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[Commentary]

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COMMENTARY

Bringing the State into Constitutional Theory

Would European Models of Government Make America More Democratic? A Skeptical View

William E. Forbath

Constitutions deal with the highest of all political stakes. They are, as Sheldon Wolin once observed, about power, what it is to be used for, by whom, and according to what understandings and justifications. Given the stakes, constitutional theory and scholarship ought to be as broad and probing as possible, and Professor Griffin deserves applause for urging that the ambit of discussion should not be restricted—even among legal scholars—by a single-minded focus on the courts.

In fact, a growing number of constitutional law scholars have embraced this view. But Professor Griffin suggests an avenue for broadening constitutional law scholarship that is fairly new to the law schools. Griffin urges us to consider constitutional reforms aimed at revamping the structure and operation of the American state. The view that the American state is an archaic one, hobbled by its 18th-century framework and ill suited to contemporary needs, has produced an important literature by political scientists and sociologists, and Griffin does an admirable job of introducing it to legal scholars, synthesizing the main insights into an intriguing narrative about American political development.

Griffin insists that his provocative essay is not normative but simply

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an exercise in historical description and explanation. In fact, however, the historical account implies a diagnosis of and prescription for what Griffin and other students of American politics see as the major ills of American democracy. The United States, according to this view, lacks institutions adequate to the tasks of democratic government. It lacks political parties with mass memberships that can “aggregate and channel” the people’s interests and “transmit authority from the people to their representatives.” The key reason for this predicament lies in the rules laid down by our 18th-century constitution. For these rules—“federalism, separation of powers, checks and balances”—have prevented the development in the United States of the kind of robust and programmatic political parties that emerged in England and much of western Europe during the late 19th and early 20th centuries. During that era American political parties grew weaker, not stronger, and since then their condition has only worsened. As a result, the modern American state has come to rest on a polity of fragmented interest groups. Parties must win elections, interest groups need not. Yet, in the United States it is the latter that hold sway over policy-making, and they represent constituencies that are both narrower and wealthier than “the people” at large. If we want to revitalize the parties, and thereby, democratize American government, Griffin argues, we must undertake basic constitutional reforms.

Griffin offers this account as a prologue to more explicit normative arguments and reform proposals. He mentions no particular reforms, but the general viewpoint seems clear. Differences between American and European state structures supply many key comparisons (both tacit and express) in Griffin’s argument about why American government is so undemocratic. It would seem, then, that Griffin hopes to make the American state more like European ones. But European experience does not correspond to many of Griffin’s assumptions about it. European actualities, and current trends in democratic thinking and reform there, prompt me to question some of Griffin’s key causal claims as well as the reform outlook that seems implicit in his theory. A good deal of what Griffin says about the infirmities of democracy in America is compatible with different visions of change. This comment cautions against a too hasty embrace of European models.

I. THE HISTORICAL ARGUMENT

Was the Constitution crucial in bringing about the relative feebleness of political parties in 20th-century America? Griffin’s essay begs some important questions. As he acknowledges, during most of the 19th century, parties in the United States were probably better at mobilizing the citizenry and controlling the levers of government than were parties anywhere

else in the world. Early 19th-century America pioneered universal white male suffrage and invented the mass-membership party. Until the 1890s voter participation rates in national elections were extremely high—as high as in virtually any European nation today. Thus neither federalism, separation of powers, nor any other aspect of the Constitution prevented the development of robust parties.

To be sure, these were not primarily programmatic parties; their ties to constituents rested as much on patronage as on policies. But that was equally the case with contemporary parties abroad. The difference was that outside the United States party patronage was an upper-class affair, because the working classes were not yet enfranchised. By the time male workers in England gained the vote, that country was in the midst of major civil service reforms, and “spoils” or patronage was not available as a currency to draw the new mass electorate into English political parties. Accordingly, the Liberal and Conservative parties alike relied on class-based programmatic appeals to bring the millions of new voters into the electorate; so did both socialists and Bismarckian conservatives in Germany.

Efforts at more programmatic and class-based party politics were not lacking in the United States. Late 19th-century labor and farmer organizations sought with some success to create new parties or recast old ones along such lines. But the elites’ response was different. Their fear of parties of “class feeling” like the Populists and the Knights of Labor and their revulsion at immigrant-based urban political machines combined to drive a decisive portion of America’s political elites (including middle-class liberals and reformers) to attack democratic politics itself. Reformers abroad sought to mobilize lower-class voters into party organizations; their American counterparts sought to *demobilize* and disenfranchise those voters. As Griffin notes, they succeeded so well that American party organizations and voter participation rates have never recovered.

