THE TRADITION OF THE WRITTEN CONSTITUTION: A COMMENT ON PROFESSOR LESSIG'S THEORY OF TRANSLATION

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INTRODUCTION

PROFESSOR Lawrence Lessig has written a series of thought-provoking essays on the process by which judicial readings of the Constitution change over time.¹ As he points out, the text of the Constitution has been changed relatively few times through the formal amendment process of Article V, even though the judicially-discerned meaning of important constitutional provisions seems radically different in many modern contexts than it did originally. Building on the notion that "[c]hange is at [the] core [of the Constitution],"² Professor Lessig argues that "many (perhaps most) changed readings are consistent with an account of interpretive fidelity," although he rejects "the view that changed readings mean that meanings are fluid and fidelity is bunk."³ "What we lack," he argues, "is not the sense that change is justifiable, but rather any clear sense of just when, or why."⁴

These, of course, are important questions, and constitutional theorists from Alexander Bickel to Robert Bork to Bruce Ackerman to Antonin Scalia have provided markedly divergent answers.⁵ Professor Lessig's answer is to offer a positive and constructive theory of constitutional change as a product of fidelity to original principles on the one hand, combined with translation of those principles to contemporary social contexts on the other. He believes that our constitutional history is best described as a process of translating founding texts from the deep and rich social background in which they were produced to new, and often radically different, contemporary social contexts. Constitutional interpretation is, he argues, the product of

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² Lessig, Fidelity and Theory, supra note 1, at 396.

³ Id.

⁴ Id.

both text and context. Although the text may remain largely the same, the background uncontested context is always shifting powerfully. As a result, readings of the Constitution inevitably change, and hence change is justifiably at the core of the Constitution.6

In responding to this argument, I want both to point out some ways in which I think Professor Lessig's account fails to describe fully our actual constitutional practice, and to sketch out a different positive account that I think is more descriptively complete and accurate. My goals here are very limited. I seek only to describe our practices; not to justify or offer prescriptions for the future. Moreover, my description in this brief Response is necessarily only an undefended sketch in rebuttal of our practices, not a three-volume book series. I leave it to my readers to intuit for themselves whose story, mine or Professor Lessig's, rings true.

I. THE INCOMPLETENESS OF THE FIDELITY AND TRANSLATION ACCOUNT

There are at least six key features of the American constitutional order that are difficult to understand if one relies solely on Professor Lessig's positive account. While Professor Lessig mentions some of these phenomena briefly, I do not believe translation theory, as he describes it, can adequately explain and describe them. The failure of translation theory to explain and describe these six phenomena, then, suggests that it fails as a positive account of the American constitutional order.

A. Translation Theory Cannot Explain Our Constitutional Tragedies

First, I think translation theory cannot explain the way we think about what could be called the Supreme Court's constitutional tragedies. These tragedies include such decisions as: Dred Scott v. Sandford;7 The Slaughter-House Cases;8 Lochner v. New York;9 Plessy v. Ferguson;10 Buck v. Bell;11 Korematsu v. United States;12 and I would add Humphrey's Executor v. United States13 and Wickard v. Filburn.14 I think translation theory can explain how it is that these tragic cases

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6. For a discussion, see Lessig, Fidelity and Constraint, supra note 1, at 1367-86; Lessig, Fidelity and Theory, supra note 1, at 401-07, 410-14.
7. 60 U.S. 393 (1857).
8. 83 U.S. 36 (1872).
10. 163 U.S. 537 (1896).
were decided the way they were decided, but it cannot explain the way we as a people think about them having happened. I submit that under our constitutional tradition it has been our practice to think that all of these cases are tragedies precisely because they were wrongly decided on the day they were decided for reasons that were clearly stated either by dissenting justices at the time or by other contemporary constitutional interpreters.

We think these constitutional tragedies are to the Supreme Court roughly what Watergate is to the presidency. We understand how Watergate happened in the social context of the times, but we think that it was an avoidable disaster, something that people should have been able to appreciate was wrong—was an unfaithful understanding of presidential power—at the time that it happened. I submit that we think of the Supreme Court’s constitutional tragedies the same way. I think the general consensus of our tradition has been that in cases like Dred Scott and Plessy the Supreme Court gave too much weight to the background social practices of the time and not enough weight to text, to founding commitments, and to things that have been constitutionalized.¹⁵

As a result, we have usually thought that the Supreme Court’s constitutional tragedies are “tragic” precisely because result-oriented Justices overly influenced by the social context of their times failed to keep faith with what founding commitments and constitutional text demanded of them. Impending Civil War and sympathy with slavery clouded the Court’s judgment and legal analysis in Dred Scott; fear of the unknown and an excessive concern for judicial restraint and federalism led to The Slaughterhouse Cases; racism and the retreat from Reconstruction led to the failure in Plessy to follow through on the no caste-based discrimination principle of the Fourteenth Amendment; a desire to constitutionalize the common law led to the excessively exacting scrutiny of economic regulations in Lochner; a hateful version of Social Darwinism and eugenics led to the appalling decision in Buck v. Bell; naivete about the existence of expert nonpartisan regulators led to Humphrey’s Executor; the panic of war coupled with racism led to the tragedy in Korematsu; and the determination to entrench New Deal nationalism led to the excessive breadth of the opinion in Wickard v. Filburn.

In each of these cases the background social context triumphed completely, and constitutional principles were overcome by the passions of the moment. For this reason, originalist judges and scholars have for years critiqued many of these cases and have offered an explanation for why they were wrongly decided notwithstanding the so-

social contexts in which they arose. I would suggest that Professor Lessig has offered and can offer no such critique of these constitutional tragedies. His emphasis on social context and background is so strong and his discussion of founding commitments, constitutionalism, and text is so brief that he has no vantage point from which to judge the goodness or badness of the translations in *Dred Scott, Slaughter-House, Plessy, Lochner, Buck v. Bell, Humphrey's Executor,* and *Korematsu.* Originalism would give him one such vantage point for criticism; our natural law tradition would give him another. Translation theory, however, leaves him with worse than nothing to say. It leaves him explaining and justifying bad decisions which some saw as bad when they were rendered and which our constitutional tradition has denounced.

