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ECONOMIC AND SOCIAL RIGHTS: A CASE OF DISCIPLINARY DISCONNECT

Eileen McDonagh *

JEFF KING, *JUDGING SOCIAL RIGHTS* (2012). Pp. 400. Hardcover \$114.00.

KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* (2012). Pp. 352. Hardcover \$85.00.

In these two remarkable books, *Judging Social Rights* by Jeff King,¹ and *Constituting Economic and Social Rights* by Katharine G. Young,² we are presented with new perspectives for analyzing the relationship between social rights and constitutionalism. Both authors argue that it is important to constitutionalize these rights, and they then engage in sophisticated analyses about how to implement these rights in the context of a complex set of government and nongovernment institutions, practices and actors, all within the context of comparative and global frames.

Yet while there is considerable agreement connecting these two books, they also exemplify a disciplinary disconnect between the fields of constitutional and social science in the context of welfare state scholarship. Most researchers in each discipline conceptualize public social provision to be a constitutive component of democracy, and in each there is a vast literature that seeks to explain the origins of the welfare state and the mechanisms that hinder or promote a robust public sector. However, despite common goals, as will be evident in this essay, the models and explanations employed by each discipline rely on orthogonal sets of variables, problems, and methodologies. In addition to reading these two very important books, therefore, this essay invites readers also to turn their attention to the social science literature for comparative perspectives defined by more than cross-national orientations.

I. JUDGING SOCIAL RIGHTS

In *Judging Social Rights*, Jeff King argues that it is important for countries to constitutionalize social rights; that is the beginning, obviously, not the end of what matters. He focuses instead on the importance of the role of courts in conjunction with other government institutions. In particular, he develops a theory of *judicial restraint* structured around four principles: democratic legitimacy, polycentricity, expertise, and

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1. JEFF KING, *JUDGING SOCIAL RIGHTS* (2012).

2. KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* (2012).

flexibility.³ When these principles are taken together, he argues that they allow for judicial restraint based on an incremental approach to adjudication.⁴ He argues that what best promotes the implementation of social rights are courts that proceed slowly rather than quickly when addressing social rights policies.⁵ In so doing, King makes a distinction between social and economic rights and policies.

King accepts the claims that social rights are human rights, and begins his analysis from that standpoint.⁶ That is, he endorses the view that social rights inclusive of housing, education, health care, and social security should be included in constitutions, but that judges should be given broad powers to interpret and to enforce these rights, including striking down legislation.⁷ He argues that there is a theory of judging that must be used as a foundation for discussing how social and economic rights can be implemented.⁸ It is this theory of judging that is important so that constitutional rights are a necessary, but not sufficient condition, for implementing social and economic rights. What is also necessary is a theory of judging. One of King's main contributions, therefore, is pointing out that we need to look at different mechanisms for implementing social rights as entitlements than perhaps we do for other types of rights.⁹

King notes that although courts have not always been successful in guaranteeing social and economic rights, the judicial system nevertheless should remain a focus of analysis.¹⁰ Courts, for example, focus on issues, which compels the state to address rather than to ignore social and economic rights. Courts also engage in principled reasoning, so that interpretations of standards and arguments for the resolution of conflict have to be explicit. Courts also have constitutional authority, and this can produce jurisdiction over executive and legislative action in terms of remedial flexibility when it comes to deciding the outcome of conflicts. In addition, courts are, relatively speaking, independent and impartial compared to other branches of government that are more grounded on partisan and political interests. Courts also are an arena that, relatively speaking, has procedural fairness as a norm, regardless of the substance of what is decided. Courts, therefore, can promote participation for claimants by providing an arena where various sides of an issue can be heard in public, thereby giving some attention to a variety of perspectives. Courts also can, according to King, play an expressive, even educative role, by bringing out into the open major policy questions.¹¹ Courts as the site of constitutional litigation, therefore, publicize social rights controversies in a way that can provide salience to the issues. And, finally, courts promote inter-institutional collaboration in the context of rights discourse and deliberation. For these reasons, King believes that courts can be an arena not only of implementation of social and economic rights, but actually social change for increasing the application of those rights in a political system.¹²

3. See KING, *supra* note 1, at 119-286.

4. *Id.*

5. *Id.*

6. See *id.* at 20-41.

7. See *id.* at 59-96.

8. See *id.*

9. See *id.* at 17-58.

10. *Id.* at 59-60.