If the late 19th and early 20th centuries saw the demise of robust, mass-membership parties in America, this strategic choice by the country’s various political elites was a principle reason. Yet Griffin nowhere shows how the Constitution was crucial in shaping that choice; he nowhere suggests how a more European form of government might have transformed the situation. Such a counterfactual argument would inevitably be speculative and maddeningly complicated; for, among other things, one cannot neatly separate the identity and interests of a nation’s political elites from its forms of government. Nevertheless, such a thought experiment seems called for by Griffin’s claim.

He would need to show, for example, that the Constitution was critical to the disenfranchisement of Black and poor white voters in the turn-of-the-century South. I am doubtful that a somewhat more centralized and unified structure of government would have produced a Northern leader-

ship in the 1890s and 1900s that would have intervened on behalf of biracial democracy in the South, instead of condoning its destruction. Likewise, although I think this case could be made more plausibly, I would need to be persuaded that a more “European” structure of government would have produced American political and cultural elites that would have chosen to embrace—rather than striving to shut down—robust party politics in the major cities and regions with immigrant working-class majorities.

II. CONTEMPORARY ILLS AND REMEDIES

Of course, the historical record may be more equivocal than Griffin suggests, and still he may be right that federalism, separation of powers, and checks and balances are responsible for many baleful aspects of present-day government: interest group dominations, terribly low voter participation, and what Griffin calls the “politicization of civil society.” He may be right that these aspects of the Constitution work to thwart the possibility of robust, programmatic parties as well as the citizenly confidence and participation such parties can muster. But I shall suggest that, at key points, his views are partial and ingenuous; we agree on the existence of a “crisis” in American democracy but differ as to both diagnosis and remedy.

Griffin seems to assume that strong programmatic parties are the way that social needs and demands are successfully communicated to, and accommodated by, the state in Western Europe but not in America. The great flaw in the American system lies in the fact that nonelectoral, interest group organizations carry out these functions. Griffin ignores that nonelectoral, private interest groups play a *greater* policy-making role in nations that have all the governmental virtues he prizes; he ignores the phenomenon of corporatism in European governance. The countries in Europe with the highest voter participation rates and the most broadly based parties are those in which party government coexists with national organizations of workers, businesses, professionals, and others that bargain over many key terms of public policy and social provision. The government may participate but often simply waits in the wings.

Contrary to Griffin’s view, it may be that effective, democratic policy-making and administration *require* a substantial role for “private” (i.e., non-state-based) associations. What makes the difference in terms of democracy may not be whether “interest groups” shape policy but rather the character of the “groups” and “interests” involved. Americans like to quote Tocqueville about our vigorous tradition of voluntary associations. Yet America notably lacks strong and broad-based associations of working people, businesses, or other groups. Without such associations, without

innovations in the organization of “private” as well as “public” institutions and the creation of new frameworks and incentives for broad mobilization and participation, it does not seem very likely that a more centralized and unified structure of national government would lead to a more democratic polity or more democratic policy formation in the United States.

Consider England’s recent past. England has a highly unified, centralized state. No one could say that English government suffers from divided powers and lacks decisional capacity. Moreover, of all European countries England has the purest form of “party government.” Yet the poorer 50 percent of England’s eligible voters are virtually as disaffected as their American counterparts, and a party with less than half the electorate behind it has proved able to work its will on society, unimpeded by “checks and balances” or by the need to forge a broader public consensus behind its policies. Small wonder that democratic thinkers in England have little good to say about the English state. Indeed, like Griffin, many of them have begun serious discussions of weighty constitutional reforms. But their constitutional thinking runs in the opposite direction. They champion a “pluralization” of governmental and private power; they point to the American Constitution as a model of republican liberty.

In democratic theory, as elsewhere, then, neighbors’ vices can easily appear as foreign virtues. Thatcher’s England stands as a warning that a less divided, less fragmented American state could prove less a vehicle for reviving democratic politics than a more effective weapon for the richer segments of society to wield against the poorer.

France’s recent past suggests other important caveats. Griffin writes that in the 1960s America suffered a “crisis of public authority” and a “politicization of civil society” marked by protest movements and public disorder. The reason was this. New groups arose with new demands on the polity and because of the absence of European-style national political parties, party politics and peaceful elections could not address the demands of these groups and resolve their conflicts with established groups and institutions.