My first critique of translation theory then is that by emphasizing social context and background so heavily it has the potential to justify everything the Supreme Court does or has ever done simply because the Supreme Court has done it. Such an outcome would leave us with the ultimate positive theory, but with no means to criticize anything the Supreme Court ever does.

B. Translation Theory Cannot Explain Our Constitutional Restorations

A second problem with Professor Lessig's translation theory is that it incompletely describes certain positive phenomena in our constitutional tradition. Aside from our belief that we have lived through certain great constitutional tragedies, another feature of our constitutional tradition is that we also believe we have lived through certain great constitutional "restorations" as well. These restorations could be described as being fundamentalist epiphanies (experienced by the Supreme Court) that some founding value or textual provision is not being adequately taken into account by the current legal culture.

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17. I count Bruce Ackerman on my side here. His theory of three originalisms offers such a vantage point as well.

18. This of course is the opposite error of the one some originalists are accused of committing, which is of having an idealized theory of constitutional interpretation that bears no relationship to what the Supreme Court actually does and has done.
Professor Lessig discusses and explains several of these fundamentalist epiphanies—the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*¹⁹ and its New Deal era caselaw, for example—and I agree with much of what he says about those episodes but there are many, many other episodes which he does not discuss and which I doubt translation theory can explain. The appearance of the incorporation doctrine many decades after the Fourteenth Amendment was ratified; the extirpation of racial discrimination beginning with *Brown v. Board of Education*;²⁰ the revival of separation of powers beginning with *Buckley v. Valeo*²¹ in 1976, and *INS v. Chadha*²² and continuing through the decision in *Plaut v. Spendthrift Farm,*²³ the revival of federalism beginning with *National League of Cities v. Usery*²⁴ in 1976 and continuing through the recent decisions in *United States v. Lopez*²⁵ and *Seminole Tribe v. Florida,*²⁶ the abolition and subsequent reinstatement of the death penalty; the rise and fall of the Warren Court's libertarian criminal procedure caselaw; the recognition that the Constitution imposes limits on libel suits in *New York Times v. Sullivan*²⁷ and on punitive damages in *BMW v. Gore,*²⁸ the revival of the Free Exercise Clause in *Sherbert v. Verner*²⁹ and *Wisconsin v. Yoder,*³⁰ and the use of the Fourteenth Amendment to protect against regulatory takings in *Nollan v. California Coastal Commission,*³¹ *Lucas v. South Carolina Coastal Council,*³² and *Dolan v. City of Tigard.*³³

Professor Lessig's argument is that changes of this kind occur because of changes in social context, especially the uncontested background social context. Thus, *Erie* is explained by the shift to positivism and realism in our understanding of common law decision-making; the New Deal is the natural result of the growth of a vast national economy coupled with the arbitrary and political nature of the doctrines the old Court made up to protect a sphere of state power; the questioning of independent agencies in the 1980s is the natural result of the growth of public choice criticisms of the possibility of expert, disinterested public administration; and *Chevron*³⁴ defer-

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19. 304 U.S. 64 (1938).
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ence is the result of our appreciation of the political nature of legal interpretation under broad post-New Deal statutory delegations of power.

I do not disagree with any of these observations; indeed, as Professor Lessig acknowledges they are so obviously true that they are practically part of the received wisdom of our scholarly canon. I do not agree, however, that changing social context and uncontested background by themselves account entirely for either the decisions Professor Lessig discusses or for the other positive originalist epiphanies I listed above. To begin with, the background assumptions of our legal culture are powerfully shaped in my opinion by our reverence for the "sacred" texts of the American constitutional tradition. The Constitution, the Bill of Rights, and the Civil War Amendments are great pillars of our culture. They are to our imagination what the dome of the Capitol Building, the White House, the Supreme Court, and the chiseled faces on Mount Rushmore are to television newscasters. They are the foundation stones of the Republic, cultural icons of the greatest importance. Their meaning is illuminated by other powerful texts of varying degrees of significance: the Declaration of Independence; the Federalist Papers; Washington's Farewell Address; the writings of Thomas Jefferson and Abraham Lincoln. All of these foundational texts (the "Founding Texts") shaped, and continue to shape, our constitutional culture every day. They cut like a powerful spotlight through the foggy opinions of the Supreme Court and through the corrupt practices and customs that sometimes threaten to encrust our ancient liberties. They stand for the values of progress, the Enlightenment, liberty, reason, individualism, limited government, and the continuing war against feudal ideas of caste.

In my opinion, these great texts exercise a permanently destabilizing influence on our social and legal life.\textsuperscript{35} Contexts may change, new technologies may develop, ideas about the nature of law, caste, and of government may shift, but the constitutionalized ideals of the Founding Era are always pulling like a powerful rip tide in certain predictable directions.\textsuperscript{36} Put another way, uncontested background

\textsuperscript{35} Consider here, my colleague Tom Merrill's argument that textual originalism is very unsettling to conventional ways of doing things. See Thomas W. Merrill, \textit{Bork v. Burke}, 19 Harv. J.L. & Pub. Pol'y 509, 523 (1996). Merrill argues that:

Borkean originalism [is] not very conservative at all. It is more akin to the radical philosophy of the Seventeenth Century puritan revolutionaries who argued for throwing off the "Norman Yoke" by returning to the purity of the original Anglo-Saxon Constitution. [citing Christopher Hill, \textit{Puritanism and Revolution} 50-122 (1958)]. Like other forms of radicalism, originalism is no doubt far more exciting than conventionalism. But then if you are a true conservative, revolutionary excitement should not be the \textit{sumnum bonum.} \textit{Id.}; see also Lawrence B. Solum, \textit{Originalism as Transformative Politics}, 63 Tulane L. Rev. 1599 (1989) (making a similar argument).

