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CONSTITUTIONAL CORNER

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Constitutional Theory for People Out of Power[1]

Mark A. Graber

This essay examines various strategies for constitutional theorists out of power, commentators who reject the basic principles animating the present incumbent regime. The present strategies all involve exegesis on constitutional law. The standard essay on constitutional doctrine seeks to provide Supreme Court justices with the right reasons for reaching the right results in constitutional cases. The only difference between essays by persons in power and persons out of power is often the degree to which the scholar believes the Supreme Court needs instruction. Doctrinal analysis and constitutional theorizing ought not be influenced by the constitutional tendencies of the present Supreme Court or the present administration, constitutional commentators may believe, because justices (and perhaps other constitutional decision makers) ought to be open to any good constitutional argument or because constitutional commentators should speak to a more enduring audience than the present ruling coalition. Whatever the reason, progressive constitutionalists have for over twenty years engaged in a scholarly enterprise primarily designed to find the magic premise, information, or incantation that would transform conservative justices and other members of the ruling center-right coalition into liberal justices and democratic socialists.

Progressive constitutional theorists or other constitutionalists out of power would be better off spending more time doing constitutional theory than constitutional law. Two hundred years of "nattering at justices" suggests that progressives who call on Merlin the Magician to turn Justices Scalia and Thomas into frogs behave as realistically as those progressives who call on Laurence Tribe to turn Justices Scalia and Thomas into liberals.

Progressive constitutional theorists or other constitutionalists out of power would be better off spending more time doing constitutional theory than constitutional law. Two hundred years of "nattering at justices"[2] suggests that progressives who call on Merlin the Magician to turn Justices Scalia and Thomas into frogs behave as realistically as those progressives who call on Laurence Tribe to turn Justices Scalia and Thomas into liberals. Persons who reject the central claims of the incumbent regime need a constitutional theory that does more than help Supreme Court justices reach right results. The need of constitutional theory progressives need should address the conditions of persons who have limited power to influence official constitutional meanings. Some progressive theory should help the left establish constitutional priorities that will enable social democrats to choose between fifth and sixth best alternatives, the alternatives presently on the political agenda. Other forms of progressive theorizing might help social democrats understand why they do not have power and what might be necessary to gain power.

I. Traditional Strategies

A. *If at First/Second/Third/. . . You Don't Succeed*. The First Amendment clearly permits scholars to play infinite variations on themes that have long since lost their power to persuade the still unconverted. Such commentaries even satisfy the repressive bad tendency test for restricting speech, having demonstrated no tendency to produce any effect on the body politic. The possibility does exist that the next law review will contain language that will finally convince the Rehnquist Court that the constitution is committed to social democracy. That language might also have magical powers causing the heavens to rain gold on the poor. History suggests the probability that each strategy will succeed is approximately equal.

B. *Appeal to National Actors Outside of the Courts.* Repeat the last paragraph, substituting "the Bush administration and Tom DeLay" for the Rehnquist Court.

C. *Move to Vermont or Sweden.* Progressive advocates occasionally pitch their arguments to jurisdictions where the governing authorities are persuadable.[3] Vermont is a good site for progressive advocacy. The state is presently represented in Congress by Patrick Leahy, a liberal Democrat, James Jeffords, a liberal independent, and Bernard Sanders, the only socialist in the House of Representatives. Vermonters are currently open to progressive arguments that are failing on the national level. Recent state constitutional precedents, made both inside and outside of courts, provides solid legal and political foundations for expanding progressive constitutionalism in that jurisdiction. The Vermont Supreme Court has insisted that gay couples enjoy the same benefits as married persons,[4] the Vermont state legislature passed a law recognizing such civil unions, and Governor Howard Dean defended that measure during his successful reelection campaign.[5] Other examples no doubt exist. Just as Broadway shows have tryouts before hitting the big time, so should arguments about constitutional law. For the immediate future, therefore, all progressive constitutional arguments might first be based on the Vermont Constitution. If they play in Vermont, they should then hit the road in other sympathetic states before attempting the national stage.

