

William & Mary Law Review

Volume 41 (1999-2000)
Issue 1 *Institute of Bill of Rights Symposium:
Fidelity, Economic Liberty, and 1937*

Article 7

December 1999

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John O. McGinnis, *The Inevitable Infidelities of Constitutional Translation: The Case of the New Deal*, 41 Wm. & Mary L. Rev. 177 (1999), <https://scholarship.law.wm.edu/wmlr/vol41/iss1/7>

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THE INEVITABLE INFIDELITIES OF CONSTITUTIONAL TRANSLATION: THE CASE OF THE NEW DEAL

JOHN O. MCGINNIS*

INTRODUCTION

Professor Lawrence Lessig's theory of fidelity in translation¹ has been perhaps the most celebrated idea in constitutional interpretation since the democracy-reinforcing theory of Professor John Hart Ely in *Democracy and Distrust*.² The theory has acquired many disciples.³ Good reasons exist for its popularity. Professor Lessig is a learned, persuasive, and elegant writer. While complicated in execution, the theory at its core is stated simply: The social facts of the world change and these changes transform the context of legal texts. To be faithful to their original meaning, we must translate the text in light of this new context. The theory draws power by appearing to offer a synthesis of interpretative and noninterpretative methods. It purports to preserve the original understanding of the Constitution, but consults materials unavailable to the Framers to achieve that goal in a world they could not have fully imagined.

The theory of constitutional translation has the potential to influence courts as well as academics. It is a refined formulation of a widely held intuition: times change and the Constitu-

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1. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

2. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing that the Constitution should be interpreted to promote democratic decision making).

3. See, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 855-87 (1995).

tion must change with them. In *Planned Parenthood v. Casey*,⁴ the plurality opinion justified overruling *Lochner v. New York*⁵ by suggesting that economic changes in the country made substantive due process in the defense of economic freedom no longer tenable.⁶ More recently, Justice Kennedy in his concurrence in *United States v. Lopez*⁷ suggested that the federalism of 1789 had to be transformed in light of the substantially greater economic integration that had occurred subsequently.⁸ As we will see, Justice Kennedy's observations about federalism parallel those of Professor Lessig, albeit in a much less sophisticated form. Professor Lessig thus may already have realized the fondest dream of all law professors—to be an unacknowledged justice of the Supreme Court.

This Essay offers a few challenges to translation as both a descriptive and normative theory by focusing on the claims of translation that Professor Lessig makes in relation to the New Deal and Progressive Eras. First, many of the facts Professor Lessig claims as changed facts justifying translations do not represent clear changes from the time the Constitution was framed. This undermines the theory as an explanation of novel constitutional constructions. Also, it undercuts the normative value of the theory because it raises doubts about whether judges, and law professors for that matter, are well-positioned to

4. 505 U.S. 833 (1992).

5. 198 U.S. 45 (1905).

6.

[*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937),] signaled the demise of *Lochner* by overruling *Adkins* [*v. Children's Hospital*, 261 U.S. 525 (1923)]. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.

Casey, 505 U.S. at 861-62 (plurality).

7. 514 U.S. 549 (1995).

8. See *id.* at 574 (Kennedy, J., concurring) (stating that the Court was foreclosed "from reverting to an understanding of commerce that would serve only an 18th century economy" and that "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy").

assess the wide-ranging social facts that are necessary inputs for the theory's operation.

Second, the process of translating the Constitution on the basis of changed social facts is an inherently more complex and open-ended task than Professor Lessig acknowledges—so complex and open-ended that it is unsuitable for judges. Considered at their most general level, most important constitutional structures try to achieve a balance between two objectives—encouraging public interest action by the government and discouraging action that is taken to benefit some private interest.⁹ Social changes may affect the likelihood of both kinds of action. For instance, reduced information and transportation costs—to take factual changes that perhaps preceded the New Deal—may create a greater need for public interest legislation to address greater integration; however, they may simultaneously create a greater danger of private interest legislation.

That the Constitution characteristically constrains as well as empowers government raises profound problems for the translation theory. The complex consequences of such social changes for the balance between restraint and empowerment suggest that judges would necessarily act more like legislators or indeed constitutional framers themselves if they were to undertake the open-ended inquiries necessary to reequilibrate that balance. The judiciary, however, cannot strike a new balance by simply deferring to Congress when, by hypothesis, one of the principal objectives of the Constitution was to restrain governmental power. The process of translation is therefore incompatible with the judicial function envisioned by the Framers.¹⁰

Third, Professor Lessig's theory takes peculiarly little account of the importance of changing political ideas in constitutional

9. Of course, defining the exact contours of these two kinds of actions is a matter of some dispute. For classical liberals, public interest actions consist generally of the production of public goods, like defense and infrastructure, that the market and the family cannot provide. Private interest actions use the government to transfer resources and opportunities from one group to another. Modern social democrats would include transfer payments that increase equality as public interest actions.

10. See Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1162 (1998) (objecting to the translation theory because "[t]he Constitution assigns courts a limited institutional role under the constitutional structure").

transformation. The Framers of the Constitution proceeded on a vision of human nature that posited that men were self-interested but capable of acts of reciprocity. The United States Constitution thus sharply limited the power of the state and surrounded it with so many checks and balances that zealous men would stalemate each other rather than aggrandize themselves at the expense of other citizens. They created a commercial republic to make self-interest and reciprocity engines a dynamo of invention and innovation.¹¹

In contrast with the underlying theory of the original Constitution, social theories with a view of human nature more compatible with empowering government have been the intellectual fashion for much of this century.¹² The contests between the political theory underlying the Constitution and these other theories have been the source of political conflict for much of this century.¹³ The assault against the intellectual underpinnings of the Constitution gathered strength in the Progressive and New Deal Eras, as social theorists under the influence of European ideas began to believe that a more collectivist state was necessary to make more rational plans for society and to realize human autonomy.¹⁴ As many intellectuals of the time recognized, these ideas did not represent translations of the Constitution, but instead, bold denials of its core political ideals.¹⁵

11. I lay out my view of the underlying vision of the Framers in more detail in, John O. McGinnis, *The Original Constitution and Our Origins*, 19 HARV. J.L. & PUB. POLY 251 (1996) [hereinafter McGinnis, *Original Constitution*]; and John O. McGinnis, *The Partial Republican*, 35 WM. & MARY L. REV. 1751 (1994) (reviewing CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993)) [hereinafter McGinnis, *Partial Republican*]. For further discussion in this Essay, see *infra* notes 40-43, 121-25 and accompanying text.

12. One modern view of human nature is that individuals can systematically act altruistically in the public sphere. See CARL N. DEGLER, *IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT* 59-211 (1991). Another perspective views human nature as socially constructed. See *id.*

13. Cf. Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 516-17 (1989) (concluding that "American constitutional theory . . . bears the marks of [a] struggle between reason and will").

14. See Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 411-16 (1986) (describing European collectivist theories of Plato, Jean-Jacques Rousseau, Jeremy Bentham and G.W.F. Hegel, and the work of the twentieth-century political theorist Willmoore Kendall).

15. See, e.g., McGinnis, *Original Constitution*, *supra* note 11, at 256; Michael W.

Consequently, I do not believe that Professor Lessig has shown that his translation theory is superior to the view that the New Deal's, and indeed the Warren Court's, changing constitutional interpretations simply represent the working out of new social democratic ideas antithetical to the original constitutional design. These theories were given concrete legal form when such constitutional transformations served the purposes of the many interest groups that became stronger since the time of the Framing. Unlike the translation theory, this explanation accounts for the modern Court's willingness to exercise intrusive judicial review on state legislation touching morality, including criminal law, while reducing judicial review on matters of constitutional structure and economic rights.

