RETHINKING EQUAL PROTECTION IN DARK TIMES

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The decision handed down by the United States Supreme Court in *Bush v. Gore,*1 when read superficially, promises a renaissance for progressive constitutional thinking. The per curiam opinion in that case, on the basis of an exceptionally generous reading of the Fourteenth Amendment, insisted that the principle of “one person, one vote” required that all ballots in a statewide recount be judged under a uniform state standard.2 Eschewing paean to local diversity and the Tenth Amendment right of states to determine their electoral practices, as well as any references to the original intentions of the persons responsible for the relevant constitutional provisions or any case previously decided by the Rehnquist Court, the per curiam opinion in *Bush* relied primarily on Warren Court decisions that had given conservatives apoplexy when decided thirty years previously. Citing both *Harper v. Virginia Board of Elections*3 and *Reynolds v. Sims,*4 the Justices solemnly declared that the state court-ordered recount had to be suspended because “the State may not, by . . . arbitrary and disparate treatment, value one person’s vote over that of another.”5 Chief Justice Rehnquist’s concurring opinion suggested that Justice Scalia, Justice Thomas, and he were far more sympathetic to the living Constitution than heretofore suspected. The Chief Justice made no reference to any person responsible for the framing or ratification of the Fourteenth Amendment and cited no Rehnquist Court precedent on federalism. He distinguished a Burger Court precedent obligating the Justices to “defer to state courts on the interpretation of state law”6 on the authority of *NAACP v. Alabama ex rel Patterson*7 and *Bowie v. City of Columbia.*8 These two Warren Court decisions substantially broadened previous constitutional understandings of Fourteenth

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2 See id. at 105-10.
3 383 U.S. 663 (1966) (holding that the right to vote is implicit in the Fourteenth Amendment).
4 377 U.S. 533 (1964) (concluding that state legislative apportionment implicates the Equal Protection Clause of the Fourteenth Amendment).
5 *Bush,* 531 U.S. at 104-05.
6 Id. at 114.
Amendment liberties to protect the rights of civil rights organizations and protestors. Justice Ginsburg's dissent in Bush was the only opinion in that case that relied extensively on recent judicial opinions celebrating the virtues of federalism.

Bush v. Gore read more realistically promises dark days for progressives in the United States. The explicit and implicit understanding in the Court's opinion is that the Supreme Court's expansive understanding of equal protection is good only for that case. As the per curiam Justices opined, "[o]ur consideration is limited to the present circumstances." No one thinks that the many persons of color denied the right to vote or have their votes counted in Florida will be able to ride the Bush precedent to victory in federal court. Present Rehnquist Court doctrine apparently is that conservative understandings of constitutional rights govern unless those understandings threaten conservative political prospects. Worse, Bush v. Gore guarantees that the federal judiciary for the foreseeable future will be dominated by persons with conservative understandings of constitutional equality rights and of more general constitutional principles. During his campaign, President Bush expressed his admiration for Justices Scalia and Thomas. Conservative ideologues presently control the Bush Administration's Justice Department. The best progressive constitutionalists can hope for is that some combination of Senate Democrats and "moderate" Republican electoral needs suffice to yield a next generation of federal judges and Supreme Court Justices who are reasonably moderate conservatives or, at least, prided conservatives, willing to apply conservative constitutional principles even when their immediate beneficiaries are more progressive political interests.

Given the likely direction of constitutional doctrine in federal courts for the foreseeable future, progressives should consider celebrating present equal protection jurisprudence. Fourteenth

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10 See generally id. at 135-44 (Ginsburg, J., dissenting). "Were the other Members of this Court as mindful as they generally are of our system of dual sovereignty," Justice Ginsburg concluded, "they would affirm the judgment of the Florida Supreme Court." Id. at 142-43 (Ginsburg, J., dissenting).
12 Bush may suggest that Rehnquist Court decisions upholding legal abortion, see Planned Parenthood v. Casey, 505 U.S. 833 (1992), and striking down laws discriminating against homosexuals, see Romer v. Evans, 517 U.S. 620 (1996), are best understood as keeping certain social issues that harm Republicans out of the political arena. The day after Casey was handed down, the first sentence of the analysis article on the front page of the New York Times declared, "From the standpoint of President Bush's re-election strategy, today's Supreme Court ruling on abortion took the edge off a recurring Republican nightmare." Robin Toner, Ruling Eases a Worry for Bush, but Just Wait, His Critics Warn, N.Y. TIMES, June 30, 1992, at A1.
13 See Jim Drinkard & William M. Welch, Rivals Present Contrary Views on Key Issues, USA TODAY, Oct. 4, 2000, at 6A.
Amendment law is so satisfactory at present, critical legal theorists might contend, that the Supreme Court should not take any case that would require the Justices to rethink any aspect of equal protection doctrine. In other words, these theorists hope that the Rehnquist Court will not decide equal protection cases for the next four years. Even better, the Court should declare a moratorium on making any constitutional decisions. In light of the wonderful job the federal courts have been doing for the past decade, Congress should reward that bench by passing legislation giving all federal judges a well-deserved four-year vacation. If the Justices on the Supreme Court nevertheless feel some conscientious compulsion to earn their salaries, their efforts might be directed towards rethinking those difficult Western state disputes over rights to the North Platte River, a matter that has never been satisfactorily resolved. If Justice Thomas wants to reopen long decided constitutional controversies in the name of original understandings, the Court should begin by rethinking the annexation of Texas, a matter which if decided correctly would result in Al Gore being declared President of the United States.

This Essay explores the practice of theorizing about equal protection doctrine or any other aspect of constitutional law by persons out of power. The standard essay on constitutional doctrine seeks to provide 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. The following pages challenge this widespread assumption that doctrinal analysis and constitutional theorizing ought not be influenced by the constitutional tendencies of the present Supreme Court or the present administration, either 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. Persons in power have different short term goals than persons out of power. Constitutional commentators sympathetic with the incumbent regime have an opportunity to make their ideal constitutional understandings official constitutional law. The best constitutional commentators unsympathetic with the incumbent regime can do is provide arguments that may strengthen the hand of the faction within the domi-

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17 Cf. Sanford Levinson, Why the Canon Should Be Expanded To Include the Insular Cases and the Saga of American Expansionism, 17 CONST. COMMENT. 241, 256-57 (2000) (discussing unresolved issues regarding the annexation of Texas).
nant coalition deemed the lesser evil. Persons in power must also act more immediately than persons out of power. The incumbent administration must make decisions concerning constitutional ideals that the opposition may avoid. Constitutional commentators who are constructing constitutional meanings that might become official only at some unknown point in the future need not and should not include the level of detail necessary for persons responsible for official constitutional meanings in the present. Not knowing what the political universe will look like when progressives will again influence official constitutional meanings, little reason exists for making specific arguments that inevitably depend on the specifics of that political universe.

My particular perspective colors the details, but not the central themes, of this Article. That perspective is of a person sympathetic with the sort of economic policies favored by democratic socialists who is writing at a time when the national government has been controlled by a center-right coalition for at least a generation. The issues discussed below, however, are hardly limited to progressives in 2002 or more generally to constitutional thinking in 2002. All persons more than a standard political deviation from the center-right have little influence on official constitutional meanings at present. Serious libertarians are no more likely than progressives to influence the present production of constitutional meaning on most issues. Social conservatives were similarly out of power throughout most of the 1960s. Just as the wicked child expresses estrangement from the community during Passover by asking, “[w]hat is this observance to you?,” so progressives, and others presently estranged from the official constitutional community, should be asking “what is the meaning of constitutional theory for us?”

Americans estranged from the official constitutional lawmaking process typical rely on counter-constitutional stories of redemption. Proponents of politically disfavored positions continually produce elaborately detailed and justified constitutions-in-exile or, in J.M. Balkin’s apt phrase, “Shadow Constitution[s].”19 These shadow constitutions lay out the constitutional meanings that would become official should the author or his political faction acquire the power necessary to articulate official constitutional meanings. Professor Balkin has asked what declaring allegiance to the Constitution means when what one is doing is really declaring allegiance to one’s own shadow constitution instead of the official Constitution as presently inter-

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My concern is with the structure of shadow constitutions, with whether they ought to mirror their official counterparts.

