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Articles

Fidelity in Translation

Lawrence Lessig*

| | |
|---|------|
| I. Introduction | 1166 |
| II. Changed Readings and Fidelity | 1174 |
| III. Step One of Fidelity: Contextualists | 1182 |
| IV. Step Two of Fidelity: Translation | 1189 |
| A. <i>Step Two: The Link to Translation</i> | 1189 |
| B. <i>Step Two: The Practice of Translation</i> | 1192 |
| 1. <i>Aspects of Translation: Familiarity</i> | 1194 |
| 2. <i>Aspects of Equivalence: The Problem</i> | 1196 |
| 3. <i>Aspects of Equivalence: Creativity</i> | 1205 |
| 4. <i>Aspects of Equivalence: Humility</i> | 1206 |
| V. Two-Step Fidelity: Finding Equivalence | 1211 |
| A. <i>Two-Step Fidelity: A Model</i> | 1212 |
| B. <i>Two-Step Fidelity: Translations</i> | 1214 |
| 1. <i>Legal Presuppositions: Overruling</i> | 1215 |
| 2. <i>Legal Presuppositions: The APA</i> | 1218 |
| 3. <i>Legal Presuppositions: Article V</i> | 1220 |
| 4. <i>Legal Presuppositions: States' Rights</i> | 1224 |
| 5. <i>Legal Presuppositions: The Exclusionary Rule (Mapp)</i> | 1228 |
| 6. <i>Nonlegal Presuppositions: Safeguards Against Self-Incrimination (Miranda)</i> | 1233 |
| 7. <i>Nonlegal Presuppositions: Protection of Privacy</i> | 1237 |
| 8. <i>Nonlegal Presuppositions: Support for Established Religions</i> | 1240 |

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| | | |
|------|--|------|
| 9. | <i>Nonlegal Presuppositions: Abandoning State-Imposed Segregation</i> | 1242 |
| 10. | <i>Nonlegal Presuppositions: Antitrust, Economic Theory, and Mistranslations</i> | 1247 |
| VI. | Two-Step Fidelity: Limits on Equivalence | 1251 |
| A. | <i>Translative Limits: Structural Humility</i> | 1252 |
| B. | <i>Translative Limits: Capacity</i> | 1261 |
| C. | <i>Two-Step Fidelity: The Model Summarized</i> | 1263 |
| VII. | Conclusion | 1263 |

Readings of the Constitution have changed. Sometimes they have changed because the constitutional text has changed. But more often they have changed while the text has remained the same. Can it be that these changed readings—changes that track no change in constitutional text—can nonetheless be readings of fidelity, faithful to the Constitution's original meaning? On some readings of originalism, the answer must be no. But this essay argues that any complete account of interpretive fidelity must allow—indeed require—changes in constitutional readings even when there has been no change in the constitutional text. If meaning is a function of both text and context, the claim made here is that fidelity in interpretation must accommodate changes in both. Drawing on the interpretive practice of translation, the author models an argument of interpretive fidelity that tracks changes in the background context, justifying changed readings as necessary translations to preserve constitutional meaning in different interpretive contexts. Using this model, the author then examines ten examples of changed readings unsupported by changes in text and argues that these may best be understood, through the device of translation, as arguments based in fidelity. Finally, the author points to limitations on a practice of fidelity as translation present in the practice of literary translation itself. These suggest a practice of translation in law that would not be as radical as first impressions may suggest, and indeed, may be required to understand some of the most significant moments in American constitutional history.

I. Introduction

From Texas come a question and a claim, and together they raise the subject of this essay.

First the claim. In an article published in this review just last year, Nicholas Zeppos divided the world of interpretive practice (for statutes at least) into three parts. At the core is a practice of originalism, a commitment to “fidelity” needed to “counter anxiety over judicial lawmaking.”¹ Originalism, said Zeppos, “resolves interpretive questions in statutory cases

1. Nicholas S. Zeppos, *The Uses of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1074 (1992); see also Lino A. Graglia, “Interpreting” the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1019-22 (1992) (“Originalism is a virtual axiom of our legal-political system, necessary to distinguish the judicial from the legislative function.”).

by asking how the enacting Congress would have decided the question."² Quoting Richard Posner, Zeppos continued, "[T]he judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him."³ Or again,