In contrast, the translation theory has a dilemma: in order to explain the Court's willingness to defer to Congress on federalism, this theory must posit that judges discovered the truth of realism—that judges could discover no neutral principles to police the boundaries of power between the states and federal government.¹⁶ The Court, however, seems to forget that legal discovery when it engages in intrusive review to police the boundaries between governmental power and individual rights.¹⁷ Trying to defend this dual approach as a translation and not simply as an exercise of unconstrained will, Professor Lessig suggests that both the abnegation of federalism and the intrusive review of individual rights are consistent with the legal culture.¹⁸ This may well be so, but the legal culture is not an autonomous social fact like the decline in information costs; instead, it is an important constituent of an era's political ideas. Professor Lessig's use of the concept to fill a gap in his theory supports the ideological view of constitutional change.

The systematic failure of Professor Lessig's views as a descriptive theory suggests its dangers as a normative theory of fidelity as well. It underscores how easily judges, and law professors

Spicer, *Public Administration and the Constitution: A Conflict in World-Views*, 24 AM. REV. PUB. ADMIN. 85, 91-93 (1994) (discussing the tension between the theories of public administration of the New Deal and the original Constitution).

16. See *infra* notes 28-67 and accompanying text.

17. See *infra* notes 108-20 and accompanying text.

18. See *infra* note 44 and accompanying text.

alike, can justify their constructions by referring to changed facts when in reality they are caught up in an intellectual tradition reflecting disagreement with the substantive values that underlie the original Constitution.

I. THE CONTEXTUAL FLAWS OF LITERARY TRANSLATION AS A METAPHOR FOR CONSTITUTIONAL INTERPRETATION

Before cataloguing some of the particular infidelities of Professor Lessig's version of the New Deal, I raise some general questions about the usefulness of the entire metaphor of linguistic translation as a descriptive and normative theory of the judicial process. To borrow from Professor Lessig's own terminology, one must fully understand context to determine whether the "translation" theory is itself a proper translation of techniques of linguistic interpretation into the political context.¹⁹ Professor Lessig's metaphor suffers from its own problems of context. Separated from its linguistic and literary moorings and placed on the sea of politics, fidelity in translation systematically translates as infidelity.

First, linguistic translation differs fundamentally from legal translation in the continuity of the confronted contexts. Linguistic translation is a necessity because when faced with two languages, we encounter two dichotomous worlds—for instance, French and English. The social world we inhabit, however, was inherited from that of the Framers. Of course, social innovations occasionally generate hard questions under the Constitution, but the very continuity of our world with that of the Framers helps us address these questions through the incremental and interstitial means of the judicial interpretation recognized by the Framers, focusing on text, analogy, and precedent. This continuity does not require us to make wholesale translations between worlds as linguistic translation demands.

Second, and more fundamentally, translation in its ordinary linguistic sense differs from constitutional interpretation because linguistic translation is an enterprise in which the trans-

19. See Lessig, *supra* note 1, at 1174 (suggesting that words "have meaning because of [their] context").

lator, the person whose words are translated, and the audience are engaged in an essentially cooperative enterprise. For example, begin with the case of nonliterary translation, and assume that I take a translator along on a vacation to a country where I do not know the language. The translator has every incentive to offer accurate translations. If I discover that he translates inaccurately—by persistently not getting what I want to eat, for instance—I will fire him. Others in the audience—the waiters and cooks—also have every interest in assisting and, if necessary, correcting him until he gets it right so that my desires are satisfied. In the quotidian linguistic context, translation is embedded in a spontaneous order, guided and kept honest directly by market forces. In other words, self-interest—that bedrock and immutable fact of human nature—assures fidelity.

The story is not so different if a living author wants his text translated. Through his agents he will strive to have the book translated as accurately as possible. He has a reputation—perhaps, in the case of a popular best-selling author, a franchise—to maintain. Certainly, if his audiences in different countries overlap in their linguistic abilities, this too will discipline mistranslations.

The case of translating from a literary work when the author is dead is different in degree, but not in kind. Almost all important authors give rise to a group of scholars whose interest is defined by defending the legacy of the author. Mistranslations are condemned. As a former classicist, I still remember with pleasure A.E. Houseman's vigorous and vituperative policing of misreadings of Latin texts.²⁰ Film critics broadly criticized the recent film, *The Scarlet Letter*,²¹ for so changing the details that it changed the meaning of the story. At the very least, few members of either the scholarly or general community have a positive interest in generating linguistic mistranslations.

The "translation" of a constitution from one era to another has a completely different context that encourages systematic infi-

20. See, e.g., A.E. HOUSMAN, *THE NAME AND NATURE OF POETRY AND OTHER SELECTED PROSE* 91-93 (John Carter ed., 1989) (savaging Seymour Grieg Tremeneheere's translation of Sextus Propertius, a Roman elegiac poet).

21. *THE SCARLET LETTER* (Hollywood Pictures 1995). The translation in *The Scarlet Letter* was from one medium to another, rather than from one language to another.

delity. Constitutions, like politics in general, bear both on the distribution of resources and the instantiation of political ideals. Given that intense conflict marks both activities, one would expect that the translation of a constitutional document would not be policed well by either scholarly communities or the general audience. Indeed, if one of the principal purposes of a good constitution is to restrain citizens from using the government to acquire status and resources for themselves, then we would predict that all sorts of interest groups would offer their own translations to relax these strictures in order to better engage in their rent seeking.²² Because judicial appointments are affected ultimately by these same interest groups, the judiciary may have little incentive to be faithful as well.²³ Finally, the general audience would not offer much of a constraint on such infidelity. Most people are ignorant of politics, in general, and the actions of the judiciary, in particular.²⁴ Others would stand to benefit directly from the mistranslations because they are members of interest groups. In other words, self-interest has the reverse effect that it did in the linguistic context. It assures that translation in the constitutional context will likely produce infidelity.²⁵

Even if one believes that ideals as well as interests motivate political actors in some measure, the history of political thought

22. See John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 201 (1997) (arguing constitutional provisions reduce agency costs and thus restrain rent seeking by making it easier for citizens themselves to monitor and oppose expropriative activity by their representatives and by interest groups).

23. See Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from the Federalist Papers*, 61 S. CAL. L. REV. 1669, 1681 (1988) ("Life tenure may indeed deprive judges of incentives to accede to the desires of new majority factions who might control their reappointment with limited terms. It does not, however, deprive them of the incentive to act as a minority faction of their own . . .").

24. For a more comprehensive explanation of rational ignorance, see John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 125-26 (1996).

25. All constitutional methodologies, of course, are subject to misuse by self-interested actors. My point here is that the metaphor of translation is misleading in that it suggests little risk of misuse when the risk of this procedure as applied to the constitutional process is actually enormous. My own views of the proper methodology of interpretation are informed by the need to guard against abuse. See *infra* notes 121-30 and accompanying text.

has been marked by sharp debates about the nature of the individual, the nature of the state, and the nature of the individual's relation to the state. Consequently, it would be expected that constitutional translations would also be driven by different visions of liberty, equality, and human nature rather than by a close analysis of changed circumstances.

The politics of resource and status acquisition, and the politics of conflicting ideals combine to create such a huge risk of legal mistranslations that the translation paradigm is misplaced. As soon as a good constitution—one that promotes creation of public interest goods and restrains private interest goods—is born, it begins to come under attack from interest groups and others who would like to relax its restraints so that they can more easily acquire resources and status for themselves. A sad paradox bedevils constitutional change: the better a constitution restrains rent seeking, the more prosperity and stability it creates; but a more prosperous and stable society generates more interest groups that would benefit from eviscerating the constitution so that they can acquire more resources.²⁶ Accordingly, a good constitution is threatened by its very success.

Similarly, while a good constitution proceeds on some relatively coherent political theory, rival political theories do not disappear. Instead, these rival theories represent a ready source of intellectual artillery that interest groups and others can use to break down the restraints the Constitution imposes. For instance, as John Adams recognized, no sooner was our own Constitution ratified than the ideas of Jean-Jacques Rousseau, despite being antithetical to the philosophy of limited government, drifted to the United States from Europe and threatened our Constitution's foundation.²⁷

If this is an accurate description of the structure of the natural world of constitutionalism, translation seems a peculiarly perilous paradigm for constitutional interpretation. Because of the incentives for mistranslation in the translators themselves,

26. For further discussion of this paradox, see *infra* notes 52-60 and accompanying text.

27. See JOSEPH J. ELLIS, *THE PASSIONATE SAGE: THE CHARACTER AND LEGACY OF JOHN ADAMS* 88-98 (1993).

one would need internal constraints on the process of translation that were far *stricter* than those used in linguistic translation to obtain anything similar to the fidelity that we associate with translation. The following Section contends that the internal constraints of translation that Professor Lessig offers us are far less stringent, if they can be considered constraints at all.