11. *Id.* at 60-63.

12. *Id.* at 63-85.

The question, of course, for King, is how do courts make use of their authority and jurisdiction? He argues that what is most important is that constitutionalized social and economic rights have to be interpreted. And they have to be interpreted as based on an *incrementalist principle*.¹³ He defines a right to social and economic benefits as starting with the agreement that everyone has a right to adequate social and economic provision.¹⁴ And the second principle is that everyone agrees that the state shall take reasonable measures with available resources to implement that right. Thus, King makes a distinction between the scope of the interest or the right and the nature of the obligation of the state in respect to promoting that right.¹⁵ In addition, he draws attention to the difference between absolute obligation on the part of the state and qualified obligations, where the latter means that people have a right to health care, for example, as national laws and practices establish that right.¹⁶ King's conclusion is that it is not the scope of social rights that most fundamentally concerns judges, but rather the implementation of qualified obligations on the part of the state to provide benefits to people.¹⁷

When addressing the distinction between principles and policies, King draws upon Ronald Dworkin's definition of a policy as a kind of standard that "sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community."¹⁸ By contrast, "[A] 'principle' [is] a standard that is to be observed, not because it will advance . . . an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."¹⁹ King, however, focuses more on justices' abilities, employing a concept he refers to a *judicial restraint*. He sees the use of judicial restraint as a crucial institutional mechanism for problem solving, to be used in conjunction with other institutions.²⁰

Thus, King defines democracy as a form of government in which there must be a respect for basic social rights, and that political equality must be what legitimizes democracy.²¹ He argues, therefore, that legislation must be adopted in a democracy that manifests the background, political cognitions, and entitlement to political equality in relation to social rights, and that legislatures must be given strong decision-making authority.²² That assumes, of course, that there has been a legislative focus on rights issues and that the relationship of the legislation to politically marginalized groups also must be considered. He also argues "that constitutional judicial review can provide a workable and proportionate response" to those problems related to the implementation of social rights, particularly if judicial review is necessary to secure the needs of marginal groups.²³

King also argues that a strong welfare state necessarily includes the regulation of

13. *See id.* at 289-325.

14. *Id.* at 98.

15. *Id.*

16. *Id.* at 103.

17. *Id.* at 117-18.

18. *Id.* at 125 (citing RONALD DWORIN, TAKING RIGHTS SERIOUSLY 22 (1978)).

19. *Id.*

20. *Id.* at 150-51.

21. *Id.* at 152.

22. *Id.* at 153.

23. *Id.*

commerce and redistributive tax and spending policies.²⁴ However, this view of the welfare state is sure to be viewed as diametrically opposed to the goals of some, such as the wealthy, and, therefore, it will be targeted by lobbying interests. Thus, although redistribution is a crucial premise of the welfare state, it is not a premise that all members of society endorse, thereby complicating legislative democratic processes oriented toward meeting the needs of marginal groups. Too often, for example, groups that are in need can be rhetorically dismissed as “welfare queens.”²⁵

To solve the dilemmas posed by implementing social and economic rights, King focuses on *policentricity*, which is defined by issues involving a large number of interlocking and interacting interests and considerations.²⁶ King believes that polycentricity is a property of legal issues, but it is not a property of decision-making itself.²⁷ He argues that courts can deal with polycentricity very well, particularly when considering a range of attenuating factors, such as “judicial mandate, degree of polycentricity, access to information, comparative judicial competency, and the nature of the remedy.”²⁸ He explores all of these attenuating factors and then evaluates the proper role of polycentricity in the way courts adjudicate social rights. King’s major conclusion is that polycentricity is often accepted in adjudication and can be managed.²⁹

King also focuses on the importance of *administrative expertise*, noting that there must be a trade-off between expertise and accountability, the types of expertise when evaluating the role of courts and public law, and how there can be failures of expertise and what to do about that.³⁰ He argues that there has been historical development in the idea of expertise in conjunction with public law and administration, and that it is important to use accountability as a principle to evaluate claims of expertise. When this is done, expertise can be an important dimension for evaluating how courts promote social and economic rights.³¹

Another principle that King develops is *flexibility*. He argues that “judges ought to give prominent consideration to the idea of administrative and legislative flexibility in their adjudication of constitutional social rights.”³² He analyzes a wide range of types of flexibility, such as legal, bureaucratic, and political forms as well as how they are connected to procedural rights. He argues that flexible remedies are important because in a complex welfare state, there needs to be a way to provide discretion and to strike a balance between courts that intervene and courts that are prudent.³³ Thus, he argues that flexibility is one way to achieve that balance.