[t]he judge's role [is] to re-create and then return to the time of enactment to imagine what that Congress would have done had it been confronted with [a] claim. This temporal aspect is critical to the originalist's inquiry. The court asks only what the enacting Congress would have done; subsequent events or the state of the world today are not a basis for decision.⁴

As method, of course, originalism is not unchallenged, and Zeppos contrasts its two main competitors. The first, what Zeppos called "dynamic" or "public values theories," urges "courts to decide cases by applying current public values or practical considerations."⁵ These public values schools teach that judges need to "focus on the current needs or values of society,"⁶ that their method should be "'nautical' (not archeological) and 'dynamic' (not static),"⁷ and that "[t]he views, beliefs, or values of a Congress long gone and unaware of the current structure of society are unlikely to provide a useful or meaningful guide for decision."⁸ Thus, the public values theories "openly acknowledge[] a role for evolutionary considerations and societal values in the interpretive process."⁹ The second competitor of originalism, what we all call "textualist" theories, are more ascetic,¹⁰ working to reduce the discretion of the originalist judge by reducing the "potentially wide array of originalist sources."¹¹ Like originalists, "textualists envision no role for the judiciary in updating statutory law," but unlike originalists, textualists abstain from a broad view of the

2. Zeppos, *supra* note 1, at 1078.

3. *Id.* at 1078 n.22 (quoting RICHARD A. POSNER, *FEDERAL COURTS: CRISIS AND REFORM* 286-87 (1985)).

4. *Id.* at 1079 (footnote omitted).

5. *Id.* at 1081, 1080, 1081-84. The leading "dynamist" scholars are Alexander Aleinikoff, William Eskridge, Daniel Farber, and Philip Frickey. *See id.* at 1074-75 n.3 (citing these authors' major works). Cass Sunstein also embraces something close to the dynamist's method. *See* CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 157-59 (1990). I discuss these scholars below at notes 32, 61, 191, and accompanying text (Aleinikoff); notes 32, 51, 327, 350, and accompanying text (Eskridge); notes 26, 32, 59, 360 (Farber); and notes 32, 35, 37, 67, 193, and accompanying text (Sunstein). Dean Guido Calabresi's approach is obviously related, but, as I argue below, distinct in significant ways. *See infra* note 351.

6. Zeppos, *supra* note 1, at 1081.

7. *Id.* (footnotes omitted).

8. *Id.*

9. *Id.* at 1084.

10. *See* Larry Kramer, *Judicial Asceticism*, 12 *CARDOZO L. REV.* 1789, 1789 (1991) (arguing that Justice Scalia's textualist approach is more accurately characterized as judicial asceticism than as revisionist formalism).

11. Zeppos, *supra* note 1, at 1086, 1086-87.

context within which a statute is written, fearing the judges cannot be trusted with all that context may allow.¹²

That is the claim—that interpretive theory divides into these three schools, only the first of which (originalism) may claim for itself the virtue of fidelity. Dynamic and textualist theories depart from fidelity, even if they depart for good reason. Or so Zeppos suggests.

Now for the question. In a recent essay, Sanford Levinson asks “How many times has the Constitution been amended?”¹³ One might think this a relatively simple question—after all, twenty-six (or is it twenty-seven?)¹⁴ snippets of text have been appended to the constitutional text; therefore, the Constitution must have been amended twenty-six (or twenty-seven) times. But if by “amendment” one means “a legal invention not derivable from the existing body of accepted legal materials,”¹⁵ then twenty-six (or twenty-seven) amendments may be either too many or too few. Too many, if some snippets of text were unnecessary (perhaps the Fifteenth Amendment was immanent within the Fourteenth);¹⁶ too few if some changes required, but received no, new snippets of text (the New Deal, for one example; *McCulloch v. Maryland*,¹⁷ for another).

Focus on the second part of this puzzle—that there may have been more amendments than snippets of new text. We all know that *readings* of the Constitution have changed, even when the text read has remained the same.¹⁸ At one time “Commerce . . . among the several States”¹⁹ did not allow spending to build highways;²⁰ at another, it authorized the regu-

12. *Id.* at 1085. See Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 62 (1988) (arguing that the use of original intent rather than an objective inquiry into the reasonable import of the language increases the discretion and, therefore, the power of the court).

13. Sanford Levinson, *Accounting for Constitutional Change*, 8 CONST. COMMENTARY 409, 409 (1991).

14. On the (what ought to be) questionable status of the Twenty-Seventh Amendment, see Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497 (1992).

