

1997

## Fidelity as Translation:

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### Recommended Citation

*Fidelity as Translation*, 65 Fordham L. Rev. 1507 (1997).

Available at: <https://ir.lawnet.fordham.edu/flr/vol65/iss4/13>

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## FIDELITY AS TRANSLATION: COLLOQUY

PROFESSOR GREENE: We will give Professor Lessig a chance to respond and then we will open it up.

PROFESSOR LESSIG: I think Jed's right. I don't believe in a generalized theory, a universal hermeneutics, useable to figure out constitutional theory generally. With that much I agree completely. But there is a suggestion at the end of what Jed said that I do want to disagree with. This is Jed's focus on the writtenness of constitutionalism as it gets expressed in paradigm cases. I think this is a kind of universalism itself. And there are two problems with this sort of universalism.

First, I am not sure how paradigm cases are any different from original understandings of texts. They present, it seems to me, the very same problem: Once we have a paradigm case, just as with an original understanding of an original text, we must still say how to understand its continuing significance. What frightens me is that paradigm cases become easy ways for the one-step originalist to insist: "Here is how they thought about it, and so too should we." But I think that it takes something more to understand what we do with an original text, or original and paradigm case. We need a theory to carry it forward.

For Jed, this something more is his emphasis on "writtenness." But this raises the second problem. Writing has multiple purposes. We might think that a constitution aims to codify certain values. Or we might think that a constitution aims to transform certain values, or features of the people being constituted. Our Constitution tried to do both. The Constitution that Akhil Amar writes of—1791, the Bill of Rights—is in large part a constitution that codifies values that the people expressed. These values were part of their tradition, and their constitution aimed to carry these values forward. The Reconstruction Amendments, however, were transformative. They were about saying that part of who we were had to change. Writtenness is used in both contexts, but for very different ends. It is not clear to me how a universal theory about writtenness addresses that.

The universalist point is something that Sandy pointed to as well, but there is a first part to Sandy's contribution that I really want to question. I know that it is fun to embrace our American ignorance; I embrace it as well. Of course, I confess, I am not a translator (except I have, in fact, done Dante two or three times. Just as an exercise). But it is not true, Sandy, that you have never translated. You translate all the time, in the sense in which translation is being offered by me, and I also think by Professor Dworkin.

What is translation in this sense? Obviously, it is not a particular practice of looking words up in dictionaries and carrying words into different languages. It is translation in the sense that James Boyd White speaks of. It is translation in the sense of first understanding

that you must understand a text or a person or a statement, whether in English or any other language, according to the perspective or the world from which it is being expressed, and then second, carry that meaning into your own world, in a way that helps you understand what is being said. There is no life in expression without translation in this sense. And it is this sense that I suggest translation is behind understanding the practice that I describe of taking a text that is 200 years old and attempting to find a meaning in it that continues today.

It is true that the way translations function differs. Translations of Shakespeare, translations of music, translations of Beethoven—each of these are different acts. There is a great piece by Judge Richard Posner titled *Bork and Beethoven* reviewing two articles that appeared in an issue of *Commentary*. In the first article, Bork is talking about the virtues of originalism, and in the very next article, another author is criticizing original interpretations of Beethoven. Isn't it odd, Posner asks, that this conservative publication is originalist with respect to one and not originalist with respect to the other? The answer is, no, it is not odd at all. Why? Because the function of the enterprise is going to be different in these different contexts. Because I am not a universalist, as Jed reminds me, I don't have to be committed to the same practice across these contexts.

Now, I said that the theory of translation operates on two levels. The first level is the negative use of translation theory, which is the "turning the tables" that Jim Fleming was talking about earlier. The second level is the positive use of translation theory. The positive use asks how much of the past does translation explain descriptively, and how much does it justify?

Professor Calabresi's criticisms track this second level, the positive theory. He asks, how fine-grained is this positive account going to be? I guess my response to that is this: My first training was as an economist. As an economist, I used regression techniques to estimate equations to explain how the economy was working. That raised in me an intuition about how theory is to work. Theory is to explain as much as possible; or at least, it is to describe an equation with variables that are significant in explaining what is to be explained.

