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LAW'S ASPIRATIONS

Kermit Roosevelt III*

Aspiration is a word of several meanings. With respect to people, an aspiration can be a hope or a dream, a destination towards which one's life is directed.¹ That is, of course, the most common meaning. But it can also be something that is sucked out of a person.² And, in almost an opposite sense, it can be something inhaled into the lungs, upon which a person runs the risk of choking.³

We could imagine a story in which all these meanings play a role: law students arrive at school with grand goals and desires, which legal education sucks out of them, and later in their careers these alienated ideals return to choke them. At least the first two of these stages are commonly noted,⁴ and I tried to dramatize the third in a novel, *In the Shadow of the Law*.⁵

Why might this happen? To put it briefly, it happens because people are taught that the law has no space for their aspirations, or not the law as it is practiced by the big firms that suck up such large numbers of new graduates. (Or used to—if there is a silver lining to the contraction of the big-firm job market, it is that many of the people who would have spent their early post-graduate years realizing that they hated their jobs may start out instead with ones they will not hate.) And I wanted to suggest to the contrary that there is some room for aspirations in the law, that law can be practiced in a way that does not require the creation of a professional identity severed from the authentic self.⁶ Instead, law and legal practice offer some space in which moral judgment can be exercised.

Whether this suggestion is true to the experiences of big-firm associates is an empirical question, and speculative fiction cannot answer it. (My concrete example involved lawyers

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1. See generally Tan N. Nguyen, *An Affair to Forget: Law School's Deleterious Effect on Students' Public Interest Aspirations*, 7 CONN. PUB. INT. L.J. 251 (2008) (discussing changes in students' goals).

2. See, e.g., Jim Hawkins, *Financing Fertility*, 47 HARV. J. ON LEGIS. 115, 119 n.25 (2010) (describing aspiration of ova in assisted reproduction).

3. See, e.g., David Baggish, *The Ethics Consultation*, 23 QUINNIPIAC PROB. L.J. 432, 437 (2010) (describing possibility of developing pneumonia from aspiration of food into the lungs).

4. See, e.g., DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (Richard Delgado and Jean Stefancic 2004); Todd David Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 414 (2009) ("Some law students find themselves fighting a losing battle to maintain their personal code of ethics, their personal relationships, their creativity, their ideals, and their original career aspirations.") (citations omitted).

5. See KERMIT ROOSEVELT, *IN THE SHADOW OF THE LAW* (2005).

6. *In the Shadow of the Law* offered the practice of securitization as a legal analogue of this bifurcation of the self. See *supra* at 249-51.



turning over, as the rules of discovery demanded, documents they knew would incriminate their guilty client. This was, I think, consistent with their ethical obligations, though it might well not be the most direct path to advancement in some firms.) Here I want to turn to a slightly more abstract question, but a related one. Does the law have aspirations? And how might they relate to ours?

Does the law have aspirations?

It is relatively common to say that law does have aspirations. Page through the law reviews, or better yet, search them on Westlaw, and you will find claims that tort law aspires to embody “rights, principles, and dignitary values,”⁷ administrative law “to bring reason to agency policymaking,”⁸ contract law “both to state the law governing social interactions--buying, hiring, leasing, and licensing--and to depict an ideal society--the market free and just.”⁹ Law more generally has aspirations both grand (“the normative ideal—justice”¹⁰) and mundane (“consistency and predictability”¹¹).

But what do we mean when we ascribe aspirations to the law? Typically, it seems to be no more than a convenient shorthand or a rhetorical flourish, essentially equivalent to a claim about either the purpose of a law (rationalizing policymaking) or general desiderata (consistency and predictability).

As I will use it in this essay, aspiration has a slightly more definite meaning. It is a goal that exists without being fully realized, and towards which one progresses by means of change. Does law have aspirations in this sense?

There is of course the immediate objection that aspiration, in any sense, requires intent or desire, and law, not being sentient, has none of these things. This is true, and it is why language about law’s aspirations tends to be figurative. But analysis of even figurative language can tell us things. Let us suppose, then, that in the same way it makes sense to talk of a law’s purpose, it makes sense to talk of its aspiration - that is if the law has an enduring purpose which it initially fails to attain but later changes to fulfill - a purpose that directs its development.

Three Criteria

7. Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 477 (2011).

8. Cary Coglianese & Gary E. Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PA. L. REV. 1255, 1256 (2004).

9. Todd D. Rakoff, *Too Many Theories*, 94 MICH. L. REV. 1799, 1799 (1996) (reviewing MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (Harvard University Press 1993)).

