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# Utopian Thinking for Progressive Constitutionalists

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## Utopian Thinking for Progressive Constitutionalists\*

MARK TUSHNET†

The opening pages of Rousseau's *Social Contract* have two striking phrases. The more celebrated is, "[m]an was born free, and everywhere he is in chains."<sup>1</sup> That, though, is preceded by this: "I want to inquire whether, taking men as they are and laws as they can be made to be, it is possible to establish some just and reliable rule of administration in civil affairs."<sup>2</sup> I take this second sentence as my guide: Taking the textual Constitution as it is and with the interpreted Constitution as it could be, can there be a constitutionalism that progressives could wholeheartedly endorse?<sup>3</sup>

I contrast utopian thinking to the thinking grounding the day-to-day work of progressive litigators and academics focused on achieving the best outcomes possible in the courts (and legislatures) as they are, not as they could be. To focus on the Supreme Court: In such work the hoped-for outcome is one favorable to our long-term goals. Ordinarily that means winning cases.<sup>4</sup> With that goal in mind we unsurprisingly count votes and understand that to win a victory for progressivism (today) we have to develop arguments that have some chance of getting the vote of Justice Anthony Kennedy (or, or perhaps and, the vote of Chief Justice John Roberts).

Doing so requires that we take Justice Kennedy's "jurisprudence" seriously, working with it to show how, understood in the correct way, it supports progressive outcomes.<sup>5</sup> Yet, at the same time, progressive constitutionalists ought not—indeed, I think, cannot—take Justice Kennedy's jurisprudence as correct in some deeper sense. It might be the best interpretation of the Constitution available today, but it is

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1. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762), reprinted in *THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES* 156 (Susan Dunn ed., 2002).

2. *Id.* at 154.

3. The title of this Essay was received by some readers of an earlier version as off-putting, seemingly on the ground that the word "utopian" connoted "unrealistic" or "unachievable." An alternative term—"aspirational"—was suggested. I have retained "utopian" and rejected "aspirational" for several reasons: (1) the thinking I hope to encourage is utopian in the positive sense of seeking the constitutional rules for a good society; (2) that society is unachievable today and in the near future, but it is what political philosophers call a "realistic utopia,"—that is, one that can be achieved without requiring large transformations in individual psychology; (3) for me, "aspirational" is too weak, suggesting only that we orient our action today to the aspirational goals, without also believing that the aspirations can actually be realized.

4. Sometimes it might be enough—or the best possible outcome—that our arguments are taken seriously even if they are rejected, or are articulated in a forum whose prestige can give the arguments credibility in other fora even if they are rejected in courts. Those other fora include the popular imagination. Without discounting the fact that sometimes it makes sense in terms of a long-term strategy to make arguments without considering whether they are likely to prevail in the case at hand, I focus on the more usual situation in which the desired outcome is an immediate victory.

5. An example from scholarship is Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278 (2011).

not the best interpretation of the Constitution. Here we might take a lesson from conservative legal scholars, who rather clearly distinguish between the two: Randy Barnett's scholarship, for example, supports a far more restrictive interpretation of the Commerce Clause—his view of the best interpretation of the Constitution—than he argued for in the Affordable Care Act litigation—his view of the best interpretation of the Constitution available today.<sup>6</sup> Conservatives understand the difference between advocacy positions shaped by the need to win votes on the Supreme Court and claims about the Constitution's meaning as such. We should too.

So, in tandem with our advocacy positions, we ought to develop utopian constitutional visions—constitutional interpretations not likely to be adopted within the near future.<sup>7</sup> Progressivism has many rooms, so there will be many utopian visions, and some may clash with others. Readers can generate for themselves their own examples. For what it is worth, mine center around a nonracialized social democracy, and in the next pages I sketch some aspects of what a utopian constitutionalism aimed at achieving such a social democracy might look like. But, I emphasize, this is only an example of what utopian constitutionalism for progressives might look like, not a program for others to adopt.

