Social Democracy and Constitutional Theory: An Institutional Perspective

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CONSTITUTIONAL THEORIZING ABOUT SOCIAL DEMOCRACY MIGHT START FROM SEVERAL DIFFERENT PLACES. PROFESSOR ROBIN WEST'S WONDERFUL MEDITATION ON THE POSSIBLE CONSTITUTIONAL SIGNIFICANCE OF MARTHA NUSBAUM'S WORK ON CAPACITY-BASED LIBERALISM^1 BEGINS BY DEPICTING THE BEST POSSIBLE SOCIETY. PROFESSOR WEST THENexplores the extent to which the Constitution of the United States can and should be interpreted consistently with this regime. 2 PROFESSOR STEPHEN ELKIN begins a careful study of the constitutional theories underlying the American commercial republic by elaborating the principles underlying a particular political regime. He starts from the "circumstances of politics," focusing our attention on "a political order that will garner wide-spread support in the form of civil peace, and that will be widely thought a good or decent political order."^3 Other theorists begin with an exegesis on particular strands of American constitutional thought, or more commonly in the legal profession, with a series of related judicial rulings handed down by the Supreme Court of the United States. Professor William Forbath's important work on welfare rights focuses on the historical relationship in American constitutionalism between the tradition of equal citizenship and the tradition of social citizenship. 4 FRANK MICHELMAN'S SEMINAL 1969 HARVARD LAW REVIEW FOREWORD STARTS WITH CERTAIN

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Supreme Court decisions and seeks to offer the best possible interpretation of their underlying principles. He "suggest[s] that the judicial 'equality' explosion of recent times has largely been ignited by reawakened sensitivity ... to a ... value or claim which might better be called 'minimum welfare.'" Michelman's work is better understood, however, as synthesizing these different approaches to constitutional theorizing. Thus, his Foreward, taking a "cue from Professor Rawls' idea of 'justice as fairness,'" defends a "proposition about social justice" described as "'minimum protection against economic hazard.'"

Constitutional theorizing about social democracy might also begin with Karl Llewellyn's observation that "there is no reaching a judgment as to whether any specific part of present law does what it ought, until you can first answer what it is doing now." Rather than demonstrating that a particular progressive vision is rooted in the Constitution, progressive constitutional theorists might first ponder why the American polity has frequently rejected and, at best, imperfectly implemented the practices and policies associated with democratic socialism or social democracy. This approach to constitutional theorizing promises to highlight the importance of constitutional institutions as opposed to constitutional exegesis for the constitutionalist enterprise. The answers to "Why is there no Socialism in the United States?" and related questions indicate that progressive failures throughout history cannot simply be ascribed to either a constitution that does not mandate a fair degree of economic equality or American unwillingness to recognize that the Constitution does in fact mandate a greater degree of economic equality than has ever been realized in the United States. Social scientists who study American and comparative political economy emphasize the structural barriers to social democracy intentionally or unintentionally built into the design of American government institutions. Federalism and the separation of powers, in particular, have placed distinct obstacles in the path of social democrats. Progressive movements and progressive policies often fail in the United States when they enjoy approximately the same popular support as successful progressive

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6. Id. at 14-15.
7. Id. at 13.
9. Michael Harrington points out that "social democracy and Socialism are not synonymous." The "former" seeks "State intervention, planning and social priorities within capitalism." The "latter" is "a political movement which seeks to transform capitalism fundamentally." Michael Harrington, Foreword to Werner Sombart, Why is there no Socialism in the United States?, at ix, xi (1976). Progressive constitutional theorists are almost always social democrats, not democratic socialists.
10. See infra Part I.
movements and progressive policies in other countries because for institutional reasons progressive policies are much harder to pass and implement in the United States than in other countries.\textsuperscript{11}

Whether constitutional institutions obstruct the enactment and implementation of progressive policies is as much a fundamental constitutional concern as whether some constitutional provision or the Constitution as a whole requires government to adopt policies associated with social democracy. Professor Elkin properly recognizes that the constitutional theory of the good society must be one that present institutions are well-designed to adopt and capable of implementing. "The aim of constitutional theory," his article points out, "is to specify the institutions needed to realize [a conception of justice'] and the political sociology that gives political energy to that rule."\textsuperscript{12} When constitutional theorists think about the material preconditions of the good society in the United States, therefore, they must recognize that progressive or other interpretive understandings of constitutional political economy will be realized only when "citizens of the political order... are inclined to operate the institutions in the necessary fashion."\textsuperscript{13} Their constitutional visions must combine textual exegesis, political philosophy, and empirical institutional analysis. Aligning text and institutions often presents severe difficulties. Most polities lack the governing institutions and political support necessary to realize the ideal form of constitutional life.

