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ASPIRATIONS AS A BASIS FOR LAW: DISCERNING THE EFFECTS OF ASPIRATIONAL VERSUS STATUS INFLUENCES ON LEGISLATIVE AND JUDICIAL LAW

By

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Aspirations are the ingredients of hopes and dreams, the subject of graduation speeches and wedding toasts, the focus of great novels. But are they also a proper concern or foundation of law? And if so, how does a focus on individual aspirations get incorporated in judicial and legislative agendas?

To examine how concerns for individual aspirations shape the law, this Essay will look at how the two legal and political ideologies – generally speaking, liberalism and conservatism – incorporate aspirations into their legislative and judicial agendas. The two ideologies obviously differ in many respects; but as this Essay will attempt to demonstrate, they may also differ in their preference for individual aspirations or individual status as a basis of their public policy and judicial agendas.

To make this demonstration, the Essay will focus on two areas of law: public policy legislation in Congress, and constitutional individual rights cases at the Supreme Court. Within these two areas, the positions of the liberal and conservative philosophies will be compared. Obviously, broad generalizations will have to be made in this brief essay, but these generalizations nonetheless might illustrate important distinctions in how the two ideologies consider aspirations in their respective agendas.

The liberal position on social welfare and economic legislation tends generally to focus on individual status, rather than individual aspirations.¹ Government social welfare programs, for instance, look to static measurements of individual status, most particularly age, current income or family size. By necessity, such programs have to be based on some objective

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¹ In a research study, Kristian Niemietz demonstrates how a status approach to welfare programs can actually hurt the poor. When a person’s economic status is determined vis a vis some comparison point with an average earnings status, that person’s “poverty” status can actually erode during periods of serious economic recession because the more well-off persons have lost their jobs and hence the average earnings benchmark has declined; thus, in comparison, the poor person has actually gained in economic status. Instead, according to Ms. Niemietz, a better policy approach would be to focus on empowering the poor to take advantage of opportunities to climb the economic ladder. See Kristian Niemietz, A New Understanding of Poverty 65 (Research Monograph, Institute of Economic Affairs, 2011).
criteria of an individual’s status. Consequently, the larger the public sector role, the more public policy will be based on status; the more public policy focuses on status, the more impetus for the public sector to grow.

A status-focus can lead to an increase in government power because the maintenance or achievement of certain statuses, especially if those statuses go against the social grain, requires a significant assertion of government power. An illustration can be seen in a rule recently promulgated by the Department of Housing and Urban Development (HUD) titled Affirmatively Furthering Fair Housing. This rule goes beyond prohibiting private sector housing discrimination and attempts to restructure actual urban neighborhoods so as to comply with HUD standards on integration. Consequently, the desires of freely-acting people seeking to reside in certain neighborhoods in which other people of the same ethnic or racial group live may now be overridden by a federal government trying to direct the make-up of local communities.

With regard to taxation, the liberal position generally favors a more redistributionist approach. This approach incorporates an underlying presumption of a static society – a society that does not offer the kind of social mobility needed to allow individuals at the lower end of the economic ladder to advance up that ladder through the private sector economy. This belief in a static society, dismissing realistic opportunities for true social mobility, sees a need for government intervention that will narrow the inevitable inequality in society. Since individual status is relatively fixed, so the assumption goes, only government involvement can produce the additional benefits or security people in that status might desire.

A focus on status often arises out of a concern for security, whereas a focus on aspirations tends to reflect values such as freedom and mobility. Government may not be as flexible, fluid or dynamic as is the private sector; but then, the private sector is not as secure and unchanging as is the public sector (as illustrated by the fact that during the 2008 recession a far greater proportion of private sector employees lost their jobs than did public sector employees). This security-freedom distinction between the liberal and conservative positions can be seen in connection with their stances toward recent reform efforts aimed at Medicare and Social Security. Again, in general, the liberal position has opposed efforts to transfer more freedom and responsibility to individual beneficiaries, thereby making the overall system less fixed – e.g., the Democratic opposition to the Medicare plan proposed by Rep. Paul Ryan in 2012.

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2. See generally Affirmatively Furthering Fair Housing, 78 Fed. Reg. 139, 43710 (proposed July 19, 2013) (The Act instructs states and local governments to affirmatively further the purposes of the Fair Housing Act by considering national data about integration and segregation.).
3. Id.
4. Id.
2012. A similar Democratic opposition arose to President Bush’s proposals in 2005 to allow individuals to self-direct their Social Security plans.