Progressive constitutional energy at present is not best spent endlessly refining and elaborating a constitution-in-exile. Little chance exists that the present Supreme Court majority will move in the directions suggested by progressive constitutional theory. Progressives are likely to influence present constitutional meanings only by devising arguments that convince some conservative officeholders to maintain what progressives perceive to be a very imperfect status quo. Moreover, a constitution-in-exile does not require the same degree of justification and detail as the official constitution. Progressives do not know what the state of the law will be, and they cannot accurately assess the normative costs and benefits of particular policies at that future time. While the party in power must often make very specific choices concerning their notion of constitutional equality, progressive constitutional theory ought to be satisfied with charting in a general way the directions progressives would go if given the power to influence official constitutional meaning.

Fixated on trying to convert President Bush and Justice Scalia to democratic socialism, present progressive theorizing, and constitutional theorizing in general, rarely helps actual democratic socialists and other progressives out of power make those constitutional choices that such persons must presently make. Constitutional theory tends to consist of arguments for particular constitutional ideals. Little theory helps persons on the fringes of power establish constitutional priorities for exercising their limited political authority to influence legislation and vet political appointments. The minority party in the Senate is not able to secure the appointment of ideal judicial nominees, but does have some power through filibusters and negotiation to prevent particularly hostile nominees. Such decisions, however, require an ordering of constitutional values that, with rare exception, are never a part of constitutional theory.

Much progressive constitutional theorizing also presents the present political regime as fundamentally more liberal than is actually the case. Bruce Ackerman, in particular, fosters the impression that the present political order is structured by past constitutional moments when persons with progressive conceptions of equality significantly influenced the production of official constitutional meanings.

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20 Cf. at 1724-25 ("constructing a Shadow Constitution ... does not avoid the real problem of constitutional faith").

21 Though, as noted infra, progressive arguments are likely to fall on sympathetic ears in some states and in some lower federal tribunals.


23 See generally BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991)
Whatever the normative merits of this and related claims, past progressive triumphs do not a progressive regime make, even in the absence of an intervening conservative constitutional moment, constitutional amendment, or even major constitutional precedent. Philip A. Klinkner and Rogers M. Smith better describe the American political order when they note that rare moments of racial progress are systemically followed by lengthy periods of conservative retrenchment. This suggests that progressives will return to power only when they successfully tell a new constitutional story. Older progressive narratives have lost their capacity to inspire electoral majorities.

Conventional rethinking of constitutional equality from progressive and other out of power perspectives often proves quite valuable even when politically inefficacious. Most of us are employed as pedagogues, not politicians. As pedagogues we have less reason than political actors to confine our thinking to present political possibilities. Professors attempt to foster habits of critical thinking that students will be able to use when in the future they are called on to consider various known and yet unknown political and jurisprudential problems. Law professors, in particular, teach their students to argue before the full spectrum of potential judges, not just those judges presently on the federal bench. Participation in scholarly debates over doctrine improves teaching more directly. At least, I am most effective as a teacher when I have done extensive thinking and writing on some subject matter. Thus, in my capacity as undergraduate and graduate professor, efforts to rethink the meaning of constitutional equality in the United States are welcomed. This Essay merely questions the political value of conventional progressive efforts to rethink equal protection doctrine.

ACKERMAN, FOUNDATIONS]; BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) [hereinafter ACKERMAN, TRANSFORMATIONS]. The claims made in this paragraph will be discussed infra notes 77-86 and accompanying text.

24 See PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 4-5 (1999) (asserting that while racial progress was made during three phases, the years in between brought extended regression in racial equality).

25 This emphasis on the political function of constitutional argument merges the truth and advocacy function of scholarship. Scholars should speak truth and "truth to power." See Bruce Ackerman, Revolution on a Human Scale, 108 YALE L.J. 2279, 2247-49 (1999) (urging legal scholars not to detach themselves from practical concerns of lawyers, judges, and politicians, but rather to try to influence the practice of law with their scholarly efforts). An infinite amount of truths, however, may exist. One may speak truth to power about the constitutional meaning of equality, the nature of the present ruling coalition, or the toenail lengths of federal judges. What truths one explores must depend on previous normative commitments that determine what is important to know and beliefs about what is already known. These beliefs, of course, should be subject to critical scrutiny as should every other belief, but not all beliefs can be subject to critical scrutiny at the same time. Given the intense critical scrutiny given to constitutional understandings of equality, the cause of certain understandings of that equality might be advanced more by greater attention to the present regime's capacity for advancing those understandings.
I. THE POLITICAL USES OF CONSTITUTIONAL EXEGESIS

Equal protection doctrine will be different when I control official constitutional meanings. My first priority will be socializing the legal profession. Socialization is constitutionally necessary because persons enjoy equal protection of the laws only when all are equally capable of vindicating their legal rights. Given the overwhelming evidence that access to experienced counsel and other resources used in litigation substantially affect the capacity to assert, exercise, and defend legal rights, equality under the law entails equal capacity to litigate. Moreover, to the extent that judges make as well as apply laws, principles of democratic equality require that persons have the same practical opportunity to litigate as they do to speak or vote.

Maimonides suggested two practices for achieving equal justice among economic un-equals. Judicial disciples attending trials had a religious obligation to raise every point they believed might favor the less fortunate litigant. Such interventions prevented the powerful from using their superior legal knowledge and fact-finding abilities to advantage in the legal process. When rich litigants came to court dressed to the hilt, they were required either to change into ordinary clothes or provide the same finery for the other parties before the judges. Judges who could not identify the more affluent party could not make decisions on the basis of wealth or impressions bought by wealth.

A constitutional equality in the Maimonidean spirit might insist that all judicial clerks provide substantial assistance to less fortunate litigants and that any party attempting to influence the outcome of a lawsuit by spending more than other parties be required to provide those parties with the funds necessary to purchase equal or equivalent legal services. Should IBM hire an entire law firm to defeat a private suit, the court would order IBM to pay an equivalent law firm to prosecute that suit. Private parties could spend more money when they felt doing so would promote a more accurate legal fact-finding.

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26 For a more elaborate version of the argument in this paragraph, see Mark A. Graber, Law in the Good Society, 9 THE GOOD SOC’Y 68 (1999).
27 The classic article documenting the numerous disadvantages less fortunate persons suffer in the litigation process is Marc Galanter, Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change, 9 LAW & SOC’Y REV. 95 (1974).
28 See SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING (1990) 154-58 (stating that poor persons’ inability to access the Court effectively sets parameters on the issues addressed, leaving neglected issues of importance to poor Americans).
30 See id. at 63 (commanding a judge to tell the “well clad” party to either dress like the “ill clad” party or dress the “ill clad” party like himself).
That spending, distributed to all parties, would not advantage the more affluent party in ways unintended by the law.

Elaborating the constitutional and jurisprudential merits of this argument for equal legal assistance would make sense at a time when progressives controlled or substantially influenced official constitutional meanings. Following the pattern of many contributions to this Symposium, my Article would first detail the inadequacies of equal protection doctrine laid down by the Rehnquist Court, insulting perhaps the probity or intelligence of the more conservative members of that tribunal. The Article would then detail previously proposed progressive rethinkings of equal protection, highlighting in more respectful terms the virtues and difficulties of those efforts. The core of that piece would explain in elegant detail both the specific justifications of a Maimonidean understanding of equal protection and the precise policies that follow from Maimonidean principles. Particular emphasis would be placed on how my rethinking of equal protection is actually different from and superior to other progressive ideas. These arguments might ultimately prove unpersuasive, even in a political universe where progressives controlled official constitutional meanings. Still, the progressive members of a hypothetical Wellstone administration would regard my conclusions as reasonable constitutional ideals worth contemplating. Members of a hypothetical Tushnet Court would not scoff at my reliance on the “thin Constitution” set out in the Declaration of Independence. When progressives control official constitutional meanings, refining progressive constitutional arguments is a meaningful political project.

Elaborating the constitutional and jurisprudential merits of this argument for equal legal assistance makes less sense while the Rehnquist Court sits, George Bush governs, and Republicans control one House of Congress. Commentaries on Jewish Law are not likely to provide the magic premises, information, or incantations that transform crucial members of the ruling center-right coalition into democratic socialists. Maimonides is also probably not the best source for arguments that will persuade moderate conservatives to resist calls to reduce present levels of legal assistance. References to the “thin Constitution” are unacceptable to conservatives in power. My egalitarian conclusions are an anathema to the present ruling class. Officials who do not believe that poor persons are entitled to substantial legal assistance are not likely to be persuaded that all persons are entitled to the same quality legal assistance presently enjoyed by major corporations.