Consider first affirmative action as a means of getting beyond racism.<sup>8</sup> When originally adopted, affirmative action programs had a number of rationales. Prominent among them were restorative justice (placing African Americans in positions as close as possible to the ones they would have had, had they not been blocked by racism), distributive justice (ensuring that shares of social goods are distributed as they should be in a non-racist society), and reparations (repaying African Americans in kind for material deprivations they and their predecessors experienced in the past). For all practical purposes the Supreme Court has driven these justifications underground by defining them as insufficient to satisfy the demanding requirement that race-specific programs be narrowly tailored to advance compelling governmental interests; apparently, only “diversity” is an available justification.<sup>9</sup>

The contemporary discourse of affirmative action has been shaped by the Court's jurisprudence. So, for example, progressives might explain how affirmative action in

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6. Compare Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001), with *Constitutionality of the Individual Mandate: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 27–40 (2011) (statement of Randy E. Barnett, Professor, Georgetown University Law Center), and *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 97–104 (2011) (statement of Randy E. Barnett, Professor, Georgetown University Law Center).

7. As I discuss below, the Supreme Court is not the only venue in which constitutional interpretations are adopted. Congress is another, as are popular mobilizations.

8. The allusion, of course, is to Justice Blackmun's assertion, “[i]n order to get beyond racism, we must first take account of race.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

9. I write “driven underground” because I believe that many of those who support affirmative action today do so because they believe that it genuinely advances a desirable diversity and because they believe in addition that it serves the justice-based goals the Court has said are insufficient. In defending affirmative action under contemporary law, progressives would do well to develop an account of the constitutionality of “mixed motive” programs—that is, those whose proponents are motivated by a combination of permissible purposes and purposes that, under existing doctrine, are insufficient on their own, to support the programs.

public contracting programs promotes diversity by bringing into consideration ways of organizing construction work associated with minority contractors that might be overlooked without affirmative action.<sup>10</sup> A utopian constitutionalism of affirmative action would return restorative justice, distributive justice, and reparations to their proper place in constitutional discourse. And, important scholarly work would be needed to do so. With respect to distributive justice, for example, one would need to define the metric for measuring appropriate distribution of social goods; with respect to reparations, one would need to figure out “tracing” rules forward from those who were subject to racial discrimination in the past and backward from contemporary African Americans, some of whom are recent arrivals in the United States.<sup>11</sup> Such work was in progress when the Court constricted constitutional discourse about affirmative action. It needs to be revived.<sup>12</sup>

Next consider the structure of political opportunities. Recently scholars of comparative constitutional law have written about “abusive constitutionalism,” the use of constitutionally validated actions to transform liberal democracies into something less.<sup>13</sup> Progressives might adopt the term to describe a nation in which a political party engages in voter suppression targeted at groups that disproportionately favor its opponents, develops gerrymandering programs aimed at entrenching their party’s control of legislatures,<sup>14</sup> enacts tax laws that punish residents of states where their political opponents dominate,<sup>15</sup> and structures a system of financing political campaigns that stacked the cards in its favor<sup>16</sup>—and gets a supreme court dominated by judges nominated by presidents of that party to approve the entire program.

Of course the Supreme Court’s cases leave room for progressives to challenge specific aspects of this program.<sup>17</sup> I focus on campaign finance because the pattern I described in connection with affirmative action can be seen in the campaign

10. I personally find it easier to understand this claim in connection with gender-based affirmative action, where one might plausibly argue that female-organized workplaces might be more cooperative—and productive—than male-organized ones. But, I am confident that the argument can be developed in connection with race as well.

11. For a discussion of some of the tracing issues associated with reparations, see BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973).

12. And, I am sure, it is. *See, e.g.,* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/K35S-ERG5>]. This is not the place, though, for a bibliography of recent work on the older rationales for affirmative action.

13. The term originated with David Landau. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

14. *See* DAVID DALEY, *RATF\*\*KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA’S DEMOCRACY* (2016).

15. *See* Michael C. Dorf, *The New Tax Law Punishes Blue States: Is That Constitutional?*, JUSTIA: VERDICT (Dec. 27, 2017), <https://verdict.justia.com/2017/12/27/new-tax-law-punishes-blue-states-constitutional> [<https://perma.cc/V4MS-7B6B>].

16. *See* JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016).

