

1997

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Recommended Citation

Sanford Levinson, *Translation: Who Needs It*, 65 Fordham L. Rev. 1457 (1997).

Available at: <https://ir.lawnet.fordham.edu/flr/vol65/iss4/10>

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Translation: Who Needs It

Cover Page Footnote

W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School. What follows is a somewhat awkward amalgam of spontaneous remarks and prepared text responding to Lawrence Lessig's *Fidelity and Constraint*, 65 *Fordham L. Rev.* 1365 (1997). As is usual in symposia, Lessig was able to present only relatively brief parts of his extremely interesting paper, and I chose myself to focus also on very selective aspects of the paper (and comments). No one, therefore, should confuse what follows with a full response to Lessig's very broad-ranging arguments. I am extremely grateful to the organizers of the Symposium for offering me the opportunity to participate in such an interesting event.

TRANSLATION: WHO NEEDS IT?

Sanford Levinson*

I. ANALOGIES

I begin with some remarks about analogy, for in some ways the debate over the meaning of constitutional fidelity boils down to what, among several contenders, one finds the best analogy to (and thus a good means of insight for understanding) the ordinary enterprise of constitutional interpretation. Consider several of the leading contenders. Ronald Dworkin has famously analogized the practice of constitutional interpretation to writing a "chain novel," as the author of chapter one hands on her work to the person who will write the next chapter (who will then similarly give the first two chapters to yet a third person, and so on).¹ As a participant in this Symposium, Dworkin strongly supported the analogy pressed by Lawrence Lessig of constitutional interpretation as "translation." Finally, I note the suggestion by Jack Balkin and myself that those persons engaging in operationally important acts of constitutional interpretation (which may immediately eliminate most academic interpreters), can be described as "performing artists" and, therefore, can usefully be compared to a musical performer playing a Schubert sonata or a piece of "classic" jazz, or to a stage director who has the responsibility for putting on a production of a play.²

One might, then, imagine being asked to take a multiple choice test and facing a question as to which of these three is the best analogy to constitutional interpretation, though one should probably recognize the possibility, as Mark Tushnet has suggested, that the correct answer is none of the above. Even if that is the case, though, I think it remains true that much contemporary discussion about constitutional interpretation draws, like much legal discussion more generally, on analogical reasoning. One might ask Tushnet, therefore, whether the problem lies in these particular analogies rather than in the fact that one is offering an analogy at all.

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1. See Ronald Dworkin, *Law's Empire* 228-38 (1986).

2. See Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. Pa. L. Rev. 1597 (1991).

On the assumption, then, that analogical reasoning is pervasive, I want to ask how analogies work in everyday life, as a preface to pointing out something that I think is peculiar about the specific analogies (and analogists) mentioned above. Return for a moment to your teenage years, when new things are happening, new experiences are being assimilated. Imagine that you are curious about what it means truly to be in love, or to experience fighting in a war. I assume for the moment that you have actually experienced neither of these, but you are talking to someone who has. How might that person respond to you? Well, one possibility is that your interlocutor would adopt the method of analogy. She might ask you to think about the kinds of feelings you have about Fido and then add that being in love is at least ten times more intense than that. As to fighting in a war, especially if it is two males talking to one another, the person with experience might ask you to recall how you felt when playing football against the team of bruisers from across town, when you were just run over every play by somebody bigger and more dextrous than you; the analogist might well add, once again, that being in a war is at least a hundred times scarier than that because people are trying to kill you and not simply block you out.

Let us look at one structural feature of these analogies. The person asking the question, by stipulation, hasn't experienced the phenomenon X about which information is being sought, whether it is being in love or fighting in Vietnam. The person offering the analogy, who has, presumably, experienced X, attempts to convey to the questioner the phenomenological nature of X by making an appeal to what the questioner *has* experienced in his or her own life, such as devotion to a dog or being in a highly competitive—and not a little dangerous—sports event. As the stock wisdom of political organizers would have it, you begin your conversations with people by addressing them in the terms with which they are already familiar, indeed comfortable, before introducing a brand new vocabulary or analytical structure.