\textsuperscript{36} I include Abraham Lincoln among the Founders here because of the role his ideas played in giving rise to the critically important post-Civil War amendments.
social contexts are constantly being shaped and transformed by a legal
culture that has at its heart and soul transformative texts that we all
recognize as being fundamental, and to which we all can repair for
sustenance when things seem to be going wrong.37

The transformative destabilizing nature of these texts is evident
throughout our constitutional history. The ringing words of the De-
claration of Independence and the post Civil War Commitment to a no-
caste society have helped destabilize slavery, Jim Crow laws, Social
Darwinism and eugenics, and discrimination against women and reli-
gious and ethnic minorities. The commitment to government by the
consent of the governed in the Declaration and in the Constitution has
encouraged a two century long global revolution in the forms of
human governance.

The commitment to limited government through federalism, separa-
tion of powers, and a Bill of Rights has likewise been transformative.
From 1976 through 1996 there has been a steady revival of the values
of federalism and of separation of powers in the opinions of the
Supreme Court. This revival represents a partial rejection, frankly, of
the constitutionalism of the New Deal era. It is occurring, in my opin-
ion, in part because of the inconsistency of aspects of the New Deal
with the Founding Texts. Similarly, an aura of fundamentalist
reawakening and revival overlay the incorporation of the Bill of
Verner, Wisconsin v. Yoder, and the recent cases on regulatory takings
and punitive damages which have revived principles of economic lib-
erty that have long been dormant. There is no mystery about where
cases like Brown v. Board of Education or the incorporation cases, or
INS v. Chadha or United States v. Lopez or Nollan v. California
Coastal Commission came from. They all reflect the continuing power
of our "sacred" Founding Texts to shape and mold the uncontested
background legal culture at all times.

This is not to deny Professor Lessig’s points about how changing
technology and ideas about law can result in the same texts being ap-
plied in different ways at different times. I do, however, deny that
changes in background social context and translation are very impor-
tant compared to the fidelity side of the equation which Lessig leaves
largely undiscussed. The Founding Texts and their cultural influence
are more permanent than the shifting social ideas that Professor Les-
sig mentions about the nature of law and about caste and the implica-
tions of new technologies. Those texts represent really big ideas in the
march of human history for which millions of people have gone to war
and died, and to which the nation is literally dedicated. Debates
about the nature of the common law, or gay rights, or the implications
for the Bill of Rights of wiretap technology, and the development of

37. See Solum, supra note 35.
television simply cannot compare to the principles of Democracy, Freedom, Individual Rights, and Limited Government over which we fought the Revolutionary War, the Civil War, World War II, or the Cold War. The Founding Texts quite simply tower in importance over the shifts in social context that have occurred over the last 200 years.

Clearly, Americans revere the Constitution to the point of mistakenly thinking that it is perfect. One consequence of this is that our constitutional texts have a constant transformative effect on social background assumptions of the kind that Professor Lessig discusses. The great texts of our constitutional tradition are always calling us back to the Founding values of individual freedom, economic liberty, the separation of powers, and federalism. Thus, I think that it is the writtenness of our constitution—the text—that explains most of the constitutional epiphanies in our constitutional tradition and not shifting background assumptions and social contexts. I think our tradition is essentially anti-Burkean and anti-corrupt practices. There is a fundamentalist, protestant textualist strain to our constitutional tradition which seeks constantly to strip away corrupt interpretations as part of a never-ending quest for social renewal.

C. Translation Theory Cannot Explain Our Changing Conceptions of the Judicial Role

A third difficulty with translation theory is that it relies heavily on something that Professor Lessig describes as the Frankfurter Constraint on the judicial role. Professor Lessig argues that this constraint works differently in structural constitutional cases than it does in individual rights constitutional cases. With respect to the former, Professor Lessig argues that the Frankfurter Constraint counsels judicial deference and restraint once something becomes contested due to shifting social background assumptions. In individual rights cases, however, Professor Lessig shifts his ground. Here he contends that an active judicial role is called for once individual rights become contested due to shifting social background assumptions. Professor Lessig does not argue normatively for this differential application of the Frankfurter Constraint. Rather, he seems to believe that such a differential application is a permanent and positive feature of our constitutional tradition.

40. For a defense of the proposition that federal courts should be active in enforcing individual rights guarantees, but passive with respect to most structural constitutional clauses, see Jesse Choper, Judicial Review and the National Political Process (1980).
I have several criticisms of Professor Lessig's positive account on these matters. First, the ideas about judicial role implicit in the notion of the Frankfurter Constraint are themselves evidence of the power of the constitutional text in shaping the way we think about the federal courts. This constraint, which assuredly exists and binds all our courts, is itself the product of a legal culture shaped for 200 years by a document that distinguishes between judicial, executive, and legislative power, and that reserves policy choices to democratically accountable actors. There is no mystery about where the Frankfurter Constraint comes from. It comes from the text of our Constitution which gives the federal courts "judicial power," and not the power either to sit as a Council of Revision or to render advisory opinions.

Second, and more importantly, I think it is indisputably true that Professor Lessig's account notwithstanding, the Frankfurter Constraint has clearly operated very differently in structural and in individual rights cases at different points in our history. Prior to 1937, the Supreme Court was quite active in structural constitutional cases and in defending property rights, and it was quite passive in enforcing the civil rights aspects of the Fourteenth Amendment. The Privileges or Immunities Clause and the Equal Protection Clause were treated almost as though they addressed nonjusticiable political questions, while the Commerce Clause and the Due Process Clauses were the subjects of an extensive body of caselaw.

After 1937, however, the opposite situation prevailed. Structural constitutional provisions and economic rights became judicially unenforceable and individual liberty provisions bearing on civil rights became almost the exclusive concern of the federal courts. By 1980, Jesse Choper was able to write a widely cited and much discussed book that accurately described the prevailing positive account of the judicial role between roughly 1937 and 1976. Choper's book received much attention because it described a positive set of understandings about the judicial role that had reigned for nearly forty years.

