THE REDEMPTION OF ORIGINALITY: RECLAIMING THE LAW’S ASPIRATIONS (A RESPONSE TO PROFESSOR KERMIT ROOSEVELT III)

Michael Brandon Lopez*

POETS to come! orators, singers, musicians to come!
Not to-day is to justify me, and answer what I am for;
But you, a new brood, native, athletic, continental, greater than before known,
Arouse! Arouse—for you must justify me—you must answer.

I myself but write one or two indicative words for the future,
I but advance a moment, only to wheel and hurry back in the darkness.

I am a man who, sauntering along, without fully stopping, turns a casual look upon you,
and then averts his face,
Leaving it to you to prove and define it,
Expecting the main things from you.

---Walt Whitman, “Poets to Come,” LEAVES OF GRASS

Aspirations and Delegations

Roosevelt’s elegant understanding of the problems inherent in concretizing law and interpretation into a singular concept are evident in his essay, “Law’s Aspirations.” In analyzing the apparent and often contradictory stances of individual legal philosophy camps—such as the ‘originalists’ and ‘living constitutionalists’—Roosevelt’s subtlety dispenses with such crude monikers, and instead weaves an historic understanding—

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As with any work that I write, I am grateful to the work, time, and thought of others. Too often we forget that we are only as good as those we know, and the work of those who have come before us. To that end, I wish to thank my friends and colleagues at the University of North Dakota School of Law—who continue to inspire me.

1 Kermit Roosevelt III, Law’s Aspirations, 2 J.L. & INTERDISC. STUDS. 1, 3-7(2012) (discussing constitutional interpretation).
his term is “delegations” — of legal creation juxtaposed with the concrete reality of present negotiation.2

As Roosevelt suggests, “Constitutional delegations have room for 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.”3 I suspect that Roosevelt is correct. A better, and perhaps more principled method for grasping the sometimes odd results where constitutional law (or indeed, statutory or common law) is at issue is not simply to view the Constitution as a static instrument fixed at its moment of creation, but rather as a series of inscriptions statically fixed at the moment of their creation and meant, by their ratifiers and authors, to be aspirational.

As Roosevelt articulates it,

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. . . . It views general and forward-looking constitutional provisions as examples 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.4

There seems to me no question that any creator, whether of fiction, art, music, or law, understands both on a conscious and unconscious level that once they free their creation into the world, it is no longer their own, and instead becomes an entity that is

3 Roosevelt, supra note 1, at 9.
4 Id. at 7.
constantly coming-to-be. In the case of law that seems to me very apparent. Law is lived, adjudicated, altered, interpreted. Its institutional mechanisms strive to give it life, either through propping up original meaning or an evolving application suited for modern circumstances. And, perhaps, most importantly with constitutional law, which I think Roosevelt correctly excises from statutory and common law considerations under the framework of delegations, there is always an inherently aspirational quality that is not the same as with, for example, a common law principle. This is so not simply because the Constitution is extremely difficult to change (it is), or because of its national application to disparate legal regimes in all fifty states, or because the Court’s constitutional pronouncements are virtually final and cannot be altered by ordinary legislation, or even because of the Constitution’s generally phrased authorizations or constraints on government power, but because it is understood to be a document potentially without end. And like any good author strives to do, there is an effort to magnify the great principles of law and life, and leave for future generations the task of critiquing, amplifying, and living those principles within the contours of those original values.

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 negotiations, 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.

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6 The concept of an infinite document is arguably analogous to the work of literary interpretation, such as with each successive generation’s configurations of the works of Shakespeare. See, e.g., MARTHA TUCK ROZETT, TALKING BACK TO SHAKESPEARE 14-33 (1994).

7 Roosevelt, supra note 1, at 8.
Even if the present moment is inhibited by the fragility of its own presentness, great authorship nevertheless demands that future generations ascribe the aspirations into those original creations, and so evoke the full breadth of those original meanings.

**Originality**

I also think that Roosevelt’s concept of delegations must equally rest on a concept of originality. This is so because the only way to understand the present moment—any present moment—is through the originating past. But more importantly, there is an originality as idea that I think is so often missing from any debate about legal interpretation. That is the question of how we think about our particular legal system—unlike, in many ways, any other in the world. The Constitution, in particular, is a remarkable document, formed by a relatively small republic in the shadows of empire. But crucially, the point that I think is so often overlooked, is that as a document it is a social contract. Roosevelt, however, understands this, concluding his thoughtful essay with an acknowledgment of the fugue that is constitutional interpretation.