Now, note a peculiarity in the analogies of Dworkin, Lessig, or Balkin and myself, at least if they are supposed to help an inexperienced (or, at least, confused) person understand what it means to engage in faithful constitutional interpretation. The peculiarity is this: neither those offering the analogies nor the audience to whom they are offered has in fact engaged in the experience that the analogy is based on. Thus Ronald Dworkin, for all of his truly remarkable accomplishments, has not, to my knowledge, ever tried to write a chain novel, nor, I am quite sure, has anyone within the legal community to whom the chain-novel analogy is offered. Balkin and I have never actually tried to mount a production of an opera or a play or offered a public performance of *Take the A Train*, nor, I strongly suspect, have more than a fraction of the audience to whom we offer such analogies

as a way of understanding legal interpretation.³ Finally, even though Larry Lessig has in fact on occasion translated Dante into English (as I learned at the Fordham Symposium when I had casually assumed that he had not), he has not, so far as I know, offered his translations to the public at large. Once again, it is almost certainly the case that few in Lessig's audience have ever defined themselves as professional translators.

Isn't there something peculiar about a conversation in which you ask someone, "What is it like to do X," and the answer offered is that doing X is like doing something you haven't done? How is that supposed to help you? It is like telling someone who asks what it is like to design a mousetrap that "it is, you know, like designing a rocket to send people to the moon." But, of course, I do *not* know what it is like to design a rocket to send people to the moon. The only analogy *that* evokes, for me at least, is to something of almost impossible difficulty. Crafting a rocket to land on the moon is a great analogy for that, because I have no idea how they did it; for me it was just a miracle. But if you offered it to me (at least) as an analogy for something reasonably concrete, I would be mystified. Why didn't you speak to me of something I *did* know something about rather than asking me to compare to something I am having trouble with—what is it like to design a mousetrap, or what is it like to faithfully interpret the Equal Protection Clause—to something I have never experienced (and, what is worse, that you yourself may never have experienced)?

These questions can be raised, of course, about any and all analogies. But I want now to focus on the particular analogy, translation, about which our principal paper-giver, Lawrence Lessig, has written a number of extremely interesting articles from which I have learned much.⁴ Still, I have questions about whether the emphasis on translation in Lessig's work can bear the weight he places on it.

I begin by asking a very simple question: who needs translations? Surely "native speakers" do not. I would not, after all, except in the most metaphorical of senses, ever wander into a book store and ask for an English-language translation of Shakespeare or Milton. We might, of course, ask what is the best edition of Shakespeare or Milton, and one of the criteria might well be the extent to which a specific edition defines (and in some sense surely "translates") words

3. In fact, Balkin and I organized a session at the 1996 meeting of the law and interpretation section of the Association of American Law Schools, on law and music, and a number of persons who spoke in the discussion afterward spoke of their own experiences as musicians, which included, in at least one instance, experience as a professional opera singer prior to entering the legal academy.

4. See Lawrence Lessig, *What Drives Derivability: Responses to Responding to Imperfection*, 74 Tex. L. Rev. 839 (1996) [hereinafter Lessig, *Responses*]; Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Sup. Ct. Rev. 125; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395 (1995); Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993).

likely to be unfamiliar to the modern reader (such as “fardel”) or, perhaps as much to the point, words that continue in the present vernacular but whose meanings have shifted profoundly over time (such as “sentimental”). Perhaps this example underscores the point that there is a strong connection between “translation” and that constitutional theory known as “originalism” inasmuch as both are based on the notion of a primordial text whose meaning has grown elusive because of the passage of time.

One does not, of course, have to be a “native speaker” to know a language (and thus have little or no use for translations). I happen to know that Bruce Ackerman, one of the other principal speakers at this conference, is an accomplished reader of German. I presume, therefore, that if he wants to read a work by Goethe or Habermas, he can walk into any bookstore in Berlin or Frankfurt, purchase a German-language copy, and begin reading it at a local coffeehouse. Alas, that option is unavailable to me; I am an all-too-typical American who is literate in one and only one language. What this means, therefore, is that if I want to read Dante or Goethe—or anybody else who writes in any language other than English—I need a translation because the original work was written in a foreign language that I almost literally can make no sense of. If the original language is, say, Chinese or Armenian, I can drop the “almost,” for there is no way that I can supply the slightest meaning to the completely undecipherable (for me) squiggles of ink on the page. But there are, of course, people who *can* supply meaning to such otherwise mysterious collections of ink: they are the persons whose services have been purchased to provide readers like me with a translation.