15. Levinson, *supra* note 13, at 412.

16. Compare U.S. CONST. amend. XV, § 1 (“The rights of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”) with U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

17. 17 U.S. (4 Wheat.) 316 (1819); see JAMES B. WHITE, *WHEN WORDS LOSE THEIR MEANING* 247-63 (1984).

18. See Sheldon D. Pollack, *Constitutional Interpretation as Political Choice*, 48 U. PITT. L. REV. 989, 989 (1987) (“[T]he very same constitutional text has at various times sanctioned the concepts of slavery and human chattel, as well as racial discrimination and segregation.”).

19. U.S. CONST. art. I, § 8, cl. 3.

20. Or so Madison thought. See James Madison, *Veto Messages of the Presidents of the United States*, in SENATE MISC. DOC. NO. 53, at 16-17 (1887).

lation of the consumption of homegrown wheat.²¹ At one time “equal protection of the laws” permitted *de jure* racial segregation,²² at another it (arguably) requires mandated integration.²³ These different readings we can call *changed readings*, and we can understand Levinson to ask how we can tell when a changed reading is an amendment (an “invention”) rather than mere interpretation.²⁴

But to ask this is to presume what Zeppos seems to deny—that some changes can be *changes of fidelity*. For the category “changes of fidelity” appears nowhere in Zeppos’s taxonomy. *Constancy* is the virtue of originalism; *change* the vice (even if the necessary vice) of dynamism. Thus, in Zeppos’s scheme, once we know that readings are changed readings, different from those the originals would have given, we are already on to justification, not of the readings, but of our act of interpretive infidelity. With changed reading comes our expulsion from the domain of faithful interpreters. Fidelity requires constancy; change betrays infidelity.

Now it may be a bit unfair to burden Nicholas Zeppos as standard bearer of the originalists. After all, his important and original work was an attempt to quantify (and question) the originalists’ claim to interpretive dominance. Nonetheless, he captures what I believe is a common understanding about the relationship between interpretive change and interpretive fidelity, and one which I believe is, in important ways, mistaken.

The mistake is suggested by the following: We emerge from a generation where the badge of infidelity was affixed to those who desired to keep the Constitution “in tune with the times.” So charged the great fidelitist Justice Black,²⁵ and before his righteousness have cowered the Constitution’s tuners, defending their “adjustments” on grounds of necessity, meekly attacking his rigidity with claims of impossibility.²⁶

21. *Wickard v. Filburn*, 317 U.S. 111 (1942).

22. *See, e.g., Plessy v. Ferguson*, 163 U.S. 537 (1896).

23. *See, e.g., Keyes v. School Dist. No. 1*, 413 U.S. 189, 217 (1973) (Powell, J., concurring and dissenting) (holding that if a school system is determined to be a racially dual system, the school board has an affirmative duty to desegregate the entire system).

24. Levinson, *supra* note 13, at 428 (suspecting that the problem may be insoluble).

25. *See, e.g., Katz v. United States*, 389 U.S. 347, 373 (1967) (Black, J., dissenting) (“I will not distort the words of the Amendment in order to ‘keep the Constitution up to date’ or to ‘bring it into harmony with the times.’”); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 675-76 (1966) (Black, J., dissenting) (“[T]here is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems.”); *Griswold v. Connecticut*, 381 U.S. 479, 522 (1964) (Black, J., dissenting) (rejecting the philosophy that the Court has a duty to “keep the Constitution in tune with the times”). Black of course was not first to voice this criticism. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 402 (1937) (Sutherland, J., dissenting) (“[T]he meaning of the Constitution does not change with the ebb and flow of economic events.”), among others.

26. As Daniel Farber suggests,

Probably the most prevalent argument against originalism is that it is too static, and

But just think of the image that Black's metaphor evokes. Is "tuning" unfaithful? A concert pianist plays a series of outdoor concerts. On the third night, the temperature falls dramatically, causing the piano to fall "out of tune." Is it more faithful to Beethoven to leave the piano out of tune? Would tuning the piano be the same kind of infidelity as adding a couple of bars to the end of the first movement? Is there no difference between tuning so the music sounds "the same" (the same?) and changing the tempo or cutting some particularly dark passages so the music sounds better? Is it really "tuning" when one makes the music sound better? Is it really infidelity when one changes the music to make it sound the same?²⁷