The general theme of King’s enterprise, therefore, is *incrementalism*. He argues that “[j]udicial incrementalism is an appropriate response to two different demands.”³⁴ One demand, which is practical and managerial, requires courts to deal with complex

24. *Id.* at 157.

25. *Id.* at 167.

26. *Id.* at 190.

27. *Id.* at 189.

28. *Id.*

29. *Id.* at 210.

30. *Id.* at 211-12.

31. *See id.* at 229-49.

32. *Id.* at 250.

33. *See id.* at 251-86.

34. *Id.* at 289.

data and should “be dealt with in a fragmented rather than holistic way.”³⁵ In addition, he argues that courts should not intentionally nor accidentally act to oppose social rights that have been initiated by other components of the government.³⁶ King discusses the relationship between incrementalism and public administration, drawing upon Charles Lindblom, who defined it as “The Science of Muddling Through.”³⁷ King sees incrementalism as “not necessarily an inert strategy,” but rather as a “*dynamic and searching*” strategy that includes particularization, that is, the familiar tactic of using narrow grounds to decide cases; being cautious about expanding analogies in relation to cases; being cautious about using vague legal standards; and being cognizant of the procedural rights when making decisions.³⁸ King connects incrementalism to Sunstein’s judicial minimalism, as well as to democratic experimentalism as argued by Michael Dorf and Charles Sabel.³⁹ He sees incrementalism as an important way to control the expansion of positive obligations, which will then enhance the sustainability of those social and economic rights that are already secured.⁴⁰

In sum, therefore, King has three major contentions. First, social and economic rights need to be constitutionalized because they are similar to and as important as civil and political rights. Second, there needs to be a theory of restraint on the part of courts when dealing with the adjudication of social and economic rights. And, third, the way to achieve that restraint is through procedures that are based on incrementalism rather than judicial activism.

II. CONSTITUTING ECONOMIC AND SOCIAL RIGHTS

In *Constituting Economic and Social Rights*, Katharine G. Young also presents a very powerful set of perspectives that give us new ways to think about the welfare state. At the very beginning of her book, Young agrees with King that social and economic rights are as fundamental as are civil and political rights.⁴¹ She discounts, therefore, the typology of rights that would cast the former as positive and the latter as negative rights.⁴² She argues instead that “[l]iberal markets and liberal democracies now coexist with economic and social rights.”⁴³ She is interested in how the new formulation of economic and social rights has evolved and its origins, and she looks to comparative and international law to understand how economic and social rights have come to be viewed by many—perhaps most—as equivalent to civil and political rights.⁴⁴ She defines rights as “a focal point of interpretative disagreement and agreement, of agitation and contestation, and of monitoring and enforcement, of the fundamental material interests that are reasonably argued to be universal and compelling.”⁴⁵ She argues, therefore, that

35. *Id.*

36. *Id.* at 289.

37. *Id.* at 290 (citing Charles E. Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79 (1959)).

38. *Id.* at 293.

39. *Id.* at 306-07.

40. *See id.* at 315-20.

41. YOUNG, *supra* note 2, at 1-2.

42. *Id.* at 1, 74.

43. *Id.* at 1.