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 of 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.8

That Roosevelt’s distillation of constitutional change seems grounded in responsibility is essential to meaningful social discourse, and vindication of public constitutional values. Such is the social contract. As Jean-Jacques Rousseau stated it in *The Social Contract*—a monumental work of human life and the organization of social structure—

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8 Roosevelt, *supra* note 1, at 9.
As soon as serving the public is no longer the main concern of the citizens, and they prefer not to give service themselves, but to use their purses, the state is already near to ruin. Is there a battle to be fought?—they pay for troops and stay at home; are public decisions to be made?—they choose deputies and stay at home. Through being lazy and having money, they end up with soldiers to oppress their country and representatives to sell it. . .

The word finance is for slaves, it is unknown in a real state. In a truly free state, the citizens do everything with their own hands, and nothing with money: far from paying in order to be exempted from their duties, they would pay in order to carry them out themselves. I do not share the ordinary view at all: I believe that taxes are more contrary to freedom than the enforced labour of the corvée.

The better a state is constituted, the higher is the priority given, in the citizens’ minds, to public rather than private business.9

There is an originality in our nation that predicates social cohesion, power, and structure not only on constitutional documentation, but on the individual will, social responsibility, and being that we bring to our legal documents. Contracts require performance—and this is no less the case with constitutional requirements. Nevertheless, there is always a danger with failing to negotiate and instead permitting gap-filling in any contractual arrangement, and so whether original intentions or living intentions that mirror modernity form the basis for our constitutional social contract, the text is only as good as the lives we choose to create. In some ways then, each of us is a living embodiment of the Constitution, whether we admire it, despise it, think it outdated, or perfectly acceptable as it presently exists. We are walking textual inscriptions, and we ascribe our constitutional meanings whenever we assume the responsibility to live the delegations presented to us in the present moment.

But this requires responsibility. Just as Roosevelt suggests that the ratifiers of the Reconstruction amendments likely did not consider segregated schools unconstitutional in enacting those amendments prohibitions against discrimination, and so would have been surprised by, for example, Brown v. Board of Education,10 so too might the original

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10 Roosevelt, supra note 1, at 6-7.
drafters of the Fourth Amendment be surprised by its current legal understanding.\textsuperscript{11} It is not enough, perhaps, that the Framers prohibited unreasonable searches and seizures, given recent revelations concerning government surveillance, wide-reaching decisions by secret courts, and proscriptions on the First Amendment.\textsuperscript{12} We can only act with intentionality when we give due consideration to originality. And so whether we agree or disagree with the current framing of these legal issues and the values of the Constitution as it applies (or doesn’t apply) to these legal questions, as Roosevelt makes clear, “[i]t is current generations—it is we—who deserve the credit for current decisions, or the blame.”\textsuperscript{13}

Our understanding of the contractual nature of our social existence and community must be predicated on an understanding of ourselves, history, textual relationships with others, and future intentions.

\textit{The Double Move}

Similarly, this demand of responsibility and originality calls into question our reliance on the judicial branch for fully delegating into existence original—or, perhaps, even present—meaning. As Roosevelt suggests,

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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
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\textsuperscript{11} U.S. CONST. amend. IV. Of course even with the Fourth Amendment there has been a considerable evolution of understanding the values that underpin the protections against unreasonable searches and seizures. \textit{Cf.} Katz v. United States, 389 U.S. 347, 352-53 (1967) (providing analysis for determining whether a search takes place that focuses on a person’s reasonable expectation of privacy instead of on whether a trespass has taken place); United States v. Jones, 132 S.Ct. 945, 946-47 (2012) (concerning the installation of a global positioning system tracker on an individual’s vehicle and explaining that \textit{Katz} did not eliminate the trespass analysis, but provided alternate privacy expectation analysis).


\textsuperscript{13} Roosevelt, \textit{supra} note 1, at 9 (emphasis added).
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.\textsuperscript{14}

It would be a strange expectation in our constitutional democracy to expect an unelected federal judiciary to tell us—\textit{the people}—when it is time to live the originally delegated meaning of a piece of constitutional text.\textsuperscript{15} But, perhaps more importantly, it calls into question the judiciary’s tendency to regress constitutional meaning.\textsuperscript{16} After all, in theory the role of the judicial branch is to interpret and apply the law \textit{as it is}, and even in those situations there are often surprising results.