What Black's metaphor misses is a distinction between fidelity and change, a distinction that is the subject of this essay: Can an interpretive change be interpretive fidelity and, if so, how can we know when?²⁸ For we all know that sometimes fidelity to an original meaning requires doing something different, and that, in those cases, doing the same thing done before would be to change the meaning of what was done before. Take a simple example to make the point: If a diplomat is ordered to "be polite" while in Iraq (where belching after eating signals approval)²⁹ and belches loudly at the end of her meal, it would not be *fidelity* to her order to belch loudly at the end of her next meal with the British Monarch, even though (in an importantly impolite sense) she would have done the *same thing* as

thereby disregards the need to keep the Constitution up to date with changing times. Originalism is unworkable, then, even if the original intent can be reliably determined, because originalism would make the Constitution itself unworkable.

Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1095 (1989). In *Harper*, 383 U.S. at 663, Justice Black restated the approach that he vehemently opposed as he attacked it in his dissenting opinion:

The Court's justification for consulting its own notions rather than following the original meaning of the Constitution . . . apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be "shackled to the political theory of a particular era," and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast of this Court's more enlightened theories of what is best for our society.

Id. at 677 (Black, J., dissenting).

27. The same question may be evoked by Sanford Levinson and J.M. Balkin's essay, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1598-99 (1991). Indeed, much of the question that is the focus of this essay follows their analysis.

28. As John Wofford suggests, "It is misleading . . . to think of this choice as one in which words are given either 'frozen' or 'dynamic' meanings." John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 520 (1967). *But see* Graglia, *supra* note 1, at 1030 (asserting that "flexible interpretation" is "a euphemism for short-circuiting the amendment process").

29. *See* DONALD HAWLEY, *MANNERS AND CORRECT FORM IN THE MIDDLE EAST* 102 (1984) (observing that though belching is never obligatory in the Arab world, some guests will mark their appreciation by deep belches).

before. Change here—bowing rather than belching—is fidelity. We all know that this diplomat must *do something different* in Britain if she is to *do the same thing* as in Iraq. She must change her act to remain faithful to the original command—not to change her act would be to manifest infidelity.

Yet despite this that we all know, much of the debate over fidelity in constitutional theory proceeds as if all this were forgotten. While originalists sometimes say that we must apply the principles of the Framers and Ratifiers to the circumstances of today,³⁰ they more often behave as if the question were simply (and always), “How would the originals have answered this question then?”³¹ And while non-originalists usually claim that weight should be given to the historical meaning of the Constitution, rarely do they suggest just how this should be done. Thus, the extremism of the strict originalist (decide cases now as they would have been decided then) invites the extremism of the non-originalist (decide cases now as would be now morally the best), and in between these extremes is lost our understanding of what fidelity might be.

In this essay, I suggest we rethink our ideas of fidelity and change with what is by now quite an old trope: translation.³² For if there is truth

30. See, e.g., *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir.) (Bork, J., concurring) (“[The judicial duty] is to ensure that the powers and freedoms the framers specified are made effective in today’s circumstances.”), *cert. denied*, 471 U.S. 1127 (1984).

31. See, e.g., *Schad v. Arizona*, 111 S. Ct. 2491, 2507 (1991) (Scalia, J., concurring in part and concurring in the judgment) (arguing that precisely what process is due is defined by historical practices); Edwin Meese III, *Address Before the D.C. Chapter of the Federalist Society Lawyers Division*, in *INTERPRETING LAW AND LITERATURE* 25, 29 (Sanford Levinson & Steven Mailloux eds., 1988) (“On every question of construction [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it was passed.” (quoting Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), in *15 THE WRITINGS OF THOMAS JEFFERSON* 439, 449 (Albert E. Bergh ed., 1907))).

32. The notion of translation as a trope derives from THOMAS WILSON, *THE ARTE OF RHETORIQUE* 194 (facsim. reprod. 1962) (1553). Oxford describes a trope as a “procedure,” which captures well the use of the term here. 18 *OXFORD ENGLISH DICTIONARY* 581 (2d ed. 1989). As I discuss it below, translation is a procedure for locating an application of fidelity in a current context. For a discussion of tropological inference, not wholly in sync with my usage, see Scott Brewer, Note, *Figuring the Law: Holism and Tropological Inference in Legal Interpretation*, 97 *YALE L.J.* 823 (1988).