This paper highlights probable mismatches between the constitutional theories of social democracy eloquently detailed in the previous article and the capacity of present constitutional institutions to realize those visions. A system of "separated institutions sharing powers"\textsuperscript{14} has proven a poor vehicle for passing and implementing

\textsuperscript{11} A more complete analysis of why no socialism in the United States would also note that too many citizens are historically unwilling to support social welfare policies whose primary beneficiaries are perceived to be persons of color. As Philip Klinker and Rogers Smith point out, while "many [Americans] oppose[] big government on principle, it seems undeniable that for many others, this threat to national initiatives benefiting blacks [is] not irrelevant." Philip A. Klinkner & Rogers M. Smith, The Unsteady March: The Rise and Decline of Racial Equality in America 298 (1999); see Jennifer L. Hochschild, The New American Dilemma: Liberal Democracy and School Desegregation, at xi-xii (1984) (citing the issue of race as essential to "Why is there no socialism in the United States?"); Jill Quadagno, The Color of Welfare: How Racism Undermined the War on Poverty (1994) (exploring the connection between the lack of success of American public policy programs and American perceptions of race). This and other political sociology explanations for the American welfare state raise fundamental constitutional questions associated with which people are capable of sharing the same civic space. Space limitations, however, prevent any discussion of this constitutional matter.

\textsuperscript{12} Elkin, \textit{supra} note 3, at 1948.

\textsuperscript{13} \textit{Id.} at 1937. This passage also points out that whatever the abstract merits of some constitutional vision as a theory of justice or a theory of constitutional justice, the vision must also be one that is shared by most citizens.

\textsuperscript{14} Richard E. Neustadt, Presidential Power and the Modern Presidents: The
measures associated with progressive or social democracy. Federalism, by increasing the number of veto points and decentralizing American politics, further confounds the progressive constitutionalist. Future progressive constitutional theory may not, therefore, rest content laying out the interpretive or Madisonian foundations of social democracy. Scholars should also explore the conditions under which present institutions might yield social democracy or detail those institutional reforms necessary to create a regime more favorable to progressive policies and politics. Alternatively, progressive constitutional theorists may begin exploring the best non-progressive regime that present institutions (which include existing practices of constitutional interpretation), 15 might yield.

The present incapacity of American institutions to produce progressive policies is a constitutional problem, not merely a technical problem with realizing a constitutional vision. The Framers structured constitutional institutions not simply to produce good government or fair outcomes, but to privilege certain policies and certain interests. 16 "Constitutional rules," Robert Dahl notes, "help to determine what particular groups are to be given advantages or handicaps in the political struggle." 17 Hence, one important dimension of constitutional theory is the study of what policies constitutional institutions were intended to privilege, what policies those institutions have historically privileged, and whether those institutions may be reformed so that they may either better serve their original purposes or privilege a different set of policies. That some Americans established constitutionally worthy ideals at extraordinary times in American history does not provide a sufficient basis to establish the constitutional theory of the good society, or the best possible American society. Constitutional theory must also demonstrate that American institutions are presently capable of realizing those ideals in ordinary times.

All constitutional theories must align textual commitments and institutional capacities. As the topic of this symposium is constitutional issues as a material precondition to a good society, and I believe the good society would be a progressive democracy, this paper explores misalignments in the constitutional theory of social democracy. Further, the papers for this symposium all endorse some

16. See infra Part III.
version of progressive democracy. Had a libertarian been in the mix\textsuperscript{18} or the subject matter been different, only the particular details of the underlying analysis would change. Government institutions and political culture in the United States confound both libertarians and social democrats. Federalism and the separation of powers place similar barriers in the way of any coherent national policy. More generally, constitutional theorists who begin by documenting more than two hundred years of constitutional error\textsuperscript{19} ought to consider whether American institutions are designed to properly realize their particular constitutional vision. One theme of this article is that any theory of American institutions that historically has failed to resonate with American practice is consequently not a good constitutional theory. The consistent incapacity of American institutions to enact or implement social democratic politics is the central challenge to progressive constitutional theory, not the dubious claim that the Constitution protects only negative rights.\textsuperscript{20}