Recent debates over education policy further illustrate the distinctions between security and freedom, status and aspirations. The liberal position has concentrated on strengthening and maintaining the public education system, while the conservative position has often advocated voucher systems that allow children to attend the school of their family’s choice. A voucher system, while arguably undermining the security of the public education system, gives families of all incomes the ability to pursue the education of their choosing. Given the importance of education to an individual’s ability to pursue opportunity, this freedom to choose reflects a valuation of aspirations over current status. On the other hand, an education policy aimed primarily at the public sector tends to use government spending rather than student development as its primary evaluative component.

The conservative policy approach, on the other hand, emphasizes individual aspirations. And this emphasis on aspirations encompasses the values of freedom and mobility, just as an emphasis on status encompasses a focus on security. The pursuit of individual aspirations necessarily requires the social freedom and mobility to facilitate that pursuit. By definition, aspirations are not static. Hence, a pursuit of aspirations will more likely occur within the more free-flowing private sector. And it is the private sector that conservatism generally favors in terms of providing the direction and energy of society.

The conservative belief in the value and vitality of the private realm of society naturally leads to a favoring of an aspirational/freedom approach over a status approach, which tends to facilitate a larger public sector. To conservatives, the private social sphere – occupied by family, religion, voluntary associations, the private economy, etc. – has historically defined America. The more freedom that this private realm has, so the belief holds, the more dynamic and responsive society will be. And the more autonomous the mediating institutions of private society are, the more they will be able to act as a buffer between the individual and the power of the state. The liberal advocacy of a larger public sector, and hence a more diminished private realm, often stems from a belief that this private realm and its institutions are plagued by intolerance, backwardness, and selfishness.


9. As an illustration of the liberal opposition to voucher systems can be found in their opposition to the voucher programs that have been adopted in 18 states and the District of Columbia. Recently, the Obama Justice Department sought an injunction against the Louisiana system Student Scholarships for Educational Excellence Program. See Allie Bidwell, Justice Department Attempts to Block Louisiana School Voucher Program, US News (Aug. 26, 2013), http://www.usnews.com/news/articles/2013/08/26/justice-department-attempts-to-block-louisiana-school-voucher-program.
The belief in the freedom and mobility of the private sector contributes to the conservative advocacy of lower taxes and less government regulation. A lower taxation rewards and facilitates upward mobility, and a policy of less regulation likewise facilitates private sector freedom and flexibility. The conservative advocacy of education vouchers demonstrates this focus on freedom and aspirations. Not only does such a policy shift education more into the private sector, but it gives individuals the power to pursue their aspirations in the manner of their own choosing. Education vouchers, according to supporters, allow people greater freedom to direct their lives.

In the area of welfare, conservatives favor an aspirational approach that considers an individual’s ability and motivation to move up the economic ladder, while liberals advocate a status approach that primarily considers an individual’s current income conditions. For instance, liberal Democrats during the Obama administration have opposed work requirements in welfare programs, thus advocating an agenda that reinforces status by removing an incentive for recipients to move out of that status.

The conservative approach argues that simply transferring resources to someone so as to make that person no longer poor only addresses symptoms and does not help the person become self-sufficient. The liberal argument, on the other hand, asserts that no one should live in poverty, and that a person’s poverty should be remedied before any thought of future advancement is considered, even if this remedial public assistance diminishes the incentives of that person to improve their condition by earning more income. Of course, the more entrenched a status-based welfare system becomes, the more governmental resistance there is to implementing an aspirational-based system that might entail less direct public sector involvement.

A realization that the liberal and conservative policy agendas might in general rest differently on status versus aspirational concerns, besides highlighting differences in these two approaches, might also lead to a conclusion that the two different ideologies are best suited for different types of issues. For instance, given its focus on status, the liberal approach might be the best approach for shaping a social safety net; whereas, with its aspirational focus, the conservative approach might be the best for the fields of education and economic policy.

While in the area of government policy liberalism seems to focus on status and conservatism on aspirations, just the opposite seems to occur in the judicial arena concerning individual constitutional rights. In this arena, the liberal focus appears to be on individual aspirations. And since an aspirational focus necessarily entails a value of freedom, the liberal approach to individual rights reflects a more singular desire to eliminate social and legal

10. This opposition to government regulatory stifling of innovation can be seen in conservative opposition to regulations that restrict Uber, the app-based taxi alternative, from entering local markets. According to conservative opponents, the regulatory obstacles reflect the status interests of established taxi and transport companies, seeking to prevent competition from Uber. Beth Reinhard, GOP Hails Uber, Says Rules Stifle It, Wall Street Journal (March 26, 2014, 12:13 AM), available at http://online.wsj.com/news/articles/SB20001424052702303949704579461731467585894.

11. See Bidwell, supra note 8.
restraints on the individual. In this respect, it takes an anti-government stance, unlike the stance it takes in the area of social and economic policy.