Elaborating the Maimonidean understanding of equal protection also makes little sense as an effort to refine further the progressive

\[^{31}\text{For Professor Tushnet's elaboration of the “thin Constitution,” see Mark Tushnet, Taking the Constitution Away from the Courts 9-14 (1999) [hereinafter Taking the Constitution Away].}\]
shadow constitution or constitution-in-exile. Extensive squabbling over the best justification or form of providing substantially more assistance to less fortunate litigants is a poor use of intellectual energy at a time when the main issue on the political agenda is how much legal assistance programs should be cut. The best progressive shadow constitution might simply declare, "much more help for poorer litigants," leaving to the future the precise dimensions of that help and the best justification. The differences among progressives that need debate at present concern the best strategies and rhetoric for preventing less help for poorer litigants.

Progressive rethinkings of other specific areas of equal protection law or of more general equal protection principles seem no more pressing than progressive rethinkings of the equal protection rights of litigants. Thirty years of progressive argument has not had a noticeable influence on Chief Justice Rehnquist or the senior patriarchs of the Bush dynasty. Thirty more years of progressive argument is not likely to influence Justice Thomas or the younger scions of the Bush dynasty. Rather than trying to convince Justice Scalia to think more like Professor Ronald Dworkin, progressives should spend more energy doing the political organizing necessary for ensuring that when Justice Scalia retires he will be replaced by a Justice who thinks more like Professor Dworkin.  

Elaborating new progressive critiques of Rehnquist Court practice is at present politically futile. Progressive constitutional argument reached the point of diminishing political returns in almost every area of equal protection law more than a decade ago. Constitutional theory at the turn of the twenty-first century is saturated with alternatives to present Fourteenth Amendment doctrine. Those persons who have not yet been persuaded by previously published progressive claims are not likely to be persuaded by the next refinements on fairly worn themes. Should progressives take control of the government tomorrow or at some more future point, they will already have in hand numerous progressive proposals to guide their constitutional decision making. What progressives lack is a constitutional theory for persons out of power, a constitutional theory that might inform the present political choices actually open to the democratic Left.

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38 For a general discussion of "diminished political returns" as applied to progressive constitutional argument, see Mark A. Graber, Social Democracy and Constitutional Theory: An Institutional Analysis, 69 Fordham L. Rev. 1969 (2001).
A. Influencing the Official Constitution

Progressive constitutionalists are not likely to convert the Rehnquist Court, the Bush Administration, and the Republican-controlled House of Representatives. Bombarded by a steady stream of progressive law review articles and advocacy, the Supreme Court has nevertheless been moving consistently in a rightward direction over the past three decades, particularly with respect to the rights of poor people. Justices Thomas and Scalia, undeterred by that barrage of critical commentary, are working hard to convince their brethren to overrule those liberal precedents that have not been twisted to serve conservative ends. Justice Thomas, in particular, is committed to abandoning past judicial decisions providing some constitutional protection for poorer litigants. A similar outpouring of progressive political arguments has not stemmed the conservative drift of national politics. The elected branches of the federal government are presently controlled by a center-right coalition nearly identical to that which presently controls the federal judiciary. Indifferent to the disturbing increases in economic inequality over the past three decades, President Bush's proposed budget cuts funds for the Legal Services Corporation while offering a substantial tax cut to the most fortunate Americans. Interrupted only occasionally by a progressive member of Congress making an impassioned speech on the need for funneling more resources directly to the poor, debate in Congress focuses almost entirely on the size and distribution of those cuts.

Progressive constitutionalists participate only at the margins in the process by which the ruling center-right coalition resolves questions of constitutional equality. Whether the subject is the tax code, legal

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56 For Justice Thomas’s assault on existing constitutional precedent, see Mark A. Graber, Clarence Thomas and the Perils of Amateur History, in THE STRUCTURE OF REHNQUIST COURT JURISPRUDENCE (Earl Maltz ed., forthcoming 2003).
58 See, e.g., KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH (1991) (stating that the Reagan Administration's economic policies led to an income increase for the wealthiest one percent of Americans, while middle class income stagnated and incomes dropped for many lower-income Americans).
assistance, or some other matter, the central constitutional choices inside and outside courts range between moderate-conservative positions and more extreme conservative positions. Distinctively progressive policies are not among the alternatives seriously being considered by those national political actors whose votes are likely to determine legislative, executive, and judicial decisions. The practical alternatives for legal assistance, for example, are the moderate-conservative position (held by the American Bar Association), that some increases in funding are necessary to maintain existing services, and the more radical-conservative position (held by ideological conservatives in the Justice Department and Congress), that federal legal assistance programs should be abandoned. Debate within the Supreme Court for the foreseeable future is over whether the line of cases beginning with *Griffin v. Illinois* and *Douglas v. California* should be overruled. No substantial expansion of those precedents is on the judicial horizon, though particularly strict limitations on legal services may be declared unconstitutional. 

Distinctively progressive premises fall on deaf ears during these debates. Arguments that begin by declaring that democracy requires substantial economic equality end in failure. Most participants in public debates over legal assistance and other egalitarian concerns have been exposed to, and have rejected, that and related progressive starting points. The consistent failure of such claims to influence national policy making suggests that the persons who presently control official constitutional meanings are unwilling to accept any argument that calls for substantial redistribution of wealth. The problem stems less from politics defeating principle than from the principles that animate the present ruling class. No persuasive argument for substantial redistribution of wealth can probably be made using only premises and information generally accepted by conservatives. Inevitably, a progressive principle sneaks into the syllogism. Maimonidean equal protection, for example, assumes a difference between legal services and consumer goods. Conservatives regard legal services as another commercial good that ought to be bought and sold as any other commercial good. The idea that persons should not be allowed to gain legal advantages from unlimited spending makes no more sense from this anti-progressive perspective than the idea

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351 U.S. 12 (1956) (holding that poor persons have a right to a free transcript when appealing a criminal conviction).
372 U.S. 353 (1963) (holding that poor persons have a right to counsel during mandatory appeals from a criminal conviction).
4 For instance, think of all the arguments for legal abortion that assume that consenting adults have the right to engage in sexual intercourse. See generally Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).
that persons should not be allowed to gain political advantages from unlimited spending.

1. The Justice O'Connor and Justice Kennedy Strategy

Socially liberal policies constitute a partial exception to the depressing constitutional landscape for progressive causes. Possible alliances exist with "country-club Republicans," who "identify the claims made by the organized women's movement with their own class interests."43 These suburban residents, who are conservative on economic issues, want their daughters to have successful careers, recognize that birth control and abortion services may be necessary for those careers, think that sexual orientation is largely a matter of private choice, and generally hope that religion plays a limited role in public life. Justices Blackmun and Powell clearly fit the profile of country-club Republicans.44 So do Justices O'Connor, Souter, and Kennedy.45 Many legislative and executive officials in the ruling center-right coalition similarly combine economic conservatism with mild social liberalism. 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. These alliances explain why, at a time when the United States became more conservative economically, the sexual revolution was largely institutionalized.46 Perhaps progressive constitutional theory should take this political reality into account and primarily pitch arguments at Justice O'Connor, Justice Kennedy, and other country-club Republicans with moderately liberal social tendencies.

Progressives writing for this small but influential audience47 should nevertheless understand the limited nature of any coalition with the suburban wing of the Republican party. Country-club Republicans call the shots in this relationship. Their control serves to wall social liberalism off from economic liberalism. Even if the principles underlying the best justification for keeping abortion legal and banning discrimination based on sexual orientation also mandate substantial economic redistribution, suburban members of the present center-right regime do not come to this conclusion. The distinctive political and constitutional problems of the poor are not going to be ad-

43 TAKING THE CONSTITUTION AWAY, supra note 31, at 148.
44 See id. at 148-49 (describing how the careers of Justices Blackmun and Powell classify them as country-club Republicans).
45 Cf. id. at 156-57 (discussing the belief of Justices O'Connor, Souter, and Kennedy that Roe v. Wade, "while perhaps wrong when decided, [has] become so entrenched in our constitutional scheme that it cannot be abandoned").
dressed by the present ruling coalition. Additional analysis of that injustice is not likely to remedy the problem.

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. The Chamber of Commerce has little quarrel with the modern welfare state as that state has evolved in the last generation. Members are not likely to complain about, and may even support, Supreme Court decisions that make executing the mentally retarded a bit more difficult, rein in particularly egregious prosecutorial practices, retain bans on official prayer in public schools, give the federal government some power to prevent discrimination against the disabled, and reject constitutional claims based on the Second Amendment. Progressive constitutional theorists might see their role in the short run as helping these moderate conservatives find arguments that will convince Justices O'Connor and Kennedy to maintain most existing precedents, and convince other country-club Republicans in the elected branches of the national government to maintain the constitutional status quo.