Beginning in 1976, however, the first signs were becoming quite evident that a modest movement was underway to push our conception of the judicial role back in the pre-1937 direction. Today's Supreme Court is clearly more active in federalism, separation of powers, and economic liberty cases than were the Supreme Courts that sat between 1937 and 1976. Decisions such as National League of Cities v. Usery, United States v. Lopez, Seminole Tribe, Buckley v. Valeo, INS v. Chadha, Plaut v. Spendthrift Farm, Nollan v. California Coastal Commission, 44 Liquormart v. Rhode Island, and BMW v. Gore all herald the end of the New Deal conception of the judicial role and the

41. See id.
42. 116 S. Ct. 1495 (1996).
reemergence of a modest degree of judicial enforcement of structural and economic constitutional rights. At the same time, the period between 1976 and the present has seen the reemergence of judicial restraint in the area of individual civil rights. Decisions such as *Washington v. Davis*[^43] and *Bowers v. Hardwick*[^44], coupled with the restoration of the death penalty and the cutting back of the Warren Court's criminal procedure caselaw, all suggest a slowing (perhaps temporary) of the Court's activism in the individual civil rights area.

The point of all of this is that I doubt our practice is clear enough to support Professor Lessig's generalizations about the judicial role and when we do or do not invoke the Frankfurter Constraint in structural and individual rights cases. Aside from the three different eras with differing conceptions of the judicial role that I have mentioned, there are no doubt other eras as well. There is simply no uniform conception of the judicial role throughout American history that would support Professor Lessig's positive account on this matter. Every age apparently has its own conception of whether judges should be active in structural or economic or civil rights cases.

Third, Professor Lessig's account here is suspect because it presupposes a sharper distinction than actually exists between individual civil rights cases and structural cases in the federalism and separation of powers areas. The difference between these two categories of cases is not at all clear to me. Why is it that *Romer v. Evans*[^45] and *Planned Parenthood of Pennsylvania v. Casey*[^46] are individual civil rights cases, as Professor Lessig claims, and not federalism cases as I have claimed in some of my prior writings?[^47] On the other hand, why are the federalism issues in *Lopez* and in *Erie* not also individual rights issues, at least as far as individuals like Mr. Lopez are concerned? I frankly do not believe that any very clear line exists that really helps to explain why the Supreme Court (or those who comment on the Court) choose to characterize some of these cases as being federalism or separation of powers cases while others are characterized as being individual civil rights cases. The decision to characterize *Lopez* as a federalism case and *Casey* as an individual rights case seems to me to be completely an arbitrary one. Both cases obviously involve issues of both federalism and of individual rights.

Finally, Professor Lessig advances the positive claim that the Frankfurter Constraint is never invoked in individual rights cases in our political tradition once something becomes contested. Thus, he ar-

gues that judicial restraint in cases like Romer is no longer possible in our constitutional tradition once it becomes contested whether homosexuality is or is not a psychological or biological disorder. This claim seems to me not to be accurate. We certainly do not privilege individual claims of right under the Eighth Amendment's cruel and unusual punishment clause, even though the constitutionality of the death penalty is contested in American society. Similarly, our courts have in recent years practiced restraint in criminal procedure cases, and they have been reluctant to expand new theories of legal liability in discrimination cases absent evidence of invidious intent. It is simply not true that there exists a settled consensus that we should never invoke the Frankfurter Constraint in individual rights cases. Major figures in our recent constitutional history have devoted their whole careers to arguing that it is in precisely this area that judicial restraint is most needed. Justices Scalia and Thomas, Presidents Reagan and Bush, Judge Bork in his nationally televised confirmation hearings, and Chief Justice Rehnquist for the last twenty-five years have all argued vigorously against the proposition that Professor Lessig assumes is uncontested and uncontestable.

It is quite clear as a positive descriptive matter that no settled consensus exists in this country with respect to the judicial role in individual rights cases.

D. Translation Theory Departs Radically from the Traditional Way in Which We Characterize the Process of Fidelity and Change

A fourth way in which translation theory fails to account positively for our constitutional traditions stems from the implications of the new language it uses to describe an ancient and long recognized phenomenon. I frankly find it a bit surprising for a positive account of our constitutional practices to depart from the traditional way of characterizing the process of fidelity and change which Professor Lessig is talking about. The traditional characterization has been one that emphasizes a dichotomy between, on the one hand, the text of the Constitution as originally understood and, on the other hand, the need to apply that text to changing social circumstances. This is the characterization of which Judge Bork speaks in The Tempting of America when he is discussing his famous concurrence in Ollman v. Evans & Novak. Professor Lessig, however, chooses to substitute for the traditional dichotomy a wholly new dichotomy between, on the one hand, fidelity to founding commitments, and on the other hand, translation of those commitments into the world in which we live.

48. See Bork, supra note 5, at 167-69.
Professor Lessig's decision to change the phrase "text and application" to the phrase "founding commitments and translation" seems to me to be unhelpful in an essay that purports only to offer us a positive account of our constitutional traditions. "Founding commitments" are never described at any length in Professor Lessig's article, but the phrase connotes for me a watered down, abstract version of the constitutional text as it was originally understood. The substitution of the phrase "translation" on the other hand for the traditional phrase "application" is clearly meant to connote something aggressive—a thorough reshaping if you will of the original with the suggestion that inevitably something of the original text will be lost in translation, and that multiple translations must compete necessarily with one another before we can know either which one is the best or more simply which one we like the most.

I think the substitution of founding commitments/translation for text/application is inconsistent with what I would call a deep-seated cultural commitment to written constitutionalism in this country, and thus is regrettable in any positive account of our constitutional traditions. For more than 200 years, we Americans have endorsed written constitutionalism as: (1) a mechanism for solving intergenerational collective action problems, (2) as a vehicle in important constitutional moments for entrenching fundamental rights, (3) as a way of removing by gag rule contentious issues of religion and race from the agenda of ordinary politics, and (4) as a way of structuring permanently our political institutions. Moreover, our devotion to constitutionalism has always emphasized the writtenness of our admittedly epigrammatic and short Constitution. Our civic culture emphasizes the fact that we, unlike the British, have a written Constitution, and it is on this aspect of our Constitution that Chief Justice Marshall founded the institution of judicial review in Marbury v. Madison. For more than 200 years, it has always been the case that ordinary educated Americans would answer the question "What is the Constitution of your country?" by pointing to a certain text that begins with the words "We the People."