One surprising result that immediately comes to mind is the Supreme Court’s treatment of sovereign immunity. In the case of \textit{Chisholm v. Georgia}, the Supreme Court arguably did what one expects a court to do—it applied the Constitution to a particular controversy, and held that a citizen of one state could sue a state \textit{as a state} in federal court.\textsuperscript{17} The reaction was almost immediate with the passage of the Eleventh Amendment that barred suits by either foreign citizens (those from another nation), or by citizens of a different state.\textsuperscript{18} The Amendment was silent, however, as to whether citizens of their own state could sue their home state. In the seminal case of \textit{Hans v. Louisiana} in 1890, the Supreme Court imported an additional, non-textual meaning into the original enactment of the 11th Amendment, finding that sovereign immunity also barred suits by citizens against their own state for money damages.\textsuperscript{19} Thus, the Court essentially acted pursuant to what it believed to exist—an implied delegation—and then in a subsequent move imported a meaning not present in the actual text of the amendment. Yet, it is questionable whether this ideology of sovereign immunity as it existed in the empire—where the King is indeed sovereign—was ever a part of the

\begin{footnotes}
\item[14] Roosevelt, \textit{supra} note 1, at 7.
\item[15] In addition to various constitutional constraints (\textit{i.e.} standing) on the cases a federal court can hear, the Supreme Court has also imposed prudential restraints, further evidencing the judiciary’s view that the scope of its review—even of important social issues—is necessarily narrower than that of a legislature. See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979) ("[A] plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."); Warth v. Seldin, 422 U.S. 490, 500-01 (1975); Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2142-46 (1992); Valley Forge Christian College v. Americans United, 454 U.S. 464, 474-75 (1982).
\item[16] See, e.g., \textit{THE FEDERALIST NO. 78} (Alexander Hamilton).
\item[17] Chisholm v. Georgia, 2 U.S. 419, 420-25 (1793).
\item[18] U.S. CONST. amend. XI.
\item[19] Hans v. Louisiana, 134 U.S. 1, 15 (1890).
\end{footnotes}
nation’s Constitution.\textsuperscript{20} Indeed, such an importation of meaning has given rise to successive restrictions on the ability of private citizens to sue states in federal court (without the state’s permission), and has also placed evolving constraints on Congress’ ability to abrogate a state’s sovereign immunity.\textsuperscript{21} Consequently, one must be skeptical about whether courts are venues for aspirational delegations, and it seems apparent that delegations are properly grounded in the appropriate apparatus for such legal movements—those who non-judicially create, alter, refine, and ultimately live the laws.

I would also add that I am not alone in this confusion over the Court’s double movement. As retired Justice John Paul Stevens said in his memoir \textit{Five Chiefs},

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“Rehnquist’s opinion in \textit{Seminole Tribe of Fla. v. Florida} (1996) is unquestionably the most important opinion in this line of cases and the most important of any sort that he authored as chief justice of the United States. There, relying on sovereign immunity and prior misinterpretations of the Eleventh Amendment, the Court invalidated the provision in the Indian Gaming Regulatory Act that authorized the Seminole Tribe to sue the State of Florida to enforce its statutory rights . . .

The extraordinary consequences of the holding were to preclude Congress from authorizing private plaintiffs to recover damages for a state’s violation of federal law. Whereas the Eleventh Amendment itself dealt only with the jurisdiction of the federal courts in suits brought against states by noncitizens, the logical implication of \textit{Seminole Tribe}—at least according to the five-justice majority in \textit{Alden v. Maine} (1999)—is preclusion of private litigation to enforce federal rights in both state and federal courts. . . .

The common-law doctrine of sovereign immunity originated in England and was the product of a belief that the king could do no wrong, and even if he did sin, only God could decide the appropriate remedy. As Thomas Macaulay explained in his classic history of England, that conception of sovereignty was rejected in 1688 when the abysmal reign of James II came to an end. . . .
\end{quote}

Justice James Wilson, who played a leading role in the drafting of our Constitution, made the point better than I can. Before the Eleventh Amendment was adopted, he made this comment on sovereignty on this side of the Atlantic:

‘To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves “SOVEREIGN” people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.’

Like the gold stripes on his robes, Chief Justice Rehnquist’s writing about sovereignty was ostentatious and more reflective of the ancient British monarchy than our modern republic. I am hopeful that his writings in this area will not be long remembered.”