These progressive attempts to speak seriously to the center-right confront several difficulties. Persuasive efforts may be superfluous. The United States presently faces no shortage of intelligent lawyers who are country-club Republicans (or Democrats) that might require progressives to fill an intellectual void. Presumably, center-right law professors and lawyers are likely to make better and more persuasive moderate conservative arguments than progressive scholars. Persuasive efforts may also not be believable. Members of the center-right coalition have good reason for doubting whether progressives will continue to sound so moderate when the Left gains more power to control official constitutional meanings. Finally, persuasive efforts may weaken long-term progressive goals. Arguments that might prevent more conservative judicial decisions might also foreclose more liberal movement in the near future.

The constitutional arguments that best justify maintaining a line of precedents are not those that best justify expanding that line of precedents. Justices Kennedy and O'Connor will instinctively recoil from any defense of the Griffin line of cases or any other liberal precedent that explicitly, obviously, or even possibly, provides strong grounds for expanding those holdings in the future. The arguments most likely to appeal to those moderate conservatives are claims that

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48 See TAKING THE CONSTITUTION AWAY, supra note 31, at 148 (noting that "country-club Republicans... accepted the basic contours of the New Deal and the welfare state....").
will limit future judicial capacity to move in both liberal and more conservative directions. The difficult question progressive theorists confront is whether to advance doctrines that might persuade moderate conservatives to maintain existing rights for poor people at the cost of including language that might limit the capacity of future progressive Justices to expand those rights.

Judicial minimalism highlights some advantages and disadvantages with progressive strategies for finding common ground with the moderate right. Cass Sunstein and other proponents of this approach to the judicial function claim that the Supreme Court should generally resolve constitutional cases on the narrowest possible grounds, both in terms of the actual issues decided and the justification for the decision. Such progressive calls for judicial minimalism presently have several political virtues. Judicial minimalism appeals to crucial swing Justices on the Supreme Court. Unlike distinctively progressive claims, calls for courts to decide cases narrowly have historically echoed across the political spectrum. Whether "judicial minimalism has been the most striking feature of American law in the 1990s" is open to doubt, but Justice Thomas and Justice Scalia have so far failed to convince the more moderate conservatives on the bench to abandon completely past progressive decisions, however those decisions have been watered down. Justice O'Connor in particular, is typically reluctant to make bold judicial pronouncements. Progressives should do what they can to buttress her reluctance, given the probability that a more assertive Justice O'Connor is likely to have more sympathy for the political Right than for the political Left. Progressives for the foreseeable future should "prefer to leave fundamental issues undecided," both inside and outside the Court. The more constitutional questions left open for the foreseeable future, the less precedent the next progressive Court will have to overrule. Progressives who foreswear broad judicial decisions are sacrificing nothing of present value. Broad judicial decisions for the next few years will be broad conservative decisions, decisions striking down all affirmative action plans or all legal assistance to civil litigants. Finally, judicial minimalism serves as a healthy reminder that progressives will presently win constitutional victories inside and outside the courts only if their claims can be couched in the narrowest possible terms. Moderate conservatives who cannot be persuaded to make the

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49 The following discussion of the political virtues of minimalism does not impugn the intellectual sincerity of any scholar who advocates that approach to the judicial function. As noted above, purely tactical uses of minimalism are probably not believable.

50 Cass Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court xi (1999).

51 See id. at xiii.

52 Id. at x.
legal system more egalitarian in practice might be persuaded that a particular party has a right to a particular form of legal assistance.\(^3\)

Progressives prepared to jump on the minimalist bandwagon should look at how such decisions may buttress the present regime before they leap. Just as minimalist decisions during the 1970s striking down particularly egregious forms of discrimination against women weakened support for the Equal Rights Amendment,\(^4\) so 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 stunning gross injustices are remedied. The minimalism of Justice O'Connor and, to a lesser extent, Justice Kennedy, may play a vital role in sanitizing the present regime. 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.

Minimalism may be directed at all constitutionalists, but the primary audience for Cass Sunstein's writings are persons whose leanings are center-left. Conservative understandings of the judicial function are more likely influenced by such conservative thinkers as Michael McConnell than by jurists on the editorial board of The American Prospect. Should Sunstein successfully persuade many readers, the most likely outcome is that the next generation of potential progressive Justices will be committed to some version of judicial minimalism. Debate over judicial minimalism should, therefore, be one of the central debates associated with progressive shadow constitutions. This debate is over what progressives should do when in power, and is not about how to influence the suburban conservatives who govern at present. Progressives participating in this conversation should remember that our willingness to be minimalists when we control official constitutional meanings does not mean that conserva-

\(^3\) This progressive reality suggests that Sunstein may be wrong when he claims that the more liberal wing of the present Court is in principle more minimalist than the more conservative wing. See id. at xiii. The difference between Justices Scalia and Ginsburg may simply be that Justice Scalia believes he might be able to obtain maximalist conservative decisions, while Justice Ginsburg knows she cannot obtain maximalist liberal decisions. The minimalism of the liberal wing of the Court can only be measured when a stronger liberal majority forms on the federal bench.

\(^4\) See JANE J. MANSBRIDGE, WHY WE LOST THE ERA 45-47 (1986); see also Mark A. Graber, Our (Im)Perfect Constitution, 51 REV. POL. 86, 95-96 (1989) (citing various equal protection gains made by women in the years leading up to the defeat of the Equal Rights Amendment).
tives will be minimalists when they control official constitutional meanings.

2. The Senator Kennedy Strategy

Progressive constitutional theorists are better advised to help Senator Kennedy than Justice Kennedy in making constitutional choices. Senator Kennedy and other progressive officials in Congress are far more likely than country-club Republicans to be influenced by constitutionalists who identify with the Left. Liberal Democrats presently lack the power necessary to make their constitutional vision the fundamental law of the land. They may, however, be able to 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 influence on public policy. Some constitutional openings may be determined solely by political possibility. Senator Kennedy may find that forty-one Senators are willing to filibuster against a bill banning abortion, but that only thirty Senators will support a filibuster against a bill reducing assistance to poor civil litigants. Other constitutional openings may require progressives to decide on the lesser of two evils. Liberal Democrats may be able to restore some funding for abortion or legal assistance, but not both. Senator Kennedy and his political allies may need some standards for determining when a judicial or executive nominee is too conservative.

Present constitutional theory says almost nothing that helps persons with relatively disfavored political ideas determine how to exercise their very limited power to influence official constitutional meanings. 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. Senator Kennedy during various confirmation debates will be able to filibuster for decades reading progres-

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55 Cf. LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 220 (1985) (stating that progressives "should not be lulled into the belief that, if we but embrace neutrality [in free speech cases] for those who would exterminate some among us, its shield will automatically be available to protect us when it is we who cry for help").
sive 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*\(^5\) and *United States v. Lopez*\(^6\) or a Justice who would treat both decisions as good law.

Constitutional theory presently fails to help anyone establish constitutional priorities because constitutional discourse typically works within only two categories: constitutional and unconstitutional. Virtually no language exists for constitutionally evaluating practices that are in the same category. No good constitutional standards exist, for example, for determining whether segregated schools were a “worse” constitutional violation than the Alien and Sedition Acts. Practices in the constitutional category do admit of gradation based on wisdom. Not everything constitutional, theorists admit, is wise. Justice Felix Frankfurter noted that “preoccupation by our people with the constitutionality, instead of the wisdom, of legislation or of executive action is preoccupation with a false value.”\(^5^8\) 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 justiciability 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,\(^5^9\) interdoctrinal deals are strictly forbidden. The Supreme Court, Earl Warren

\(^{54}\) 410 U.S. 115 (1973) (finding that the right to have an abortion is a fundamental right protected under the Due Process Clause).


\(^{56}\) Dennis v. United States, 341 U.S. 494, 555 (1951) (Frankfurter, J., concurring).

declared, is not the place where one “tak[es] half a loaf where a whole loaf could not be obtained.” Justice Brennan is not expected to trade his vote in flag burning cases for Justice Rehnquist’s vote in death penalty cases. 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 and on such constitutional matters as campaign finance reform. Moreover, the structure of legislative decision making virtually 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 support filibusters rather than confirm any official believed to hold at least one mistaken constitutional notion. Given the occasional disagreements among such ideologically similar Justices as Marshall and Brennan, or Thomas and Scalia, Senators who resolved never to support a nominee with whom they have any constitutional disagreement will probably only be able to vote to confirm 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. One such ordering might regard the use federal funds by religious organizations as a tolerable constitutional injustice, attacks on legal abortion as a constitutional injustice that should be opposed, and executions as a constitutional injustice that should be opposed by all constitutional means.