17. On voter suppression, see *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc); on partisan gerrymandering, see *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court).

finance cases as well. Supporters of stricter regulation of campaign finance began by claiming that a system regulated only around the margins promoted corruption of civic processes and tilted the playing field in favor of policies favored by the wealthy. The Supreme Court described the latter claim as seeking the rough equalization of financial resources available to serious candidates, characterized it as “wholly foreign to the First Amendment,”<sup>18</sup> and eliminated it as a potential rationale for restrictive campaign finance regulation: Only reducing opportunities for corruption could justify restrictions on campaign finance.

Progressive advocates of restrictive campaign finance rules have worked within the “anti-corruption” rationale by developing new and interesting accounts of corruption<sup>19</sup>—which the Supreme Court rejected.<sup>20</sup> At this point, I think, only utopian constitutionalism points the way forward. Progressives simply have to ignore the Court’s doctrine and return to the equalization rationale for campaign finance regulation. And, as with affirmative action, returning to abandoned lines of thought will require serious conceptual work. The idea of equalization is hardly transparent. No one could plausibly contend that every party that qualifies for the ballot is entitled to exactly the same resources. How are we to measure “how much” money each candidate should be allowed to raise? With reference to support in the polls? With reference to how many small contributions the candidate is able to garner? And, lying beyond all this is the devilishly difficult question of regulating truly independent expenditures on behalf of a candidate.<sup>21</sup>

Dealing with doctrine dealing with structuring political opportunities is an essential predicate to progressive legislative achievements. We know from experience around the world that creating a relatively dense social safety net, another component of social democracy, will require such achievements. Courts can play some role in enforcing social welfare rights, but they will not be at the center of a progressive utopian constitutionalism of social democracy. Consider for example the right to adequate health care. There are many alternative reasonable definitions of such a right: a minimum core of basic or essential mechanisms of care for and prevention of illness, not only available but actually provided to all; adequate levels of healthfulness given the society’s available resources; and more. No plausible account of progressive constitutionalism would commit the choice among these definitions exclusively to the courts.

Even more, designing the institutions to implement the right, however defined, is well beyond the capacity of even the best set of judges we could imagine, much more beyond the capacity of ordinary (progressive) judges. Judges might work around the edges, identifying occasions on which system designers overlooked important considerations or came up with institutions that sometimes misfired, but

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18. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976).

19. See, e.g., LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (rev. ed. 2015); ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* (2014).

20. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1438 (2014) (holding that “the only type of corruption that Congress may target is *quid pro quo* corruption” (italics in original)).

21. We can without strain design institutions aimed at smoking out nominally independent contributions that are actually coordinated with the candidate. The problem of truly independent contributions would remain.

utopian constitutionalism would commit the major part of defining and designing social welfare rights to legislatures.

At this point it seems important to me to emphasize that, in contrast to the two doctrinal areas I've already discussed, here there is essentially no Supreme Court doctrine to work with. The Court has held that there is no free-standing federal constitutional right to education, for example,<sup>22</sup> and the now-long-ago cases dealing with other social welfare rights tried—and failed—to invoke the Equal Protection Clause to justify extensions of existing statutory components of the social safety net.<sup>23</sup> The materials for constructing arguments for social welfare rights must be found primarily outside the Supreme Court's cases.<sup>24</sup>

I have now suggested that utopian constitutionalism for progressives must move beyond the Supreme Court, in two ways: Supreme Court doctrine may be unduly constricting, and it may be unavailable. Moving beyond the Supreme Court has implications for how we think about the Court itself. The most modest claim is that, for progressives, existing Supreme Court doctrine has no authority in the Raz-ian sense. That is, the mere fact that the Supreme Court has said that equalization is an impermissible justification for campaign finance regulation—and the other things it has said in other doctrinal domains—carries no independent normative weight beyond that flowing from the reasons the Court has given. In constructing constitutional arguments, Supreme Court decisions have only the weight the reasons the Court offers rationally deserve. Sometimes that weight will be a lot, sometimes it will be rather little.

Saying that Supreme Court decisions have no Raz-ian authority sometimes raises hackles among progressives with respect to decisions we like. We imagine our opponents saying, about those decisions, "The reasons the Court gave for its ruling are inadequate in our view. Because the Court's decisions have no Raz-ian authority, we are justified in acting on our own assessment of the balance of reasons." So, for example, opponents of marriage equality, finding *Obergefell* badly reasoned, say they can justifiably act on the reasons they think correct—and discriminate in various ways against those who seek to implement the right to marriage equality. Some progressives find this troubling, and, for that reason, sometimes want to give independent normative weight to the mere fact that the Supreme Court came out one way or another.