In the sense in which I will describe the term below, the list of “translators,” or at least those sketching a translator’s argument, is quite long. The most famous of these is perhaps Dean Paul Brest who, just over a decade ago, sketched the practice of the “moderate originalist” who aims to “translate” the Constitution into the current context. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204, 205 (1980). Brest has been followed by others. See Michael J. Perry, *The Authority of Text, Tradition and Reason: A Theory of Constitutional Interpretation*, 58 *S. CAL. L. REV.* 551, 599 (1985) (discussing a characterization of originalists as attempting to project the Framers’ intentions through time); H. Jefferson Powell, *Rules for Originalists*, 73 *VA. L. REV.* 659, 672 (1987) (“To converse with the founders, you need a translator.”); Terrance Sandalow, *Constitutional Interpretation*, 79 *MICH. L. REV.* 1033, 1068, 1067-69 (1981) (“Constitutional law thus emerges . . . as a process by which each generation gives formal expression to the

values it holds fundamental in the operation of government.”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 494-95 (1989) (casting judicial interpretation of ambiguous statutes in terms of translating congressional intent to the current factual assumptions, societal norms, and legal environment); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793 (1983) (“[H]istorical understanding requires an imaginative transposition of former world views into the categories of our own.”). The notion, of course, was not born with Brest. Perhaps its most creative pre-Brest appearance was in an extraordinary piece by Felix Cohen, which linked the process of interpretation across contexts to the theory of relativity, to suggest, “The achievements of modern mathematics and physics . . . give ground for hoping that we shall some day achieve a powerful new organon for mutual understanding,—a theory of translation.” Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 272 (1950). Most recently, James Boyd White has offered the most thoughtful discussion of legal interpretation as translation in JAMES B. WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 257-69 (1990) [hereinafter WHITE, *JUSTICE AS TRANSLATION*]. Much earlier, Frances Lieber may have captured the essence of translation in his distinction between “interpretation” and “construction.” See FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 11, 44 (3d ed. 1880). Alfred Hill has also described a practice of constitutional interpretation that may, in result, be quite similar to the translator’s practice. See Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1239, 1240 (1990); see also Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1335-39 (1992) (analogizing the lawyer’s role to that of a translator in that the lawyer bridges the gap between the language used by the parties and that used by the judge). And in political science, Hanna F. Pitkin displays a work of translation as she explicates THE CONCEPT OF REPRESENTATION (1967).

The notion of “translation” has not been solely the product of academics. Justice Jackson most famously described the Court’s task as one of translation in *West Virginia v. Barnette*, 319 U.S. 624, 639-40 (1943). See *infra* note 372. Similarly, Justice Brennan adopted the methodology of translation. See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING LAW AND LITERATURE, *supra* note 31, at 13, 17. Justice Brandeis has also been described as a great translator. See James B. White, *Judicial Criticism*, in INTERPRETING LAW AND LITERATURE, *supra* note 31, at 393, 404 [hereinafter White, *Judicial Criticism*]. Charles Reich, certainly the most ingenious of modern translators, has even found a way of reading Black’s opinions as translations—despite their apparent rejection of anything like “translation.” Charles Reich, *The Living Constitution and the Court’s Role*, in HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 133, 139-49 (1967).

The approach sketched below comes closest in substance to that suggested by Brest, *supra*, and in process to that Judge Posner describes as “imaginative reconstruction.” See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) [hereinafter Posner, *Statutory Interpretation*] (“The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.”). Posner analogizes the judge’s role when interpreting statutes to that of a platoon commander who may not receive the command of his superior officer and who must, therefore, “decide what the commander would have wanted him to do, and act accordingly.” RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 253 (1988) [hereinafter POSNER, *LAW AND LITERATURE*]; see RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 273-76 (1990) [hereinafter POSNER, *PROBLEMS*] (explicating the military analogy and imaginative reconstruction); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189-90, 199-201 (1986) [hereinafter Posner, *Legal Formalism*] (making the military analogy); see also Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 449 (1989) [hereinafter Posner, *Legislation and Its Interpretation*] (advocating a “pragmatic approach” to statutory questions). The approach sketched here is distinct from Posner’s approach in ways that will be apparent below, but the counterfactual imagination required by both is the same.

Finally, within private law, translation most directly patterns the doctrine of *cy pres*. For a dis-

in the suggestion that Levinson's question raises—that there can be fidelity in interpretation even if there is a change in a text's readings—then no practice of language is more familiar with how change can be fidelity than translation.³³ The translator's task is always to determine how to change one text into another text, while preserving the original text's meaning. And by thinking of the problem faced by the originalist as a problem of translation, translation may teach something about what a practice of interpretive fidelity might be.