Indeed, the case of Seminole Tribe of Florida v. Florida also underscores the differentiation between schools of textual interpretation, and whether this tension can be resolved even with reference to originality.

All of this underscores the contractual nature of the lives we lead, or are expected to lead. The textual arrangements that will define the social arrangements that we exist within are ours to create — and if left to institutional structure alone, or even to philosophic interpretation by the judicial branch, are susceptible to ceasing to be delegations of future aspirations, and instead risk importation of meanings that were never present to begin with.

**The Redemption of Beginnings**

If we wish to live the Constitution that we imagine, then we must redeem its original intentions and infuse them with our own. But what does this require? I return to Roosevelt’s opening statement at the beginning of his essay —

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

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education sucks out of them, and later in their careers these alienated ideals return to choke them. At least the first of these two stages are commonly noted, and I tried to dramatize the third in a novel, *In the Shadow of the Law*.\(^{24}\)

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. . . . 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.\(^{25}\)

It is impossible to fully grasp the truth and vision that Roosevelt presents in his essay without discussing the authenticity of the self. This is determinative. Whether one is a lawyer or member of a state legislature or the federal congress, whether one is a judge, or simply a daily commuter frustrated by transportation policies enacted by detached government planners—what defines us is as important, if not more important, as the life we wish to live and the communities of others that we wish to live in. The principles of life that define our local, state, and national communities are premised on an originality of responsibility, which is inextricably linked with meaning, and subsequently with the laws that we enact and the understandings associated with them. We are the receptors and inscribers of that meaning, and that should be a cause for celebration. And yet it so often isn’t.

In my view, and I think Roosevelt shares this aspiration (if I may call it that), we must reclaim our authenticity and place in our legal society. In effect, we must redeem our role as inscribers of meaning in a constitutional democracy, and negotiate the delegations prescribed to us by prior generations, and add to them our own aspirations. This does not mean to suggest that we do so without principle. Instead, I think that we are part of a very long and ongoing dialogue, about the nature of meaning, law, and society. What principles do we wish to dictate, and what constraints do we believe we can be bound by? It is necessarily an imperfect system, and fraught with difficulties, so much so that much contemporary debate seems more intent on out-talking one’s

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\(^{24}\) Roosevelt’s novel is replete with explorations, from multiple perspectives, of the dimensions of authenticity and personal autonomy within the legal profession and one’s identity within it, as I have suggested in my review of the book. See Michael Lopez, *The Law, Exposed*, THE DAKOTA STUDENT, March 8 2011, at 10-11.

\(^{25}\) Roosevelt, *supra* note 1, at 1.
would-be opponent, or silencing them by expressing shock at the viewpoints expressed, that it forecloses the possibility of even approaching what legal intentions ought to be vindicated where the Constitution’s text is at issue.\textsuperscript{26} Too often these disagreements are treated as negative constraints on social policy—but they are the life-force that gives law its ever-changing meaning and purpose. They allow for the dialectical force of meaning to manifest itself in our laws and the legal institutions that mechanize their actualization. We can control those, and we can do so in a way that is aspirational. It is an epic impulse, but if we truly wish to realize \textit{and} actualize the inherent aspirations of the law, then we must do so no less in ourselves, and I think it can be traced to the concept of beginnings. The beginning of a moment, an era, or an idea—there’s always something that echoes the infinite in a beginning. I think we need to retrace those beginnings and apply them to the present. The result will be an inspired vision of life that gives due regard to the \textit{values} implied and express in the Constitution (and, indeed, all other laws), and moreover, will translate into a much needed reclamation of social meaning worth living. As Roosevelt so aptly puts it, “we do not have to change the Constitution. No, we need only change the world.”\textsuperscript{27} I augmented Roosevelt’s conclusion at the beginning of this response with a poem by Walt Whitman who leaves it to future generations to explain and actualize the poet’s work, “Leaving it to you to prove and define it, / Expecting the main things from you.” It is an ambitious possibility, and reachable, but only if we have the courage to live our values, and to continuously ascribe meaning to the lives and laws that we live.

\textsuperscript{26} See generally, Guy Debord, Comments on The Society of the Spectacle (Trans. Malcolm Imrie) (2002).

\textsuperscript{27} Roosevelt, \textit{supra} note 1, at 9.