In constitutional theory, a theory doesn't have to explain much for it to be a lot better than a lot of other theories out there. In particular, a theory doesn't have to explain much for it to be better than the theory (implicitly relied upon by Calabresi) focused on text and original tradition. This is because the text and original tradition didn't change in the relevant periods, yet readings of the constitution did. To understand change, you need to track change; a constant doesn't explain change.

The question thus is, do we have a theory that explains the shifts in, say, the period of 1935-41? One part of explaining the shifts is timing, no doubt. Bruce Ackerman's theory is great for that. Here we have

great timing, at least to the extent that he is talking about the New Deal and Reconstruction changes. (He, too, will face the problem about timing, when he gets into the synthesis half of his story, asking why is it that it is 1954 before *Brown v. Board of Education*<sup>1</sup> is the synthesis of moment two and moment three.) But another part of explaining the shifts is to ask whether there are enough moving parts in the account to give us a theory that will describe the changes?

All that I wanted to suggest here is that any theory that does not try to incorporate what Abner was talking about — that does not try to incorporate talk about contested and uncontested discourses and the relationship that they have to the institutional competence of a court—seems to me to be missing an extraordinary dynamic.

Now with Abner I have one disagreement and one strong agreement. First the agreement: Abner is right to say that my “activist contestability stuff” and my “deference contestability stuff” will not cut along the line of rights and powers. The line is more complicated than that. That is absolutely correct. I have to go back and work on that.

But, one thing that troubled me about his description of the deference point is that this deference to uncontested discourses sounds too active. The interesting feature about relatively uncontested discourses is their invisibility. Not that everybody agrees with them. The point is how some discourses just exist in the background, whether contested or not, without anybody noticing them. So to point to uncontested as something that people defer to, seems to be not quite the verb. It is not that they are deferring.

PROFESSOR GREENE: I completely agree with that.

PROFESSOR LESSIG: Okay. The last point is really excellent. The claim is this: Let’s see how far this idea of contested and uncontested discourses can get us. Jack Balkin, in his paper, says quite forcefully, many people think *Bowers v. Hardwick*<sup>2</sup> is more incorrect than *Dandridge v. Williams*<sup>3</sup> or that economic inequality is more consistent with our constitutional tradition than denying rights to homosexuals; Abner asks the question, How is that possible? I think Abner is absolutely right to focus on what it is in our interpretive context that makes it possible for us to be such economic inegalitarians.

For consider where we have been: Here is Frank Michelman sitting in the front row. In 1969, he writes a piece that simply doesn’t live in this world anymore.<sup>4</sup> Why? Did he just not understand our constitutional tradition then? Was he just uneducated at what constitutionalism was? I don’t think so.

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1. 349 U.S. 294 (1955).

2. 478 U.S. 186 (1986).

3. 397 U.S. 471 (1970).

4. Frank Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

It is to remark a change in the world to note that Professor Michelman can write one of the most influential articles of the 1960s that now is so alien. It is an odd piece — beautiful, and wonderful and we can dream about it. But still it is a piece that none of us would write anymore. That's a reflection of something about how our background has changed, about what these changes can bring up, and what they can suppress, to note that what was great then could not be imagined now.

There is lots that these background changes can bring up. Again, MacKinnon's work raises the same point, but this time the other way round: who would have expected, prior to her work, the changes we have seen, because of her work? Who would have said that what MacKinnon did was consistent or fit with our constitutional past? Where was the fit? The answer is that there wasn't a fit: That instead, we were made to fit. We were remade in a way that now it seems to us consistent with earlier principles.

When I talk about these changes as constraints on fidelity, what I mean to say by that is that as they remake us, we are given a Constitution that is in an important way different from the constitution the framers gave us. It has a connection and a tradition that works its way through this practice of interpretation. So, I think a faithful interpretation of the Constitution that says that *Romer v. Evans*<sup>5</sup> is right. But it certainly is a different Constitution. This change in our way of looking at the world constrains us, it stops us from being able to embrace the world that the framers had.