Persons out of power require a constitutional theory that makes gradations among constitutional injustices rather than one that merely identifies constitutional injustices. Little such theory exists at present.

Sweden is an alternative for progressives not happy with the local option. Many nations have more liberal constitutions and more liberal constitutional decisionmakers than the United States. Arguments that do not move Chief Justice Rehnquist may tilt the Supreme Court of Sweden or some other Western European nation in more progressive directions. Significantly, Sweden and many other nations have a real tradition of democratic socialism, not one that has to be manufactured by placing selective quotations out of context in a legal brief or, too often the same thing, a law review article. Given the relative success of Western Europeans (and Vermonters) at instituting some progressive policies, however, one might think that nationally oriented American constitutional theorists might be better advised to learn what progressives in those jurisdictions did or are doing right than suggesting that more successful social democrats elsewhere should adopt strategies that have failed in the United States.

D. *Help Justice Kennedy Resist Justice Scalia.* Progressive constitutional theorists have explicitly pitched arguments at Justice O'Connor, Justice Kennedy, and other "country club Republicans"[6] with moderately liberal social tendencies.[7] When redistributive issues are not on the table, progressives and economic conservatives sometimes join forces to defeat social conservatives eager to regulate sexual behavior in the name of religious norms. Progressives and moderate conservatives may find a broader common commitment to maintaining the present constitutional status quo. Progressives favor maintaining the status quo because for the short term the practical political alternatives are much worse. Country club Republicans (and Democrats) favor maintaining the constitutional status quo because, after at least two decades of rule by a center-right coalition, the constitutional status quo on virtually all matters reflects country club conservative values.

These progressive attempts to speak seriously to the center-right confront several difficulties. Justice Kennedy probably does not need much help, and what help he needs will probably come from other quarters. The United States presently faces no shortage of country club Republican lawyers, who are likely to make better and more persuasive moderate conservative arguments than progressive scholars. Moreover, progressives who accept the moderate conservative practice of striking down only egregious constitutional violations buttress the incumbent regime. Minimalist decisions striking down individual death sentences and providing narrowly targeted forms of assistance to less fortunate civil litigants may weaken support for abandoning capital punishment and substantially reducing the role wealth plays in the legal process. Such decisions may assure interested citizens that the criminal and civil justice systems are fundamentally fair when, in fact, only the worst injustices are remedied. By voting to strike down unpopular limits on abortion, gross discriminations against homosexuals, and other violations of equality that offend middle-class sensibilities, moderate conservatives contain political forces that might otherwise mobilize against the ruling center-right coalition.

II. Less Traditional Alternatives

A. *Help Senator Kennedy Establish Priorities.* Progressive constitutional theorists are better advised to help Senator Edward Kennedy than Justice Anthony Kennedy. Liberal Democrats currently lack the power necessary to make their constitutional vision the fundamental law of the land. They may, however, influence official constitutional meanings at the margin by taking advantage of the filibuster and other legislative practices that permit cohesive minorities in the national legislature to exercise some power. This strategy acknowledges that national official holders on the left can presently do little more politically than avert really

destructive outcomes. Hence, some theoretical energy ought to be spent distinguishing the constitutionally terrible from the merely constitutionally bad.

Persons out of power require a constitutional theory that makes gradations among constitutional injustices rather than one that merely identifies constitutional injustices. Little such theory exists at present. Senator Kennedy will find the law reviews a useful source of constitutional guidance when he symbolically proposes a bill banning capital punishment. The senator will find almost no useful material in legal journals when he is deciding which provisions of a Republican bill on the death penalty he should spend the most energy defeating. Should he use his limited influence to make the capital sentencing process more consistent with progressive understandings of the rights of indigent criminal defendants or with progressive understandings of the rights of racial minorities? Progressive constitutional theory provides no answers. Sen. Kennedy during various confirmation debates will be able to filibuster for decades reading progressive arguments for maintaining legal abortion. He will also be able to deliver long orations on why the constitution, properly interpreted, permits the federal government to ban handguns near schools. The senator will be reduced to silence when asked by colleagues to expound on whether progressive constitutionalists would prefer a justice willing to overrule both *Roe v. Wade*[8] and *United States v. Lopez*[9] or a justice who would treat both decisions as good law.