So now I ask the following question: given that we are in fact native speakers of English, and even, at least within this audience, adept in the particular language of American law talk, how can we be helped to understand the perplexities that even we feel, when engaging in constitutional interpretation, by reference to the perplexities we feel when confronting a book written in a language that we do not understand at all?

I might be dwelling too much on this point, but still all of these “translation” metaphors have, if you will, gravitational weight that ought to be recognized (and analyzed). And, as I’ve been suggesting, one of the curiosities about the translation metaphor is its implication that we as acknowledged experts in lawtalk need translators. But maybe I am missing the point. After all, one might suggest not that we need translators, but, rather, that we *serve* as translators for others who are not conversant in lawtalk. Here the notion is we are the experts and there are people out there who just don’t know what lawtalk means. When Lessig, then, talks about translation, it might be in this sense. We are, to our audience of non-legally trained naifs, exactly in the same position as, say, a translator of *The Tibetan Book of the*

Dead is to us. This being said, I do not have the impression that Lessig is truly referring (only) such naifs as the consumers of translations.

II. TRANSLATIONS

I want to use the remainder of my response to look at some of the questions raised by Lessig's invocation of the translation analogy. The point, of course, is to determine how truly helpful that analogy is.

Lessig's extremely important enterprise is to address the ways that we explain and/or justify—these may or may not be the same enterprise for the constitutional theorist—the changes that undoubtedly have occurred within the American constitutional order. To what extent can any—let alone all—such changes be viewed as “faithful” to the Constitution in whose name interpreters claim to speak and by which they gain their political authority? A theory of fidelity, Lessig argues, must answer two demands. First, it must show how interpretive change is consistent with interpretive constancy; second it must show how interpretive change is not just the judges making it up.⁵ Quite obviously, the task is not to show that *some* “change is consistent with interpretive constancy.” As a practical matter, almost no one can be heard to argue the opposite. Rather, the debate is almost always triggered by *particular* changes and the charges by their outraged opponents that they are not in fact legitimized by the Constitution. Should these changes be the result of judicial interpretations of the Constitution, as is the case, for example, with *Roe v. Wade*,⁶ then the opponents are quick to charge “judicial usurpation,” which is just another way of saying that, in some fundamental sense, the judges just made it up.

This does not mean that judges behave whimsically. Rather, the usual charge would be that the judges in question are highly committed to political agendas and that they simply do whatever it takes to present, however implausibly, their favorite political visions as being required by the Constitution itself. Lessig may believe that such judges and implausible opinions exist, though he has not, so far as I know, devoted many pages to those suggested changes that he finds unacceptable. His primary purpose has in fact been to defend—some might even say offer apologetics for—many of the important changes that have occurred in our constitutional fabric. And, in defending these changes as skillful translations of the Constitution, Lessig is determined to overcome the image of the judge as someone who “simply beats the text into a shape which will serve his own purpose.”⁷

5. See Lawrence Lessig, *Fidelity and Constraint*, 65 Fordham L. Rev. 1365, 1365-66 (1997).

6. 410 U.S. 113 (1973).

7. Richard Rorty, *Consequences of Pragmatism* 151 (1982).

This debate has been going on for quite a while now, under the rubric of constitutional interpretation or constitutional hermeneutics. Lessig's most self-conscious contribution to this debate, as indicated, is precisely the analogy of translation as at least a complement, and possibly even a substitute, for these other terms. But I presume it is already obvious that I have my doubts about the ultimate helpfulness of the analogy.

All of us are consumers within an intellectual marketplace, swamped with offers for new tools that will ostensibly make our lives easier and, one hopes, better. Often, though, purchase of these tools requires learning new languages, as can be attested to by anyone who has ever tried to read the directions for installing a VCR. There is, as Milton Friedman tirelessly points out, no such thing as free lunch; the purchase even of helpful tools may require significant startup costs as we learn how to use them. Over the past decades, all of us have made our own decisions as to how much to invest in such tools as economics, structuralist anthropology, moral philosophy, history, and the like in our efforts to make sense of the Constitution. So now Lessig asks us to think deeply about translation as a way of understanding (and resolving?) some basic constitutional issues. The practical question for many of us is whether we now need to take the time and devote our ever-more-scarce energies to becoming conversant with various issues that arise within the community of professional translators.