II. THE ACTUAL OPERATION OF TRANSLATION THEORY

A. *The Chimera of New Social Facts*

First, because substantial continuity connects the world of the Framers to our own, it is doubtful whether all the facts that Professor Lessig points out as having changed really represent clear changes. For instance, Professor Lessig justifies the novel construction of the Contract Clause in *Home Building & Loan Ass'n v. Blaisdell*²⁸ by suggesting this changed fact: In the Depression, unlike at the Framing, it was recognized that contracts were "affected by a public interest."²⁹ As I have observed previously, the Framers did not include the Contract Clause on the naive notion that no governmental interferences with contracts could ever be in the public interest.³⁰ Indeed, both Gouverneur Morris and George Mason put the Convention on notice that governmental interference could at times be justified, the latter saying that it could be "proper and essential."³¹ In response, James Madison conceded the possibility of public interest legislation affecting contracts and the "inconvenience" of frustrating majority will.³² He justified the Clause, nevertheless, on the grounds that "on the whole [the inconvenience] would be overbalanced by the utility of it."³³ Also, James Wilson believed that this was the right balance because the Contract Clause prohibited only retro-

28. 290 U.S. 398 (1934).

29. Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 459 (1995).

30. See Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 530-31 (1987).

31. *Id.* at 531 (citing 2 JAMES MADISON, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 439 (Max Farrand ed., 1911)).

32. *Id.* at 530 (citing 2 MADISON, *supra* note 31, at 440).

33. *Id.*

spective interferences with contracts.³⁴ Those who supported the Contract Clause, thus, did so not because they believed that the public interest did not affect contracts, but because, on balance, it was more dangerous to permit retrospective interferences because such claims could be mere masks for attempts to use government to transfer resources from one readily identifiable group to another.³⁵

Second, Professor Lessig suggests that in the twentieth century new conditions showed that all economic activity was an interconnected web and that this was one of the new factors that justified a new construction of the enumerated powers that gave the federal government more regulatory and spending authority.³⁶ Again, I disagree that economic integration was a fact either startlingly new or newly recognized. Markets were interconnected in 1789.³⁷ Labor conditions, including sadly the existence of slave labor, affected the price at which goods could be sold.³⁸ These economic truths of interdependence are timeless. Indeed, because the average citizen was poorer in 1789 than in 1930,³⁹ sudden market changes over which he had no control probably put him at more risk of serious hardship, and yet the Framers still did not give plenary regulatory and spending power to the federal government.

34. See *id.* at 531.

35. Another reason it is implausible that the Framers believed that contracts did not affect the public interest is that the Framers were emerging from a world in which the public interest view was so generally accepted that guilds heavily regulated contractual relations. See P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 61-67 (1985).

36. See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125 [hereinafter Lessig, *Translating Federalism*]; Lessig, *supra* note 29, at 395. In *Understanding Changed Readings*, Professor Lessig is careful to say that more substantial economic integration is only one of the factors justifying the new construction. See *id.* at 454-55. Also, in *Translating Federalism* he appears to treat it as an even less important factor. See Lessig, *Translating Federalism, supra*, at 140-44.

37. See generally FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 358-85 (1958) (describing how economic interest groups affected "the making of the Constitution").

38. See *id.* at 369-74.

39. See generally BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, *HISTORICAL STATISTICS OF THE U.S.: COLONIAL TIMES TO 1970* (1975) (providing economic statistics).

Nor was the fact of economic interconnectedness unknown to the founding generation. Shortly after the ratification of the Constitution, two giants of American political theory observed that the interconnectedness of the economy could have substantial effects on political economy. James Madison observed that "[i]n the great system of political economy, having for its general object the national welfare, everything is related immediately or remotely to every other thing."⁴⁰ Madison feared that the "inevitable tendency must be to convert a limited into an unlimited government."⁴¹ Thomas Jefferson called the legal claim that all was interconnected the "House that Jack Built," and noted that under this theory Congress might claim plenary power under the Necessary and Proper Clause.⁴² Thus, the Founders recognized that claims of integration could be used to destroy the limits of the enumerated powers.⁴³ To proffer the factual premises of integration or interconnectedness as part of the justification for the New Deal's consolidating construction of the Commerce Clause hardly seems faithful to the Framers' vision.

In light of the new facts of integration, perhaps advocates of translating federalism can suggest that even if the integration of today does not mark a difference in kind, its difference in degree justifies their translation. They have not, however, shown us why this greater interdependence in degree requires a new construction. Because the Commerce Clause allows Congress to regulate interstate commercial transactions, Congress's power under the original construction of the Commerce Clause will increase in some relation to the increase in interstate com-

40. Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 761 (1997) (quoting Letter from James Madison to Judge Roane) (Sept. 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 143 (Philadelphia, J.B. Lippincott & Co. 1865)).

41. Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 711 (1996) (quoting Madison).

42. Letter from Thomas Jefferson to E. Livingston (Apr. 30, 1800), in 4 THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE 329 (H.A. Washington ed., Washington, D.C., Taylor & Maury 1854) ("Under such a process of filiation of necessities the sweeping clause makes clean work.").

43. See John Norton Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139, 145 (1988).

merce.⁴⁴ Nor have the advocates of translation introduced hard evidence to support a change in the degree of interdependence, which is, in any event, a hard concept to measure. Was there a substantially greater proportion of goods transported interstate in 1945 than 1789? If so, did this actually have a greater effect on the lives of individuals, given their greater income and mobility than the proportion that moved interstate in 1789? Determining whether such changes require a translation raises further difficulties: Even if the degree of integration did change, when did it change fundamentally? Was translation justified in 1875, 1900, 1922, 1932, or 1937? One reason that advocates of translation tend to pitch their claim of changed facts at very high levels of generalities is that ascertaining when a new social fact has come into being is beyond the capacity of historians to determine retrospectively, let alone within the capacity of any judge to assess contemporaneously.

The first objection—that Professor Lessig is either mistaken about the existence of new facts or at the very least has not proven their real transforming novelty—might seem to refute only an application of the translation theory on the ground that

44. In *Translating Federalism*, Professor Lessig suggests that the Court adopted its pre-New Deal construction of the Commerce Clause to prevent the greater integration from eroding federalism. See Lessig, *Translating Federalism*, *supra* note 36, at 152. I disagree that the pre-New Deal Court was engaged in translation. The distinctions between manufacture and commerce make sense under the original understanding of the Clause even without the benefit of translation. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443-54 (1987). Congress's power would increase even under this understanding as more interstate transactions were made.

At the conference, Professor Lessig briefly attacked my reliance on Professor Epstein's interpretation of the Commerce Clause and suggested that the Necessary and Proper Clause would have permitted the kind of regulation contemplated in the New Deal. I do not believe this to be the case. The Necessary and Proper Clause requires a decision about the propriety of government regulation and can only be assessed against the purposes of the enumerated powers, including the Commerce Clause, in constructing a federal system. See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 331 (1993) (emphasis added). All the enumerated powers, including the Commerce Clause, should be interpreted against such important purposes of federalism as preserving regulatory competition. See *Federal-State Relations, The State of Federalism: Hearing Before the Senate Comm. on Gov't Affairs*, 106th Cong. (1999) (statement of John O. McGinnis), available in 1999 WL 16947318. The distinction between manufacturing and commerce served this purpose.

these particular translations were based on mistakes about changes in fact. If there are enough mistakes, however, it raises questions about the competence of theorists and, by extension, judges to spot the changes in fact, which, in turn, poses a problem for the theory in general. As suggested below, a better explanation for many of these different interpretations of constitutional provisions highlights not changed facts, but changed values or changed visions of human nature. Because individuals are notoriously unreflective about their own values, it is not surprising that they find it easy to attribute their new interpretation to changed facts rather than to their own values. If, in practice, theorists and judges cannot distinguish between changed social facts and changed social ideas, the translation theory is likely to be used simply as a rationalization for infidelity.