44. *See generally id.*

45. *Id.* at 2.

rights are both normative and practical in terms of how they are to be implemented, thereby combining rather than dividing normative inquiry and empirical evidence in relation to rights.⁴⁶ Young sees rights as “pronouncements in social ethics, sustainable by open public reasoning.”⁴⁷ She also views rights as pronouncements in law.⁴⁸

Young argues that all rights require “positive action” on the part of the state “for their enjoyment, as well as significant expenditures.”⁴⁹ Therefore, she rejects the idea that economic and social rights are different in kind from civil and political rights as they would have been historically established in foundational, primarily Western legal documents, such as the Magna Carta.⁵⁰ Instead she focuses on economic and social rights as being as fundamental and as crucial to constitutional democracy as any other rights are.⁵¹ Thus, in her analysis, all rights – civil, political, economic, and social – are positive rights because governments are implicated in all of them at every step.

Young makes a very important claim that social and economic rights might be held by individuals but that they must be implemented and demanded through collective action.⁵² Thus, it is collectivities that must shape how economic and social rights are implemented through the relevant range of institutions. This raises the question of how organizations, social movements, and associations are also important to the process of implementing social and economic rights.

She sets out to evaluate the way institutions conceptualize constitutional rights, using comparative law. She argues that rights must be considered as process-driven and as value-based conceptions that are relevant to many categories of analysis.⁵³ She considers the right to education and other rights that refer to baseline material security, such as the right to housing and food, as being perhaps equally important to the right to vote.⁵⁴ Her fundamental claim, therefore, is “that a constitutional legal framework protective of rights to food, water, health care, housing, and education is one which establishes processes of value-based, deliberative problem-solving, rather than one which sets out the minimum bundles of commodities or entitlements.”⁵⁵

Young has a very interesting historical perspective that examines how social and economic rights—such as education, work, and health care—came to be viewed as fundamental rights. She talks about interpretative standpoints that argue that basic needs as human dignity are part of what constitutes human rights, and then she illustrates the “minimalist pressures” on the interpretation of rights by looking at “the doctrinal setting of minimum core characteristics . . . that are internal to rights.”⁵⁶ She also explores the ways rights are limited, sometimes “through doctrinal escape clauses, amendment provisions, default decision rules, or through the form of quasi-utilitarian reasoning

46. *Id.*

47. *Id.* (citing Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315 (2004)).

48. *Id.* at 3.

49. *Id.* at 5.

50. *Id.*

51. *Id.* at 5-6.

52. *Id.* at 13.

53. *Id.* at 2-6.

54. *Id.* at 4.

55. *Id.* at 6.

56. *Id.* at 30.

known as balancing.”⁵⁷ Young argues that all of these ways are important for interpreting how social and economic rights will be implemented and for understanding what the pressures are that go into the processes related to fulfilling economic and social rights.⁵⁸

One of Young’s major arguments is that we need to focus on what *constitutes* rights rather than whether they are merely constitutionalized.⁵⁹ In her view, to constitute means “to socially institute, so that the commitments are committed to social understanding, and are realized effectively in law.”⁶⁰ Although the text is important, she focuses on the post-interpretative framework in which other processes in addition to the text are also important. In order for economic and social rights to be constituted within social institutions, she argues that they must be “grounded on the layered sands of what is right according to reason, what is right according to decision-making authority, and what is right according to experienced social fact.”⁶¹ That is, reason, authority, and social fact are the keys to constituting economic and social process. In the process that is necessary for the articulation of social and economic rights, there may be shifting emphases on each of the three.

Young equates reason with the philosophy of justice; she equates what is right according to decision-making authority to the question of positive law; and she equates what is right according to social facts to the process that links constituting economic and social rights with actually existing social understanding, that is, what the people who are governed by the law actually believe to be accepted by the law.⁶² She argues, therefore, that there are a “multiplicity of foundations” for constituting social and economic rights and that there must be adjudication to implement social and economic rights.⁶³ However, the latter must be done in conjunction with the executive and legislative branches of government. Thus, the state institutions—courts, legislative, and executive branches—must work together rather than only seeking solutions to the implementation of social and economic rights in courts.⁶⁴ Thus, Young establishes that there will be collective locations of authorship that articulate the rights in terms of social movements and other forms of association. In particular, she uses South Africa as a way to provide examples and answers that will address these perspectives that she established.⁶⁵ In addition, Young is interested in global issues, *transformative globalism*, as she puts it.⁶⁶ In that sense, she challenges the use of the nation-state alone as the context for examining social and economic rights. This is an important and topical perspective that expands the way we think about how social and economic rights are both established and implemented.

