in the American constitutional tradition, this is not the case with respect to the idea of happiness as a political ideal. Not only is the pursuit of happiness one of the fundamental rights famously pronounced in the Declaration of Independence, it also appears as a provision in two-thirds of all state constitutions. This widespread state constitutional recognition of the pursuit of happiness, as reported in a recent survey undertaken by former California Supreme Court Associate Justice Joseph R. Grodin, is often in conjunction with the promise of a right to safety as well as a declaration to actually "obtain" it.[101]

The California constitutional formulation is typical. It states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."[102] "Privacy" as an explicit right was added by referendum to the California Constitution in November 1972.[103] The language regarding "pursuing and obtaining safety and happiness" dates back to the initial California Constitution of 1849,

101. *See* Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L.Q. 1 (1997).

102. CAL. CONST., art. I, § 1.

103. *See* CAL. CONST., art. I, § 1 (West 1983).

and it replicates language found in the Virginia and Pennsylvania Declarations of Rights of 1776, both of which were adopted at state constitutional conventions shortly before the signing of the Declaration of Independence.[104]

In considering the philosophical underpinnings to happiness as a political idea in the 18th and 19th centuries, Grodin discusses both classical and enlightenment strands.[105] He attributes to the founders, in particular, a solid familiarity with such knowledge, whether they were formally schooled or tutored at home. Classically, from Aristotle, the key term is "eudaimonia," which is translated as "happiness" or "flourishing."[106] Our contemporary ear does not always hear happiness as meaning flourishment, but it is the latter denotation that best captures the sociological significance of the concept. It signifies both a quest for human perfection and a communal goal. The virtuous life involves striving to fulfill one's true nature, and an essential societal function is to help individuals fully realize their special talents.

It is this sense of happiness, personally and politically, that prompts Denvir's reliance on the Declaration of Independence as a constitutional starting point for his vision of democratic individualism. What he does not explore is the state constitutional historical legacy and potential contemporary relevance of happiness as a fundamental right. Because these state constitutional provisions have not been extensively interpreted, they provide a relatively unencumbered legal framework for developing new constitutional thought. What this would mean for the role of government, however, is not clear.

The difficulty originates in enlightenment political theory, which was divided as to what the idea of happiness implied for good government. As Grodin points out, a prominent figure like John Locke emphasized the *negative* rights—the immunities—that individuals had against government.[107] Locke's political thought is not supportive of an expansive role for government in promoting the happiness of individuals. This is in contrast to the views of the 18th century Swiss writer Jean Jacques Burlamaqui—a much lesser known political theorist today but not then—who stressed the *affirmative* obligations of govern-

104. *See* GRODIN *supra* note 101, at 5–7. According to Grodin, historical accounts credit the happiness and safety language in the Virginia Declaration of Rights, which was generated first, to George Mason, who later as a leading anti-federalist refused to endorse the Federal Constitution of 1787 because it gave too much power to the federal government and lacked a statement of rights. *See id.* at 8–10.

105. *See* GRODIN, *supra* note 100, at 8–19.

106. *Id.* at 11.

107. *See id.* at 15.

ment to increase the happiness of its citizenry.[108] Grodin frames the difference in this way: "In modern terms, Locke's perspective is more libertarian, Burlamaqui's more communitarian."[109] That one accepts the pursuit of happiness as an overarching constitutional ideal does not resolve the political or constitutional dilemma regarding what is properly within the public domain of government and what is best left to the interactions of private individuals and organizations in society-at-large.

Grodin found the judicial record of interpreting state constitutional provisions regarding the right to happiness typically shallow and unimaginative.[110] Some state courts have treated this type of provision as merely hortatory—a direction to the legislature—and not judicially enforceable.[111] Other state courts have considered whether such a right limits the ability of the state to regulate alcohol consumption or the use of drugs, or even engage in professional licensing or other forms of economic regulation.[112] Only a few state courts have ventured forward to discuss whether provisions regarding the pursuit of happiness or the rights of happiness and safety establish affirmative governmental social welfare obligations.[113] In short, the existing court cases are neither especially illuminating nor definitive.

The point is that the historical and continuing existence in state constitutions of provisions guaranteeing happiness as a fundamental right provides an additional intellectual opening for considering in the American political cultural context any ambitions regarding the eventual constitutional recognition of social rights. Denvir makes this link generally at the beginning of his book, but he never specifically addresses the state constitutional prospects either as a direction to the legislature and a catalyst for popular action or as affirmative rights directly enforceable judicially. The Privileges or Immunities Clause is not the only largely forgotten textual source to be resurrected in support of the constitutionalization of social rights.

There is nothing certain about the course of ideas as steps on the path toward meaningful social and political reforms. Ideas with deep cultural resonance, however, tend to have the most significant practical impact because they touch a common-sense nerve with leaders and

108. *See id.*

109. *Id.*

110. *See id.* at 19–33.

111. *See id.* at 19–22.

112. *See id.* at 22–28.

113. *See id.* at 29–33.

the general citizenry alike. In *Democracy's Constitution,* Denvir makes an important innovative contribution toward shifting the constitutional dialogue. It is now incumbent on him and the rest of us to tap further into our collective intellectual heritage.