B. The Incompatibility of Translation with the Judicial Function

The second objection grants Professor Lessig's claims of changed facts. For instance, assume that in the twentieth century contracts are suffused with a greater degree of public interest or that the country has become more economically integrated. Assume further that these changes would, other things being equal, justify a novel construction of the Contract Clause or Commerce Clause to permit greater intervention by the state and federal governments respectively. The difficulty is that once one has opened two eras for comparison, other things are never equal. A single set of inferences from one set of changed facts cannot lead to a particular construction of any important provision of the Constitution, because either these very same factual changes generate other effects that militate against that interpretation or there may be other factual changes that swamp those changes in their constitutional implications.

To be more specific, both the Contract Clause and the structure of federalism, like most other significant provisions of the Constitution, are aimed in large measure at promoting a high ratio of public interest legislation to private interest legislation.⁴⁵

45. For a classical definition of public good and private good legislation, see *supra*

The Contract Clause does so by restricting the states' ability to pass legislation that will benefit one class at the expense of another.⁴⁶ Federalism is a more wide-ranging mechanism to accomplish the same objective. Under this view, the advantage of federalism is that a properly designed dual system of government can limit the total amount of rent seeking by interest groups more than can a unitary state.⁴⁷ Rent seeking from the national government is limited by giving it only limited powers, including limited powers of taxation. Rent seeking from state government is limited by putting those governments in competition with one another for capital, including human capital.⁴⁸ The bridge between the two mechanisms is that the limited powers of the national government sustain the conditions for competition among the state governments.

If provisions like the Contract Clause and those that make up the complex structure of federalism are Janus-faced—seeking both to empower the government to promote the public interest and restraining it from advancing the private interest—it is not enough to say that changing facts in the world suggest a greater need for legislative intervention at the state or federal level in the public interest. One must also investigate whether these same facts or other facts suggest that there is greater risk of private interest legislation. In theory, only then could a correct translation be made.

Neither the judiciary at the time of the New Deal nor Professor Lessig has undertaken such an inquiry. A complete investigation cannot be undertaken here, but a brief set of facts can be suggested that strongly suggest that the forces of rent seeking have increased since the Framing, creating a more substantial risk of private interest legislation.⁴⁹ First, economic development

note 9.

46. See Kmiec & McGinnis, *supra* note 30, at 526.

47. I discuss this theory of federalism at greater length in John O. McGinnis, *In Praise of the Efficiency of Decentralized Traditions and Their Preconditions*, 77 N.C. L. REV. 523 (1999).

48. See Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 162 (1992).

49. A longer version of the discussion of factual changes that will increase rent seeking appeared in John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999).

has extended the division of labor and specialization. When the country was formed, the polity was divided largely between farmers and merchants,⁵⁰ but it now consists of corporate executives, clerical workers, laborers, government bureaucrats, academics, and journalists, to name just a few of the most salient classifications. As the number of occupations with distinct interests increased, so have the number of interest groups that have an incentive to lobby for subsidies from the government.⁵¹

Second, the declining costs of information transmission have increased the ability of interest groups to extract subsidies from the government.⁵² Costs of information transmission have declined due to the revolution in both computers and communications.⁵³ As a result of these changes, interest groups are better able to organize and monitor the benefits to their members, thus avoiding some of the freerider problems that frustrated special interest groups in the past.⁵⁴ Interest groups are also better able to monitor members of Congress, thus eroding the ability of legislators to act independently of special interest groups.⁵⁵

Third, as government bureaucracies have grown, they have become a powerful special interest group. Whatever their particular objectives, generally government bureaucrats have an incentive to support a larger bureau and enhanced government powers.⁵⁶ Moreover, once government programs are established, they provide an impetus for interest groups to organize.

50. See ROBERT LIVINGSTON SCHUYLER, *THE CONSTITUTION OF THE UNITED STATES: AN HISTORICAL SURVEY OF ITS FORMATION* 11 (2d ed. 1928) (stating that in 1787 "the people of the United States were divided into two factions or parties"—"merchant and small farmer").

51. See Douglass C. North & John Joseph Wallis, *American Government Expenditures: A Historical Perspective*, 72 AM. ECON. REV. 336, 338-40 (1982).

52. See John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 911 (1996).

53. See J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1209-10 (1993) (reviewing MICHAEL K. KELLOG ET AL., *FEDERAL TELECOMMUNICATIONS LAW* (1992) and PETER W. HUBER ET AL., *THE GEODESIC NETWORK II: 1993 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY* (1992)).

54. See McGinnis & Rappaport, *supra* note 49, at 394-95.

55. See Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1336-37 (1994).

56. See William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617, 618 (1975).

Mancur Olson has shown that relatively stable societies like ours also tend to accumulate special interest organizations.⁵⁷ Olson maintains that generally it is difficult for individuals to circumvent free riding problems and to organize groups that can influence governmental decision making.⁵⁸ Over time, however, favorable circumstances often arise that permit an inchoate group to overcome free riding through a variety of means, including the creation of organizations that can effectively restrict rewards from government influence to its members.⁵⁹ Once such organizations are created, they have staying power and thus the number of special interest groups will grow over time until a social upheaval cleanses society of their negative impact.⁶⁰ Consequently, the very success of a constitution becomes a social fact that will strengthen the forces that seek to weaken its restraints against rent seeking.

If the Constitution is to be properly translated, one would need to balance the increase in the need for public interest legislation versus the increased likelihood of private interest legislation. Given the evidence that has been adduced thus far, it seems to be at least as plausible that judges should have translated the Constitution to make it more difficult for the government to have passed private interest legislation either by narrowing the scope of enumerated powers or by strengthening the guarantees of property rights. Under the translation theory, Professor Lessig inadvertently may have provided a new justification for Professor Richard Epstein's expansive and otherwise historically unsupportable construction of the Takings Clause!⁶¹

The very complexities of this factual inquiry, however, make it wholly unsuitable for judges. This point should be intuitively clear on a moment's reflection. Its force can be underscored by

57. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 39 (1982).

58. See *id.*

59. See *id.* at 40.

60. See *id.* at 69-73.

61. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (arguing that much of the modern welfare state, including the progressive income tax, is unconstitutional under the Takings Clause of the Fifth Amendment).

analogy to antitrust law. Early in the history of antitrust law, judges saw that they could not determine the legality of an antitrust practice by determining whether it would lead to a reasonable price for the good. Such an inquiry would set judges on a "sea of doubt" because they do not have access to the supply and demand curves for the good.⁶² Without the appropriate information, judges are likely to fill the void not with reason but with prejudice. Similarly, to recalibrate the proper public interest balance for federalism or the Contract Clause, judges would need to know demand and supply curves—only this time the demand and supply for public interest and rent-seeking legislation. Surely, these curves would not be easier to either intuit or discover through empirical inquiry than those for a specific good. In addition, because judges have more preconceived notions about political guarantees and structures than the price of widgets, constitutional translation would be more distorted by prejudice and partisanship than would an open-ended antitrust jurisprudence. Thus, constitutional translation cannot be reconciled with the judicial function.⁶³

Professor Lessig also offers another kind of social fact to justify the New Deal's translation of the structure of federalism. He argues that in the New Deal, unlike the Framing, it was recognized that formalism had died—that "courts could no longer be seen to be 'discovering' neutral and inherent limitations on legislative action under the . . . federal Constitution."⁶⁴ On this basis, Professor Lessig perhaps can argue that Richard Epstein's translation of the Takings Clause was wrong and that the New Deal Court's translation of the Commerce and Contract Clauses is still correct because the former requires the Court to construct

62. The phrase is from Judge William Howard Taft's opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898).

63. In my view, the analogy to antitrust militates against any claim that all legal methodologies are indeterminate to the same degree. Just as antitrust law has been structured to reach more determinate conclusions than it would if judges were at liberty to determine the reasonable need for goods, we can make our method of constitutional interpretation impose more constraints on judges than the theory of translation. For an example of a structure with more constraints than translation, see *infra* notes 121-30 and accompanying text.