When looking at interpretative theories that define the meaning of economic and social rights, Young introduces two very important principles: *rationalism* and *consensualism*.⁶⁷ She associates rationalism with not only the fundamental rights of

57. *Id.*

58. *Id.* at 30-31.

59. *Id.* at 6.

60. *Id.*

61. *Id.* at 7.

62. *Id.* at 7-9.

63. *Id.* at 10.

64. *Id.* at 13.

65. *Id.* at 15-25.

66. *Id.* at 22-25.

67. *Id.* at 33-34.

human dignity, but also just plain human survival.⁶⁸ Consensualism, on the other hand, is what is agreed to by the majority of states or constituents, and it can also serve as providing a meaning for both the rights and the legal and social institutions that are assigned the job of implementing those rights.⁶⁹ Young's view, however, is that these two interpretative standpoints share a common ground rather than constituting two polar extremes on a continuum.⁷⁰

Young places great emphasis on establishing what constitutes the minimum core for economic and social rights that would be compatible with ethical pluralism, noting that this enterprise entails serious problems.⁷¹ She argues, however, that it is important to give legal bite to the standard of obligations established by the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), and that there is an obligation to realize progressively economic and social rights.⁷² Young addresses the difficult problem, of course, about how to measure the minimum core, and she also discusses how one interprets limits in terms of the application of economic and social rights. However, she finds that the idea of the minimum core, however many objections there might be, nevertheless is a way to advance a base line of social and economic protection across varied economic policies and vastly different levels of available resources.⁷³

Young also addresses the issue of global redistributive lines, arguing that states that are in a position to protect minimum core benefits are liable if they do not do so.⁷⁴ Thus, she points to an "obligation to provide 'international assistance and cooperation.'"⁷⁵ In so doing, she links core benefits to justiciability, thereby connecting justiciability with a substantive minimum.⁷⁶ In particular, she underscores *justiciability*, arguing that the idea of the minimum core provides a guide for economic and social rights in the context of judicial review.⁷⁷ As a result, there is more predictability in terms of the application of principles for implementing social and economic rights.

Young recognizes that there can be reasonable limits to social and economic rights, or even suspension of them, and she focuses on the justification for limits.⁷⁸ A legitimate limitation occurs when there is a proper justification for the abridgment of the right, perhaps because of balancing competing claims or conflicting rights or conflicting interests or some assessment of proportionality of modes for implementation. She contributes a very important and lucid discussion of what makes limitations reasonable, arguing that justificatory tests of reasonableness can sometimes avoid the risk of over- or under- inclusivity in defining economic and social rights.⁷⁹ The key to this doctrinal test—*reasonableness*—is the ability to assess the nature of the duty within the context of

68. *Id.* at 33.

69. *Id.*

70. *Id.* at 33-34, 65.

71. *Id.* at 66.

72. *Id.* at 67-68 (citing International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter "ICESCR"]).

73. *Id.* at 72.

74. *Id.* at 73.

75. *Id.* (citing ICESCR, *supra* note 72, at art. 2(1)).

76. *Id.* at 77-78.

77. *Id.* at 77-79.

78. *See id.* at 99-129.

79. *Id.* at 126-29.

social and economic rights, including the range of factors that are relevant to the performance of the duty.

Young also addresses the issue of enforcing economic and social rights, which, of course, is central to their legal significance. Here she invokes a typology of judicial review in which the question of judiciability involves two opposite extremes: “judicial usurpation on the one hand, and judicial abdication on the other.”⁸⁰ She introduces an important typology of judicial review, defined by deferential review, conversational review, experimentalist review, managerial review, and preemptory review, and she explains each in turn with examples from court cases drawn from a variety of political systems.⁸¹

Young notes that although different types of judicial review differ in terms of the mode of interpretation, scrutiny, and the remedy the courts deploy, they nevertheless are replicated to some degree in comparative constitutional law.⁸² Thus, she develops the idea of the *catalytic court*, which is a court that is in a “productive interaction with other political and legal actors.”⁸³ This metaphor suggests energy and change as triggered by the court system. She particularly examines the idea of the catalytic court in the context of South Africa.⁸⁴