The Democratic Party, and possibly progressive constitutionalists, have apparently reached a consensus on constitutional priorities in the absence of any theorizing on the subject. That coalition’s fundamental constitutional commitment is maintaining *Roe v. Wade.*

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61 Professor Sotirios Barber, however, 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. *Sotirios A. Barber, On What the Constitution Means* 97-98 (1984).

62 410 U.S. 113 (1973). The argument in this paragraph is detailed at length in Graber,
The political Left demands that Republican appointees promise to respect reproductive liberties, but rarely seeks to extract pledges on other progressive constitutional concerns. Abortion has become the constitutional priority of the Democratic Party even though no liberal constitutional theorist has explained why reproductive rights are constitutionally more important or more firmly grounded in the Constitution than other rights that progressive constitutional theorists have advanced. Abortion has become the first priority of legal liberals even though virtually all progressive and liberal moral theorists believe the morality of abortion is far more contestable than the morality of greater redistributive policies for the poor. The abortion right is now the Left's "darling privilege" even though the primary supporters of abortion rights are affluent Americans, not the poorer citizens the Democratic Party and progressives claim to represent.

Those politicians and interest groups will, if pressed, doubtlessly be able to offer good reasons for their insistence that Attorney General Ashcroft pledge to respect abortion rights but not the rights of poor litigants. The abortion right may be the only progressive freedom that can be sustained in the present political environment. Legal abortion primarily benefits poor persons, who before Roe were unable to obtain safe or legal terminations of their pregnancies. These claims, however, require debate. If progressives may only exercise a limited degree of influence over official constitutional meanings at present, then the most constructive constitutional debate progressives can have among themselves is over what progressive constitutional concerns are most pressing and not over the precise details of the shadow constitution. Perhaps agreement on a different ordering of constitutional values will emerge, one that more explicitly measures constitutional injustice by impact on the poorest Americans.

3. The Vermont Strategy

Progressive advocacy does influence official constitutional meanings that fall under the radar of Congress and the Supreme Court. Progressive lower federal court judges are often able to escape direct Supreme Court supervision, progressive state court judges play important roles on many state benches, and progressive elected officials play active roles in many state governments. Pitching progressive

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Clintonification, supra note 35, at 731-80.
66 The phrase is shamelessly lifted from MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE’S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000).
64 See GRABER, RETHINKING ABORTION, supra note 32, at 66-68.
65 See generally Walter F. Murphy, Lower Court Checks on Supreme Court Power, 53 AM. POL. SCI. REV. 1017 (1959) (detailing how lower courts use procedural or interpretive devices to circumvent general policies advanced by Supreme Court decisions).
constitutional arguments to these officials makes good sense. Progressive state courts and legislatures may presently serve both as laboratories of progressive democracy, where different progressive theories may be tested in practice, and as sources of precedent when progressives again control official national constitutional meanings. Vermont seems a particularly good site for progressive advocacy. The state is presently represented in the Senate by Patrick Leahy, a liberal Democrat, James Jeffords, a liberal independent, and in the House of Representatives by Bernard Sanders, the only Socialist member of Congress. The Vermont Supreme Court has insisted that gay couples enjoy the same benefits as married persons, the Vermont state legislature passed a law recognizing such civil unions, and Governor Howard Dean defended that measure during his successful reelection campaign. Clearly Vermonter are open to progressive arguments that are failing on the national level. Recent state constitutional precedents, made both inside and outside of courts, provide solid legal and political foundations for expanding progressive constitutionalism in that jurisdiction. Progressives who wish to defend Maimonidean equal protection or similar measures might think locally, making arguments that rely on Vermont's distinctive constitutional heritage and practice or the distinctive constitutional heritage and practice of a similarly progressive state.

The market for constitutional theory, alas, does not favor the Vermont strategy. Progressive and other constitutional theorists find prominent outlets for their thoughts when they seek to instruct the Justices of the United States Supreme Court, not the justices who sit on the Supreme Court of Vermont. Progressives in states must largely fend for themselves with little help from constitutional theorists seeking national prominence. Interestingly, the insulting tone of much progressive theory suggests that most progressive theorists agree that the nattering at the Rehnquist Court is a hopeless cause. The goal of progressive constitutional theory, this practice suggests, is to instruct progressives on what they should do at the future time when progressives control or substantially influence official national constitutional meanings.

64 The classic article is William J. Brennan Jr., State Constitutions and the Protections of Individual Rights, 90 Harv. L. Rev. 489 (1977) (describing judicial and legislative measures sensitive to progressive needs).
68 Perhaps Governor Dean's reelection in Vermont is part of a state constitutional moment that endorses civil unions. See generally ACKERMAN, FOUNDATIONS, supra note 25 (discussing the concept of constitutional moments).
69 See TAKING THE CONSTITUTION AWAY, supra note 31, at 155-57.
Sweden is an alternative for progressives unsatisfied 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 other Western European nations 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, in a law review article. Given the relative success of Western Europeans (and Vermon ters) at instituting progressive policies, however, nationally-oriented American constitutional theorists might be better advised to learn what progressives in those jurisdictions did, or are doing, right than suggest that more successful social democrats elsewhere should adopt strategies that have failed in the United States.

B. The Shadow Constitution

Progressive arguments for equalizing legal assistance and similar progressive claims are best understood as constructing shadow constitutions or constitutions-in-exile. Parties out of power in many nations form shadow cabinets. These bodies consist of the persons who might hold various executive offices when that coalition gains control of the government. The American equivalent apparently is the shadow constitution. Scholars out of power in the United States author various shadow constitutions that detail the constitutional meanings that might become the fundamental law of the land should the author’s preferred coalition gain control of the federal government. Proposed amendments to the progressive shadow constitution are aimed primarily at progressives, who might be persuaded that newer progressive arguments advance better policies and justifications than older progressive arguments. For instance, Deborah Rhode has just published a wonderful book arguing for substantial increases in legal assistance. Maimonidean equal protection might be considered a minor revision or a supplement to this version of the progressive shadow constitution.

Progressive refinements of the progressive shadow constitution assume the shadow constitution should mirror the official constitution, much as the shadow cabinet mirrors the official cabinet. The official

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72 See, e.g., Chris Parkin, Dublin Shadow Cabinet Named, PRESS ASS'N, Feb. 15, 2001; Czech Republic: Czech Opposition Alliance To Present “Shadow Cabinet” in April, IPR STRATEGIC BUS. INFO. DATABASE, Mar. 21, 2001.

73 Just as more than one shadow cabinet can exist in a nation, so may countries have more than one shadow constitution. See New Shadow Cabinets Grow in Number, IPR STRATEGIC BUS. INFO. DATABASE, Dec. 26, 2000.

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The cabinet has a Minister of the Interior, so the shadow cabinet has a shadow Minister of the Interior. The Rehnquist Court articulates the official understanding of equal protection, so persons constructing the shadow constitutions articulate alternative understandings of equal protection. If members of the party out of power debate with the same intensity who ought to be the shadow Minister of Justice as members of the party in power debate who ought to be the official Minister of Justice, then members of the party out of power ought to debate with the same intensity the legal assistance rights recognized by the shadow constitution as members of the party in power debate the legal assistance rights recognized by the official constitution. In short, constitutional analysis done by persons out of power ought to be identical to constitutional analysis done by persons in power. The only difference between official cabinets or constitutions and shadow cabinets or constitutions is that the former lay down the present law of the land while the latter articulate proposals for the future.

This "shadow" metaphor and practice obscures how constitutional theory might be influenced by the different responsibilities of, and opportunities before, persons in and out of power. Persons in power are responsible for determining official constitutional meanings. They decide whether the constitution will presently be interpreted as guaranteeing poor persons various rights to assistance in civil cases. Constitutional theorists who are generally sympathetic to the ruling center-right coalition have the opportunity to influence the choices government officials will make when deciding that and other constitutional matters. The precise differences between alternative conservative constitutional understandings really matter at present. When making authoritative constitutional decisions, government officials will be choosing between different conservative constitutional visions or creating a new conservative synthesis. Persons out of power are not responsible for determining official constitutional meanings. They do not get to decide whether the Constitution will presently be interpreted as guaranteeing poor persons various rights to assistance in civil cases. Rather, the responsibility of the opposition party is to explain why the governing coalition's principles and policies are wrong. This critical function rarely requires choosing between specific alternatives. Progressives can demonstrate that existing legal assistance policies are woefully inadequate without deciding whether Professor Rhode's proposals are more attractive than Maimonidean equal protection. The precise differences between these and other proposed progressive understandings of constitutional equality are not of immediate concern because they are not on the present political agenda.