I. WHY NO SOCIALISM (OR SOCIAL DEMOCRACY) IN THE UNITED STATES

The apparent failure of socialism, related political movements, and associated public policies to thrive in the United States has puzzled political sociologists for almost two hundred years. Karl Marx and Frederick Engels spent considerable intellectual energy first exploring whether the United States was fertile soil for communism, and then explaining why movements in that direction were not forthcoming. Werner Sombart's 1906 book, \textit{Why is there no Socialism in the United States?}\textsuperscript{21} remains a social science classic both in the United States and Europe. Seymour Martin Lipset has more recently devoted numerous works to the question of American exceptionalism and the failure of socialism to establish at least a beachhead on the western shores of the Atlantic Ocean. Lipset and other contemporary scholars

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  \item \textsuperscript{18} I gather some were invited.
  \item \textsuperscript{19} For a particularly notorious claim that American judges have systemically misinterpreted the Constitution, see Robert H. Bork, \textit{The Tempting of America: The Political Seduction of the Law} 19-128 (1990).
  \item \textsuperscript{20} Professor West's paper clearly demonstrates that both the Constitution and liberal theory protects some positive rights. West, \textit{Rights}, \textit{supra} note 2; see also Mark A. Graber, \textit{The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory}, 58 Ohio St. L.J. 731, 756-62 (1997) (questioning whether the distinction between positive and negative rights is of any value). For the argument that the Constitution safeguards only negative rights, see Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983); David P. Currie, \textit{Positive and Negative Constitutional Rights}, 53 U. Chi. L. Rev. 864, 889-90 (1986).
  \item \textsuperscript{22} Sombart, \textit{supra} note 9.
  \item \textsuperscript{23} See Seymour Martin Lipset & Gary Marks, \textit{It Didn't Happen Here: Why Socialism Failed in the United States} (2000); Seymour Martin Lipset, American
highlight both the weaknesses of the socialist parties and the weaknesses of social democratic policies in the United States. Americans, they agree, neither vote in significant numbers for a socialist party nor support to a significant degree the policies championed by social democrats. One could stock a good-sized library with books and articles explaining why Americans refuse to adopt and implement policies that would assure the vast majority of citizens meaningful jobs, adequate incomes and other basic goods needed for human flourishing.24

Professor Forbath touches on some ideological and institutional reasons historically given for the failure of social democracy in the United States when he notes how “the hammer lock on Congress that the Southern Democrats enjoyed by dint of their numbers, their seniority, and their control over key committees” derailed popular demands for social citizenship during the New Deal.25 This claim is in part about ideology during this era. Full employment failed because crucial political actors rejected progressive economic policies. Had Southern Democrats recognized the Fourteenth Amendment as the foundation of social citizenship, they would have provided the votes necessary to ensure that all citizens had access to meaningful work. Forbath might also be making a point about the structure of governing practices during the New Deal. Full employment failed, in this view, because institutional rules enabled Southern Democrats to control Congress and Congress to control lawmaking. Had democratic practices in the United States been differently organized, Southern Democrats might not have had the political power necessary to block a popular mandate for full employment.26

Ideological and institutional explanations for dismal American welfare practices offer obvious truths that constitutional thinkers ignore to their peril. Progressive democracy would be realized if all Americans were persuaded by the arguments presented by Professors West, Michelman, Forbath, Elkin, or any other progressive constitutionalist. Americans will enjoy a progressive renaissance when Professor Elkin persuades the appropriate powers to restructure present institutions in ways that privilege social democratic policies. Most progressive theorists, however, focus almost exclusively on ideological barriers to social democracy, attempting to make better or more persuasive arguments for a progressive interpretation of the

Exceptionalism: A Double-Edged Sword (1996); Seymour Martin Lipset, Roosevelt and the Protest of the 1930s, 68 Minn. L. Rev. 273, 273 n.* (1983) (citing his other works on this subject) [hereinafter Lipset, Roosevelt].

24. Some of this literature is discussed elsewhere. See supra note 11 and accompanying text, and infra notes 25, 26 and 38 and accompanying text.

25. Forbath, Caste, supra note 4, at 76.

26. Forbath provides a third, sociological interpretation of why full employment failed. His emphasis on the Southern Democrats highlights how progressive politics may be defeated when they challenge the racial status quo. Id. at 76-89.
Constitution. This practice may have reached the point of diminishing political returns. Proponents of social democracy might more successfully advance their progressive constitutional ambitions for the foreseeable future by identifying, correcting or learning to work within the institutional barriers to social democracy in the United States.