In the constitutional individual rights arena, the liberal focus is on providing individuals the power to define their personal lives, as free as possible from outside constraints, and to live their lives according to their defining values. A brief survey of cases producing results favored by the liberal position demonstrates this focus.

In Lawrence v. Texas, the Court justified its decision striking down a sodomy statute with the pronouncement that the Constitution “gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” This decision essentially created a nationalized right of sexual privacy that trumps any countervailing community standards. It attempts to free individual aspirations in the area of sexual behavior from the previous status of social traditions and values, and to craft legal rights supporting one’s self-defined dignity. As Justice Scalia noted, the decision “effectively decrees the end of all morals legislation.”

The aspirational approach to individual rights is illustrated in Leigh Ann Wheeler’s How Sex Became a Civil Liberty. According to Wheeler, whereas sex was once seen as a province of civil society, conducted through the guidance of custom and cultural mores that were legally recognized but not a province of constitutional law, it eventually became a constitutional liberty protected from both state and private interference. This development was due in large part because autonomy advocates considered sexual freedom to be an essential element to individual happiness and fulfillment.

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12. This support of individual freedom reflects the more general liberal philosophical rejection of the notion of human self-limitation. According to this belief, the individual is not inherently limited by natural or social restraints. See generally David E. Bernstein, Liberals, Conservatives, and Individual Rights, Cato Institute (June 27, 2008), http://www.cato.org/publications/commentary/liberals-conservatives-individual-rights.


14. See id. at 435 (stating that the “foundation of the Warren Court era was the concept of fundamental rights”).

15. Lawrence v. Texas, 539 U.S. 558, 572 (2003) (reasoning that personal decisions concerning sexual activity are at the core of individual autonomy). Id. at 574 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

16. The decision also vindicated Justice Stevens’ dissent in Bowers, arguing that the status of tradition and moral values should not trump the aspirations of individual freedom: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

17. Lawrence, 539 U.S. at 599 (Scalia, J., dissenting). As one commentator has noted, the Court in Lawrence ruled that “government may not restrict or punish personal decisions based purely on moral disapproval.” Gregory P. Magarian, Substantive Due Process as Source of Constitutional Protection for Nonpolitical Speech, 90 Minn. L. Rev. 247, 288 (2005).


19. Id.

When striking down regulations in the Cable Act of 1992 that required cable operators to segregate indecent programming on separate channels, and which allowed for unblocking those channels only after a subscriber request, the Court focused primarily on all the various inconveniences to would-be viewers of indecent programming.\textsuperscript{21} Even though none of the inconveniences presented insurmountable obstacles, and even though the viewer could access the programming by following the requested procedures, the Court still struck them down as impermissible burdens on individual freedom.\textsuperscript{22}

In its constitutional privacy decisions, the Court has used an individual right not expressly mentioned in the Constitution to strike down a host of state regulations. According to the Court, privacy freedoms involve those “choices central to personal dignity and autonomy” that help “define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”\textsuperscript{23} In \textit{Casey}, the Court, striking down abortion regulations, gave central importance to concerns of individual autonomy and self-definition, and specifically sexual activity freedoms, over any community interests or concerns.

The Court has favored individual freedom to access sexually explicit entertainment even over the public interest in preventing child pornography\textsuperscript{24} and children’s access to dial-a-porn messages.\textsuperscript{25} In \textit{United States v. Playboy Entertainment Group}, the Court struck down a law requiring cable channels dedicated primarily to sexually-oriented programming to confine their programming to late night hours when children are least likely to be watching television, stating that despite the community’s interest in shielding children from such programming the law put too great a burden on the freedoms of adult viewers to access such programming.\textsuperscript{26} Free speech, as the Court noted, enables individual personalities to be formed and expressed.\textsuperscript{27} Similarly, in \textit{Cohen v. California}, the Court gave individuals the right to express themselves with profane language, even in such public venues as government buildings visited by children.\textsuperscript{28}

Contrary to the liberal approach, the conservative viewpoint on individual rights tends to focus more on status. This focus in turn tends to narrow the scope or degree of individual freedom. Yet within this narrower range, the conservative approach favors a full freedom. For instance, in the area of speech rights, conservatives advocate full freedom for political speech. Indeed, as exemplified in the area of campaign finance, conservatives may actually advocate a greater degree of freedom than do liberals. But the further the speech drifts from political speech, which the Supreme Court has repeatedly stated resides at the top of the hierarchy of speech protected by the First Amendment, the more apt conservatives are to take