It is possible that I have misunderstood Lessig. Perhaps he does not ask us to think very deeply about issues surrounding the notion of translation. In that case, then, "translation" would be simply a heuristic, but otherwise containing no great significance as an understanding of law. It might be similar, say, to the earlier mentioned suggestion offered by Jack Balkin and myself that one might profitably ask whether the Constitution is more like a classical symphony or a jazz standard. The latter, for example, features opportunities—indeed, many would say, *demand*s improvisation—in a way that the former is thought not to. I think I speak for Jack as well in saying that I rather like our question and believe that it grasps something about the role of the constitutional interpreter. Yet we scarcely offer the jazz artist, trying to make a particular performance of *Take the A Train* "the best that it can be," as the one best way to understand the Herculean judge. We do argue that it is *a* way, worth, say, several hours of reflection even if not an entire course. So what, precisely, does Lessig think he is selling us in offering "translation" as a new tool in our intellectual kit? Should we buy it?

By happy accident, *The Times Literary Supplement* (the "TLS") only recently devoted part of an issue to reflections on "the translator's art."⁸ A perusal of the interesting reviews and essays it con-

8. See *The Times Literary Supplement*, Sept. 6, 1996, at 3-14.

tained reveals the minefield of problems attached to the translation analogy that Lessig has made his own. At the highest level of theory, one is faced with basic ontological questions involving the relationship of the translated text to the translation. Consider "the special case of Samuel Becket," who translated his own works, first written in French or English, into the other language.⁹ According to one writer, though, "Beckett never was strictly a translator of himself."¹⁰ Each shift in language produced not a literary or linguistic equivalent but a new work. There simply are no equivalents between Beckett's French and English texts.¹¹ The reviewer, George Craig, laconically goes on to write, "Ah, I see: there never was a problem [of deciding whether a translation was adequate to the occasion]: we just happen to have two texts called by the same or similar names."¹² This would lead to the conclusion that "there is no English translation of *En Attendant Godot*,"¹³ but, rather, a brand new play called *Waiting for Godot*. This latter play could, perhaps, be compared in certain ways to the earlier-written play—which is more inventive in its use of language, which seems to offer a more or less bleak view of the human condition, etc.—but *not* praised or criticized as a translation of the former. "Perhaps it is not translation," Craig is willing to concede, "but neither is it the invention of something utterly other."¹⁴ One is tempted to offer the same comment in regard to Lessig's argument, though it should be obvious that this would forestall little argument, especially as to how, if at all, we could tell when the (non)-translation indeed spills over into the presumptively forbidden "invention of something utterly other." Constitutional theory cognescenti will recognize this as one of the issues underlying the existence of non-Article V amendments within the American constitutional system, about which both Lessig and I have written elsewhere.¹⁵

Or consider another *TLS* review, this one by Clive Wilmer of Robert Pinsky's new translation of Dante's *Inferno*.¹⁶ One's attention might be caught by Wilmer's contrast of the warm embrace of Dante into English culture with the decidedly more chilly reception accorded "Goethe, Racine or Pushkin, the notorious *untranslatables*."¹⁷ One is immediately interested in what kinds of texts *can* be successfully translated. How important is it that Wilmer is writing of poets? An-

9. George Craig, *By Whose Hand? The Special Case of Samuel Beckett*, *The Times Literary Supplement*, Sept. 6, 1996, at 4.

10. Whatever it might mean to be "strictly a translator."

11. Craig, *supra* note 9, at 4.

12. *Id.*

13. *Id.*

14. *Id.*

15. See Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Sanford Levinson, ed., 1995); Lessig, *Responses*, *supra* note 4.

16. See Clive Wilmer, *Dante Made Plain*, *The Times Literary Supplement*, Sept. 6, 1996, at 3.

17. *Id.* (emphasis added).

other reviewer, writing about recent work in the theory of translation, reminds us of Robert Frost's famous comment that poetry is precisely what gets *lost* in translation.¹⁸ Maybe "untranslatability" as an attribute of (certain) language is limited to poetry, especially if we view poetry as constituted in part by pure relationships of sounds rather than, say, by its propositional semantics. To the extent that we can quickly distinguish poetry from law, then we, as lawyers, would presumably not have to worry about translational "impossibilities" in relation to our more mundane world.