64. Lessig, *supra* note 29, at 463.

elaborate neutral principles and the latter requires the Court to defer only to Congress.

Reliance on this fact to justify a new translation suffers from the same kind of defects previously noted. First, the claim of social change, at least in its stark form, is again insupportable. The Framers did not depend on rigid formalism as their justification for judicial review. For instance, the defense of judicial review in *Federalist* 78 depended simply on the claim that traditional methods of judicial reasoning—textual interpretation and precedent—constrain the judiciary more than politics constrains the national legislature.⁶⁵ Second, this comparative claim—which is all one needs to sustain judicial review—also would have been strengthened by other changes in the social world. For instance, the very factual changes that increased the power of rent-seeking interest groups also made legislators worse conservators of the Constitution because interest groups have better access to the legislature than to the judiciary.⁶⁶

Reliance on realism as a new fact has additional defects. First, it is belied by subsequent history. As is suggested below, the subsequent constitutional transformations after the New Deal, such as the Warren and Burger Courts' constructions of the right to privacy, cast serious doubt on whether such a factual discovery can be understood as a continuing wellspring of the Court's jurisprudence.⁶⁷

Second, a full acceptance of realism is fatal to the underpinnings of the translation theory itself. Translation requires that judges be able to use neutral principles to interpret provisions of the Constitution as they operated in the era of the Framing, including those relating to judicial review. Only after ascertaining the Framers' meaning could judges be able to translate them into our own era. In other words, the theory of translation presupposes a kind of correlative formalism. Just as one must be

65. See THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (arguing that the judiciary was the "least dangerous" branch (emphasis added)).

66. See Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POLY 219, 229-30 (1997) (demonstrating why interest groups have more influence on the legislature than they do on the courts).

67. See *infra* notes 109-20 and accompanying text.

able to understand French under its linguistic principles before rendering it into English, one must be able to attach a determinate meaning to the Constitution of 1789 to translate it into another era's context.

C. Translation Theory as a Mask for Ideological Disagreement with the Original Constitution

The most pervasive weakness of the translation theory, however, is its failure to recognize that fundamental arguments for constitutional change have been propelled not by changes in fact, but by changes in the values and views of human nature. The Progressive Era and the New Deal witnessed strong attacks on the original structure of the Constitution as wrongly conceived because it protected decentralized processes—the market and federalism—and thereby frustrated the opportunity for centralized reform.⁶⁸ The political theories undergirding the enthusiasm for centralized authority proceeded on a different theory of human nature from that embraced by the Framers—one that believed that individuals could act more disinterestedly and indeed more scientifically in politics than they could in the market.⁶⁹ The principal forbearer of this theory is Rousseau, not Madison.⁷⁰

A huge divide separates the political theories of the Framing from those of the Progressive and New Deal Eras. At the Framing, the elite consensus favored limited government because factions would capture unrestrained government and use it for their own private ends.⁷¹ As a result, the risks of inaction by the state were outweighed by the risks of intervention. In contrast,

68. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1193 (1986) (stating that "the policing reforms of the Populist and Progressive eras . . . experienced a renaissance in the Public Interest era of the 1970s—and the market-corrective programs of the New Deal").

69. See Spicer, *supra* note 15, at 91-95.

70. In fact, "Rousseau has been accused of having propounded 'democratic despotism' through his centralized philosophy that 'the community is sovereign, and against this sovereign the individual possesses no rights.'" Elfenbein, *supra* note 14, at 413 (citing GUIDO DE RUGGIERO, *THE HISTORY OF EUROPEAN LIBERALISM* 64 (R.G. Collingwood trans., 1927)).

71. See McGinnis, *Original Constitution*, *supra* note 11, at 255.

the Framers believed, along with Adam Smith, that in the private sphere the invisible hand would lead individuals to inventions and discoveries that would lead to the progress of civilization.⁷²

Their reasons for these broad conclusions were not rooted in mutable details of the political environment but in their values and, most of all, in their view of the enduring facts of human nature. The Framers preferred what some today would call negative liberty over positive liberty or social equality.⁷³ This preference was rooted in a comprehensive theory of human nature that saw man as relentlessly self-interested but not depraved.⁷⁴ Markets, thus, offered a sphere where self-interest led to the creation of wealth through material exchange, the growth of human knowledge through scientific discovery, and invention of new devices through the exchange of ideas.⁷⁵ A powerful, unitary government, in contrast, would lead to social conflict and wealth dissipation as self-interested individuals and groups jockeyed for power and resources.⁷⁶

For these fundamental reasons, the Framers established the structures of separation of powers and federalism to limit the authority and revenues of the federal government.⁷⁷ They also provided a variety of individual rights that they understood as rights of property to protect the workings of the private sphere of the market.⁷⁸

In the Progressive Era and in the New Deal, elite opinion grew to believe in the possibility of a more beneficent govern-

72. *See id.* at 252.

73. *See* JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 56 (1988).

74. *See id.*

75. *See* McGinnis, *supra* note 24, at 55.

76. *See* John O. McGinnis, *The Human Constitution and Constitutive Law: A Prolegomenon*, 8 J. CONTEMP. LEGAL ISSUES 211, 232 (1997); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1586 (1988).

77. *Cf.* A.C. Pritchard & Todd J. Zywicki, *Constitutions and Spontaneous Orders: A Response to Professor McGinnis*, 77 N.C. L. REV. 537, 538-39 (1999) ("When operating as the Framers intended, federalism and the separation of powers pit government actors in a zero-sum game, with the gains of one . . . branch of government coming only at the expense of another . . . branch.").

78. *See* Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 57-58 (1987) (stating that the "Framers attempted to guide transactions away from the political forum and towards the marketplace").

ment that would plan more rationally for social reform.⁷⁹ This Essay cannot detail the entire course of this intellectual history, but will simply quote a few of its most prominent exponents. The most celebrated social theorists of that era shared a faith in government that was inconsistent with the social theory that underlay the Constitution. For instance, Charles Beard, perhaps the preeminent constitutional thinker of the Progressive Era, disparaged expressly as a myth that individual liberty was a focus of the original document.⁸⁰ He believed that democratic government in a "new age of collectivism" could implement plans scientifically, thereby raising the standard of living of the masses.⁸¹ Herbert Croly, the most influential social theorist of the Progressive Era, stood the Framers' social theory on its head when he said: "While it is true that an active state can make serious and perhaps enduring mistakes, inaction and irresponsibility are more costly and dangerous than intelligent and responsible interference."⁸² John Dewey, the most famous social philosopher of the 1940s and 1950s, took this argument one step further, arguing against the primacy of the private sphere altogether: "[A] social order cannot be established by an unplanned and external convergence of the actions of separate individuals, each of whom is bent on personal private advantage."⁸³ In contrast, Dewey saw the corporate body of politics as a sphere where self-interest is tempered and social progress more likely.⁸⁴

As a result of these new social theories, many intellectuals attacked the original Constitution as simply wrong in conception.

79. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 443-44 (1987) (stating that "the New Deal conception of autonomous administration rejected checks and balances, considering them an obstacle to social change" and that "the purpose of agencies was to achieve . . . distributive justice").

80. See ARTHUR A. EKIRCH, JR., *IDEOLOGIES AND UTOPIAS: THE IMPACT OF THE NEW DEAL ON AMERICAN THOUGHT* 129 (1969).

81. *Id.* at 131.