The uncontested defines who we can't be anymore. About views different from the uncontested, we have to say that, we can't be that part anymore, we have to give that up. The enterprise of fidelity is constantly this imperfect enterprise that tries to carry as much as it can, knowing that there are some things that will be untranslatable. Some things we can't say that anymore. That sounds like infidelity, but I suggest it is just a constraint on the practice of fidelity.

PROFESSOR GREENE: What we will do first is see if any of the panelists want to respond and then we will take questions.

PROFESSOR LEVINSON: I think there is a conflation between judges and constitutional interpreters, or people who want to be judges. One reason that a lot of people won't write Frank's article, is see what happened to Peter Edelman. He did write Frank's article in the mid 1980s, and it cost him a federal judgeship. So, to the extent that the highest aspiration of legal academics is to make the judiciary rather than to speak truth about what the Constitution means regardless of political consequences, you will get one sort of article rather than another sort of article. What kind of constraint is it? Is it a constraint internal to the enterprise, that what we are really about is pre-

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5. 116 S. Ct. 1620 (1996)

dicting what judges will say? We are predicting what the Senate Judiciary Committee will say, so, therefore, what we write has to fit what they think? That certainly is a constraint, but I don't think it is internal to an enterprise of fidelity; it has to do with political ambition.

We need to keep separate what sorts of articles we as tenured academics ought to be able to write, even in the late 1990s, and what sort of articles we are advised to write if we have ambitions other than maintaining our tenured jobs in the future.

PROFESSOR CALABRESI: I guess I agree, it takes a story to beat a story and I can't fully provide that story in the space of a response. I think that the story would have to be what I would call sophisticated originalism, which I think really doesn't resemble the one-step originalism or the specific intentionalism that is sometimes mentioned here. I think that the essential argument that has been advanced by what I would call sophisticated originalists is that where the text is very specific, as in setting up three branches of the national government or providing two Senators from every state, there aren't meaning shifts. Where the text is more open-ended, the no caste-based discrimination principle of the Fourteenth Amendment, the original applications, the paradigm cases, as Jed was talking about, remain binding, but there is the potential for growth and accommodation of change in the meaning of the word over time. The same thing with the cruel and unusual punishment provision of the Eighth Amendment.

I found myself agreeing with much of what Jed was saying about how constitutionalism works and also about the importance of it, both as an intergenerational law-making enterprise and as a way of entrenching fundamental rights. It clearly is something that we as a society are very committed to, as evidenced by all of our state constitutions, the fact that we have always had written constitutions, and by the fact that we have done such a great job of selling the rest of the world on constitutionalism, which suggests that we had better hope that we were right in doing that.

PROFESSOR GREENE: Questions from the floor?

QUESTION FROM PROFESSOR MARY ANNE CASE: I have a question for Jed. Does your view mean that the state of Utah may now establish the Mormon church?

PROFESSOR RUBENFELD: Things are different after the Fourteenth Amendment. You are referring to what people call the original understanding of the First Amendment, which is that it is okay to establish. So then I ask you, what about the Fourteenth Amendment? On my theory, what is prohibited by the First Amendment, in its original understanding, is the paradigm case, and is what is binding. What is permitted by it, is not. I don't care if every single framer and ratifier of the Fourteenth Amendment thought that women got no protection, every single one of them thought that women could be denied en-

trance to the bar and so on. And that was part of the reason why they wouldn't have voted for it. It doesn't matter to me. You look at the paradigm case of what they intended to abolish, what the Constitution intended to abolish, and from that, you derive principles.

PROFESSOR GREENE: Questions?

QUESTION FROM THE AUDIENCE: My question is for Professor Lessig, and concerns the Naturalization and Bankruptcy Clause, the fourth clause of Article I, Section 8, which is the only one of the eighteen clauses that combines two absolutely discrete subject matters, naturalization and bankruptcy. I assume that the import of that clause is actually uniformity, which is mentioned, which is procedural.