Constitutional theory presently fails to help anyone establish constitutional priorities[10] because constitutional discourse typically works within only two categories: constitutional and unconstitutional. Practices in the constitutional category do admit of gradation based on wisdom. Not everything constitutional, theorists admit, is wise. The unconstitutional category admits of no gradation. Common sense does provide some distinctions between constitutional wrongs. Proponents of a strict separation between church and state can distinguish between Christmas trees in public places and the Spanish Inquisition. Still, little in constitutional theory provides standards for evaluating the severity of constitutional violations when common sense runs out.

This failure to establish constitutional priorities is probably another consequence of the court-centeredness of much constitutional thought. Justices, according to much constitutional wisdom, need not concern themselves with the severity of constitutional violations. Harmless error and justiciable issues aside, justices are supposed to declare unconstitutional all government practices they believe to be unconstitutional (or clearly unconstitutional). Justice Scalia is not expected to reach an arrangement with Justice Souter whereby the former agrees against his better judgment to declare unconstitutional prayer at public high school graduations while the latter agrees against his better judgment to sustain prayer at public college graduations. While some negotiation within a particular doctrinal space may be acceptable to obtain a majority or supermajority,[11] interdoctrinal deals are strictly forbidden. Justice Brennan is not expected to trade his vote in flag burning cases for Justice Rehnquist's vote in death penalty cases. Federal justices call them as they see them.

Elected officials are not similarly situated, either in theory or practice. Log-rolling and mutual accommodation are considered legitimate legislative options. Executives and legislators trade votes both on such non-constitutional matters as the best location for military bases[12] and on such constitutional matters as campaign finance reform. Moreover, the structure of legislative decision-making requires elected officials to make constitutional compromises. Justices typically vote on constitutional issues separately. Legislators frequently vote on bills that contain numerous contested provisions. Should all national officials automatically oppose any bill they believe has at least one unconstitutional feature, Congress might not be able to pass any legislation on some matters, even matters on which many legislators believe the status quo unconstitutional. Decisions concerning the staffing of the national government require an even greater degree of constitutional accommodation. Presidents might not be able to make any appointments, almost certainly not any significant appointments, and certainly not any appointments to the Department of Justice or federal judiciary if all Senators felt obligated to oppose the confirmation of any official believed to hold at least one mistaken constitutional notion. Given the occasional disagreements among such ideologically similar justices as Justices Marshall and Brennan or Justices Thomas and Scalia, Senators who resolved never to support a nominee with whom they have any constitutional disagreement will probably be able to vote to confirm only themselves. Thus, the very nature of the legislative process requires elected officials to establish constitutional priorities. The more limited an official's capacity to influence official constitutional meanings, the more vital the ordering of constitutional values. Liberal elected officials presently almost never have the opportunity to vote for the constitutional best or even a constitutional good. What power leftwing representatives may have for the foreseeable future will involve choices between

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the lesser of constitutional evils. Progressive theory might do more to inform those choices.

B. *Figure out Why You are Out of Power.* Constitutionalists may be out of power for transient reasons or reasons rooted in the constitutional structure of the present regime. That structure consists not only of the set of regime goals that constitutional theorists routinely detail, but institutions capable of achieving those goals and a people who support those goals.[13] Some political setbacks reflect transient political circumstances which have little roots in more enduring features of the constitutional order. A candidate may prove surprisingly inept or a ballot hard to read. When, however, the citizenry consistently rejects a set of constitutional claims, a misalignment almost certainly exists between those constitutional principles and either the institutions necessary to realize those principles or the people needed to support those principles. The most fundamental constitutional question persons out of power must ask is whether their most recent defeat was a mere unfortunate outcome revealing little about existing constitutional structure or whether that defeat in the 2000 national election was rooted in more enduring features of the political regime.

The civil rights movement enjoyed success during the 1950s and early 1960s, they contend, because the moral imperative of ending racism was yoked to the political imperative of attracting international support against Communism.