What follows is a sketch of a practice of fidelity in law, modeled on a practice of translation in language. I use this sketch to examine ten examples of changed readings in law, understood by many as changes of infidelity. Under the model of fidelity as translation, I then ask whether instead they can be understood as translations rather than infidelities.

As applied to these examples, however, the practice of translation will appear quite unconstrained—as a model for activism rather than a guide to restraint. I suggest this too may be misleading. For within the practice of literary translation itself are constraints which, if carried to translation in law, reveal limitations on the practice that are similar to the limitations of traditional judicial restraint. I outline some of these limitations and suggest how they may be understood as consistent, both with a practice of translation and with an ideal of restraint.

My aim in this essay is not to argue for or against fidelity as an interpretive ideal. Instead my tack is internal. I take as given the judiciary's (at least feigned) commitment to fidelity as its goal³⁴ and ask simply what, given what we know about meaning and change, a practice of fidelity would have to be. I conclude that a practice of fidelity would have to be something like the practice of translation sketched below.

cussion of this similarity, see Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 310-11 (1989) (asserting that because rational legislators would favor a *cy pres* interpretational approach, courts that engage in it can rightly claim to be implementing the legislators' design).

This approach is also inportsntly distinct from three others that may appear on first glance to be similar: Dean Guido Calabresi's view as discussed in GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Eskridge's approach as sketched throughout his articles, William N. Eskridge, Jr., & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1982); and Aleinikoff's theory as described in T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988). These three scholars have each developed extraordinarily important conceptions of evolutionary interpretation. But each, while sensitive to the effect of context on preserving meaning, rests on this unstated notion that change means infidelity. Or so I will suggest below.

33. I do not claim that the only usage of the word "translation" is as a practice of fidelity. Oxford discusses a number of meanings that directly contradict such an ideal. See 18 OXFORD ENGLISH DICTIONARY 409-10 (2d ed. 1989).

34. Which, without doing the numbers, I believe is a safer assumption than that undermined by Zeppos's work. See Zeppos, *supra* note 1, at 1099-1101 (arguing empirically that the originalist goal of fidelity to the enacting legislature is not the Supreme Court's methodology).

II. Changed Readings and Fidelity

To understand what a practice of interpretive fidelity would be, we need to say something about the object of our fidelity: meaning. That is the aim of this Part—first to sketch what it is about the nature of meaning that raises the problem of interpretive fidelity, and second to provide a language in which that problem can be addressed. The aim is not to provide a philosophical theory of meaning, though no doubt the way I speak of fidelity relies upon a particular philosophical conception. The aim is instead to speak of meaning in a way that, while artificial (and perhaps weird), helps us focus on the necessary elements of a practice of interpretive fidelity.

Begin with how meaning is made. Words are written in context. If they have meaning, contextualists³⁵ would say, they have meaning because of this context. Their meaning *depends* on this context: The nature of the context affects the text's meaning, and likewise changes in the context can affect the text's meaning. Think of it like this: If meaning is what these words *do*, then it is as if these words pull certain levers, press certain buttons, or (for boomer children) tap certain keys on a keyboard; these levers or buttons or keys are the context, and what this pulling or pressing or tapping does depends upon how these levers or buttons or keys are structured. If they are structured one way, they have one meaning; another