10. Christopher J. Meade, Note, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732, 736-37 (1996).

11. Jeffrey W. Stempel, *Refocusing Away From Rules Reform and Devoting More Attention to the Deciders*, 87 DENV. U. L. REV. 335, 355 (2010).



Applying these three criteria—a purpose, initially unfulfilled, that directs later change — we would probably conclude that most laws do not have aspirations. A statute, for instance, presumably has a purpose, at least in the everyday sense in which we use these words.¹² And it might initially fail to fulfill that purpose, though there is no necessary reason to suppose it would. But the statute does not change to better achieve its purpose. The ordinary conceptual model of statutory lawmaking posits a meaning which is fixed at the time of enactment and thereafter enforced without change, unless the statute is amended.¹³

Common law, by contrast, certainly changes. But it also lacks one of the criteria I have posited: this change is not really directed by an enduring purpose. The purpose behind a common law rule created at one time might commend itself to later judges, and they might tinker with the original rule to better serve that purpose. But they might equally adopt a different purpose. If they are dealing with contract law, for instance, they might decide to shift from a regime geared around the sanctity of promise to one directed to promoting efficient transactions. Common law judges, like later legislatures, have full authority to change the purpose of the law.

What About the Constitution?

But what about the Constitution? Constitutional provisions, like the Free Speech Clause of the First Amendment or the Equal Protection Clause of the Fourteenth, certainly do have purposes. As with statutory interpretation, there is a lively debate over the extent that purpose should inform judicial analysis, but few people would deny that purposes exist and matter.¹⁴ But are these purposes initially unfulfilled, and do they direct future changes?

With some constitutional provisions, the answer is clearly no. Some constitutional provisions are structural. They create the institutions of government, such as the House of Representatives and the Senate; they do things like allocate powers and set eligibility requirements for service.¹⁵ Structural provisions presumably fulfill their purposes immediately. Even if the structures they create are not the best, and even if their inadequacies

12. Of course there are disputes about whether purposes can be ascribed to statutes or their drafters, and, relatedly, what role a statute's purpose should play in its interpretation. See generally WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994).

13. Add in amendments, and one comes closer to meeting the criteria for aspirations, just as one does when considering successive statutes governing the same field. But here it makes more sense, I think, to talk about the aspirations of legislatures, since the change in meaning or results so clearly comes from them.

14. Of course, there may be disagreement about what the purposes are. If one supposes that the purposes of the equal protection and the speech clauses are, respectively, to prevent unjustified or invidious discrimination and to facilitate democratic self-governance, then decisions such as *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) seem perverse: they ignore and indeed undermine those purposes. If the purposes are understood as eliminating any government consideration of race or impediment to the production of speech, regardless of consequences, the decisions make more sense.

15. See U.S. CONST., art. I.



may grow more pronounced and obvious as times change, few people would contend that some underlying purpose directs changed understandings or outcomes as a result.¹⁶

“Concrete Negations”

Other constitutional provisions are specific and backward-looking. A ban on slavery, for instance, or the peacetime quartering of soldiers in houses, or the manufacture and sale of intoxicating liquors, reflects a conviction that a certain practice is bad enough that it should be taken off the table of policy choices for future generations. Typically these provisions, which Richard Primus calls “concrete negations,” arise after experience with the practice that has led to a national consensus against it.¹⁷ They fully achieve their purpose at the moment of ratification, unless public resistance thwarts their enforcement, and they do not require or direct future change.

But then there are the more general and forward-looking provisions, such as the Equal Protection Clause.¹⁸ This clause seems to indicate a relatively abstract concern with equality. Paraphrasing its meaning as it has developed in Supreme Court doctrine we could say that it prohibits some especially noxious forms of government discrimination.¹⁹ But of course the kinds of discrimination it forbids have changed over time. Race-based segregation used to be permissible; now it essentially never is.²⁰ Many sex-based classifications that once seemed

16. For instance, the Framers’ expectations about how separation of powers would work were formed in ignorance of the role political parties would play. Now that party loyalty trumps institutional loyalty, the branches of government tend to oppose each other more than they should when controlled by different parties and less than they should when controlled by a single party. See Daryl J. Levinson & Richard Pildes, *Separation of Parties, not Powers*, 119 HARV. L. REV. 2311 (2006). But no one suggests that the structural provisions of the Constitution should be read differently as a result.

17. See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 7 (1999); see also ALAN DERSHOWITZ, *RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS* 95 (2004) (explaining how the “rounding up” of Muslims after 9/11 and placing them into internment camps was not even an option despite a Supreme Court ruling that had upheld that practice for American Japanese after Pearl Harbor; “[i]t had become an American consensus that despite the Supreme Court decision approving the roundup, it was wrong.”).