Still, just as bumblebees fly in spite of their apparently contradicting certain laws of physics, there *are* English translations even of Goethe, Racine, and Pushkin,¹⁹ in part, because as yet another reviewer wrote, "there can be no civilization without translations."²⁰ But, of course, the presence of (what are agreed, ontologically, to be) translations usually serves to generate vigorous disputes, often quite acerbic, about their adequacy. Terry Hale, reviewing *The Translator's Invisibility: A History of Translation*, begins his review by noting that "[t]ranslations can be natural, crisp, vivid, idiomatic, stylish, flowing. They can also be wooden, doughy, dull, unidiomatic, hurried, disconcerting."²¹ Presumably we all want the former. But how, if at all, can we assure that happy result?

One answer is to commission translations only from persons with the proper credentials, whatever we think those might be. Among other things we must believe, for this strategy to be successful, is that the best translations are produced by the best-trained professionals, while, concomitantly, inadequate translations are produced by those readily recognized as incompetents. Alas, this does not seem to be the case. Thus Wilmer, after considering a host of translations of Dante, pronounces the latest, by the widely-praised poet Robert Pinsky, a disappointment. "The diction is numbly literary," says Wilmer, "and there seems little control of nuance or association."²² He offers Pinsky the cold comfort that there exist "many versions far worse than his."²³ I suppose this is like telling a judge that his or her opinion,

18. See Susan Bassnett, *Nothing Lost, Nothing Sacred*, *The Times Literary Supplement*, Sept. 6, 1996, at 9.

19. See Douglas Hofstadter, *What's Gained in Translation*, *N.Y. Times (Book Review)*, Dec. 8, 1996, at 47-48 (considering the merits of four translations of Pushkin's poem "Eugene Onegin"). Apropos of the central theme of my own essay, not the least interesting feature of Hofstadter's own essay is the fact that, although he "once studied [Russian] for a short while . . . I've never held a conversation or read a book in Russian." *Id.* at 47. That does not stop him, however, from offering his views as to the merits of the four translations he discusses.

20. Lachlan Mackinnon, *A Last Testament*, *The Times Literary Supplement*, Sept. 6, 1996, at 6.

21. Terry Hale, *When the Original is Unfaithful*, *The Times Literary Supplement*, Sept. 6, 1996, at 8.

22. Wilmer, *supra* note 16, at 4.

23. *Id.*

however egregious, is at least not so bad as, say, *Scott v. Sandford*.²⁴ Even if true, this is unlikely to be perceived as praise.

The *TLS* symposium is itself ample evidence of the fact that there are always a multiplicity of translators offering their wares for our purchase, and most of us are left quite in the dark as to which version should grace our bookshelves. One answer is simply to accept the verdict of the reviewers themselves. Wilmer tells his readers, for example, that “[t]he translation [of Dante] I now reach for most readily . . . is Laurence Binyon’s.”²⁵ So should we rush out to buy Binyon with confidence that we will be able to appreciate “its most pleasing quality, its relatively effortless use of rhyme”?²⁶ Perhaps, though what do we do when we read yet other reviews that may even praise Pinsky²⁷ or, at least, give kudos to translators other than Binyon? It presumably makes no more sense to rely without further questioning on those the *TLS* picks to review the latest books than, for example, to rely on those who happen to be on the Supreme Court for definitive interpretation of the Constitution. Nor, in seeking assessment of the Court’s own work product (how good *were* they in interpreting the Constitution?) would we necessarily rely on those whose articles happen to be selected by *The Supreme Court Review* or even on those august twenty-four year old editors of the *Harvard Law Review* who offer each November their own evaluations of the previous year’s cases decided by the United States Supreme Court? So what does one do, when faced with disagreement among trained professionals as to the merits of any particular translation or interpretation? One might, of course, simply read a number of translations and then announce which among them one likes best, but if the “one” doing the reading and announcing is in fact not fluent in both languages, then it is not at all clear what authority any such pronouncement may have.²⁸

24. 60 U.S. (19 How.) 393 (1856).