In addition, Young develops a typology of courts that includes engaged courts, supremacist courts, and detached courts. Using the idea of the catalytic court, she then connects this typology to that of judicial review, noting that an engaged court might be more connected to conversational judicial review and experimentalist review; a supremacist court would be more connected to managerial judicial review and preemptory review; and a detached court would be more connected to deferential judicial review and conversational judicial review.⁸⁵ Thus, Young integrates three major ideas: the catalytic court, five different types of judicial review, and three different types of courts. Her example of a supremacist court is drawn from Columbia, an example of an engaged court is India, and her example of a detached court is the United Kingdom.⁸⁶

Young also analyzes the idea that rights are constituted by means of contestation. Therefore, she argues that it is important to understand how courts are linked not only with each other but also to the market and civil society.⁸⁷ Here she looks at social movements in the context of economic and social rights, such as the right to health in Ghana, and she examines how “the development of a constitutional culture can also occur within the community at large.”⁸⁸ *Jurigenesis* is law creation, and she applies that to an understanding of economic and social rights.⁸⁹ She argues that economic and social rights frames can be successful in the context of constitutional law and international human rights on the basis of three principles. First, they establish the universalized language that differs from a particularistic assertion of the satisfaction of the human

80. *Id.* at 133.

81. *Id.* at 142-66.

82. *Id.* at 167.

83. *Id.* at 172.

84. *Id.* at 174-91.

85. *Id.* at 193-95.

86. *Id.* at 196-212.

87. *Id.* at 221-22.

88. *Id.* at 233.

89. *Id.* at 234-38.

needs specific to one or another individual or group. This universalism is in a sense post-national.⁹⁰ Second, this “frame of economic and social rights establishes a claimant-duty-holder relationship that is different from the frames provided by other distributive contestations,” and, as such, calls “for the satisfaction of ‘basic needs.’”⁹¹ Third, “the frame of normativity provided by the rights to food, health, housing, or education” addresses not only the state, but addresses the law, so they are not extra-legal in that sense.⁹² In addition, Young examines the role of social movements in relation to economic and social rights in South Africa, showing that “[e]conomic and social rights offers a powerful discourse for social movements.”⁹³

Young develops the idea of *new governance*, which goes beyond constitutionalism per se. She defines this as the act of governing, in which non-governmental actors, such as the market and civil society, play important roles.⁹⁴ Thus, she analyzes state, market, and civil society coordination in the context of how courts can enforce economic and social rights. In so doing, she considers how the market can be an ally, not just an enemy, in terms of implementing social and economic rights, and she also argues that this principle of new governance requires the continued participation of non-market stakeholders, such as social movements.⁹⁵ Young also develops the idea of an *experimentalist stake holder*, and uses the treatment action campaign as an example, which was developed to work with pharmaceutical companies to deal with the issue of HIV/AIDS virus.⁹⁶ She shows how this treatment action campaign both works with government and non-government agents, even while retaining its own autonomy, which is important for its success.⁹⁷

In sum, this book argues that economic and social rights are both human rights and constitutional rights, and that the framework of constituting rights argues for the practical importance of law, reason, and social fact in making rights a reality.⁹⁸ Young looks at the interpretation, enforcement, and contestation of economic and social rights, drawing examples from South Africa, India, Germany, Canada, and the United Nations.⁹⁹ She suggests that economic and social rights, such as the right to food, water, health care, education, and housing, provide “an opportunity to change the way we use the legal system, in order to unsettle the current experiences of maldistribution and poverty,” and she makes the case that implementing these rights “depends upon action in the legislatures, the courts, the bureaucracies, the markets, the hospitals, the schools, the streets, the Internet, and, most importantly, in our minds.”¹⁰⁰

III. DISCIPLINARY DISCONNECT

Both authors situate the interpretation and enforcement of social rights within a

90. *Id.* at 243-44.

91. *Id.* at 244.

92. *Id.*

93. *Id.* at 255.

94. *Id.* at 263.

95. *Id.* at 271-75.

96. *See id.* at 276-79.

97. *Id.*

98. *Id.* at 289.