Now, suddenly, 209 years after the Philadelphia Convention a positive account of our constitutional practices is offered that nowhere mentions the text of the Constitution of 1787 and that refers instead to the far more abstract notion of fidelity to "Founding Commitments." This I submit is a mistake. The true positive account is that for more than 200 years we Americans have taken our cue from Article VI and sworn our oaths of allegiance (or made our affirmations) to "support this Constitution." Our fidelity is to the written Constitution of 1787, as amended—nothing more and nothing less. This traditional way of describing what we are faithful to emphasizes our deepseated

50. 5 U.S. 137 (1803); see Monaghan, supra note 38.
51. U.S. Const. art. VI, cl. 3 (emphasis added).
200 year old cultural commitment both to constitutionalism and to the written document that emerged from Philadelphia in 1787. If we have a constitutional tradition in this country, it is one that emphasizes the \textit{writteness} of our Constitution. We are not England—thank God!

I also disagree with the second half of Professor Lessig's new formulation: his substitution of the word "translation" for the word "application." Our world is not so different or distant from the world of the Founders that "translation" is needed. Our Constitution is written in English and was ratified by people who read Aristotle and Plato; Shakespeare and Milton; Aquinas and Augustine; Hobbes and Hume; Locke and Montesquieu; Voltaire and Rousseau; Jefferson and Madison; the Old and New Testaments of the Bible; Dante and Homer. Americans think the 200 years from the Republic of Slavery to the Democracy of today is an eon. It is not. Most Europeans think of the last 200 years as representing a short period of time. They know more than we do in this respect. Most of the changes that have occurred in the last 200 years (the abolition of slavery and of caste) have occurred \textit{because of} our great Founding Texts not despite them.

The American legal tradition is just not that old nor can the Constitution be fairly compared to some ancient manuscript written in Greek or Sanskrit. The Founding Texts range in age from 220 to 130 years old. They are all written in a language which is with minimal exceptions the same language that we speak today. The people who produced them read the same Bible most of us read, were influenced by almost all of the same philosophers and writers, and were committed to the Enlightenment values of science, reason, and progress. While important changes have occurred (mostly as a result of the Founding Texts and not despite them), nothing has happened that requires something as wrenching as a translation. Application to changing circumstances—sure. Everyone agrees with that. But, application is not translation, and to equate our practice of application with translations is both to misstate what we do and to marginalize the importance of the Founding Texts relative to the changing modern contexts in which they are being applied. I reject the translation metaphor which conjures up images of literary interpretation where multiple readings may be appropriate and desirable, and where what the text means to the reader is more important than the social meaning it has had over time. Legal texts, unlike poems, are enforced with bullets and guns. This is why creative readings of the tax code are not received as enthusiastically in our society as are new translations of Homer.

The main differences between the world of today and the world of 1787 are the direct result of the Enlightenment commitments of the Framers which have made our world a far better place in which to live than was their own. The Founding commitments to liberty and equality and democracy have produced unprecedented improvements in the
lives of all, and especially in the lives of African-Americans and women. In all other respects, however, our knowledge of philosophy, religion, ethics, political economy, and literature have not expanded as much as we sometimes like to think. Nor, in my opinion, has human nature changed appreciably over the last two centuries as best as we can tell.

There is simply no case then to be made for "translation" as opposed to "application." We are still the same people, the same political community, as the one that ratified the Constitution. The American public of today knows this even if their humble servants in the legal academy do not. That is why they so readily accepted the ratification of the Twenty-Seventh Amendment to the Constitution, even though the ratification process was dragged out over a period of 200 years! The constitutional significance of the public’s ready acceptance of the Twenty-Seventh Amendment is that it indicates that on May 7, 1992, We thought We were still the same People, the same political community, as the one that ratified that document that emerged from Philadelphia in 1787.

E. Translation Theory Is Unnecessary to Explain the Changes Professor Lessig Seeks to Explain

Fifth, translation theory fails the test of Ockham’s razor because it is not necessary to explain the changes that Professor Lessig seeks to explain. Contrary to the account that is offered in Professor Lessig’s principal paper, all originalists agree that application of the text to changing circumstances in many of the instances he describes is quite unremarkable. Thus, Judge Bork and Justice Scalia have no difficulty applying the First Amendment to regulation of broadcasting or of cable television. Similarly, no originalist I know is the least bit concerned about the need to apply the Fourth Amendment to electronic wiretaps. Absolutely no one thinks that the fact that the Air Force was called the Air Force, instead of the Aerial Navy, means that it is not encompassed within the grant of power to Congress to set up an Army and a Navy. And, even moving beyond these most straight-

52. Similarly, *Erie* is quite explainable on originalist grounds even leaving aside the shift in ideas about legal positivism and the nature of the common law which Lessig identifies. Many developments came together to delegitimize the regime of *Swift v. Tyson*, 41 U.S. 1 (1842), and produce *Erie*. First, by the time *Erie* was decided a vibrant national commercial economy was firmly in place. This new fact undercut any social need that might once have existed for a unified federal common law and delegitimized *Swift*. Second, the rule of *Swift* had led to forum shopping and had thus proved to have administrability costs that Justice Story could not have originally appreciated. Third, *Erie* was decided in the wake of decades of federal judicial activism on economic matters mostly at the expense of state governments. For originalists, this activism raised both separation of powers and federalism problems of great magnitude. A rule of restraint like the one announced in *Erie* was plainly faithful to Founding ideas about the separation of powers and federalism, especially since by the 1930s a national commercial economy had been achieved. Finally, as Professor Stephen
forward of examples, Judge Bork has argued that the process of applying an unchanging text justifies the rule against libel suits announced in *New York Times v. Sullivan*. In a passage that Professor Lessig quotes and approves, Judge Bork explains that changing circumstances with respect to the impact of libel litigation on First Amendment values justifies a new rule as the text of that Amendment is applied to an ever-changing world. Chief Justice Rehnquist and Justice Scalia seem also to endorse new applications of old constitutional principles. Both Justices have accepted the partial application of the no caste-based discrimination principle of the Fourteenth Amendment to gender classifications, even though the Framers of the Fourteenth Amendment almost certainly did not understand the Amendment to have that application.53

Gardbaum has pointed out to me, the new rule in *Erie* coupled with revisions in pre-emption doctrine helped to give at least some power back to the states at a time when the Court was abandoning efforts to police the perimeters of Congress’s enumerated powers under Article I, Section 8.