II. SOCIAL DEMOCRACY AND CONSTITUTIONAL NORMS

Progressive constitutionalists emphasize and seek to overcome the ideological barriers to social democracy. As their writings point out, Americans do not enjoy a greater measure of social equality because crucial political actors, Supreme Court justices in particular, have never interpreted the Constitution as mandating that greater measure of social equality. Professor West complains that “[l]iberal-constitutional rights, as they are now conventionally understood and authoritatively interpreted, at least in the United States, do not obligate the state to ensure anything resembling what welfarist ‘good society’ advocates envision.” “Worse,” she adds, “liberal constitutional rights, as they are sometimes authoritatively interpreted in this country and others, actually limit the state’s authority to take action to secure the material preconditions of the good society.”27 Progressives will remove these obstacles to social democracy when they persuade those crucial political actors that liberal constitutional rights require government officials to adopt policies associated with social democracy. Constitutional shortcomings, in their view, are best remedied by making more persuasive constitutional arguments for social democracy.28

All schools of constitutional thought similarly conflate constitutional theory and constitutional interpretation. When law professors identify a constitutional flaw in public policy, they believe the underlying cause to be that the Constitution has been misinterpreted. Abortion is legal throughout the United States, pro-life constitutionalists complain, because the Supreme Court misinterpreted the Constitution in Planned Parenthood of

27. West, Rights, supra note 2, at 1904 (emphasis in original).
28. Professor West has played a vital role in persuading progressives that their constitutional arguments ought to be pitched at the citizenry, rather than almost exclusively at Supreme Court justices. See Robin West, Progressive Constitutionalism: Reconstructing the Fourteenth Amendment 281-89 (1994). Still, her progressive constitutionalism and those of other progressives concerned with the Constitution outside of the courts is almost entirely focused on explaining how the Constitution might be interpreted as supporting progressive policies and not with detailing whether constitutional institutions are particularly good vehicles for realizing progressive policies. For an important exception, see Mark Tushnet, Taking the Constitution Away From the Courts (1999) (proposing that courts are not good vehicles for realizing populist constitutional law).
Southeastern Pennsylvania v. Casey and Roe v. Wade. State and federal officials permit discrimination against homosexuals, advocates of gay rights believe, because neither those officials nor a Supreme Court majority realize that the Constitution forbids such discrimination. Constitutional theorists critique these faulty interpretations by demonstrating the superior philosophical and constitutional groundings of their constitutional vision in ways that will persuade those who are making good faith constitutional mistakes, and expose those constitutional charlatans who are bending the Constitution for their private purposes. Some people may never be persuaded. That problem, however, is one of “constitutional bad faith,” and not a manifestation of a more fundamental kind of constitutional flaw.

The problem with these endless efforts to refine the jurisprudential and philosophical case for social democracy, other progressive policies, or any other political cause, may be that such scholarship reaches the point of diminished political and practical returns long before reaching the point of diminished intellectual returns. Efforts to ground welfare rights in liberal capabilities, the Madisonian commercial republic, or full citizenship provide progressive constitutionalists with an intellectually fresh and interesting approach to constitutional political economy. The distinction between social and equal citizenship, or between liberal and republican foundations for welfare rights, however, is more likely to adjust the views of persons already committed to progressive democracy than to increase that cadre. The American experience with abortion, at least, suggests that the proliferation of new arguments on both sides of an issue is unlikely to change substantially the balance of either public or elite opinion. Many new arguments for and against reproductive choice, and for and against social democracy, offer original perspectives on important subjects. Still, the vast majority of academics who advance new progressive constitutional claims should recognize that their arguments are academic, in the best and worst senses of the term.

The precise impact of both new constitutional arguments and refinements on existing constitutional arguments has rarely been studied with any empirical rigor. During the panel discussion, Professor West challenged my notion of diminishing political returns, forcefully arguing that the debate from liberal capabilities might have
influenced the recent controversies over welfare reform and Second Amendment jurisprudence in the lower federal courts. Her evidence is speculative. So is mine. The best that might be said is that in the absence of any evidence that better constitutional arguments will advance the cause of social democracy, social democrats might instead explore whether the dismal state of American welfare policies might have constitutional causes other than legal and electoral failures to be guided by progressive arguments.

Nonetheless, efforts by progressives and others to refine further justifications for constitutional visions do make some political sense, even when diminished political returns are taken into consideration. Social democracy does not exist in the United States because most Americans accept more capitalistic norms. The United States would be a more egalitarian society if Antonin Scalia, Ruth Bader Ginsburg, Albert Gore, George W. Bush, and most American citizens could be persuaded that the Constitution obligates the government to adopt more progressive policies. Understood less ambitiously, progressive constitutional theorists are engaging in a constructive dialogue over what the left should do if and when the left were ever in a position to determine welfare policies in the United States. Exploring the judicial responsibility to realize progressive democracy, a rather silly endeavor if understood as aimed at converting the present Court, may shape decisively the legal conscience of the next generation of liberal justices. Progressive constitutionalists are thus constructing a "Shadow Constitution," an effort analogous to construction of the shadow cabinets established by the party out of power in the United Kingdom.