82. JAMES BOVARD, *FREEDOM IN CHAINS: THE RISE OF THE STATE AND THE DEMISE OF THE CITIZEN* 16 (1999) (quoting Croly).

83. EKIRCH, *supra* note 80, at 128 (quoting Dewey).

84. See *id.* In another demonstration of Dewey's distance from the Framers' support of individualism he praised aspects of Soviet education. See *id.* at 60. He also believed that communism had energized the Soviet people. See BOVARD, *supra* note 82, at 14 ("The people go about as if some mighty, oppressive load had been removed, as if they were newly awakened to the consciousness of released energies." (quoting Dewey)).

Thurmond Arnold said Americans had to substitute for the Constitution a "religion of government."⁸⁵ One of the key members of Roosevelt's brain trust, Rexford Tugwell stated that the greatest roadblock to rational reform was the "unreasoning, almost hysterical attachment of certain Americans to the Constitution."⁸⁶ Radicals in turbulent times are often refreshingly candid about the basis for their actions because the turbulence makes candor compatible with political success.⁸⁷

Perhaps Professor Lessig would suggest that these new social theories of the Progressive Era and the New Deal were simply responses to changing facts. Even if this were so, it would not redeem his translation theory. The appeal of translation is its ability to hold values constant across a world of changed factual circumstances in society. According to Lessig himself, that is what fidelity demands.⁸⁸ If the values are changing as well, what are we translating across eras?

In any event, it is implausible to argue that the social theories of the New Deal were merely responses to the new facts of industrialization. Instead, they stem from fundamentally different views of the nature of man. Long before the industrial revolution of the nineteenth century, Rousseau disparaged the pursuit of property as fundamentally alienating to man.⁸⁹ He believed that

85. BOVARD, *supra* note 82, at 16 (quoting Arnold).

86. *Id.* at 18 (quoting Tugwell).

87. H.L. Mencken collected all the claims of the New Deal theorists and satirically formulated a constitution based on them. See H.L. Mencken, *A Constitution for the New Deal*, AM. MERCURY, June 1937, at 129-36, reprinted in MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 407-09 (1986) (reprinting a condensed version).

88. See Lessig, *supra* note 1, at 1173.

89. In one of the most famous lines in modern political philosophy Rousseau writes:

The first person, who, having fenced off a plot of ground, took it into his head to say *this is mine* and found people simple enough to believe him, was the true founder of civil society. What miseries and horrors would the human Race have been spared by someone who, uprooting the stakes or filling in the ditch, had shouted to his fellows: Beware of listening to this imposter; you are lost if you forget that the fruits belong to all and the Earth to no one!

Jean-Jacques Rousseau, *Discourse on the Origin and Foundations of Inequality Among Men*, in 3 THE COLLECTED WRITINGS OF ROUSSEAU 43 (Roger D. Masters & Christopher Kelly eds., Judith R. Bush et al. trans., 1992).

the fulfillment of the individual came from his participation in democratic processes because these processes helped return him to the social harmony that man knew in the state of nature.⁹⁰ In fact, Rousseau designed a model constitution for Corsica to assure that "the property of the state [would] be as great and powerful, and that of the citizens as small and weak, as possible."⁹¹ Rousseau's objectives and the goals of the Framers were fundamentally incompatible because Rousseau wanted to celebrate the power of collective decision making whereas the Framers wanted to limit it sharply.

The American theories of the Progressive Era and the New Deal are in large measure the direct descendants of Rousseau and his nineteenth-century German and English followers.⁹² The theories gained a particular following at that time for a mixture of reasons. First, many upper-class individuals had an aesthetic revulsion against the industrial revolution of which they were not a part, and which threatened their status.⁹³ Second, particularly by the beginning of the New Deal, there was a revolt in American thought against Darwinism and the idea of a fixed human nature shaped by evolution.⁹⁴ To the contrary, Frans Boas and other sociologists began to argue that man's behavior was almost infinitely malleable.⁹⁵ This provided a new, quasi-scientific intellectual current for the proposition that through collective action man could shape himself to become a more altruistic player in the political sphere. It thus provided renewed justification for social engineering.

These intellectual trends were not limited to one party. By the time of the Depression, progressive Republicans, like Herbert

90. See Jean-Jacques Rousseau, *On the Social Contract*, in 4 THE COLLECTED WRITINGS OF ROUSSEAU 141 (Roger D. Masters & Christopher Kelly eds., Judith R. Bush et al. trans., 1994).

91. BOVARD, *supra* note 82, at 11 (quoting Rousseau).

92. See *id.* at 11-13.

93. The classic statement of this stance toward industrialization can be found in the work of one of John Adams's descendants—*The Education of Henry Adams*. See HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS: AN AUTOBIOGRAPHY* (Sentry ed. 1961) (1918). Not surprisingly, our modern intellectuals rated it the top nonfiction book of the century. See *Modern Library: 100 Best Nonfiction* (visited Oct. 20, 1999) <<http://www.randomhouse.com/modernlibrary/100best>>.

94. See DEGLER, *supra* note 12, at 59-215.

95. See *id.*

Hoover, also were hostile to the doctrines of pure laissez-faire.⁹⁶ One of the great virtues of Barry Cushman's book, *Rethinking the New Deal Court*,⁹⁷ is to see how much of the New Deal Era's jurisprudence was the work of Justices imbued with progressive thought—like Chief Justice Charles Evans Hughes and Justice Owen Roberts.⁹⁸ Consequently, it is wrong to see the changes in the Constitution as a result of merely partisan political changes. The New Deal's transformation is consistent with the view expressed above that dramatic constitutional change is the result of general changes in social thought—changes that were then used by interest groups that wanted to extract resources from government. Once again, this Essay cannot give a full discussion of this view of constitutional history, but it is worth noting that historians have long seen progressive Republicans as interested in protecting their elite status against the nouveau riche of the industrial age.⁹⁹ Although progressive Republicans sometimes used the language of laissez-faire, as when they passed the Sherman Antitrust Act, the real intent of their legislation, including the antitrust act, may have been to restrain the competition that threatened their status.¹⁰⁰ Similarly, Democratic progressives, such as labor unions and farm interests, pressed for a larger and more centralized government to circumscribe the competition that threatened their interests. Accordingly, it is hardly surprising that the first major enactment of the New Deal was the National Industrial Recovery Act,¹⁰¹ a framework

96. See generally MURRAY N. ROTHBARD, *AMERICA'S GREAT DEPRESSION* (1972) (discussing Herbert Hoover's use of economic planning as a presage to the collectivist ideas of the New Deal).

97. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998).

98. See *id.*

99. For a discussion of the importance of Republican interest groups in creating the policies of the New Deal, see Ellis W. Hawley, *Herbert Hoover and Modern American History: Sixty Years After*, in *HERBERT HOOVER AND THE HISTORIANS* 1, 7-8 (Mark M. Dodge ed., 1989).

100. See George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1, 7-8 (1985) (showing that those who voted in favor of the Sherman Act were also in favor of various forms of protectionism).

101. Ch. 90, 48 Stat. 195 (1933). In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court declared the National Industrial Recovery Act unconstitutional.

that facilitated rent seeking by both business and labor at the expense of diffuse groups, like consumers.¹⁰²

Through these explanations, my descriptive theory of constitutional transformation differs substantially from Professor Lessig's translation theory. Constitutional change propelled by ordinary politics does not occur generally to address new social realities. Instead, constitutional structures are transformed most readily when interest groups, who would benefit from changes in the Constitution, come to dominate both major political parties. Wide-ranging social theories that differ from those underlying the Constitution then are used by these interest groups to break it down. Their lawyers try to change the previous constitutional order by deploying doctrinal claims that trade on these larger social theories. In the Progressive and New Deal Eras, more businesses were thought to be infused with the public interest because the notion of a public interest apart from private interest was more plausible under zeitgeist represented by the social theories advocated by Beard and Croly.¹⁰³ The doctrines embodying federalism came to be seen as more of an impediment because these theories claimed that centralized action was more beneficent.¹⁰⁴ These theories and their legal results were not political in a narrowly partisan sense; they were constructed from the parts of the passing intellectual show most useful to interest groups. Moreover, just as new social philosophies seep into intellectual life, their legal manifestations often eat away incrementally at previous constitutional doctrine.