99. *Id.*

100. *Id.* at 299.

very large frame of government and non-government institutions and actors, that includes constitutions and courts, of course, but also so much more. In addition, both books employ a comparative approach in their discussions of what maximizes social rights agendas. In the case of *Constituting Economic and Social Rights*, there is also considerable attention directed to how globalization processes modify the dynamics of national settings. In the case of both books, there is also a clear commitment to the value of social rights as a necessary component of any political system that claims to be a democracy. In all of these respects, there is much to recommend both books to the community of constitutional law scholars and those who address the relationship between constitutions and the implementation of social rights.

Yet, were one to expand perspectives to include the social science disciplines, particularly political science and political economy, it would become evident that both books also share limitations. There is a vast social science literature that seeks to answer many of the same questions these authors address, such as how to define economic and social rights, what are their origins, how are they implemented, and most of this literature is comparative in scope. However, it would appear that the social science scholars all but talk past constitutional scholars and vice versa. Though immersed with the same questions and problems, these book exemplify a disciplinary disconnect between constitutionalism, however, broadly conceived, and empirical social science.

Judging Social Rights, for example, does make one bibliographic reference to *The Oxford Handbook of the Welfare State*,¹⁰¹ a compendium of representative works and essays by the leading scholars of the welfare state, but little—or virtually nothing—is used in either *Judging Social Rights* or *Constituting Economic and Social Rights* that reflects the rich scholarship that *The Handbook* summarizes. Thus, although both *Judging Social Rights* and *Constituting Economic and Social Rights* focus on social and economic rights in the context of democracy, they omit attention to one of the most fundamental principles of democratic governance: public opinion. To what degree, for example, do public attitudes support the view that the redistribution of economic resources by the government—a key to social provision—is an essential characteristic of a democracy? In 2005, a World Values Survey asked that question of 71,313 people—far fewer people than it should have—if economic and social rights are to be implemented.¹⁰² On a ten point scale, where ten represents complete agreement that it is an essential characteristic of a democracy for the “government to tax the rich and subsidize the poor,” and one represents complete disagreement, the average score for the United States was only 4.98.¹⁰³ Clearly, it is more than just the wealthy who account for resistance to the redistributive role of the government in relation to social provision.

Both books invoke social rights in relation to democracy and address how the judicial system in concert with other actors, including non-governmental ones, can work to find ways to make economic and social rights a reality. However, they omit attention to the variables and perspectives social scientists have found to be most salient in those

101. KING, *supra* note 1, at 40 (citing Wil A. Arts & John Gelissen, *Models of the Welfare State*, in THE OXFORD HANDBOOK OF THE WELFARE STATE 569 (F. G. Castles et al., eds., 2010) [hereinafter THE HANDBOOK]).

102. Variable 152, 2005 SURVEY, available at <http://www.worldvaluessurvey.org>.

103. *Id.*

democratic processes.¹⁰⁴ Democracy is literally the “rule of the people,” but most scholars in the social sciences analyze how the people’s opinions are funneled through political parties, interests groups, and social movements in the context of political, structural, and fiscal characteristics of a political system.¹⁰⁵ While King and especially Young invoke some of these variables, neither one explores the labyrinth of left-leaning versus right-leaning partisan components of a political system¹⁰⁶ as explanations for welfare state development nor the intricacies of parliamentary versus presidential systems, proportional versus winner-take-all electoral systems,¹⁰⁷ the number of parties available for channeling public opinion,¹⁰⁸ or fiscal institutions that also influence taxation and spending as the foundation of the welfare state. Omitted is the vast literature on the varieties of capitalism,¹⁰⁹ power resource models,¹¹⁰ how wages structure social benefits,¹¹¹ and how gender figures—in both to the analysis of types of welfare states and the resulting economic and political impact on women.¹¹² Similarly, neither book considers the organization of the working class as measured by union density, for example, in relation to welfare spending indices where the latter could be a fruitful way to determine if the minimum core is being met.¹¹³

However, if one turns to the social science study of economic and social rights, it is precisely such “variables” that explain why the United States lags in establishing social provision in contrast to the Scandinavian countries that excel. It is also precisely such variables as the political organization of the working class that social science scholarship shows to be a powerful corrective to those—often the wealthy—who are not initially supportive of the redistributive policies upon which social provision depends.¹¹⁴ And as social science scholarship has also shown, it is often the coordinated efforts of both business and labor, rather than their conflicts or contestation that explain why development of a welfare state is successful.¹¹⁵

To be fair, of course, it is also true that social science empirical work all but ignores constitutional issues, including even such tangible data as constitutional texts.