18. The line between what I am calling forward-looking and backward-looking provisions is not perfectly sharp, but I think it is useful. One way of thinking about it is by focusing on the specific practice that the drafters and ratifiers of a constitutional provision intended and expected to prohibit – see Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977 (2006) for what he calls the “paradigm case” – and then asking how far beyond that the chosen language sweeps. A backward-looking provision is tied closely to a specific practice; a forward-looking one articulates a more general value.

19. In early cases discussing the meaning of the clause, and occasionally in more recent decisions, the Supreme Court has noted that it forbids not all discrimination, but only the “invidious” kind. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (“The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.”).

20. Compare *Plessy v. Ferguson*, 163 U.S. 537, 549-50 (1896) (upholding racial segregation of railroad cars), with *Johnson v. California*, 543 U.S. 499, 507 (2005) (applying strict scrutiny to racial classifications in prison housing).



entirely unobjectionable are now obviously unconstitutional.²¹ So here, perhaps, we have an example of the law's aspirations at work.

So some scholars suggest.²² Some constitutional provisions, the claim goes, enact general principles that are not fully realized at the time of enactment. Later generations, either because they see things more clearly or because they face less forceful opposition, fulfill the promise of these provisions by reaching results that might have surprised the drafters and ratifiers. In so doing, they are not engaging in activism but rather being faithful to the true meaning of the Constitution. Crucially, these later judges or advocates do not claim the power to change the Constitution; instead, they argue that the results they reach or seek have always been implicit in the provision. Here we have an account of constitutional change that does fit the criteria I have set out for ascribing aspirations. There is an enduring purpose, initially unrealized, which directs future change towards its own fulfillment.

It is not surprising that scholars have devoted effort to explicating and defending this account of constitutional aspirations. As I have described it, this argument connects to important strands in constitutional theory. First, most obviously, it links up with the originalism versus living constitutionalism debate. Put loosely, this debate asks whether the Constitution can demand results other than those the drafters and ratifiers anticipated: can it change over time?²³

As this debate is conventionally understood, or as it was understood for decades, neither position is easy to like. The originalists had to contend with the problem that judges have simply never practiced fidelity to the expectations of drafters and ratifiers. More telling, decisions that depart from original expectations are not universally condemned. Some, such as *Brown v. Board of Education* and cases establishing constitutional protection for sex equality, are celebrated and for practical purposes beyond question.²⁴ Yet living constitutionalism had its own problems, chiefly that it seemed to cede control over America's deepest commitments to an elite caste of judges. That is why the debate over originalism and the living constitution tends to slide into a debate about activism versus fidelity: if one accepts an originalist account of constitutional meaning, it seems to follow that the living constitution approach amounts to

21. In 1873, for instance, the lawyers representing Myra Bradwell, a woman challenging the Illinois exclusion of women from the practice of law, did not even raise an equal protection argument. See *Bradwell v. Illinois*, 83 U.S. 130, 142 (1873) (ruling that the Illinois law did not abridge any privileges or immunities of United States' citizens).

22. See, e.g., Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631 (2009); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

23. I attempt only a loose formulation here because, I will argue, a more precise analysis shows that the whole debate rests on a misunderstanding about how originalism should work in constitutional adjudication.

24. See Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291, 299 (2007). There is also the possibly inconvenient fact that one of the most ringing endorsements of the originalist methodology comes in perhaps the Supreme Court's most reviled decision, *Dred Scott v. Sandford*. 60 U.S. 393, 426 (1856) ("No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.").



activism—that is, judges deciding cases based on their own values rather than the meaning of the Constitution, or judges changing the meaning of the Constitution to suit their own views.

The idea of aspirations gives the living constitutionalists a response to the charge that their approach amounts to government by judiciary: the judges are not imposing their own values, the aspirationalists respond; they are vindicating commitments that earlier generations made but could not fully live up to. Change in the outcome of cases does not reflect a change in the meaning of the Constitution, much less a change produced by judicial will. Instead, it is a recovery or a redemption of original meanings and commitments.

Thus, understanding constitutional provisions as aspirational saves living Constitution-style decisions from the charge of activism. Or rather, it would if the provisions those decisions applied were in fact aspirational. But are they? Is there any reason to think that people would enact aspirational constitutional provisions?

We can imagine a situation in which something of the sort might happen. Everyone agrees, let us suppose, that severe cuts in government spending are necessary to reduce mounting government debt. But each current spending program has a politically powerful constituency unwilling to give up its benefits. It is impossible to reach agreement on cuts that will take effect now. If the cuts are not immediately necessary, however, it might be possible to agree that they will take effect at some time in the future, when all the current recipients of government benefits are dead.