The practice of constitutional theory as constitutional interpretation also reflects an appropriate division of academic labor. Law professors (and political theorists) are experts in making arguments about constitutional political economy and interpreting texts. The institutional prerequisites of social democracy, however, are outside their bailiwick. Such a determination is a task for more empirically oriented social scientists. That progressive constitutional theorists are best able to correct jurisprudential misunderstandings inhibiting progressive democracy does not entail a belief that these misunderstandings are the main reason why social democracy has not flourished in the United States. Progressive constitutional theory is grounded only in the belief that progressive constitutionalists are best able to knock down jurisprudential barriers to social democracy, and not in the belief that those barriers are the main bar to social democracy in the United States.

34. See transcript on file with the Fordam Law Review.
This argument on the division of academic labor identifies constitutional theory too closely with constitutional interpretation. That practice has been expanding in recent years as, inspired by the Princeton school of constitutional thought, scholars have recognized that constitutional theorists may ask "WHAT is the Constitution that is to be interpreted," and "WHO are its authoritative interpreters," as well as "HOW do (and should) they go about their interpretive tasks."\(^\text{36}\) Still, this expansion of the scope of constitutional interpretation hardly exhausts constitutional theory. The core of the constitutionalist project is to design institutions that privilege some results at the expense of others. While constitutionalism highlights such questions of political philosophy, as what ought to be the goals of a good society, it also raises questions of social science, such as what institutions are most likely to reach those or more feasible goals at given times and places. When a polity consistently refuses for a long period of time to adopt certain policies, the constitutional reason is probably not simply a coincidental and unfortunate combination of constitutional mistake and constitutional bad faith. Rather, the better inference is either that the Constitution was not designed to privilege those policies or that the Constitution has a severe design flaw.

### III. SOCIAL DEMOCRACY AND POLITICAL INSTITUTIONS

Forbath's observation that Dixiecrats in Congress frustrated President Roosevelt's efforts to secure a full employment bill provides an institutional explanation for the failure of progressive democracy in the United States.\(^\text{37}\) Had governing institutions been structured differently, Dixiecrats would not have had the political power necessary to foil popular demands for social citizenship. Professor Elkin offers a similar institutional explanation, claiming that unwarranted economic inequalities exist in the United States partly because business enterprise presently exercises too much power in the American polity.\(^\text{38}\) The Elkin article does not maintain either that persons who control productive assets are making constitutional mistakes or that the Chamber of Commerce acts in bad constitutional faith. Instead, he argues that our institutional design is faulty, and that public policy must reflect a better balance between the concerns of a secure and confident middle class and the concerns of a business class whose privileged position is more modest.\(^\text{39}\) Social democrats informed by Forbath's work might similarly call for a more equitable distribution of power in Congress. These progressive constitutional

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37. Forbath, 
39. Id.
reforms are aimed at the process by which policy is made, not at beliefs about what policies should be made.

Institutions matter. Both the Forbath and Elkin papers highlight how the structure of government decision-making influences public choices among different constitutional visions. Were business enterprise to have less political power, more progressive policies might result without an accompanying change in anyone's policy preferences. American political economy might be more egalitarian had the Constitution vested absolute power in either President Roosevelt or Professor Elkin. More seriously, other governing arrangements equally consistent with American democratic values would have yielded more social democratic policies during the New Deal and perhaps at other times in American history. Simple majority rule would have sufficed to bring more social democracy to the United States during the 1940s. Americans would likely enjoy greater economic equality if business enjoyed a less privileged position than at present.

The persons responsible for the Constitution recognized that institutional design played the central role in securing wise and just government. They understood that Americans would not always be governed by persons guided by the best principles of constitutional political economy. "Enlightened statesmen," Madison famously declared, "will not always be at the helm." While every effort was made to constitutionalize practices that would most likely result in the best persons obtaining public office, the Framers attempted to create governing institutions that would maximize good government even when the governors were not particularly good. As Hamilton proclaimed in The Federalist No. 31, "all observations founded upon the danger of usurpation, ought to be referred to the composition and structure of the government, not to the nature or extent of its powers."