35. The world of these contextualists is of course well populated, reaching literary theorists and philosophers. See, e.g., A.L. Becker, *Biography of a Sentence: A Burmese Proverb*, in *TEXT, PLAY, AND STORY: THE CONSTRUCTION AND RECONSTRUCTION OF SELF AND SOCIETY* 135, 135 (Edward M. Bruner ed., 1984); BEDRICH BAUMANN, *IMAGINATIVE PARTICIPATION* 189 (1975); STANLEY FISH, *DOING WHAT COMES NATURALLY* 2 (1989); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 304 (1985); Eugene A. Nida, *Principles of Translation as Exemplified by Bible Translating*, in *ON TRANSLATION* 11, 14 (Reuben A. Brower ed., Oxford University Press 1966) (1959); Burton Raffel, *Translating Medieval European Poetry*, in *THE CRAFT OF TRANSLATION* 28, 50, 53 (John Biguenet & Rainer Schulte eds., 1989). Legal scholarship, too, is populated by contextualists. See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 526-27 (1989) (Stevens, J.); *United States v. Monia*, 317 U.S. 424, 431-32 (1943) (Frankfurter, J., dissenting); *In re Sinclair*, 870 F.2d 1340, 1342-43 (7th Cir. 1989) (Easterbrook, J.); *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 118 (S.D.N.Y. 1960) (Friendly, J.); *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644-45 (Cal. 1968) (Traynor, C.J.); POSNER, *PROBLEMS*, *supra* note 32, at 101-105, 247-55; WHITE, *JUSTICE AS TRANSLATION*, *supra* note 32, at 81; Brest, *supra* note 32, at 208; Cohen, *supra* note 32, at 241; Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 187 (1965); Sunstein, *supra* note 32, at 416 & n.33, 418; Powell, *supra* note 32, at 674; White, *Judicial Criticism*, *supra* note 32, at 404. Professor Davis describes a methodology of contextual legal criticism that is essential to feminist legal study. See Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635, 1643 (1991) ("But the norms and presuppositions that shape legal outcomes cannot be understood fully in the isolation of a judicial opinion. They are shaped by a cultural context, and they emerge long before judges sit down to compose their opinions.").

way, another meaning. Any author choosing her meaning relies upon how these contexts are structured.

Because meaning depends on context—or more simply, because meaning depends on more than text alone—it should follow that the *same* text written in two different contexts can mean quite *different* things (“Meet me in Cambridge” written in England can mean something very different from “Mect me in Cambridge” written in Massachusetts).³⁶ Likewise, a *different* text written in two different contexts can mean the *same* thing (“Meet me in Cambridge, Mass.” written in England can mean the same thing as “Mect me in Cambridge” written in Massachusetts). Whether the meaning between these contexts changes depends not just on whether the text has remained the same, but also (if contextualism is right) on how the contexts have remained the same.

Context matters, then—at least in writing. But if context matters in writing, it must also matter in reading. Words are read no less than written in context. And just as differences in meaning can follow from differences in the context of writing (*X* means *A* here, but *B* there), so too may differences in meaning follow from differences in the context of reading or, more importantly, from the *gap* between the context of reading and the context of writing (*X* means *A* when read here but *B* when read there).³⁷ The phrase “Branson was a public-school dropout,” written and read in America, would mean that Branson attended and dropped out of a state-funded school. The same text written and read in England would mean that Branson attended and dropped out of a private school. The same text written in America and read in England would either confuse or simply raise questions.³⁸ What its meaning was, what its author intended its meaning to be, or what “those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used”³⁹ depends upon a judgment about the context against which we read

36. *United States v. Philadelphia National Bank*, 374 U.S. 321, 346 (1963), provides a good example of this point. In this case, the Court held that a stock acquisition provision in § 7 of the Clayton Act, though reenacted verbatim from an earlier amendment, “must be deemed expanded in its new context.” See also *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) (“What ‘clearly’ means one thing to a reader unacquainted with the circumstances of the utterance—including social conventions prevailing at the time of the drafting—may mean something else to a reader with a different background.”); cf. Letter from James Madison to H. Lee (June 25, 1824), in 3 LETTERS AND OTHER WRITINGS 441-43 (1884) (published by order of Congress) (discussing how changes in the meaning of words present a problem for the constant interpretation of the Constitution); Letter from James Madison to N.P. Trist (Mar. 2, 1827), in 3 LETTERS AND OTHER WRITINGS, *supra*, at 565-66 (same).

37. BO HANSON, APPLICATION OF RULES IN NEW SITUATIONS: A HERMENEUTICAL STUDY 13 (1977); Sunstein, *supra* note 32, at 493-94.

38. Hence when the *Wall Street Journal* writes “Mr. [Richard] Branson, an English public-school dropout,” only questions are raised. Ken Wells, *High Flier: Adventure Capitalist is Nipping at the Tail of Big British Airways*, WALL ST. J., May 22, 1992, at A1.

39. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18

the text. Obviously, at times this judgment can be critical.

Between the context of writing and the context of reading, then, there may arise an interpretive gap. And it is this gap that suggests the general problem that gives rise to the subject of this essay. When the interpretive gap is small—when the context of writing is very similar to the context of reading—the confusion caused by differences between contexts may also be quite small. Reading can proceed as if context did not matter. Judges can say interpretation begins as always with the text read as if interpretation really did involve just a text that is read.⁴⁰ When contexts remain alike they may also remain invisible.