104. CHRISTOPHER PIERSON & FRANCIS G. CASTLES, *THE WELFARE STATE READER* (2d ed. 2006).

105. *RESTRUCTURING THE WELFARE STATE: POLITICAL INSTITUTIONS AND POLICY CHANGE* (Bo Rothstein & Sven Steinmo eds., 2002).

106. Torben Iversen & David Soskice, *Electoral Institutions and the Politics of Coalitions: Why Some Democracies Redistribute More than Others*, 100 AM. POL. SCI. REV. 2 (2006).

107. JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER – AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010).

108. EVELYNE HUBER & JOHN D. STEPHENS, *DEVELOPMENT AND CRISIS OF THE WELFARE STATE: PARTIES AND POLICIES IN GLOBAL MARKETS* (2001).

109. *DEBATING VARIETIES OF CAPITALISM* (Bob Hancke ed., 2009).

110. Walter Korpi, *Power, Politics, and State Autonomy in the Development of Social Citizenship: Social Rights during Sickness in Eighteen OECD Countries since 1930*, 54 AM. SOC. REV. 309 (1989).

111. TORBEN IVERSEN, *CONTESTED ECONOMIC INSTITUTIONS: THE POLITICS OF MACROECONOMICS AND WAGE BARGAINING IN ADVANCED DEMOCRACIES* (1999).

112. Ann Shola Orloff, *Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States*, 58 AM. SOC. REV. 51 (1993); TORBEN IVERSEN & FRANCES ROSENBLUTH, *WOMEN, WORK & POLITICS: THE POLITICAL ECONOMY OF GENDER INEQUALITY* (2010).

113. *UNIONS, EMPLOYERS, AND CENTRAL BANKS* (Torben Iversen, Jonas Pontusson & David Soskice eds., 2000).

114. ALEXANDER M. HICKS, *SOCIAL DEMOCRACY AND WELFARE CAPITALISM: A CENTURY OF INCOME SECURITY POLITICS* (1999).

115. CATHIE JO MARTIN & DUANE SWANK, *THE POLITICAL CONSTRUCTION OF BUSINESS INTERESTS: COORDINATION, GROWTH, AND EQUALITY* (2012).

The Comparative Constitutions Project has now completed the coding of all of the world's constitutions on hundreds of variables, but even this empirical source of rich information has yet to be integrated into most studies of the welfare state by political scientists or political economists.¹¹⁶ The term, "constitution," for example, is absent from the Index of *The Handbook*. If and when the constitution of a country is included in empirical studies of the welfare state, most likely that will be in the context of how a constitution structures the branches of government and/or federalism as a principle of governance, rather than whether or how a country's constitution guarantees social provision.

Raising these observations is not so much a criticism as it is a comment on how different disciplines approach the question of the welfare state from such disparate perspectives, even while agreeing on the importance of social and economic provision as an essential component of a democracy. King and Young present fascinating insights and arguments as built upon innovative and explanatory typologies, but by social science standards, they do not test their arguments. There is no attempt to code the countries systematically on a set of characteristics as a foundation for analyzing statistically whether the connections asserted between those characteristics actually hold up. Rather, examples are provided from selected countries *to illustrate, rather than to test*, connections between principles or characteristics. Furthermore, we do not know from either book what the connection might be between public opinion about whether welfare rights are an essential characteristic of democracy, welfare spending, and political participation. Yet according to the theory of economic and social rights, these rights are important in part because social provision promotes greater political inclusion, including greater political participation.

For those who seek to expand the discussion and analysis of economic and social rights to encompass purviews beyond the court system itself much less merely constitutionalized text, these books are extremely valuable. However, for those who would seek to integrate welfare state scholarship from the perspectives of constitutional law and empirical social science, there is a very long way to go.

116. COMPARATIVE CONSTITUTIONS PROJECT, <http://www.comparativeconstitutionsproject.org> (last visited Oct. 22, 2013).