But this is less aspiration than hypocrisy; it amounts to enacting a necessary reform by shifting the pain onto future generations. An aspirational provision is not supposed to deliver to the future something that neither it nor the present wants; it is supposed to deliver something that is seen as desirable by the present, but unobtainable.

A moment's reflection should suggest that this is unlikely. In the abstract, there is something odd about the idea of an aspirational provision. If a supermajority of the American people, enough to ratify an amendment, think that a particular value is important or desirable, it seems unlikely that they lack the ability to implement that view, at least for a while. Enforcing an amendment is easier than enacting; it will usually require only a majority. That majority may lose power, and an amendment may be blunted by later political developments, but that is not the same thing as the amendment being aspirational from its inception.

The Reconstruction amendments may be a special case, since their enactment was achieved through strong-arm maneuvers of questionable legality.²⁵ They may not have had as much support as an ordinary Article V amendment, and the drafters might well have expected or feared that their intentions would not be fully realized. To some extent, of course, the history of Reconstruction and its abandonment with the Compromise of 1877 bears out those fears. But the course of the Reconstruction amendments does not truly fit the aspirational model. Take the Equal Protection Clause as an example, and consider *Brown v. Board of Education* as a full, or fuller, realization of the principle of equality.²⁶ The aspirational account

25. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99-119, 207-34 (1998).

26. See Fallon, *supra* note 22, at 1323.



suggests that the drafters and ratifiers of the Equal Protection Clause enacted a provision that demanded *Brown*—demanded it at the moment of ratification—even though it could not be realized at that time, in the hopes that the fuller realization would blossom forth in the future.

That does not seem an accurate description of the views of the ratifiers. The historical record is subject to debate, of course, but historians have generally concluded that the drafters and ratifiers did not believe they were enacting constitutional language that demanded school desegregation, and the Reconstruction Congress demonstrated its view of the merits by continuing to segregate District of Columbia schools and even the galleries of Congress.²⁷ If we follow the career of the Equal Protection Clause to *Loving v. Virginia* and state bans on interracial marriage, and from there on to the Court's sex equality decisions and the emerging strain of sexual orientation equality, the matter becomes even clearer: we cannot lay responsibility for these decisions with the Reconstruction Congress.

It may well be that some drafters and ratifiers hoped that future generations would seize on the abstract language of the Equal Protection Clause to go further in the name of equality.²⁸ But as long as these were a minority, that makes the clause not so much an aspiration as a Trojan Horse. Indeed, the aspirational account does at least sometimes slide into such a vision of constitutional change. Richard Fallon, for instance, has argued that a judge might believe that the true or full meaning of the Equal Protection Clause includes a right to same-sex marriage, and also that announcing such a right would trigger a backlash likely including a constitutional amendment banning gay marriage. In such a case, he suggests, the Court "should decline to adopt a rule of decision enforcing the background right."²⁹

But why would that be? What is the justification for concealing constitutional commitments until the American people are ready for them, for smuggling a hidden meaning past the reactionaries into a more welcoming future? The attempt to manipulate constitutional change by the strategic timing of decisions is too result-oriented to be appropriate judicial behavior. It cannot be justified in terms of the desires or expectations of drafters and ratifiers, at any rate: can we really imagine people deciding to adopt a constitutional amendment whose meaning must be explained to them by philosopher judges and may be withheld until their descendants are ready to accept it? The aspirational model, on this account, does no better than straightforward living constitutionalism at dealing with the charge of judicial activism.

So does that mean that the originalists win after all? Not necessarily. There is an account of constitutional change that avoids the charge of activism and also does a better job of matching up with our constitutional history. (No one really thinks that *Brown* came about because the Justices of the Warren Court were better at philosophy than those who decided *Plessy v. Ferguson*.) It views general and forward-looking constitutional provisions as examples

27. See Michael Kent Curtis & Shannon Gilreath, *Transforming Teenagers into Oral Sex Felons: The Persistence of the Crime Against Nature After Lawrence v. Texas*, 43 WAKE FOREST L. REV. 155, 212 (2008).

28. Some drafters did seem to have this hope about school desegregation. The evidence for similar desires about sex or sexual orientation equality is weaker.

29. Fallon, *supra* note 22, at 1326.



not of aspiration but of delegation. They enact a general principle with the expectation and understanding that future generations will fight over, and ultimately settle, the application of that principle to particular circumstances.³⁰ Where aspiration is a hope that the future will vindicate desires of the past, delegation is an understanding that the future will see things differently and a belief that future understandings should control.