The problem with this diagnosis is that the crisis Griffin describes was, in fact, a trans-Atlantic one. European political scientists and commentators have produced a parallel account of the erosion of traditional political parties and the resulting “politicization of civil society” (even the phrase has a European ring). France’s “crisis” found expression in the mass protests of May 1968 and the emergence of a variety of social movements utterly at odds with the traditional parties of the Left. Yet France had programmatic parties, multimember districts, a centralized state—in a word, almost all the things whose absence, Griffin claims, caused the crisis

in the United States. From this it seems to follow that the key causes were different from those Griffin identifies.

Since the 1960s not only in the United States and France but all over Europe political parties have found it difficult adequately to address the new social movements and, more broadly, the new claims and conflicts of civil society: the uprisings of student movements; the conflict between economic growth and environmental concern; the demand by women's groups for remedying gender injustices; the plight of nonwhite "under-classes" and the rise of racial antagonisms in our increasingly violent great cities. This has been so, moreover, even in those European nations which, *unlike* England or France, have been exemplars of social democratic-style corporatism.

That is not to say that America would not be a vastly more democratic place if it had such a regime, but rather than in relation to the new social movements, even this best of all current state-party-society regimes suffers a case of impaired democratic legitimacy similar to America's. What is more, the social democratic model appears to be crumbling. Even where social democratic ideals and institutions have been strongest, as in Sweden, "the market" seems ascendant. To offer any account of why this is so risks overgeneralization in a comment already tainted by that vice. Nevertheless, a glance at some of the sources of *this* crisis is useful. I will offer a shorthand version of such an account as added support for my concluding suggestion: that democracy-minded American constitutional reformers may do better by working within the radical strains of American constitutional traditions than by building on European models.

The social democratic model is crumbling, in part, because of the democratic deficits just mentioned, because left-wing parties have failed, in Griffin's terms, to "aggregate" the interests and convictions of new social groups and movements. The model was designed around an older architecture of social classes and identities, and that architecture has been undermined by the transition from "industrial" to "postindustrial" and from "national" to "transnational" economies. Some of the main dimensions of this complex transition are these: the increasing internationalization of capital and financial markets, the global relocation of heavy industry, the growth of services and electronic communications; and, concomitantly, the loss of confidence in macroeconomic management, the growing stratification of skilled and unskilled workers in postindustrial sectors, and increasing income inequality even within industrial sectors.

Quite apart from its democratic deficits, the social democratic model—like the more modest social controls on the market forged in the United States—has been undermined by this increasingly internationalized economy. In light of changed economic conditions, serious democratic thinkers in social democratic countries are not aiming at simply

rehabilitating the old state-party-society structures and relations. The end of the mass production era in industry points toward new forms of democratic renewal with a greater emphasis on democratizing financial and investment decisions and the internal organization of firms. An increase in firm-level, as opposed to national, bargaining seems imperative; yet, at the same time, growing inequalities call for new and robust redistributive measures at the level of national government. With this new appreciation for decentralization in the realm of industry has come a similar new appeal for political decentralization; likewise, the new social movements have made a more pluralistic outlook seem essential to renewing party institutions and ideologies.

Finally, the prospect of a “United States of Europe” has put a supranational form of federalism on the democratic agenda. The challenge is to create a continental polity to match the emerging pan-European market. “Euroleftists” insist that this new polity must prevent a race to the bottom among member states in regard to social standards. However, with E.C. president Jacques Delor, they also insist on the seemingly un-European principle of “subsidiarity”: “what can be done at the company level should not be done elsewhere, what can be done at the regional level should not be done at the national level and what can be done in the member states should not be done at Brussels.”

With federalism, pluralism, and decentralization bursting out all over, it seems an odd time for American democrats to be ranging abroad to borrow models of centralized, unified government. Here and abroad, new combinations of centralized and pluralized power seem more desirable and more feasible than the received European models, and the radical populist strains of American constitutionalism are rich with such ideas—richer than the more statist European traditions.

Griffin is right; strong parties are imperative—nothing in our post-industrial, “postmodern” condition undermines that insight. We all have multiple social identities and interests, but as citizens we also need encompassing associations, and thus far parties are the only such game in town. But a sounder way to encourage broadly based parties might simply be to sever the bonds between wealth and party influence. Easing America’s uniquely restrictive rules of access to voting and the electoral process, passing strict campaign finance regulation, instituting public financing of elections—all these might prod the existing parties, or enable new ones, to revive the tradition of mobilization. European models of government, in short, are not the only route to strong parties. And they may lead in other unhappy directions.