53. Similarly, some, though not all, of the New Deal expansion of federal power is explainable by reference to the constitutional text. First, as Professor Lessig and thousands of others have noted, technological change and population growth had by the 1930s created a national economy with far vaster movement of goods and people across state lines than previously existed. This necessarily increased the scope of Congress’s power and reduced the domain of state power. Second, and very importantly, the number of states had expanded from thirteen at the time of the Founding to forty-eight by the time of the New Deal. This simple development was of great legal and political consequence because it greatly increased the likelihood that any commercial activity would at some point involve a state line crossing, especially given the technological and population changes mentioned above. At the same time, state laws in areas of traditional state power were more likely to cause external effects on other states simply because by 1937 one had to contend with forty-eight actors generating external effects whereas in 1789 you had only to contend with thirteen. To the extent that severe external effects were likely to substantially affect the flow of commerce and assuming, as I think is correct, that the Necessary and Proper Clause allows Congress to regulate activity that substantially affects interstate commerce then it follows that the expansion in the number of states would necessarily lead to an expansion in congressional power.

For reasons I have explained elsewhere, these considerations I think explain the decision in *Darby v. United States*, 312 U.S. 100 (1941), and help to explain the constitutionality of many of the New Deal programs. Excesses certainly occurred, in part as a reaction to the excesses of judicial activism of the old Court. Some opinions like *Humphrey’s Executor, Wickard v. Filburn*, and *Blaisdell* were certainly written in ways that cannot be explained or justified on textualist/originalist grounds. Interestingly, it is these decisions and not *Darby* that have come under subsequent and recent criticism from both the Supreme Court and from legal academics.

But, it is also important to remember what did not happen during the New Deal era: no new fundamental transformative text was generated comparable to the Declaration of Independence or the Constitution or the Civil War Amendments. No economic Bill of Rights was adopted, no constitutionalizing of the welfare state occurred, no repeal of the Madisonian Constitution of checks and balances was proposed, no repeal of the Takings or Contracts Clauses was effected, no national code of Private Law was adopted nor were any national rules on corporate chartering proposed. In short, no entrenching and transformative text/law was produced: as a result, we see today the quiet repeal by a Democratic President of one of the very cornerstones of FDR’s New Deal, the federal guarantee of a welfare entitlement even as the Supreme
What then is the difference, if there is any between translation theory, on the one hand, and what could be called moderate originalism on the other—a moderate originalism that all agree accommodates at least some new applications of text in light of changing social circumstances? The big disagreement, it seems to me, comes over whether it is legitimate for the Supreme Court to drive the background evolution in social values and mores or whether the Court is merely authorized to discern such changes after they have already happened and only then allow those changes to reflect themselves in doctrine and caselaw. The dichotomy is between a Supreme Court that is an agent of social change and a Supreme Court that takes account of social changes only after they have already occurred. On this question moderate originalists like Bork, Rehnquist, Scalia, and Thomas are pretty clearly of the view that the Court should not drive the processes of social change. Translation theorists like Professor Lessig seem to be on the other side, however, at least judging by the enthusiasm with which Professor Lessig greets the Court's social engineering in *Romer* and in *United States v. Virginia*, the Court's recent Virginia Military Institute gender discrimination decision.

It is extremely difficult for me to understand how Translation Theory, a theory that emphasizes the importance of social background and context, could tell us much about, or justify, the legitimacy of the Supreme Court driving the processes of social change rather than discerning them. That social changes occur and become reflected in judicial doctrine is undeniably true. That the Supreme Court has a warrant to cause this process to happen at an accelerated pace is far from obvious, however. Indeed, the finest conservative legal minds on the bench all deny heatedly and rightly in my view that the Court has any such authority. Alexander Bickel once proposed that the Supreme Court should be governed by the idea of progress—that it should try always to move us toward a more perfect future. But, as John Hart Ely responded it is as tyrannical for present majorities to be governed by the future as it would be for them to be governed by the past. Even if the Court could accurately discern the future, and there is no particular reason why we should obviously assume that to be the case, it is wrong for the Court to cram down on Americans today the values of their children and grandchildren.

Finally, a positive account of the processes of doctrinal change has to be able to account for all of the Supreme Court's retreats on these matters. In recent years, the Court has come close to abolishing capi-

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FIDELITY AS TRANSLATION

F. Translation Theory Cannot Explain the Timing of Changed Readings

My sixth and final critique of translation theory is one that Professor Lessig anticipates to some degree but fails adequately to respond to, in my judgment. I believe Translation Theory fails as a positive account of the processes of doctrinal change because the changes in social context that Professor Lessig discusses cannot explain the timing of the changes in Supreme Court doctrine that he seeks to justify. The changes in the understanding of law that underlie Erie or Chevron happened over many years. So too did the growth of the national economy and the expansion in the number of states which was important to the changes in constitutional doctrine during the New Deal. If that is the case, why does translation take so long to happen? If the meaning of the Constitution really results from the courts reading a text in a new context and translating it, then why do old readings persist for so long after the context has changed? Why did we have to wait so long for Erie or Darby or Brown or Lopez? Why did the Court expand the rights of criminal defendants in the Warren Court era, and retract them somewhat after 1968? Why has the last twenty years seen a modest revival of federalism, the separation of powers, and of judicially enforced economic liberties, while the years between 1937 and 1976 were a time of unbridled nationalism?