Leading Federalists also advised against limiting power textually because they regarded constitutional language, standing alone, as an ineffective means for restraining public officials. Madison, Jack Rakove documents, "simply regarded the adoption of a federal bill of rights as an irrelevant antidote to the real dangers that republican

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40. Forbath, Caste, supra note 4, at 1, 6.
43. The Federalist No. 31, at 197 (Alexander Hamilton).
politics would generate.”45 Many Framers felt similarly. Roger Sherman informed New Englanders that “[n]o bill of rights ever yet bound the supreme power longer than the honey moon of a new married couple, unless the rulers were interested in preserving the rights.”46 Mere legal recognition could not secure fundamental liberties in the long run, other Federalists declared, because parchment declarations could be ignored or rescinded.47 “[N]either would a general declaration of rights be any security,” Civic Rusticus wrote, “for the sovereign who made it could repeal it.”48 Whether economic or political rights were protected, all agreed, depended on institutional design and political culture. The “security [for rights],” Hamilton bluntly stated, “whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.”49

Hamilton regarded “the [C]onstitution” as “A BILL OF RIGHTS” in part because it “specific[ied] the political privileges of the citizens in the structure and administration of the government . . . .”50 Forty years after ratification, Madison reminded delegates to the Virginia State Constitutional Convention that “[t]he only effectual safeguard to the rights of the minority, must be laid in such a basis and structure of the Government itself.”51 Rather than limit government legally, the Framers of the Constitution of 1787 sought to restrict national power and protect individual rights by ensuring that only persons of particular abilities and interests made political decisions. As Herbert Storing noted nearly two hundred years later, “the substance [of the

46. Friends of the Constitution: Writings of the “Other” Federalists—1787-1788, at 180 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) (emphasis in original); see also Rakove, Original Meanings, supra note 45, at 327 (agreeing that the Federalists believed that the system of representation safeguarded democracy rather than any written bill of rights).
48. 8 Documentary History, at 334; see id., at 337.
50. Id. at 581 (emphasis added); see Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era: Police Powers Jurisprudence 203 (1993); Walter Berns, Judicial Review and the Rights and Laws of Nature, in 1982: The Supreme Court Review 66 (Philip B. Kurland et al. eds., 1983) (the Framers recognized that “the most efficient way to limit power was not to withhold powers—although they did that too—but to organize power in a particular way.”).
Constitution] is a design of government with powers to act and a structure arranged to make it act wisely and responsibly. It is in that design, not in its preamble or its epilogue," he emphasized, "that the security of American civil and political liberty lies."\(^{52}\)

This Madisonian perspective offers several reasons why social democrats should move from thinking about textual guarantees for progressive policies to the institutional foundations of progressive politics. Original constitutional theory provides both interpretive and pragmatic reasons why progressive constitutionalists must worry at least as much about whether constitutional institutions at present are particularly good vehicles for achieving and maintaining a social democracy as whether some constitutional provision or the Constitution as a whole mandates social democracy. The Constitution of 1787, as interpreted by Publius, did not textually guarantee the material preconditions of the good society. Rather, the constitutional concern underlying *The Federalist Papers* is whether government is structured in ways most likely to yield a sound political economy. Publian constitutionalism adds that even if the Constitution of 1787 or an amended Constitution at some later date guaranteed the material preconditions of the good society, that parchment provision would be a mere scrap of paper in the absence of the institutional capacity to provide the requisite assistance. The right to the material preconditions of the good society is valuable only if institutional capacity and commitment exist to realize that right.

Considerable contemporary scholarship has emphasized that American governing institutions, in practice, have obstructed socialism and social democratic policies, and that constitutional institutions at present have only a limited capacity for fostering progressive policies. Both socialism and social democracy typically require a strong, politically active labor movement. Late nineteenth century efforts to fashion such a movement were frustrated by the constitutional structures established in 1787. Victoria Hattam is one of several scholars who insists that "business unionism... was the product of the distinctive institutional structure of the American state."\(^{53}\) In her view, American laborers began emphasizing private bargains with employers rather than governmental reforms aimed at full employment because the American practice of "judicial regulation of industrial conflict" meant that "even successful political campaigns could not ensure a corresponding change in government policy toward


Forbath believes that "courts, legal doctrine and language, and legal violence played a crucial, irreducible part in shaping the modern American labor movement." George Lovell challenges this view, suggesting that the legislation struck down by courts was not as friendly to labor as labor sometimes suggested, and would not have been passed had some legislators not been somewhat confident of adverse judicial interpretation. Still, most commentators generally agree that the particular way in which politics was organized during the late nineteenth and early twentieth centuries played a significant role in the realization and frustration of social democratic policies. “[S]tructural features of the U.S. state,” Lovell concludes, “require that a very high threshold be crossed before political influence leads to real changes in policy.”