Bruce Ackerman offers the optimistic interpretation of recent progressive defeats. In his view, the present constitutional order remains normatively committed to progressive constitutional values.[14] Proponents of the civil rights movement during the 1960s gained the public support and overwhelming majorities in all branches of the national government necessary to incorporate their visions into the constitution. The Reagan Revolution, Ackerman continues, has not achieved that overwhelming political success necessary to constitutionalize conservative civil rights visions. Impressive Republican victories in some branches of government during the 1980 and 1994 national elections were followed by impressive Democratic victories in other branches of government during the 1982 and 1996 national elections. Conservative attempts to control the national judiciary were thwarted when the Senate refused to confirm the nomination of Judge Robert Bork to the Supreme Court.

Professor Ackerman's reading of American constitutional development sends optimistic theoretical and empirical messages to the political left. The optimistic theoretical message is that the constitutional aspirations of Reconstruction Republicans, New Deal Democrats, and civil rights activists remain the law of the land. Progressives are the persons who must merely maintain the constitutional status quo. Members of the Rehnquist Court are the would-be revolutionaries. The optimistic empirical message is that the general public remains open to progressive constitutional arguments. Conservative Republicans have won some victories in recent elections, but in Professor Ackerman's eyes, the center-right coalition has not yet convinced the public to abandon Reconstruction, New Deal and civil rights values. Ackerman's constitution still belongs to liberal Democrats. All the left may need in the next election cycle to regain constitutional influence is more luck, more charismatic candidates, and perhaps better designed ballots.

Phillip Klinkner and Rogers Smith provide a more pessimistic account of the present regime. They treat as rare, ephemeral periods those constitutional moments that Professor Ackerman claims structure constitutional politics in the United States. All three scholars agree that at certain times in American history dramatic surges occur in public support for progressive understandings of racial equality. Klinkner and Smith, however, insist that these surge periods are typically rooted in short term political forces, most notably the need to mobilize the entire population to face an external threat. When the threat is removed, momentum for greater racial equality dissipates. A lengthy period of retrenchment follows, where new inegalitarian practices gradually replace those inegalitarian practices abandoned during the most recent progressive surge. Periods of racial progress "have come in concentrated bursts of ten to fifteen years," they write, while "stagnation and decline" tends to come in "period(s) of sixty to seventy-five years."[15] Americans never completely undo the racial progress made during a progressive surge.[16] Still, Klinkner and Smith insist that progressive surges are short-lived and that periods of retrenchment interpret those surge periods as narrowly as possible. "Exceptional circumstances," in their view, are necessary to facilitate racial progress.[17]

Professors Klinkner and Smith attach greater significance than Professor Ackerman to political developments over the last thirty years. The civil rights movement enjoyed success during the 1950s and early 1960s, they contend, because the moral imperative of ending racism was yoked to the political imperative of attracting international support against Communism. Racial progress occured from 1941 to 1968 as "the United States continuously mobilized huge numbers of black soldiers for actual or possible combat against Nazi and Communist foes, against which American leaders stressed the nation's democratic ideals."[18] The past 30 years have exhibited a steady erosion in racial equality, as a relatively durable center-right coalition maintains power. "As the imperatives of the Cold War lessened and ultimately disappeared," Klinkner and Smith declare, "so would America's march toward racial equality."[19] The absence of the conditions

historically necessary for racial progress suggest that the present regime is likely to be fairly durable. Democrats may win elections, but progressive Democrats are not likely to influence constitutional meanings for the foreseeable future. The center-right coalition, in this view, is deeply rooted in the political landscape of the early 21st century, and probably cannot be overthrown until a new crisis, similar to the Civil or Cold War, creates a better environment for more progressive notions of equality.