25. Wilmer, *supra* note 16, at 3.

26. *Id.*

27. See John Ahern, *Vulgar Eloquence*, N.Y. Rev. of Books, Jan. 1, 1995, at 3. Ahern, the Dante Antolini Professor of Italian Letters at Vassar, praises Pinsky’s “splendid translation,” with “sinewy lines whose edges you can actually hear. This is true verse.” *Id.*

28. I in fact purchased the Pinsky volume and, at long last, read the *Inferno*, which I had started at least twice before (in other translations) and never been able to finish. Still, as noted in the text, what do I know about the merits of any particular translation? The fact that I liked Pinsky is scarcely evidence of the superiority of his translation. Similarly, we would scarcely assign much weight to the announcement of someone who is ignorant of the modalities of constitutional interpretation, see Philip Bobbitt, *Constitutional Interpretation* (1991), that he greatly likes a given judicial opinion, so long, at least, as we adhere to notions of professional expertise in either translation or constitutional interpretation.

Hofstadter, in discussing the merits of Pushkin translations in spite of his own lack of training in Russian, notes the importance of multiple translations:

There was great magic in the act of jumping back and forth between two translations of each sonnet. Had there been just one, I would simply have

But this final point simply forces us to return to the central peculiarity of the translation analogy: although everyone at the Fordham Symposium and those who are now reading this Response do indeed need “translations” to read at least some great literature—I presume that we would all be dazzled if anyone announced his or her ability to read Goethe, Racine, Pushkin, Dante, Isaiah, Kierkegaard, and Sophocles in their original, to name only authors within the Western tradition—all of us can read all of the Supreme Court’s decisions for ourselves, especially insofar as they are “merely” interpreting the Constitution rather than, say, tackling the more mysterious aspects of the Internal Revenue or Bankruptcy codes.

We may be, of course, attractively modest in our claims to omniscience regarding law talk; after all, I assume that most of us run across English words that we do not know, requiring the use of a dictionary before going on. Such uncertainties might well arise in regard to letters of marque and reprisal,²⁹ the Capitation clause,³⁰ or even bills of attainder.³¹ It is still not clear to me, though, that it helps more to say that we want to “translate” these clauses rather than, simply, to “interpret” or “understand” them. If, as Ronald Dworkin sug-

had to take the translator’s word that this is more or less what Pushkin wrote, having no idea how many liberties had actually been taken. But with two translations side by side [and ultimately four], each had the effect of keeping the other honest. If they deviated from each other in any significant way, it was obvious that somebody had changed something, though it was not clear who or what. Interestingly, this happened very seldom Indeed, the two English texts taken together gave a powerful impression of what the underlying Russian had to be like. I compare this to the nautical notion of triangulation, in which having two different landmarks to sight on a coast allows you to pinpoint just where at sea you are, whereas having just one is too little information It was . . . just this type of slow and systematic line-by-line triangulation that gradually gave me the chutzpa [to assess the triangulations in spite of not knowing the Russian language itself].

Hofstadter, *supra* note 19, at 48.

The importance of a “market” in translations is emphasized in Paul William Roberts article *My Translation Problem*. See Paul W. Roberts *My Translation Problem: One Man’s Protest Against the Desecration of Dead Languages*, *Lingua Franca*, Dec. 1996, at 69-75. Roberts notes:

When we reach the realms of ancient tongues like Vedic or Sumerian, there are entire subfields dominated . . . by the work of one single scholar [T]hese particular scholarly circumstances are significant for the mortals who must, whether for pleasure or some interdisciplinary project, encounter an ancient tongue in translation. With no one to have a worrying tendency to make translations that look painstakingly liberal but are in reality arbitrary, illiterate, or bizarre—not to mention unverifiable.

Id. at 70. It is, of course, precisely the question of “verifiability” that plagues anyone interested in the issue of translation.

29. U.S. Const. art. I, § 8, cl. 11.

30. *Id.* § 9, cl. 4. I am indebted to Calvin Johnson for my own realization of the problems generated by this clause. He has treated this subject in a fascinating, as yet unpublished, essay, “Handling the Botch in the Center of the Constitution: Apportionment of Direct Taxes.”