Institutional analysis plays crucial roles in more general analyses of why there is no social democracy in the United States. Sombart’s seminal study places great emphasis on the two-party system. A strong labor party did not develop in the United States, in his view, because Americans were reluctant to throw away their votes on third parties and because the two major parties were typically willing to co-opt less radical worker demands and worker leaders. Lipset highlights how Franklin Roosevelt during the New Deal was able to co-opt more radical democracy by incorporating moderate worker demands in his program. “[T]he effects of a two-party electoral system centered on the direct election of the President,” Lipset declares, “have made it extremely difficult for any group to channel social discontent into an independent third party that appeals to class interests.”

Contemporary scholars place particular emphasis on the ways American federalism has contributed to the failure of progressive democracy. David Brian Robertson claims that “American federalism retarded state social expenditure, skewed policy design, and erected obstacles to the enactment of public health insurance in any state.” A race to the bottom took place during the Progressive era, he observes, when states considering health and other legislation considered that businesses might respond to more progressive laws by moving to states with less imposing and less expensive legislation. Americans might have supported progressive health policies had a

54. Id.
57. Id. at 83.
58. Sombart, supra note 9, at 33-54.
59. Lipset, Roosevelt, supra note 23, at 274.
national option been available, but the competition for business fostered by federalism compelled many legislators to support less progressive policies than they perhaps believed were warranted. Scholars also hold federalism responsible for weak national parties, as candidates for state and national legislative offices tailor their policy prescriptions to local needs. "American decentralized political parties," Robertson and other scholars note, "worked against centralized, uniform social policy designs."61

These institutional explanations are particularly powerful during those historical periods when American citizens held the same commitment to social democracy as citizens in other countries where social democratic policies thrived. Robertson notes that during the early twentieth century "the gap between the American and European welfare state widened significantly," even though "the forces for social reform ... in the United States ... resembled those in England, which at the time was laying the foundations for a model welfare state."62 His study of health policies concludes that Americans could not achieve a social democracy during the twentieth century because American institutions required social democratic measures to have greater support than European institutions.63 Sven Steinmo similarly notes that had the United States had a parliamentary rather than a presidential system of government during the middle twentieth century, the United States would most likely be enjoying European-style social democracy. "Consider for a moment how different America's social welfare state would be today," he declares:

If Presidents Franklin Roosevelt, Harry Truman, John Kennedy, and Lyndon Johnson could have called the Democratic party leadership together, and with this small group of elites, could have designed and implemented social welfare policies ... without needing to tailor these programs to the demands or objections of particular members of Congress and the interest groups they represented.64

Social democracy, in this view, failed in the United States because social democrats had to overcome more hurdles than their counterparts in other countries. Had England been a presidential state with numerous constitutionally autonomous federal districts and the United States a parliamentary system, scholars might be puzzling over why the English do not enjoy American-style social democracy.

61. Id. at 271.
62. Id. at 261.
63. Id. at 285-86.
Progressive constitutional theory should acknowledge the mismatch between the constitutional obligation to secure the material preconditions of the good society and the capacity of constitutional institutions to enact and implement the progressive policies that social democrats believe necessary to realize that constitutional end. American constitutional institutions place unique obstacles in the path of social democrats seeking social reform. European socialists must simply win control of the national legislature. Social democrats in the United States must gain and maintain control of the presidency, House, Senate, federal judiciary and a substantial majority of state governments. The same "fragmentation of political authority" that prevents coherent policy-making also promotes incoherent policy implementation. Gerald Rosenberg has famously demonstrated that courts in the United States are almost never capable of implementing broad scale progressive reform. Those who claim that the judicial incapacity to promote social democracy proves that such matters should be left to the elected branches of government overlook social science evidence suggesting that the elected branches of government are similarly incapable of implementing broad scale social reform whenever significant opposition to that reform exists. Moreover, scholars note, government institutions poorly designed to do a task tend to foster blanket assertions that government should not be responsible for that task. Some scholarship on welfare suggests that institutional incapacity, rather than ideology, is the primary source of American hostility to progressive social policy. "[W]hen a state does something badly," Steinmo's analysis of redistributive politics astutely concludes, "this becomes an argument for why the state should do less."

That constitutional institutions presently obstruct the realization of progressive policies hardly refutes claims that the Constitution permits or even mandates some form of democratic socialism. Few constitutional institutions presently promote their original purposes efficiently. The Senate, expected to resemble the Presidency, soon morphed into a legislative body much like the House of Representatives. Electors were originally expected to exercise some judgment. They do not and never have. Thus, nothing in

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65. Id.
69. Steinmo, supra note 64, at 127.
71. The Federalist No. 68, at 459 (Alexander Hamilton) (Jacob E. Cooke ed.
constitutional theory forbids claims that constitutional institutions are suffering from diminished capacity to realize their original constitutional purposes. The point is that after 200 years no one should blithely assume that ancient constitutional institutions are the best, worthy, or even adequate means for realizing constitutional purposes. The new "science of politics" promised by The Federalist Papers\textsuperscript{72} may be antiquated. Institutions thought to be the best means to promote human flourishing may no longer do so because they were poorly designed or because intervening changes have reduced their utility.