A slightly contrived example may help illustrate the operation of a constitutional delegation. Imagine that the drafters of the Constitution were concerned with the dignity of the Senate and therefore provided that “Senators, while engaged in Debate, shall wear the latest Fashions.” What counts as the latest fashion will change over time. Conduct that satisfied the constitutional requirement in 1789 will not satisfy it in 2011. So the applications of the latest fashions clause will change. But this is not because the people of 2011 understand the full conceptual meaning of fashion better than the people of 1789, nor because some aspiration of 1789 has blossomed forth. It is because fashions change, and the drafters in 1789 sensibly decided to delegate to future generations the task of deciding what future dress might meet the requirement. People may differ about what is fashionable, but the Constitution instructs them essentially to debate that issue. When there is an adequate consensus on what counts as fashionable, that consensus will be able to claim the authority of the Constitution.

We would not expect all constitutional provisions to delegate in this way. Some, as I have mentioned already, are structural, intended to create a stable framework for governing rather than an open space for debate about values. And some are what Richard Primus has called “concrete negations,” which take specific policy choices off the table for future generations. But when the goal is to emphasize the importance of a general value rather than a specific policy—and perhaps most obviously, when the goal is to prevent local departures from national consensus—a delegation will get the job done best.

Preventing local departures from a national consensus is certainly a reasonable thing for our Constitution to do. On some issues, federalism prevails and each state is free to choose its policy. But on others, national unity is desirable and outlier states should be reined in. This is effectively what the Cruel and Unusual Punishment Clause does: if a punishment has been rejected by some significant majority of states because it is considered excessively cruel, it is forbidden to the remainder as well. And it is essentially what the Equal Protection Clause has done through most of its history: if a national majority deems a certain kind of discrimination invidious or unreasonable, outlier states will be forbidden from engaging in it.³¹

The delegation account of these constitutional provisions has three crucial differences from the aspirational account. First, the delegation view distinguishes between the meaning of a constitutional provision (the demand that senators dress in the latest fashions, for instance,

30. Assuming that this is an accurate statement of the ratifiers’ understanding, the delegation understanding of a constitutional provision is actually a form of originalism. It is what Jack Balkin has called “framework originalism.” See Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. L. REV. 549 (2009).

31. See Kermit Roosevelt III, *Interpretation and Construction: Originalism and Its Discontents*, 34 Harv. J. L. & Pub. Pol’y 99, 102-03 (2011).



or that states not engage in invidious discrimination) and its applications (a requirement of powdered wigs, or a ban on school segregation). It explains changed constitutional requirements, in many cases, as the changed application of a constant meaning.

Distinguishing between meaning and application has a second consequence. It is not necessary, to avoid the charge of activism, to claim (as the aspirational account does) that current requirements always lay dormant in constitutional provisions. The general requirement—the demand for equality—did, but its specific applications were consciously left open. The Equal Protection Clause now forbids school segregation and bans on interracial marriage. But it did not always do so. It did not ban these practices while national majorities thought that they were justified and not oppressive forms of discrimination. Had history gone differently, their unconstitutionality might have developed later—or, imaginably, not at all.

The fact that constitutional outcomes are not foreordained brings up the third difference. The main claim of the aspirational account is that current results can still be attributed to the drafters and ratifiers of an aspirational provision, rather than to people acting in the present. It is understandable that the aspirational account tries to maintain this: that is how it seeks to avoid the charge of activism. But I have tried to demonstrate that it is wildly implausible as an account of anything sensible drafters or ratifiers might reasonably be imagined to do. And by trying to deflect responsibility onto the past, it gives short shrift to the labors of the present.

Brown came about, I have suggested, not because the Warren Court Justices were better at philosophy than their predecessors, but because the world in which they decided cases was different. *Brown* is a product of the values of 1953, not those of 1868; it is the responsibility not of the generation that decided that equality was important but of the generation that decided equality and segregation were inconsistent. Constitutional delegations have room for aspirations, but they are the aspirations of those who decide how a delegation should be applied to current circumstances. *They are aspirations about the world we make, not the one we find.*

That should be an empowering realization, but also one that brings with it responsibility. It is current generations—it is we—who deserve the credit for current decisions, or the blame. Particular applications of constitutional principles are not implicit in the Constitution, lying there for future generations to find with the spade of moral philosophy. They are there only if we put them there, if we prevail in the arena of public opinion with the argument that segregation, or sex discrimination, or discrimination on the basis of sexual orientation is unjustified and invidious.

To do that, to take advantage of the status the Constitution gives to values that win struggles over social meaning, we do not have to change the Constitution. No, we need only change the world.