I think the answer to this question is complex, and I will present the balance of my views below, but for now suffice it to say that I do not agree that translation occurs or that the meaning of the Constitution literally changes when the courts apply it differently in an ever-changing world. Nor do I think that the courts are the final interpreters of the Constitution and therefore the arbiters of its ultimate meaning. We the People perform that function over a period of many decades through our agents: the President, the Senate, the House of Representatives, and the institutions of our state governments. Periodically, acting through a kind of electoral college, we elect Supreme Court Justices and other federal judges to speak for a while in our name. If they speak wrongly (and they almost always do to some extent—just as our presidents and congressmen do) we either ignore
what they say or we gradually replace them with a new set of spokes-
men who will more accurately apply the great texts.

The core meaning of the fundamental texts is quite stable in my
view although knotty questions of application are always arising, par-
ticularly under the Fourteenth Amendment. On all the really funda-
mental matters, the political institutions of government hum along
without any need for constitutional interpretation. Elections are held
when they are supposed to be held, presidents and congresses come
and go, California and Wyoming send two representatives to the Sen-
ate, constitutional amendments are proposed and are almost always
defeated, very few important laws get enacted, and the national de-
defense and currency are maintained.

Every once in a while, the Supreme Court gets seriously out of line
with the prevailing popular understandings of the great texts in our
constitutional tradition. More often the Court just gets somewhat out
of line: too solicitous of the rights of criminal defendants or too na-
tionalist or not nationalist enough or too libertarian or too statist.
When that happens the presidential/senatorial "Electoral College"
gradually brings the Court back into line. Sometimes that process of
correction happens suddenly as with the Legal Tender cases or with
the Revolution of 1937 or with Brown. And sometimes it happens
more gradually as with the slow growth of the Incorporation Doctrine
or the slow undermining of the Warren Court's criminal procedure
caselaw or the gradual restoration of the separation of powers and of
federalism and of economic liberty.

The process is necessarily an ongoing one because changing social
contexts (disputed and undisputed) are only a very small part of the
picture. Much depends on judicial retirement patterns, the extent to
which individual presidents and senators choose to focus on judicial
selection over other issues that may be competing for their time, the
accuracy of their guesses about what nominees will do, and the bun-
dling of different interpretations of different clauses that potential ju-
dicial nominees happen to offer. The final picture is substantially the
one that Professor Robert Dahl drew almost forty years ago of a
Supreme Court that basically enacts the constitutional interpretations
of the majority coalition in the White House and in the Senate that
functioned as its "Electoral College." Enduring cohesive electoral
coalitions have a big impact on the federal judiciary and on constitu-
tional interpretation; transient and fickle coalitions produce slow
change or no change at all. Few victories achieved this way are per-

56. See Gerald N. Rosenberg, Judicial Independence and the Reality of Political
Power, 54 Pol'y Rev. 369 (1992); Robert A. Dahl, Decision-Making in a Democracy:
The Supreme Court as a National Policy-Maker, 6 J. Pub. L. 279 (1957); see also Ger-
manent and few defeats are lasting, if those defeated can figure out how to mobilize the public against the Court.

The federal courts at the end of the day are primarily constitutional agenda setters, with a fairly limited power to resist a mobilized public opinion for long periods of time. This does not mean that the federal courts are politically unimportant. To the contrary, agenda setting and issue framing is critically important in any democratic or majoritarian decision-making process as those familiar with the modern literature on public choice theory and voting paradoxes well know.

Moreover, it is also significant that under Dahl's positive account of the processes of constitutional change the Supreme Court imposes the values of a national majority coalition. Sometimes such national coalitions use the Supreme Court to coerce very large numbers of dissenting states and even regions who do not share their values and constitutional understandings. Because the policy-making procedure of the Supreme Court does not protect state power by including such impediments to national action as bicameralism, presentment, filibusters, and the periodic need to stand for re-election, it has in recent years been used with brutal effectiveness on those southern and western states that adhere to traditional moral values scorned by the more secular and less traditional voters of California and the Northeast. These voters have narrowly succeeded in electing a six justice majority of the current court that is willing to impose socially liberal elite values on substantial portions of the country that would prefer to follow more traditional social rules.

At the end of the day, however, it must be conceded that Professor Dahl's positive account is largely an accurate one. Democratic control of the Senate from 1986 to 1994 coupled with Democratic control of the White House from the 1992 presidential election to the present has led to the appointment of four socially liberal Justices (Kennedy, Souter, Ginsburg, and Breyer) coupled with one socially conservative Justice (Thomas). Adding these Justices together with their predecessors has produced a socially liberal court. Thus, it is Professor Dahl and not Professor Lessig who offers us the real positive account of the causes of doctrinal change. Dahl's theory can explain the timing and the degree of the changes we all observe in Supreme Court doctrine in a way that Professor Lessig's theory cannot.

II. CONSTITUTIONALISM, FIDELITY, AND ORIGINALISM

Now, it would be possible to conclude from the argument with which I ended the previous section that constitutionalism, fidelity, and certainly originalism are completely dead. Some might interpret the positive account I sketched out above as suggesting that, in practice, constitutional law and doctrine is all just politics. I emphatically disagree.
In my view, what Professor Dahl's positive account really tells us is something that we all basically know. Our Constitution is ultimately enforced by the people of the United States, acting through their elected representatives, and not by the Justices of the Supreme Court. Our Supreme Court acts ultimately, as the people's agent, and when it does so it ultimately reflects the way We the People, who indirectly elected those Justices, think about constitutional issues. Thus, I think that our practice and history suggests it is the American people's understanding of the nature and meaning of our Constitution that ultimately matters and not the understanding of the Justices of the Supreme Court.