How do you translate that into the present day, using your theory or any of them? You have millions of people affected by pending law on immigration and naturalization—it is a deconstruction of the former American law in that area, and bankruptcy, which was viewed as wicked and evil, I suppose—when the Framers wrote the Constitution. Now we have hundreds of thousands of such cases each year. How do you translate that clause into these very markedly significant two subject matters today? Originalism simply doesn't work in my view. Originalism is irrelevant in that particular clause. How would you deal with that?

PROFESSOR LESSIG: I agree with you that their understandings of immigration and naturalization in bankruptcy certainly were different. But the idea that these differences in understanding would create a terribly difficult problem for the scope of the power that Congress has, I don't see. So, if the question is, how do we interpret the scope of Congress's power over these areas, I think you are right, it does turn to the question of significance and uniformity. But about that I don't know enough.

QUESTION FROM PROFESSOR MCCONNELL: I have a question for Larry. I find the account actually rather persuasive. At least if we see it as a positive account. I am not sure what I think of it as a normative account. But I have this question. I don't understand why when a question becomes contested that it is therefore awarded to one side or the other constitutionally. It would seem to me that it is when the issue becomes largely uncontested that it becomes understood as a constitutional principle, and until then it would be understood as being within the range of reasonable minds may differ, and the political process prevails. That account would seem to explain the history a little bit better, if this is a positive account, because when the Fourteenth Amendment was written, there was, in fact, a consensus with regard to racial discrimination, a consensus reflected in two-thirds of both houses of Congress and three-quarters of the states, albeit under the boot of Yankee force, but nonetheless consensus, expressed rather dramatically. As that consensus broke down in the 1870s, 1880s and even more so in the 1890s, then they began to leave it back to the

political process and *Plessy vs. Ferguson*<sup>6</sup> would seem to be a result of a loosening of the old consensus and now it returns to politics.

And by the way, as of *Plessy*, you certainly cannot say there was a consensus in favor of segregation. Segregation was very much a hotly politically contested proposition. Segregation laws were still being defeated in state legislatures in the South well into the 1890s. But it was contested and, therefore, left to politics.

And then I would suggest, when at least elite opinion ceased to see it as being contested anymore, it becomes reconstitutionalized. The most you can say about the gender cases is they may have been a few years too early, not very many, and maybe the problem with *Romer*, if there is a problem with *Romer*, is that it assumes that we have reached a higher degree of consensus than in fact the nation has on that issue, yet.

PROFESSOR LESSIG: You have to distinguish between consensus about, again using Dworkin's terms, the outcome, and consensus about justifications for deviating from what I would think of as default—a default of equality.

I don't think America today has a consensus about gay rights and about equal protection for gays. But I do think that the best reading of the Equal Protection Clause now must recognize gay rights and equal protection for gays. It must now recognize that because its demand is equality, and because the reasons for inequality—for discriminating against gays—are now fundamentally contested. Given this contest, equal protection now demands that gays be treated equally across all these ranges of practices that they are not treated equally now.

The fact that there isn't a consensus politically, about the conclusion that the Equal Protection Clause requires, might be good reason for a Bickelian-like prudence about how should we move forward and what are the steps we should take. I am skeptical of that sort of prudence. But the lack of consensus about the outcome doesn't change the correct outcome.

The kind of consensus that I am talking about, or the contestedness that I am talking about, goes to the very understanding of what the Constitution requires. The fact that the justification for discriminating against gays is now contested in a way that the justifications for economic inequality are not, however wrong I might think this mix of contestedness is, has much to do with an overlapping set of views that from all sorts of perspective make it seem to make sense that inequality is permitted. The overlapping grounds for this sort of inequality are now contested.

PROFESSOR GREENE: Let me just push you for one second on this. Is your claim with regard to any rights claim that when the government justification for years is backgrounded, submerged, under-

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6. 163 U.S. 537 (1896).

stood without much reflection, then there comes a time when it becomes in the open, it becomes contested? For example, understandings about race or gender or sexual orientation. Your claim in the paper and today has been about the Equal Protection Clause, that when that happens, this is what I take you to be saying to Michael, the government justification weakens so much that the government should lose and the rights claim should win. Is that true also for free speech, freedom of religion, substantive due process, etc., etc.?