The thesis that constitutional change is powered by interest groups arranging the ideological theories of their time to suit their purposes is supported in different ways by the work of two other participants in this conference. First, David Bernstein in a series of papers has shown that some of the Progressive Era's hostility toward laissez-faire had its origins in racial status seeking—the desire of southern plantation owners and northern

102. See EKIRCH, *supra* note 80, at 101 (discussing the National Industrial Recovery Act as representing the ideal of a "broker state"—one that would govern by mediating among powerful interests).

103. See CUSHMAN, *supra* note 97, at 2-5.

104. See *supra* notes 96-102 and accompanying text.

unions alike to make it more difficult for blacks to compete in the market because this assured a supply of cheap labor for the South and prevented lower wages for northern white workers.¹⁰⁵ Professor Bernstein has shown in detail one strand of the rent seeking that I believe is the pervasive story of the New Deal. Second, Alan Meese has shown that the factual claims on which the critique of *Lochner* rested simply were not true.¹⁰⁶ The pervasive falsity of the factual premises of attacks on pre-New Deal constitutional doctrine protecting laissez-faire suggests further that it was driven by a combination of interest and ideology.

The subsequent course of judicial review confirms that broad intellectual currents and interest group politics are fundamentally responsible for the reorientation of the Constitution. Intrusive judicial review on behalf of personal expression and sexual autonomy and deferential review of economic regulation evolved in response to previous social democratic theory. For example, Alexander Meiklejohn, an important New Deal legal theorist, made a central distinction between freedom for spirit, which society should rigorously protect, and freedom for matter, which can be regulated as necessary in the service of the inner life.¹⁰⁷ The exaltation of the former freedom justifies civil liberties, and

105. See, e.g., David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797 (1998).

106. See Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 31-39 (1999). I hasten to add that I do not believe *Lochner* and its progeny were justified by the original understanding of the Fourteenth Amendment because that understanding of the Due Process Clause no more protects a right to economic liberty than a right to abortion. I believe, therefore, that while the New Deal Court was wrong to discard the pre-New Deal understandings of the Contract Clause and the Commerce Clause, it was right to discard *Lochner*. Nevertheless, Professor Meese has elegantly shown that the economic "facts," on the basis of which the translation theory seeks to jettison it, are simply false.

107. See BOVARD, *supra* note 82, at 56-57. Meiklejohn's rhetoric is so extraordinary that it is worth quoting in full:

The major problem of any social order, as seen in external, political terms, is that of so constructing and controlling our institutions that they shall serve the purposes of the inner life. I am not saying that the outer should be ignored. Rather it must be the servant of the inner and to this end it must be whipped into such shape and behavior that its service will be adequate and dependable.

Id. (quoting Meiklejohn).

the subordination of the latter justifies limitless government regulation of material property.¹⁰⁸

Meiklejohn's analysis characterizes the social thinking that began to dominate liberal elites in the New Deal Era. Alternatively stated, while the post-War intellectual consensus believed that the economic arrangements of civil society—the order created by the exercise of property rights—should be subject to perpetual revision and control through the central government,¹⁰⁹ it also recognized the need for a personal sphere beyond the reach of centralized authority, within which individuals could achieve self-realization.¹¹⁰ Indeed, it was the existence of this personal sphere that was felt to be one of the most important demarcations separating the modern welfare states of the West, including the United States, from the communist states of the East.¹¹¹ Although in a social democracy, economic enterprise was viewed as an engine of inequality and thus necessarily subject to strict government supervision, expressive activity was seen as largely personal and thus could be given free reign.¹¹² Speech was understood as a means to self-realization that could be distinguished from market processes.¹¹³ Similarly, sexual autonomy—misleadingly termed the right of privacy—could be conceptualized as a liberty compatible with economic equality.¹¹⁴ This

108. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT* 1-3 (1948) (making this distinction in the context of freedom of speech).

109. For a discussion of this aspect of the New Deal consensus, see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 40-67 (1993).

110. See Sunstein, *supra* note 76, at 1578 (stating that during the New Deal period "[a] central lesson of the republican revival [was] the need to provide outlets for self-determination").

111. See Richard Lowenthal, *The Future of Socialism in Advanced Democracies*, in *THE SOCIALIST IDEA: A REAPPRAISAL* 222, 222-23 (Leszek Kolakowski & Stuart Hampshire eds., 1974) (arguing that Western social democracy, unlike communism, seeks a regime that combines personal autonomy with social control over economic forces).

112. See Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1156 (1983).

113. See C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 653-54 (1982) (distinguishing the self-realization afforded by free speech from actions dictated by the market).

114. There is also an interest group propulsion in favor of these changes in inter-

paradigm propelled the intrusive judicial review that protected expressive but nonpolitical speech and established the rights to contraception and abortion.¹¹⁵ The Warren Court, and to some extent the Burger Court, thus continued to work social democratic theory into constitutional law.¹¹⁶

This intrusive judicial review is difficult to justify, however, if we follow Professor Lessig's belief that intensive judicial review of economic matters disappeared because of the realist discovery that law was man-made, rather than discovered, thus depriving the judiciary of the confidence in the neutrality of their judgments.¹¹⁷ Unless this "fact" was true in the New Deal and ceased to be true in the 1960s, it is unclear why the judiciary now has the confidence to pronounce on abortion and contraception.¹¹⁸ Certainly, the Due Process Clause contains no clearer commands on these subjects than it does on economic freedoms. The discarded guarantees of the Contract Clause are far more clearly stated in the Constitution than any so-called privacy rights.

More recently, Professor Lessig has suggested that the legal culture of the time made it easier to see the construction of the Warren Court's privacy decisions as justified in light of the contemporary legal culture than pre-New Deal Commerce Clause and due process decisions.¹¹⁹ The use of the nebulous concept of legal culture to bolster the translation theory, however, confirms that translations are not being driven by facts about the opera-

pretation. Briefly, the enfranchisement of women and their entry into the work force gave rise to intimate interest groups in politics. *See, e.g.,* Alice Sardell, *Child Health Policy in the U.S.: The Paradox of Consensus*, 15 J. HEALTH POL. POL'Y & L. 271, 281 (1990).

115. *See, e.g.,* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected. . ."); *Roe v. Wade*, 410 U.S. 113 (1973) (establishing the right to abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding in the Bill of Rights a penumbral right to privacy).

116. The status seeking that supported the deployment of these theories was largely that of the Court and the legal elites themselves. A consistent policy of judicial abnegation in matters of morals, as well as economics, would have made the Justices and lawyers relatively unimportant political actors.

117. *See* Lessig, *supra* note 29, at 463.

118. *See* Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1442 (1997) (showing that "[t]ranslation [t]heory [c]annot [e]xplain [o]ur [c]hanging [c]onceptions of the [j]udicial [r]ole").

119. *See* Lessig, *supra* note 29, at 457-58.

tion of the world, but by intellectual fashions. Of course, in an intellectual universe where, in the words of Peggy Noonan, the "urban liberals" find sexual intercourse "another entitlement,"¹²⁰ the legal culture will find plausible the distinctions necessary to create legal rights to such activity. Similarly, in the nineteenth century, when property rights were seen as an ultimate touchstone of social life, legal culture was constituted by the distinctions necessary to make *Lochner* plausible. The legal culture is not a hard fact capable of sustaining Professor Lessig's descriptive theory of translation based on changing facts. Instead, it is a set of soft attitudes that are bound up with the general social theory and interest group constellation of an age.

III. TOWARD A VINDICATION OF TRADITIONAL INTERPRETATION ON PUBLIC CHOICE GROUNDS

If the theory of constitutional change I offer is more plausible than that offered by Professor Lessig, it also has very different implications for a normative theory of constitutional interpretation. In a world where interest groups continually seek resources and status from the government, and make use of the passing intellectual fashions of the day, judges have to be constrained tightly if the restraints of the Constitution are not to be eviscerated. This Essay is not the place to offer a full defense of more traditional, interpretivist theories of constitutional interpretation, as opposed to translation, but I think the key is to adopt a theory that leads to government actions—in this case judicial actions—that are more likely to serve the public interest than private interests. A theory of constitutional interpretation, like the structure of the Constitution itself, must be generated by a model of human nature that recognizes that self-interest affects all political actors, including judges.