What this means is that anyone who wants to offer a positive account of the evolving meaning of our Constitution should ask themselves what do the people think the Constitution has come to mean, not what do the Justices of the Supreme Court think it means as is evidenced by their caselaw. If the people enforce the Constitution at the end of the day it is their understanding of its meaning that counts and not the Court's understanding.

So what do the American people think the Constitution means? For that matter what do the people think the Constitution is? Do they think we have one written constitution or do they think we have had three constitutional moments over the last 200 years? Do the people think we have an unwritten constitution like England or do they think that the text of 1787 as amended is somehow more special?

I think the people in this country still believe largely what they have been learning in their high school civics classes for the last 200 years. They think that we have a written constitution that has been amended twenty-seven times, unlike the British who have an unwritten constitution that comprises important texts as part of their constitutional tradition. The American people understand that constitutional commitments do grow over time and that there is open-ended language in the text that may sometimes take on new meanings in modern con-

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57. For a wonderful discussion, see Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 Harv. J.L. & Pub. Pol'y 45, 51-52 (1994) (contrasting the legitimacy of a document he might draft that is labelled the Constitution with the legitimacy of the document that the people of the United States have for 200 years accepted as being the Constitution).

58. For several years now, I have been of the view that even if one defines law only by reference to tradition and practice and not by reference to positive enactments one must still concede that in the United States it is our tradition and practice to regard the text of the Constitution as a trump card—the touchstone of constitutionality in Justice Felix Frankfurter's words. For this reason, I have entitled this Response "The Tradition of the Written Constitution." I think it is our tradition in this country to exalt the written Constitution. In this respect, we differ critically from the British who have a more Ackermanian idea of tradition based constitutionalism punctuated by important evolutionary moments.

Professor Larry Solum has independently suggested the same point in conversation.
texts. At the same time, they also think that the Constitution contains some fairly specific rules that do not change over time. Thus, rules about there being two senators from every state and the president having to be thirty-five years of age do not seem to be permissible subjects of constitutional evolution. In fact, the people are sure enough of the meaning of many parts of the Constitution that litigation about those parts of the Constitution is unthinkable, and thus never occurs. The holding of presidential and senatorial elections, the running of the big institutions of government, matters of war and peace, levels of spending and taxation—almost without exception none of these things has ever been appreciably affected by litigation or Supreme Court decisions.59

One thing that I think the people do understand is that the judicial role is in some appreciable way different from the policy-making role of the legislative and executive branches.60 I think the fact that people think this way helps to explain why it is that Supreme Court Justices and other federal judges always try to justify their decisions by writing opinions that appeal to the constitutional text, to history, and to prior caselaw. Such appeals are what the Justices' employers—the American people—expect from their Court. They think this is the proper way in which judges should go about interpreting and understanding the Constitution.

On most important matters, the meaning of the constitutional text has remained quite stable over time. And, constant efforts are made to continue to use the inter-generational law-making machinery to entrench new rights in the Constitution, thus implying the belief that constitutional entrenchment is a meaningful exercise and that newly enacted constitutional law will in fact have some effect on future generations of Americans.

The Supreme Court gets out of line at times—on criminal law issues or on the balance of national versus state power. When it does the people yank it back, sometimes sharply as in 1937, sometimes more gradually as has happened over the course of the last thirty years. Great tragedies sometimes occur like the decisions in Plessy or Roe v. Wade61 because the people elect Supreme Courts that fail to live up the original constitutional commitments. Sometimes this is the fault of the Justices leading us astray, but sometimes the fault must be said to lie with the American people. We either elect courts that ratify faulty constitutional principles, or we fail to correct egregious judicial

59. On other matters of constitutional interpretation, the differing party coalitions do sometimes hold differing views: how active or restrained do we want our judges to be on certain kinds of cases; is the Supreme Court too hostile to religion; too solicitous of the rights of criminal defendants; insufficiently vigorous in enforcing the Tenth Amendment?

60. People may argue about how different these functions are, but I think almost everyone agrees that at least some differences exist.

errors pointed out to us by our fellow citizens. Unfortunately, the American people make mistakes too. Sometimes for sustained periods of time we fall into practices that are seriously wrong—that violate the very rules that in our better moments we chose to entrench and constitutionalize. We knowingly elect Justices who do not follow through on constitutional commitments of great importance.

Do these tragedies signify that the meaning of the “great texts” has actually changed or been translated to incorporate corruption or that constitutional government is impossible or that We the People would never have gotten into at least some of these messes if we did not have a Supreme Court to lead us astray? Absolutely not. The fault in these instances lies only with ourselves because there are limits on what any constitution can do to save and restrain those who are determined not to live up to the entrenched and fundamental commitments they have made.

Fortunately, under our system there is constant pressure to revisit and correct mistakes when We make them. This is because our constitutional commitments are made in writing and because we are deeply attached to them as a people and because our Justices can write their decisions only by referring to those great written commitments which are palpably inconsistent with decisions such as Dred Scott, and Plessy, and Lochner, and Buck v. Bell, and Korematsu, and Roe. When we fail to live up to our highest aspirations as stated in the Founding Texts it is not because the meaning of those texts has been translated but because it is part of the human condition not to always live up to one’s highest aspirations as to what is right. And usually, the very existence of the texts serves as a reproach to us from our ancestors: a constant reminder to us as a people and to the Justices and lawyers who are always working with the texts that something is not quite right. That some social practice or other has been allowed to grow up is really a corruption in need of extirpation.

My conclusion, then, is that changed judicial and social readings of the Constitution are not always correct interpretations of the document and that changing social background and context is relatively unimportant in explaining the major themes of our Constitution. I agree that the Founding Texts are always being applied to new circumstances but deny that this amounts to anything as wrenching as a “translation” of those texts. Ultimately, the Constitution is interpreted by the People who mostly do a pretty good job on the important things. Lots of little mistakes get made around the edges and constant vigilance is required to minimize and gradually erase them. Sometimes big mistakes are made and the people are either to blame or move too slowly in correcting them. The existence of our constitutional texts has been helpful, historically, in permitting all of us to recognize and correct those mistakes by making it easier for us to repair to timeless principles.