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\item \textsuperscript{21} Denver Area Educational Telecommunications Consortium, Inc. v FCC, 518 U.S. 727, 754, 760 (1996).
\item \textsuperscript{22} Id. at 760.
\item \textsuperscript{23} \textit{Casey}, 505 U.S. at 851 (1992).
\item \textsuperscript{24} Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2004) (striking down a congressional statute expanding the federal prohibition on child pornography to include computer-generated images of minors engaging in sexually explicit conduct, or “virtual child pornography”).
\item \textsuperscript{25} Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 117, 119 (1989).
\item \textsuperscript{26} United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 807, 826-27 (2000).
\item \textsuperscript{27} Id. at 817.
\item \textsuperscript{28} 403 U.S. 15, 28 (1971).
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a more balancing approach to speech freedoms.\textsuperscript{29} This is why in \textit{Playboy Entertainment} Justice Scalia was open to upholding the regulations of sexually explicit entertainment for the purpose of protecting parental child-rearing power and preventing children from accessing harmful material.\textsuperscript{30}

Generally, conservatives do not take as singularly focused a view on individual autonomy as do liberals, at least in cases involving non-economic personal freedoms.\textsuperscript{31} Outside of the more narrow range of full individual freedom, conservatives are more likely to grant a greater importance and legal role to the status of tradition and social institutions. History, moral traditions and social institutions, for instance, played a much more influential role to conservatives in \textit{U.S. v. Windsor}, where the Supreme Court recently struck down a key part of the Defense of Marriage Act (DOMA).\textsuperscript{32} In opposing the nullification of DOMA’s ban on federal recognition of same-sex marriage, some traditional conservatives favored the traditional status of marriage and family over an individual freedom to pursue, and have society recognize, whatever marriage relationship the individual desired.\textsuperscript{33}

In the Establishment Clause area, the liberal approach often advocates a greater individual freedom from any religious presence in the public sector. Displays of Ten Commandments or Christmas crèche scenes on public property are opposed, as are religious messages or prayers recited at public meetings or events.\textsuperscript{34} The constitutional test often favored by the liberal position is one that looks to whether any public assistance or accommodation is given to religion, or whether the religious presence is interpreted as a government endorsement of religion that would offend the objecting observer.\textsuperscript{35}

Conservatives, on the other hand, are less focused on the individual autonomy concerns of those persons opposed to such a religious presence.\textsuperscript{36} The conservative approach is more focused on the historical status of religion in American society and on the institutional rights


\textsuperscript{30} 529 U.S. at 831-35 (Scalia, J., dissenting).

\textsuperscript{31} Under the conservative view, the liberal approach on individual autonomy and lifestyle freedom undermines traditional social institutions be seeking to create a “free marketplace of identity,” in which individuals with unrestrained personal choices try to maximize happiness by “maximizing the satisfaction of desires.” \textit{The Paradox of Liberalism}, First Things 5 (Feb. 2014).

\textsuperscript{32} 133 S.Ct. 2678, 2693 (2013).


\textsuperscript{36} For a discussion on the view that the Establishment Clause does not protect an individual dissenter’s right but is rather a structural provision focusing on the status of government power vis a vis religious institutions, see generally Patrick M. Garry, \textit{Distorting the Establishment Clause into an Individual Dissenter’s Right}, 7 Charleston L. Rev. 661 (2013).
of religious organizations to participate in society on an equal plane with other non-governmental organizations.37

The conservative focus on the status of tradition and history was also apparent in Bowers v. Hardwick, where the Court denied an individual right of sexual intimacy, from which a right to engage in homosexual sodomy could be derived.38 In denying the constitutional existence of such a right, the Court followed a conservative approach by looking to whether American history and tradition had recognized such a right. It did not focus on individual autonomy, as the Court later did in Lawrence, but instead looked at status factors such as cultural history and social traditions.39

The different approaches of the two different ideologies in the areas of social/economic policy and constitutional individual rights also relates somewhat to different views of equality. In the area of social and economic policy, the liberal attempt to bring more outcome-equality into society has further contributed to its support of a larger public sector. This is because a more activist government is needed to bring about a greater leveling of society. In the liberal view, the inherent tension between equality (of result) and liberty can only be remedied by government intervention.40 On the other hand, because of its more narrow belief in an equality of opportunity but not result, conservatism advocates a smaller role for the public sector and a corresponding larger role for the more fluid private sector, seeing expansions of government as necessarily crowding out the social space available to the cultural network of private organizations.

In the area of individual rights, however, the liberal position de-emphasizes equality and focuses on the diverse aspirations and desires of individuals. This approach tries to free the individual to pursue whatever will give that person a sense of dignity, happiness and self-actualization; whereas in the economic policy arena, liberalism tends to reject the notion of innate differences between individuals, seeing any differences as the result of social and economic inequality.

39. Id. at 192.