Constitutionalists in power often face specific constitutional decisions that constitutionalists out of power are able to avoid. The Republicans in Congress will soon vote on what they believe is an appropriate level of legal assistance. The persons who vote for that
budget will vote for a specific dollar figure to be given annually to the Legal Services Corporation. Progressive legislators are free to claim only that Republican proposals are inadequate, without revealing their ideal funding levels. Justices O'Connor and Kennedy will soon have to determine what forms of legal assistance the Constitution requires be provided to poor civil litigants. Progressives on the federal bench are unlikely to be confronted with a case in the foreseeable future that requires them to think about their ideal level of legal assistance. Justice Breyer can simply declare that the Constitution requires at least as much as existing precedent without detailing how much more he would insist on were four other Justices to share his constitutional vision.

The federal judicial appointment process provides another example of the different constitutional judgments required of official constitutional interpreters and persons constructing a shadow constitution. When a vacancy occurs on the Supreme Court, the President and his advisors will determine which specific jurist they will nominate for that tribunal. They will be unable to claim, as candidate Bush could, that they will appoint only “compassionate conservatives” or Justices similar to Justice Scalia. President Bush will not be able simply to list ten names he thinks should be considered for any judicial vacancy. His Administration will have to select a specific nominee. Progressives will not be similarly compelled to decide who is the best person to fill that judicial vacancy. That choice will not be theirs to make. Persons on the Left do not have to consider whether they prefer Justices more like Justice Brennan or Justice Ginsburg; a sitting federal judge or a professor; Kathleen M. Sullivan or Cass Sunstein. The Bush Administration will have to make all the analogous choices. Only persons who control official constitutional meanings are compelled by their office to make specific constitutional choices. Persons out of power have to determine only whether they will oppose that choice. They might suggest an alternative, a “shadow justice.” They might also rest content with declaring a nominee “too conservative.”

Cluttering a shadow constitution with excessive detail may be unwise as well as unnecessary. Conservative efforts to get the details of the official constitution right make far more sense than analogous progressive efforts. Conservatives have far greater capacity to get crucial present details right than progressives have to get future, possibly distant future, details right. Persons with the power to determine official constitutional meanings make present constitutional choices in light of present information. Conservatives constructing the official constitution act more easily on, and are better positioned to determine, their political window of opportunity, the relevant legal materials, and the probabilities that certain policies will actually secure

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Alternatively, they will decide on the specific process for determining the budget of the Legal Services Corporation.
conservative constitutional ends. A shadow constitution essentially declares, on the basis of information presently at hand, what persons out of power will do in the future when they secure power. A very high probability exists that numerous provisions of the progressive shadow constitution will be outdated by the time progressives take office.

Conservatives constructing the official constitution are better positioned to assess their political window of opportunity than progressives constructing their shadow constitution. President Bush has attained, or should be able to attain, information for determining the political possibility and costs of proposing to eliminate all funding for legal aid or nominating a Justice committed to overruling *Roe v. Wade*. The Supreme Court is similarly positioned to assess the present political response to a decision overruling the *Griffin* line of cases. Republicans may misguess. Still, President Bush and Chief Justice Rehnquist in 2002 are far better able to determine the political response to conservative policies and decisions handed down in 2002 than progressives in 2002 are able to determine the political response to progressive policies and decisions made at some unknowable point in the future. What will be politically possible for the next successful progressive coalition depends on those presently unknown political factors that will propel progressives to power. We simply do not know whether the next progressive President will have the political support necessary to nominate a Laurence Tribe to the Supreme Court, or whether the political costs of a successful Tribe nomination would outweigh the benefits. How much political capital the next progressive president will have to spend eliminating capital punishment is similarly unknown.

Conservatives constructing the official constitution are also better positioned to assess what is legally possible than progressives fashioning a shadow constitution. When Justice O'Connor considers in 2002 whether to support Justice Thomas' crusade to overrule the *Griffin* line of cases, she will be able to make that decision in light of all the relevant legal materials available in 2002. Conservative constitutional commentators are almost as well off. The universe of relevant legal materials is not likely to expand considerably between the time a conservative publishes a law review article on legal assistance and the time the Supreme Court hears its next case on legal assistance. Hence, that commentator can, with a high degree of certainty, analyze virtually all of the relevant constitutional provisions, statutes, judicial precedents, and other legal sources that might influence the judicial decision. Progressive commentators writing articles directed at future progressive Justices cannot be nearly as confident that they are analyzing the material that will be relevant when a progressive judicial majority analyzes constitutional rights to legal assistance. The more the progressive shadow constitution is rooted in a detailed exegesis of present legal materials, the more likely such a constitution
will be dated when progressives take political office. Consider a law review article whose crucial premise is that the Supreme Court has not yet explicitly ruled on whether poor persons ever have a right to a state-funded private detective. This claim is presently true. Before progressives gain a judicial majority, however, that matter might be decided adversely to the claim of constitutional right. When similar litigation came before the newly constituted progressive bench the issue would not be, as the law review claimed, whether Griffin should be extended, but whether the subsequent offending case should be overruled. Other political developments may similarly influence the constitutional status of certain arguments. To the extent that actual practice is relevant, the actual practice may change. New statutes may be passed. Scholars may find new evidence concerning the original understanding of constitutional provisions. A constitutional amendment may even be passed. Virtually all progressive defenses of state funding for abortion would be irrelevant should the Constitution be amended to include an explicit ban on state-funded abortions.

Conservatives constructing an official constitution are better able to assess the present normative costs and benefits of constitutional proposals than progressives constructing a shadow constitution. When President Bush in 2002 decides whether to cut funding for legal services, he has at his disposal all the evidence available at the time of his decision for determining the impact of those cuts on the legal system. Progressives writing for the future cannot be as confident that they have at their disposal all the information that will be relevant for determining the impact of their proposals at the time when those proposals might actually become law. Some provisions in shadow constitutions may be immune to change over time. Just as Kant believed that all murderers should be executed regardless of the costs and benefits, so some progressive opponents of capital punishment may believe that the Supreme Court should declare capital punishment unconstitutional even if no one is about to be executed or if undisputed evidence demonstrates that capital punishment deters numerous murderers. Progressives of a more pragmatic bent may, however, adjust constitutional beliefs and priorities as new evidence emerges. Proof that capital punishment actually saves many lives and improves living conditions in poor communities may convince some persons that a more fairly administered death penalty would be constitutional. Likewise, if juries begin consistently handing down huge verdicts against parties to lawsuits who spend excessively in litigation, providing legal assistance to poor litigants may become unnecessary. More generally, any provision in the progressive shadow constitution that is partly dependent upon present understandings of various policies is vulnerable to changes in those under-

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standings. The more pragmatic the provisions of the progressive shadow constitution, the more likely the argument will be out of date when progressives control official constitutional meanings.

Constitutional theorizing aimed at influencing current official constitutional meanings requires more thorough analysis than constitutional theory aimed at the distant future. The cost of mistake is higher when constructing an official constitution than when fashioning a shadow constitution. When persons in power make mistakes, society suffers the consequences. If conservative educators implement policies concerned with teenage sexuality that result in increased abortions, then the community is worse off as measured by conservative principles. Hence, conservatives in power have very good reasons for thinking carefully about what policies in practice actually promote conservative reproductive goals. Shadow constitutions, on the other hand, are mere proposals. When the persons fashioning them make mistakes, the only present harm is to their reputation. If one goal of progressive constitutionalism is promoting greater redistribution and progressive taxes will make everyone worse off, no actual harm occurs as measured by progressive standards while progressives are out of power. Progressive tax proposals will be rejected. Progressives have to be sure they are right about progressive taxation only when in office. The judicial nominations process provides a clearer example of the different costs of mistake. A Justice placed on the bench by a conservative administration who turns into a liberal over the next four years is a disaster. A Justice suggested by liberals who turns into a conservative over the next four years is just an embarrassment.