IV. NEW CONSTITUTIONAL THEORY

The present constitutional system in the United States gives social democrats three means for achieving their purposes. They might simply try harder. American progressives might accept that they must be more persuasive than social democrats elsewhere to overcome the Constitution's unfortunate institutional barriers to progressive policy. Alternatively, social democrats might adjust their proposals to existing constitutional institutions. Rather than ask what is the best constitutional understanding of the material preconditions of the good society, progressive constitutionalists might ask what is the best constitutional understanding of the material preconditions of the good society that American constitutional institutions are presently capable of realizing. Finally, social democrats may seek to adjust constitutional institutions to satisfy their constitutional visions. Some legislative means exist for reducing the number of veto points that obstruct social democratic measures. Strengthening congressional leadership at the expense of sub-committees, for example, might facilitate more social welfare legislation if the left ever regained control of Congress. Other efforts to realize progressive politics may require constitutional amendments or more fundamental restructuring of the constitutional order. Abandoning federalism, for example, would probably mean abandoning the Constitutions of 1787 and 1868.

The next generation of progressive constitutionalists should encourage progressives to choose among these approaches. Constitutional theorists who engage in this commentary should not reduce questions about the material conditions of the good society to questions about the constitutional responsibilities of government. Progressive constitutionalists must also engage in the serious empirical analysis necessary to determine the most progressive policies that present American institutions are capable of passing, implementing and maintaining, as well as the most progressive institutional reforms contemporary Americans are willing to support.

\textsuperscript{72} The Federalist No. 9, at 51 (Alexander Hamilton).
Such analyses should recognize that many institutional reforms that increase the likelihood that progressive policies will be passed and implemented also increase the likelihood that regressive policies will be passed and implemented. The same system of multiple veto points that frustrates social democrats also frustrates libertarians. Ronald Reagan could not make further dents in the social safety net partly because Democrats continued to control enough veto points in government to prevent really radical proposals from becoming law or being implemented.\textsuperscript{73} Institutional reforms that potentially promote some progressive causes may have other dangerous side effects. As Professor Elkin points out strengthening institutions that prevent factional government may make it harder to serve the public interest, as power is dispersed that must be concentrated if there is to be any sustained effort to serve these broad concerns.\textsuperscript{74} Providing constitutional actors with a realistic appraisal of the actual beneficiaries of institutional reforms is thus a vital task for progressive constitutional theory. Otherwise, the left risks fighting for measures that in practice will empower the right.\textsuperscript{75}

CONCLUSION

The Framers of the Constitution promised a new science of politics, one "by which the excellencies of republican government may be retained and its imperfections lessened or avoided."\textsuperscript{76} Contemporary constitutionalists, oblivious to the Publian disdain for parchment barriers, substitute textual exegesis and political philosophy for the political science of the foundation generation. The result is theoretical literature that asserts constitutional promises that present constitutional institutions may be unable to keep. The Framers would have rejected this practice of reducing constitutional theory to constitutional interpretation. "Having learned so much from the experience of a mere decade of self-government, and having celebrated their own ability to act from 'reflection and choice,'" Jack Rakove notes, "would they not find the idea that later generations could not improve upon their discoveries incredible?"\textsuperscript{77} Constitutional theory needs a new science of politics, one that promises to inform both progressive and other constitutional theorists whether the wonderful ideals they find in the Constitution remain

\textsuperscript{74} Elkin, \textit{supra} note 3, at 1961-63.
\textsuperscript{75} See Mark A. Graber, \textit{Conflicting Representations: Lani Guinier and James Madison on Electoral Systems}, 13 Const. Comment. 291 (1996) (suggesting that conservative evangelicals, not persons of color, will be the main beneficiaries of Professor Guinier's institutional reforms of the American electoral system).
\textsuperscript{76} The Federalist No. 9, at 51 (Alexander Hamilton).
\textsuperscript{77} Rakove, \textit{Original Meanings}, \textit{supra} note 45, at 367.
capable of being realized by the present Constitution. "A neutral and
durable principle may be a thing of beauty and a joy forever," John
Hart Ely might have said, "[b]ut if it lacks connection with any
[constitutional institution] . . . it is not a constitutional principle."78

Notes & Observations