This historical analysis suggests that Americans are constitutionally unlikely to accept progressive understandings of racial equality during times of what Ackerman calls "normal politics." Such understandings are historically available. Ackerman, Klinkner and Smith agree that during constitutional moments or progressive surges, progressives significantly influence official constitutional meanings. The problem is first, that more conservative citizens also significantly influence official constitutional meanings at that time. Second, official constitutional meanings during periods of retrenchment consistently rely on the most conservative, rather than available liberal, understandings of the last progressive surge. The Bush dynasty, in the Klinkner/Smith view, represents a typical aftermath of a spent progressive surge rather than, as Ackerman suggests, a series of failed conservative constitutional moments. As a matter of history, progressives do not triumph by restoring the old progressive surge, but by taking advantage of the conditions that promote a new progressive surge. Central to these conditions is an enemy that can be understood as committed to racially inegalitarian doctrines, an enemy that does not appear on the present horizon.

Progressive constitutionalism must resolve this debate. If and only if Professor Ackerman is right, the continued effort to spin progressive constitutional visions makes sense. Social democrats will need well specified constitutional theories should the next round of national elections bring to power a left or center-left coalition. Traditional constitutional doctrinalizing seems less pressing to the extent the center-right coalition is fairly durable and will not change significantly even if ("new") Democrats win some elections. If Smith and Klinkner are right, American politics is currently structured in ways that will require substantial political change for progressives to influence official constitutional meanings. Indeed, to the extent dramatic changes are necessary, progressive constitutional theorizing at present is likely to be dated by the time progressives have the power to influence constitutional meaning. These considerations suggest that for the future progressive constitutional theory should focus more on the regime structures that prevent progressives from achieving their goals than on what progressives might do in that glorious day when they once again control official constitutional meanings.

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Endnotes

1. The longer version of this essay is Mark A. Graber, "Equal Protection in Dark Times," *University of Pennsylvania Journal of Constitutional Law* (2001) (forthcoming).
2. Mark Tushnet, *Taking the Constitution Away From the Courts* (Princeton University Press: Princeton, New Jersey, 1999), p. 155.
3. The classic article is William J. Brennan Jr., "State Constitutions and the Protections of Individual Rights," 90 *Harvard Law Review* 489 (1977).
4. *Baker v. State*, 744 A.2d 864 (Vermont 1999).
5. See Christopher Graff, "Civil unions debate voted Vermont's top story of 2000," *The Associated Press State & Local Wire* (December 25, 2000).
6. Tushnet, *Taking the Constitution Away From the Courts*, pp. 148–49.
7. The seminal article in this tradition is Susan R. Estrich and Kathleen Sullivan, "Abortion Politics: Writing for an Audience of One," 138 *University of Pennsylvania Law Review* 119 (1989).
8. 410 U.S. 113 (1973).
9. 514 U.S. 549 (1995).
10. For a notable exception, see Walter F. Murphy, "An Ordering of Constitutional Values," 53 *Southern California Law Review* 703 (1980).
11. See S. Sidney Ulmer, "Earl Warren and the *Brown* Decision," 33 *Journal of Politics* 690 (1971); Kent Greenawalt, "The Enduring Significance of Neutral Principles," 78 *Columbia Law Review* 982, 1007–08 (1978).
12. Though Professor Sotirios Barber will be the first to point out that legislators have a constitutional obligation to establish military bases in places that will best serve the national interest. See generally, Sotirios A. Barber, *On What the Constitution Means* (Johns Hopkins University Press: Baltimore, 1984), pp. 97–98.
13. See Stephen L. Elkin, "The Constitutional Theory of the Commercial Republic," 69 *Fordham Law Review* 1933 (2001).
14. This paragraph largely summarizes claims made in Bruce Ackerman, *We the People: Foundations* (Harvard University Press: Cambridge, Massachusetts, 1991) pp. 108–11, 50–52; Bruce Ackerman, *We the People: Transformations* (Harvard University Press: Cambridge, Massachusetts, 1998), pp. 389–95.
15. Philip A. Klinkner and Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* (University of Chicago Press: Chicago, 1999), p. 5.
16. Klinkner and Smith, *The Unsteady March*, p. 8 ("although racial progress has not been either inevitable or irreversible in America, it has been in significant ways cumulative").
17. Klinker and Smith, *The Unsteady March*, p. 8.
18. Klinker and Smith, *The Unsteady March*, p. 4
19. Klinkner and Smith, *The Unsteady March*, p. 287.