The different places conservatives and progressives occupy in the present political universe suggests that constitutional theorizing is no exception to the general rule that appropriate political behavior depends on the actor's relation to the present regime. Conservative Republicans have the power to influence present constitutional meanings. Their constitutional theories appropriately consider in elaborate detail the possibilities that are politically feasible, whether such possibilities can be justified legally, and which of those possibilities best serve conservative principles. Progressives may only have the power to influence official constitutional meanings in the distant future. They cannot tell which progressive proposals will be politically feasible at that time, which will be justified legally, and which will best serve progressive principles. Hence, while the party in power needs to advance detailed constitutional proposals, the party out of power is best off simply advancing general principles, leaving the details until that time when they can be reasonably assessed.
C. Imminent or Distant

Whether progressives should construct elaborate shadow constitutions largely depends on whether progressives are likely to achieve substantial power in the near future. Progressives will need well specified constitutional theories should the next round of national elections bring to power a left or center-left coalition. The excruciating closeness of the 2000 presidential election combined with a razor-thin Republican margin in the House of Representatives suggest the reasonable probability of a more progressive ruling coalition by 2004. This coalition will need progressive doctrine at hand to govern. Traditional constitutional doctrinal analysis seems less pressing to the extent that the center-right coalition is fairly durable. That the Democrats might win in 2002 and 2004 does not entail that the Left will govern. The years 1993 and 1994 were not successful for progressives even though Democrats controlled all of the elected parts of the federal government. American politics may be presently structured in ways that will require substantial political change for progressives to influence official constitutional meanings. To the extent such changes are necessary, detailed progressive shadow constitutions drafted in the present are likely to be dated by the time they might influence official constitutional meanings in the future.

Two prominent theories of American constitutional development articulate these different understandings of progressive political possibilities. Bruce Ackerman’s writings maintain that the American constitutional order is still defined by commitments made during the Reconstruction, the New Deal, and the heyday of the Civil Rights Movement. In his view, the Reagan Administration’s failure to constitutionalize conservative political visions demonstrates the vitality of both progressive constitutional visions and progressive constitutional politics. Philip A. Klinkner and Rogers M. Smith maintain that Americans have largely abandoned commitments to racial equality made during the 1960s. The Reagan Revolution, in their view, is part of an enduring cycle in American politics where short periods of sharp gains in racial equality are followed by quite lengthy periods of renewed inequalities. Whereas Ackerman sees renewed commitments to the aspirations of the Civil Rights Movement as politically possible within the present political system, Klinkner and Smith suggest that political conditions in the United States will have to change substantially for progressives to be re-empowered.

1. Ackerman’s Optimism

Bruce Ackerman regards constitutional politics in the United States as structured by a series of major constitutional moments, most notably the Founding, Reconstruction, and the New Deal, as well as by some minor constitutional moments, the Civil Rights Era being the
best example. During these periods of intense constitutional debate, an aroused citizenry demonstrates a clear preference for one alternative in a very well defined constitutional controversy. That preference may or may not be expressed by a constitutional amendment ratified under the rules set out in Article 5 of the Constitution. What matters is that proponents of a particular constitutional vision are able to overcome all opposition to their political program by earning the overwhelming public support necessary to exercise decisive control over all three branches of the national government. This control enables those advocates to establish their popularly supported vision as the fundamental law of the land. The responsibility of the Supreme Court and other constitutional authorities during periods of normal politics is to interpret the Constitution consistently with the people’s wishes during their moments of political engagement and not to permit elected officials to challenge those wishes during times of public quiescence.

The present constitutional order, Ackerman insists, remains normatively committed to progressive constitutional values. Proponents of the Civil Rights Movement during the 1960s enjoyed the public support necessary to gain the overwhelming majorities in all branches of the national government that enabled them to incorporate their visions into the Constitution. Congress passed the Civil Rights and Voting Rights Acts by decisive majorities, President Johnson enthusiastically signed those bills into law, and the Supreme Court unanimously declared the measures constitutional. That the Civil Rights Movement embodied its vision in statutes rather than constitutional amendments is of no constitutional significance. What matters, Professor Ackerman claims, is the very clear public choice that the progressive civil rights principles of the 1960s should be understood as the fundamental law of the land. 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 Bork to the Supreme Court. The 2000 election could not have altered this constitutional status quo. A party that lost the popular vote in the most recent presidential election and whose majority in the House of Representatives is the smallest in recent history has clearly not demonstrated the overwhelming public

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77 This paragraph largely summarizes the argument in ACKERMAN, FOUNDATIONS, supra note 23, at 3-165.
78 This paragraph largely summarizes claims made in ACKERMAN, FOUNDATIONS, supra note 23 at 50-52, 108-11 and ACKERMAN, TRANSFORMATIONS, supra note 23, at 389-95.
support Professor Ackerman believes necessary for a constitutional moment.

Professor Ackerman’s reading of American constitutional development sends optimistic theoretical and empirical messages to the political Left. The explicit 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 in 2002 must still demonstrate that their present constitutional vision is the best interpretation of the progressive understanding of civil rights constitutionalized during the 1960s. The crucial point is that Ackerman regards the constitutional order as still structured by the three greatest moments of progressive triumph in American constitutional history. Progressives are the persons who must merely maintain the constitutional status quo, while members of the Rehnquist Court are the would-be revolutionaries. The implicit 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. Proponents of progressive constitutional values still have an equal, if not privileged, position in the constitutional universe laid out in Ackerman’s *We the People*. 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.

2. *Klinkner and Smith’s Pessimism*

Professors Klinkner and Smith present a decidedly more pessimistic view of American constitutional development. 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. All agree that the Revolutionary War, Reconstruction, and New Deal (extended to the Civil Rights Movement of the 1960s) are the three main constitutional moments in American history. More so than Professor Ackerman, however, Professors Klinkner and Smith highlight how substantial resistance to those understandings forced more egalitarian forces to accept many inegalitarian compromises. More important, Klinkner and Smith 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

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79 See KLINKNER & SMITH, supra note 24, at 4. See generally ACKERMAN, FOUNDATIONS, supra note 23.
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 decline tends to come in "period[s] of sixty to seventy-five years." Americans never completely undo the racial progress made during a progressive surge. Still, Klinkner and Smith insist that progressive surges are short-lived and that conservative rulers in periods of retrenchment interpret those surge periods as narrowly as possible. "[E]xceptional circumstances," in their view, are necessary to facilitate racial progress.

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 occurred 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." The past thirty years have exhibited a steady erosion in racial equality, as a relatively durable center-right coalition maintains power. "[A]s the imperatives of the Cold War lessened and ultimately disappeared," Klinkner and Smith declare, "so [too] would America's march toward racial equality." 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 twenty-first 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.

The thesis of Klinkner and Smith provides progressives with good and bad news. The good news is that progressive surges leave a record that future progressives can appropriate to their ends. Progressives looking for friends at crucial constitutional moments will find them. The crisis conditions responsible for creating constitutional moments create those conditions that make Americans more sympa-
thetic to progressive understandings of equality. The first piece of bad news is that conservatives looking for friends at crucial constitutional moments will also be successful. Progressive triumphs during constitutional moments are never complete. During the Reconstruction, New Deal, and Civil Rights eras, more conservative notions of equality had to be accommodated. History will support progressive attempts to expand progressive practices and conservative efforts to narrow those practices. The more important piece of bad news is that the political conditions of normal politics favor opponents of progressive notions of equality. Progressive surges are rare. During periods of retrenchment Americans typically prefer the most conservative interpretation of racial progress made in the past. "[F]urther progress toward a just and harmonious overcoming of racial divisions and inequalities might not occur in our time," Klinkner and Smith conclude "unless we as a people make extraordinary efforts of a sort we have never undertaken before except under the most extreme duress."8

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, and second, that the nature of politics in the absence of the conditions that promote progressive surges privileges more conservative understandings of the last progressive surge. The Bush dynasty, in the view of Klinkner and Smith, 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. No evidence exists at present that the action against Osama Bin Laden is inspiring more economically or racially egalitarian policies.

The differences between the present constitutional universe and the universe in which the Left next exercises substantial power are likely to be substantial rather than minimal if Professors Klinkner and Smith correctly understand American constitutional development. Progressives, in their view, will significantly influence official constitutional meanings only after dramatic political changes take place.

8 Id. at 3.
96 See generally ACKERMAN, FOUNDATIONS, supra note 23.
Progressives only have the vaguest notions of the external events that will precipitate this political change. No one knows how those events will reconstitute the polity or reconstitute progressives. If present constitutional politics is best described as the lengthy retrenchment after a progressive surge, progressive constitutional theory written in 2002 will be politically inefficacious. Progressive constitutional thought will not influence conservatives in the present and will be too dated to influence progressives in the future.