PROFESSOR LESSIG: The truth is I never thought about rights until I had to talk at Larry Sager and Chris Eisgruber's colloquium, and then I went to Virginia and I had to talk with Michael Klarman about the same thing, and some other people in Virginia who forced me to think about it. I don't know yet how it works out in the First Amendment and in these other areas. Of course, I have a prediction, and the prediction is of course that it will turn out to be consistent in these areas as well. But the First Amendment is a relatively easy problem to work out like this, because you do see these weird shifts in First Amendment jurisprudence as different ideas here get backgrounded. Think of Geof Stone-like First Amendment jurisprudence, backgrounded until the work of MacKinnon and Dworkin throws this backgrounded part into contestation. There is a story here to be figured out, I just haven't done it yet.

But I want to be very narrow right now and just say look, think about equal protection. I know Sandy is really upset because I have written so many articles trying to do this and he is worried about the weight of yet another one, so perhaps I will just think about it myself.

PROFESSOR GREENE: I think we have time for one more question. The gentleman—oh, Professor Dworkin.

PROFESSOR DWORKIN: First, on the question of how economic justice might be put back on the table. I think that is a wonderful question. I suppose putting the question that way suggests that it is off the table. The fact that Frank might or might not write the same article again, doesn't show it is off the table. To my mind, what would show it is off the table is showing that the argument for it is not a good argument. That is something that I actually think is so now, but it is certainly contestable.

How would it get back on the table? That depends on what you take the data set for constitutional interpretation to be. I am disposed to think that it includes such things as legislation, referenda, and the kind of phenomena that you are talking about.

So, it may be that what was a competent interpretation of the basic rights protected by the document would no longer be competent because it wouldn't fit the data set. That seems to me perfectly right.

Sandy Levinson, with respect to your remarks, a couple of observations. First, I agree that we translate all the time, you're doing it right now, because you look as if you are listening to me and trying to make

sense of what I am saying. That is an exercise in translation. Communicative interpretation, understanding what one person says to another, requires a theory of interpretation. It may not be a grand one, but it requires one.

I am not sure, Larry, that you and I mean the same thing by translation. I was using it this morning in what I thought was a technical way, because I was trying very hard to distinguish between linguistic intention and other kinds of intention. I was using it in a way that could be explicated in terms of truth values, that is a successful translation is one that preserves truth values.

There is another sense of translation. People sometimes think of translating an idea as what they call "seeing what it means today." That is a different kind of exercise, so far as it asks the question, what would people who were disposed to say that then, say now. That is a different kind of translation, which wouldn't preserve integrity of truth values.

Now, about interpretation in general. First, I would suggest to you, Jed, a couple of emendations. I don't think you are right in saying that all the theories under discussion in this conference are theories committed to the independence of interpretation and legitimacy. I think the opposite. I think they are all committed to the dependence of interpretation on legitimacy.

To quote the adolescent Dworkin, interpretation aims to make the best of something. You cannot aim to make the best of the Constitution without showing or trying to show that it can provide legitimacy. That's part of the exercise and I think everybody is trying to do that.

There is however a distinction also to be made between questions of legitimacy as they appear within interpretation and outside it. We try to show a legal system as legitimate, we interpret it that way, but we might fail to show it legitimate. And that, I take it, is the question posed for the last session of this Symposium: suppose we have shown what fidelity to this document would require—can we justify that fidelity?

One further observation about interpretation. Let's distinguish what I absolutely agree is a requirement of any theory of interpretation, which is self-referential consistency. So far as a theory of interpretation is an interpretation of the kind it is trying to explain, it has to be true of itself. I absolutely agree with that.

You want to distinguish that from something you call self-referential completeness. The point that you are making is, there is bound to be a circularity involved in using a notion of anything to validate itself.