The categories of traditional judicial interpretative methodology envisioned by *Federalist* 78—text, structure, and precedent—can be defended ultimately under the same theory of

120. PEGGY NOONAN, *LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS* 146 (1994). Actually Ms. Noonan puts this claim of entitlement a little more pungently than I do, but I believe a law review article should be suitable for family reading.

human nature that underlay the original Constitution.¹²¹ Text is a relatively definite form of signing that is equally accessible to all political actors, including citizens. Relying on text, thus, makes it easier for citizens to monitor the constitutional arguments of interest groups and the decisions of judges. Making text primary in constitutive decisions was an important advance in restraining the self-interest of governmental actors because the power of important public decisions of constitutive significance have not always depended on reasoning from visible documents. For example, in the Roman Republic, major decisions of the state were made by priests who consulted auguries and announced the results to the public.¹²² To an anthropologist, the noninterpretivist theories of constitutional interpretation might well seem a return to practices that are cognate to some forms of ancient decision making.¹²³ The noninterpretivist judge consults his own private signals or values to make decisions that will govern the public. As we have seen, despite its claims to the contrary, translation theory operates as a cover for these value judgments and thus helps dissolve the constraint of text.

Structure also should count in a constitutional interpretation designed to advance the public interest in a world driven by private interests. To be sure, structure is not as determinate and visible to the naked eye as text and therefore permits more room for manipulation. Text considered in isolation is subject to manipulation, too; it may not capture the meaning of complex and interrelated provisions. A constitution must be interpreted holistically if it is to create an integrated system and thereby serve the public interest. Consequently, on balance, including structure in the materials of our interpretation is likely to promote judicial decisions that are faithful to the original constitution.

Precedent also gives room for manipulation, but it has advantages in the natural constitutional world we have described. As discussed above, good constitutions generate more pressures to

121. See THE FEDERALIST NO. 78 (Alexander Hamilton).

122. See 1 THE OXFORD ENGLISH DICTIONARY 785 (2d ed. 1989) (defining augur).

123. Cf. Philip B. Kurland, *Earl Warren: Master of the Revels*, 96 HARV. L. REV. 331, 339 (1982) (reviewing EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* (1982)) ("Many a primitive society based its judgments on the examination of animal entrails. None left behind a 'jurisprudence.'").

eviscerate their constraints over time.¹²⁴ It is therefore likely that, other things being equal, decisions will be more faithful to a good constitution the closer they occur to the time of its framing.¹²⁵ In this way, deference to precedent also serves fidelity.

Other kinds of traditional interpretation also can be justified under this view. For instance, we should interpret a word or phrase as it was understood in 1787. Even if a word has changed in its meaning since then, we can consult materials, such as dictionaries and other contemporary documents from 1787 to capture its former signification. Recovering past meaning is an act that is constrained sufficiently to allow judges and the legal observers to monitor; thus, it does not make rent seeking through judicial review appreciably easier. Yet, it contributes to the public interest by construing all the Constitution's words to have the meaning they did when it was enacted and thereby assuring that the Constitution is interpreted coherently.

Defenders of translation theory may suggest that we need it to ensure that our constitutional system must take account of changing social facts.¹²⁶ Other provisions of the Constitution, however, offer mechanisms to achieve this goal more effectively than Professor Lessig's translation theory, which as I have argued, offers no effective constraints on interest groups. While no procedure can ever guarantee that constitutional transformations will occur in the public rather than the private interest, our constitutional amendment process has been designed to provide for ways to address changing facts in a way that is resistant to the machinations of interest groups. Article V's requirement of two separate supermajorities makes it more likely that responses to changing social facts passed as amendments will serve the public interest better than responses rendered as judicial translations.¹²⁷

124. See *supra* notes 26-27 and accompanying text.

125. Judicial decisions are never exogenous to the constitutive system as a whole. If interest groups become more powerful over time they will affect judicial appointments and, through appointments, judicial decisions. The decline of the constitutional system as a whole will tend to reduce the quality of judicial output, distorting the Constitution to serve private interests.

126. For a fuller discussion of the constitutional amendment process, see John O. McGinnis & Michael B. Rappaport, *Still a Solution: In Further Support of Spending Supermajority Rules*, 40 WM. & MARY L. REV. 527, 547 (1999).

127. In this, I follow the originators of public choice analysis. See JAMES M.

First, the double supermajoritarian requirement forces proponents to appeal to the public interest because only overwhelming majorities can overcome the high hurdles to constitutional reform.¹²⁸ In contrast, judicial "translations" can be accomplished with support from a relatively limited section of the public—judges, lawyers, and elite opinionmakers. Second, constitutional amendments capture the public attention better than legal disputes because the latter are the province of lawyers and are conducted in debates over legal doctrine that may seem arcane. As a result, a diffuse public pays more attention. This, itself, reduces the power of interest groups who are less able to exploit the citizenry's rational ignorance of politics.¹²⁹

Third, the judgments rendered through judicial translations can be limited as any precedent can be. In contrast, under a strict construction of the Constitution, constitutional amendments are entrenched against easy transformation or limitation.¹³⁰ Consequently, individuals determine their support for constitutive amendments under a more gauzy veil of ignorance than they do in the case of a judicial translation because they will almost certainly have to live under the full mandates of these amendments under circumstances they cannot predict. As a result, they are more likely to consult the public interest rather than their own private interests in their constitutive decisions.

Translation theory is wrong to attempt the work of *both* the constitutional interpretation and the amendment process because inputting large scale social changes into a complex constitutional system is a far riskier enterprise than interstitial interpretation, and therefore needs greater restraints than judicial translation can afford. Constitutional mechanisms designed ex-

BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 285-86 (1965).

128. See Jeffrey Rosen, *Overcoming Posner*, 105 *YALE L.J.* 581, 604 (1995) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1995) and suggesting that the public is more engaged in constitutional debates than in ordinary politics).

129. See JOHN R. VILE, *CONSTITUTIONAL CHANGE IN THE UNITED STATES: A COMPARATIVE STUDY OF THE ROLE OF CONSTITUTIONAL AMENDMENTS, JUDICIAL INTERPRETATIONS, AND LEGISLATIVE AND EXECUTIVE ACTIONS* 95-96 (1994) (suggesting that the obstacles in the constitutional amendment process discourage interest groups).

130. See *id.* at 97 (noting the relative clarity and generality of constitutional amendments as opposed to ordinary legislation).

pressly for each specific purpose, therefore, can better accomplish these ends than can the more general mechanism of translation. Indeed, I would venture to say that much of the progress of constitutionalism has been derived from creating multiple mechanisms designed optimally for specific goals in order to replace general mechanisms that served many different goals suboptimally. The trick is then to integrate the mechanisms to prevent the whole system from crashing. For this reason, the combination of traditional constitutional interpretation and the constitutional amendment process offer a greater prospect of sustaining a good constitution in the public interest.

CONCLUSION

The flaws of translation theory mirror the flaws of the political theories that propelled the Progressive Era and the New Deal. As beguiling as they are, all these theories put too much stock in the power of centralized, scientific reasoning to reach impartial judgments in the public interest. By contrast, the Framers believed that man's self-interest was fundamental and particularly destructive in the political sphere. Consequently, the key to building a successful constitution is to create institutions that constrain that self-interest by preventing individuals from using the state for the private advantage of themselves or their supporters.

These constraints, in turn, create a society that is both wealthier and more harmonious because, in such a constrained political regime, individuals will not see one another as either threats or targets of opportunity in the political game of redistributing resources and status. Professor Lessig's theory of translation, much like the New Deal construction of a unitarian, centralized democracy, deprives us of the severe constraints on all governmental actors, including judges, that are necessary to realize the Framers' vision of prosperity and harmony in a world populated by self-seeking individuals.