II. LESSONS FROM JUDGE ROBERT BORK

The fate of the shadow constitution drafted by Judge Bork in 1971 should chasten progressives who hope that their present writings will guide progressive judicial majorities in the future. Judge Bork seems the perfect case study, superficially, for demonstrating the value of the shadow constitution enterprise. His writings when conservatives were out of power earned him a seat on the United States Court of Appeals for the District of Columbia Circuit and a nomination to the Supreme Court. Judge Bork is presently an iconic figure within the triumphant conservative movement. Nevertheless, while Judge Bork has personally done well over the past twenty years, his shadow constitution has had almost no influence on public policy. His concerns are not the concerns of the Rehnquist Court majority, which has gone in directions almost entirely unanticipated by any prominent conservative constitutionalist writing when conservatives were out of power.

The shadow constitution set out in Bork's *Neutral Principles and Some First Amendment Problems* bears almost no relationship to the official constitution promulgated by the Rehnquist Court. Bork's shadow constitution insisted that "[c]onstitutional protection should be accorded only to speech that is explicitly political," that both the clear and present danger test and the incitement standard set out in *Brandenburg v. Ohio* should be abandoned, that state courts could enforce covenants not to sell property to persons of color, that the one person, one vote standard had no constitutional foundation, and that married persons had no constitutional right to use birth control. The Rehnquist Court has rejected all these suggestions. That tribunal unanimously insists that non-political speech, most notably commercial advertisements, are protected by the Constitution.

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88 Id. at 20.
89 Id. at 34-35.
90 Id. at 15-17.
91 Id. at 18-19.
92 Id. at 7-11.
and unanimously regards the *Brandenburg* standard as appropriate for determining free speech rights.\(^9\) *Shelley v. Kraemer,* \(^9\) *Reynolds v. Sims,* \(^9\) and *Griswold v. Connecticut* \(^9\) are in no danger of being overruled.\(^9\) Much to Bork's dismay, a clear Rehnquist Court majority insists that the Constitution protects abortion rights.\(^9\) The main arenas for Rehnquist Court activism have involved the expansion of Tenth Amendment rights of states and the limitation of the reach of the Interstate Commerce Clause.\(^9\) These matters were ignored in Judge Bork's writings during the 1970s. Indeed, state rights and enumerated power issues played no significant role in his 1990 book.\(^9\) Progressives writing in 2002 should wonder whether they will have any more influence on the direction of a future progressive court than Judge Bork has had on the direction of the Rehnquist Court.

Other conservative shadow constitutions drafted before 1986 provided similarly poor guides to Rehnquist Court decision making. A central conservative concern in these years was promoting judicial restraint in the name of democratic majoritarianism. Lino Graglia spoke for many on the political right in 1985 when he asserted that "[t]he basic justification for democracy is that experience has not shown us a better way of resolving these conflicts than to abide by the collective wisdom of elected officials, who represent ordinary people."\(^2\) Moreover, he continued, the Constitution properly interpreted gave those elected officials the latitude to make almost any policy they pleased. "If judicial review were in fact limited to merely that federal limits on casino advertising violate the First Amendment).\(^9\)


\(^9\) See 381 U.S. 479 (1965) (striking down state law forbidding the distribution and use of contraceptives).


enforcing the restrictions of the Constitution," Graglia concluded, "there would be so few occasions for its exercise that it would be a subject of little controversy or even interest." The Rehnquist Court has not heeded this advice. The conservative judicial majority on that tribunal has been more prone to expand judicial power into new areas of political life than to curtail instances where statutes had previously been declared unconstitutional. Such conservative scholars as Richard Epstein and Bernard Siegan who did call for the Justices to declare statutes unconstitutional emphasized constitutional rights to economic freedom. Rehnquist Court Justices, while occasionally using the Takings Clause to strike down a local measure, are far more inclined than any influential conservative scholar writing in the 1960s, 1970s or early 1980s to use the Tenth and Eleventh Amendments as main sources for judicial decisions declaring laws unconstitutional.

This Article helps explain why the shadow constitution Judge Bork drafted in 1971 did not become the official constitution promulgated by the Rehnquist Court. The practical costs and benefits of different free speech principles have changed significantly over the past thirty years. During the first two-thirds of the twentieth century, progressives and reactionary extremists were the persons most likely to be protected by expansive understandings of constitutional free speech rights. More recently, persons expressing socially conservative attitudes have felt themselves in need of constitutional protection from university hate speech codes and claims of harassment in the workplace. Reapportionment, once thought to empower urban Democratic constituencies, is now regarded as increasing the political power of more economically conservative suburbanites. Judicial decisions in 2002 overruling Brandenburg v. Ohio and Reynolds v.

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103 Id.
106 See, e.g., Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014-31 (1992) (holding that state regulations that deprive land of any economically beneficial use without compensation violate the Takings Clause, unless the proffered uses were not contemplated under the title); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 838-42 (1987) (finding that a building permit conditioned on granting a public easement constitutes a taking of property).
107 The analysis of free speech law in this paragraph borrow from Balkin, supra note 36 and Taking the Constitution Away, supra note 31, at 129-33.
Sims,\textsuperscript{10} thus, would not promote conservative political interests. These landmark progressive free speech precedents, along with cases like \textit{New York Times Co. v. Sullivan},\textsuperscript{11} also at present provide precedent for important conservative legal principles. Rehnquist Court Justices frequently rely on the broad statements about the First Amendment made in those cases when attacking campaign finance reform and regulation of commercial speech.\textsuperscript{12} Finally, \textit{Griswold v. Connecticut}\textsuperscript{13} has not been overruled because doing so is politically impossible. Virtually all Americans agree that married couples ought to have the right to use contraception. While conventional wisdom in the late 1970s was that abortion was a conservative wedge issue, present conventional wisdom is that Republicans should downplay their opposition to reproductive choice or lose support from crucial swing voters.\textsuperscript{14} In short, Judge Bork got the future wrong. Broad free speech protection contributes far more than he anticipated to conservative principles and interests. Attacking reproductive choice is politically more risky than he realized.

Judge Bork drafted a poor shadow constitution if shadow constitutions, as well as shadow cabinets, are judged by their capacity to serve as vehicles for bringing down the incumbent regime. Conservatives in the 1960s and early 1970s were not going to gain power on a platform of restricting both free speech and reproductive choice. For every voter attracted by that conservative vision, another voter, typically a more affluent voter, was repelled. Conservatives were propelled to power by some combination of racial politics, taxes, and a globalizing economy.\textsuperscript{15} The shadow constitution laid out in Kevin Phillips’s \textit{The Emerging Republican Majority},\textsuperscript{16} proved a far better guide to effect political action by conservatives than the shadow constitution laid down in \textit{Neutral Principles and Some First Amendment Problems}.\textsuperscript{17}

\textsuperscript{10} 377 U.S. 533 (1964).
\textsuperscript{11} 376 U.S. 254 (1964) (holding that to prevail on a defamation claim, a public official must show that speaker or publisher acted with actual malice).
\textsuperscript{13} 381 U.S. 479 (1965).
\textsuperscript{14} \textit{See} \textit{GRABER, RETHINKING ABORTION}, supra note 32, at 131-33.
\textsuperscript{17} Bork, \textit{Neutral Principles}, supra note 87.
or any other conservative constitutional analysis published in the 1960s and early 1970s.

Progressive shadow constitutions that purport to be politically efficacious as well as being intellectual exercises should similarly be judged by their capacity to be vehicles for bringing down the incumbent center-right regime. Under this standard, the fundamental constitutional debate progressives must resolve is whether the present conservative governing coalition seems relatively durable. If Ackerman is right, Americans retain both a normative and a practical commitment to the progressive ideas constitutionalized during the New Deal and the Civil Rights Movement. Further progressive debate over the content of those ideas makes sense given their continuing vitality in American politics. The Left, after all, may be only a more charismatic candidate away from regaining substantial power to influence official constitutional meanings. With a return to power potentially imminent progressives must quickly figure out whether Maimonidean equal protection will be implemented should they win the next election. If Klinkner and Smith are right, the progressive ideas of the New Deal and Civil Rights Movement have lost their capacity to inspire successful progressive coalitions. Further debate over the meaning of those progressive ideas is an exercise in nostalgia. Explaining in great detail why the existing regime is really committed to Maimonidean equal protection or some other progressive ideal in theory seems a pure academic exercise if that regime must be overthrown for progressives to realize their ideals in practice.