The issue of the Court's Raz-ian authority has been a matter of long-standing controversy. My own view, developed at some length elsewhere, is that there are often good prudential reasons for people, especially public officials, to accede to Court decisions that, in their view, fail to provide adequate reasons for their holdings.<sup>25</sup> For present purposes, though, another more partisan point is important: Conservatives *already* deny Raz-ian authority to Supreme Court decisions with which they disagree. For progressives to give such authority to Supreme Court decisions is to skew the discursive field against us: We would be giving the Court authority in cases with which we agree *and* in cases with which we disagree, while conservatives give the

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22. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

23. *See, e.g., Dandridge v. Williams*, 397 U.S. 471 (1970).

24. The ongoing project by Joseph Fishkin and William Forbath is an example of utopian constitutionalism for progressives in this vein. *See* Symposium, *The Constitution and Economic Inequality*, 94 TEX. L. REV. 1287 (2016).

25. Mark Tushnet, *The Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017 (1987).

Court authority only in cases with which they agree (and with which we disagree) but not in cases with which they disagree.<sup>26</sup>

Extending utopian constitutionalism beyond the courts raises another question. In what sense is the project I've sketched one in *constitutional* theory rather than, for example, in political theory? That is, once we treat Supreme Court doctrine as relevant only to the extent that the doctrine rests on good reasons independent of the Court's authority, how is the utopian constitutional analysis of affirmative action, the structure of political opportunities, and social welfare rights different from political theories—untethered to the U.S. Constitution or indeed any constitution—about those same topics?

The place to begin, I think, is by rejecting as descriptively inaccurate the second part of Charles Evans Hughes's widely cited statement, "We are under a Constitution, but the Constitution is what the judges say it is. . . ."<sup>27</sup> That statement is descriptively inaccurate if given the narrow interpretation that most readers give it: The judicially interpreted Constitution is not what the Supreme Court says it is. As Hughes's statement implies, even the judicially interpreted Constitution is sometimes and to some extent what lower court judges say it is.<sup>28</sup>

Even more, the judicially interpreted Constitution is not the Constitution full stop. We have long known that the courts leave some constitutional provisions "underenforced."<sup>29</sup> That is, the courts do not enforce—and sometimes do not even

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26. For myself—though I doubt for other progressives—I think that progressives should go beyond denying Raz-ian authority. We should treat the Court's decisions as occasionally interesting but mostly banal expressions of views about the Constitution, on a par with op-ed pieces in major newspapers written by partisans advancing a political agenda under the guise of neutral analysis. Here too my concern is with asymmetry. Conservatives already treat progressive decisions as "merely" partisan. When progressives argue that, with "minor" exceptions like *Bush v. Gore* (and *Citizens United* and *Shelby County*), the Court addresses constitutional claims in politically neutral terms, the effect may be selectively to validate conservative decisions in general discussions of the Court: For conservatives, progressive decisions are by definition merely political, whereas for both progressives and conservatives, conservative decisions are politically neutral. Put another way: In contemporary discourse only conservatives or progressives who take conservative positions can be principled. I think that's why Justice Scalia's stance on flag burning attracts so much attention (and, perhaps, the positions taken by Justices Souter and Breyer on the equal protection issue in *Bush v. Gore*). See, e.g., DAVID M. DORSEN, *THE UNEXPECTED SCALIA: A CONSERVATIVE JUSTICE'S LIBERAL OPINIONS* (2017). I do not expect to see any time soon a book by a conservative with the title, "The Unexpected Ginsburg [or Breyer or . . .]: A Liberal Justice's Conservative Opinions," not because there aren't any, but because such a book would undermine the conservative claim that progressive constitutionalism is merely partisan. In my view, progressives would be better off were we to eliminate the asymmetry by treating all decisions with some political inflection as partisan.

27. Charles Evans Hughes, *Address at Elmira Chamber of Commerce, May 3, 1907*, in *ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES* 133, 139 (1908).

28. See, e.g., Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 *GEO. L.J.* 921 (2016); Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 79 *VAND. L. REV.* 1183 (2017).

29. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *HARV. L. REV.* 1212 (1978).

articulate—the substantive content of those provisions. That in turn implies that the provisions’ substantive content is supplied by other institutions. In my view, for example, the U.S. social welfare state has constitutional status, but lies mostly outside the domain of judicial enforcement. It is composed of a web of state and national statutes and is subject to regular construction and reconstruction—both in the sense that legislatures are “construing” the Constitution when they enact, amend, and sometimes repeal components of the social safety net and in the sense that they are directly building that net.

These constitutional constructions do not come out of nowhere, though. The politicians who enact the statutes respond to normative views they hold, which lead them to seek elected office, combined with electoral pressures generated by what the literature has come to call social movements. As Joseph Fishkin, William Forbath, and James Gray Pope have shown, labor activists and advocates for expansive social provision and redistributive taxation historically connected their claims to the constitution.<sup>30</sup> Leaders of and participants in those movements described their goal as equality, linked to the Constitution directly through the Fourteenth Amendment’s Equal Protection Clause and, more deeply, through what the movements characterized as the Constitution’s fundamental commitment to a republican political order. Such an order, they argued, required that no citizens be dependent upon others for their material well-being, so that they could participate in civic deliberations by focusing on the public good without needing to use politics to guarantee their survival.<sup>31</sup>

An important feature of social movements’ use of constitutionalized discourse is that it was often utopian in my sense. Sometimes participants in such movements did say that they believed that the Supreme Court in place at the time would vindicate their claims.<sup>32</sup> Often, though, they knew that the Supreme Court was quite unlikely to agree with them in the short run. Their goal in using constitutionalized discourse was to change prevailing understandings of the Constitution’s meaning, perhaps to the point where their understandings would become the Supreme Court’s.

As the social-movement example shows, utopian constitutionalism for progressives requires adopting a long time-perspective. The Supreme Court as it is and as it’s likely to be for the next decades is unlikely to adopt utopian constitutional interpretations.<sup>33</sup> The decisional dynamics on a closely divided Supreme Court will impel the Court’s progressives to do their best to gradually shift the direction of doctrinal

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30. See, e.g., Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014); James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941 (1997).

31. I note that translating the civic republican concern about equality and dependence into doctrinal terms is relatively easy in some contexts—campaign finance regulation being the most obvious—and more difficult in others.

32. Most notably, see Martin Luther King, Jr., Address to the First Montgomery Improvement Association (MIA) Mass Meeting (Dec. 5, 1955), in *A CALL TO CONSCIENCE* 10 (Clayborne Carson & Kris Shepard eds. 2001) (“If we are wrong, the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong.”).

33. Individual justices might occasionally do so. A good example is Justice Sonia Sotomayor’s dissent in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1651–83 (2014), which came closer than any prior opinion to defending the proposition that race-based affirmative action is constitutionally required and not merely constitutionally permissible.

development—incrementally expanding the types of activities that can be described as corruption in the context of campaign finance regulation, or loosening the constraints of the diversity rationale in affirmative action cases. Incremental doctrinal development can lay the groundwork for later interpretations that would not seem utopian when they come about, but that are utopian today.

Utopian constitutionalism for progressives can supplement the work of progressive litigators doing their best to squeeze these incremental victories out of the Supreme Court as it is.<sup>34</sup> For me, Antonio Gramsci described well the stance we should take: “Pessimism of the intellect, optimism of the will.”<sup>35</sup>

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34. I have sometimes heard concern expressed that utopian constitutionalism for progressives allows conservatives to counter the arguments for incremental doctrinal development by arguing that the progressive litigators’ position is simply a stalking horse for the far broader utopian claims—or, in another animal metaphor, that the litigators’ arguments are the camel’s nose under the tent. My response is one that I’ve already given (and one that is important to keep in mind generally): Conservatives *already* make such arguments, and progressives gain no strategic or rhetorical advantages from attempting to suppress utopian constitutional thinking. (This is not to say, of course, that progressives cannot disagree among ourselves about the content of utopian constitutionalism, as I have already suggested in describing the substantive positions sketched in this Essay as an example of and not a program for utopian constitutionalism for progressives.)

35. Gramsci is said to have placed the phrase, originally from Romain Rolland, on the masthead of the newspaper he edited, *L’Ordine Nuovo*, but I have been unable to locate an image showing the masthead.