That is absolutely right. But think where we would be if we decided that that kind of circularity was noxious. The first thing to go would be science and the second would be mathematics. In the case of science, you have to assume the soundness of empirical verification in order to claim that the experimental method is a good method. The

only thing we can do, and this is what philosophy does, is to try and construct a large enough picture so that we ask this picture to confront our conviction as a whole. Philosophers have expressed this in different ways. One contemporary influential way of saying it is Rawls's notion of reflective equilibrium. That's the best we can do. You are absolutely right. Someone could stand up and say interpretation aims to make the worst of something and this then makes the worst of interpretation and there you have it. This person would not succeed in bringing conviction and even more to the point would not even intend to be bringing conviction. You are imposing too strict a requirement by requiring that we are able to get outside any part of our thought entirely and criticize it from an external point of view. It can't be done.<sup>7</sup>

Finally, if I have understood you correctly about paradigms, then you say, for example, about the Fourteenth Amendment: you don't care what they thought, women can't be treated as second-class citizens in the way that you describe.

That's true. But I want to press the question: in virtue of what is it true? There would be another view to take of the paradigm. Michael McConnell will tell you that other people can have other thoughts about this. You think yours is right, so do I, but in virtue of what is it right? I think that the answer you give me will constitute your theory of interpretation, because there is no place else for you to go.

PROFESSOR GREENE: Jed, do you want to respond and then I know Sandy has a minute, and then we will break.

PROFESSOR RUBENFELD: I am not giving you a theory of generalized interpretation that I then apply to constitutional adjudication. I am giving you a specific theory of interpretation that grows out of political theory—indeed, taking up your invitation that you mentioned earlier. Whereas your theory of constitutional interpretation—although to be sure you bring legitimacy in—doesn't begin with political theory, indeed it is something you wish people would do more of. It begins with an account of interpretation in general.

And although Larry's work isn't universalizing—he is ready to have interpretation of various kinds of texts—nor do you insist when you look at the Constitution: “I am thinking about the Constitution's relation to democratic self-government.” It is not political theory. I am sure you agree there are different kinds of texts. This is what I am criticizing.

But, yes, I certainly think normative judgment, considerations of justice reappear when we try to decide what the paradigm case means. I am perfectly content to agree with that. When you talked about legitimacy in your remarks here, you equated it with justice. When

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7. Professor Dworkin expands upon these points in his comments on Professor Rubenfeld. See Ronald Dworkin, *Reflections on Fidelity*, 65 *Fordham L. Rev.* (1997).

you say that your account is going to make the Constitution the most legitimate it can be or that it wouldn't be possible to interpret the South African Constitution in order to make it legitimate, you have done the separation already that I am saying you can't do. To figure out how judges are to interpret a constitution, you have to decide whether and how this constitution exercises legitimate authority. You don't decide first how you interpret our text. Is it text, let's figure out how to interpret texts, or maybe texts that are old, or maybe certain kinds of text as opposed to poetry or something. No, you have to think about what a constitution is, its legitimate place in democratic self-government, and then we know how to interpret.

PROFESSOR LEVINSON: I think I agree with every single word that Ronald Dworkin said. I agree, I was trying to understand you, I was trying to interpret you. But the real question is, if this session had been titled *Fidelity as Interpretation*, or *Fidelity as Understanding*, would we have a different question to be discussing than *Fidelity as Translation*?

I take it that part of what Larry is doing is suggesting that translation purchases us something. I was fascinated, too, about fifteen years ago, when I commissioned the student translation, by George Steiner's book *After Babel*. One of the things all of us know is that we are constantly being besieged with new things to learn, structural anthropology, economics, whatever. And so a practical question is whether we have to start learning some translation theory and look at what happens if you take the term as something more than a momentary heuristic.

But of course I agree with you that informally I am trying to translate you and I am not going to get angry at somebody who talks about translation. I think Larry's articles are really splendid. The question is just how much weight do we want to put on this word as offering us a brand new insight that we don't already have from talking for the last twenty years about interpretation and understanding. That's the *only* issue.