31. *Id.* § 9, cl. 3; § 10, cl. 1.

gested in the discussion following the initial presentation of these remarks, "translation" is offered simply as a *synonym* of "interpretation" or "understanding,"³² then this means, I believe, that the translation analogy in fact give us no added insight into the complexities of interpretation. By definition, synonyms can be used in place of one another, so that anyone using the term "translation" could presumably replace it with "interpretation" without any loss of semantic content. But Lessig claims, I believe, to be offering us a way of adding to our understanding of what "understanding" or "interpretation" is like, phenomenologically. Ultimately, we must ask ourselves if the translation analogy saves us from any of the specific disputes that have dominated constitutional theory in (at least) the past quarter century. I am dubious. There is a tremendous amount to be learned from Lessig's particular treatment of our constitutional past. His remarks about the "Erie effect," for example are richly provocative. But learning from Lessig does not, I believe, require that one necessarily embrace the translation analogy.

I am hesitant to conclude on this negative note, in part because I happily confess to sharing Lessig's interest in the notion of translation and the practical implications of being familiar with a text only through a translation. Indeed, about fifteen years ago I became sufficiently intrigued by the problem of translation to commission a University of Texas student, who had been a professional translator prior to coming to Austin, to find a French translation of the United States Constitution³³ and translate it back into English without, of course, any reference to the original English text.

Imagine, for example, that *all* original English-language versions of the Constitution had for some unaccountable reason been destroyed and that some researcher of the future was entirely dependent on a French translation for his or her understanding of the United States Constitution.³⁴ What might one's picture of the Constitution then be? As the beginning of an answer, I offer some of the translations given me by this student-translator (who I recently discovered, now lives in Paris, so I assume this is added evidence that he was no slouch as a student of the French language).

Article I, Section VIII, Clause 1,³⁵ for example, he translated as "Congress shall have the power to assess and levy fees, duties, taxes and excise taxes, to pay the debt of the United States, to provide for

32. Symposium, *Fidelity in Constitutional Theory*, Fordham University School of Law 221-22 (Sept. 20, 1996), (on file with the *Fordham Law Review*).

33. The text translated is that found in Maurice Duverger, *Constitutions et Documents Politiques* 246 (1957).

34. I assume that our knowledge especially of some ancient texts is based entirely on just such translations. See Roberts, *supra* note 28, at 69-75.

35. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ."

their common defense, and to attend to their general prosperity." You will instantly notice, no doubt, that there is nothing about the "general welfare" in this version of the clause. And I do know enough of French to be able to read basic cognates, so I checked for myself that the Duverger translation does indeed refer to "prosperite generale,"³⁶ and not to whatever the French word for "welfare" might be.

If that's how Article I, Section 8 begins, how does it end? The answer is that Congress is authorized, in Clause 18, "[t]o make all laws which may be required by the execution of the powers listed above and all those which the present Constitution vests in either the Government of the United States, or all the departments or officials thereunder."³⁷ One will obviously search in vain for the term "necessary and proper." A final example: one part of the First Amendment now reads that "Congress may not make any law concerning the establishment of a religion . . ."³⁸ To put it mildly, the placement of the "a" before "religion" has profound implications for one's theory of establishment, at least if one is a hard-core textualist. Is that indeed what the French believe that our Constitution says? As Casey Stengel might have put it, you can look it up, and you would find that the French text indeed includes the phrase "l'etablissement d'une religion."³⁹

Now, of course, what makes this example slightly amusing (though, I hope, edifying as well) is precisely that we are in fact all native speakers and thus aware of the potentially misleading aspects of the French translation. But, as already suggested, if by some unaccountable accident we had lost all evidence (and memory) of the original text of the Constitution and had to depend on the French translation, then we would presumably be without the resources to criticize it as "unfaithful" in important senses to the original. To be able to criticize any of these as inadequate translations requires access to the original text plus fluency in both its language and that to which it is being translated. What this means, as a practical matter, is that the only person truly capable of offering an authoritative assessment of any given translation would in fact not require any such translation herself. But if we *do* need a translation, because the language of the original is truly alien to us, then we are, in a fundamental sense, incompetent to offer any authoritative critique of the translation that is handed us.

36. "general prosperity."

37. "[The Congress shall have power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."

38. "Congress shall make no law respecting an establishment of religion. . . ."

39. "the establishment of a religion."