But when the gap is not small—when the differences between contexts become quite large—then reading cannot proceed as if context did not matter.⁴¹ Or at least it cannot so proceed if contextualism is correct and the aim of the reader is something like interpretive fidelity. For if contextualism is correct, and a change in context is ignored, the reader may rewrite the writer's original meaning.

Consider a recent example that may better make the point.⁴² Former Title 38, Section 3404(c) of the United States Code said that a veteran could pay an attorney no more than ten dollars for services related to a veterans' benefit suit.⁴³ In *Walters v. National Ass'n of Radiation Survivors*,⁴⁴ the Supreme Court upheld this limitation against a challenge based on the Due Process Clause of the Fifth Amendment. Said the Supreme Court, the government had an interest in keeping the benefits proceedings simple and cheap, and this interest would be defeated if attorneys were allowed to muck up the process.⁴⁵ Effectively barring attorneys thus served a rational end, and the statute survived substantive review.

(1899). I do not mean that these formulations are equivalent. I mean only that whatever formulation is selected, the same point applies.

40. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 183 (1988); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990).

41. Referring to statutes, Judge Easterbrook writes: "Legislation speaks across the decades, during which legal institutions and linguistic conventions change. To decode words one must frequently reconstruct the legal and political culture of the drafters." *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989). Cf. Edward S. Corwin, *Judicial Review in Action*, 74 U. PA. L. REV. 639, 658 (1926) ("In the case of the Constitution . . . the question at once arises, whether this is the ordinary meaning of 1789 or the present year of grace? The divergence is, naturally, at times a very broad one.").

42. Note that I offer the case here only for this limited point—that is, to show how meaning may change. I later address the question of how to deal with the changes in meaning that a changing context makes.

43. 38 U.S.C. § 3404(c) (1958), amended by 38 U.S.C. § 5904(d)(1) (1988). In 1988 Congress amended this provision, replacing the ten-dollar attorney fee limit with a provision that allows attorneys to collect a fee not in excess of 20% of any past due benefits awarded under certain circumstances. *Id.* § 5904(d)(1) (Supp. III 1991).

44. 473 U.S. 305 (1985).

45. *Id.* at 311, 321-26.

So far, so good—for a statute written in 1985. But the statutory limit in *Walters* was written not in 1985, but rather derived from a statute written in 1864. When written in 1864, its meaning⁴⁶ was to limit the fees attorneys could charge, not to exclude lawyers from veterans' benefits proceedings altogether.⁴⁷ As Justice Stevens pointed out in dissent, ten 1868 dollars were the equivalent of some five hundred eighty 1985 dollars, and five hundred eighty dollars in 1985 was certainly adequate for the services an attorney would render.⁴⁸ When enacted, the statute was a price ceiling, and like all meaningful ceilings, it was set above the price floor. But because of inflation—one kind of change in context—as read by the Court in 1985 this ceiling had dropped below the price floor. The statute as read became a complete barrier to acquiring lawyers' services, not simply a limitation on reasonable rates. Whatever the meaning of the statute Congress passed, it was not the meaning the Court applied.⁴⁹ A changing context had changed the statute's meaning.

Now what the proper response is to a change such as the one in *Walters* is a distinct question, and one I defer answering until the last Part of this Article. (It is enough now to say that it certainly does not follow that a proper response would have been to read "\$10," say, as "\$580," though indeed, the example should suggest why it might.) The only point of the example is just this: Between 1864 and 1985, the context of this statute had changed in a dramatic way, at least with respect to the relative prices of attorneys. If meaning is the use that words have, then that changing context changed the meaning of these words. By ignoring, as the Court did, the change that the context had effected, the Court read the words as if context did not matter. But here context clearly did inatter.

If context matters to meaning, and if contexts may change, then the reader focused on fidelity needs a way to *neutralize* or *accommodate* the effect that changing context may have on meaning. Fidelity, that is, needs a way of reading that preserves meaning despite changes in context.

This I suggest we have not yet done, or have not yet done well. Too much of legal interpretation proceeds as if all that mattered to meaning was text, and hence, too much legal interpretation proceeds as if all that need be focused upon is fidelity to text. Much fidelity does come from fidelity to text,⁵⁰ but *much* is not *all*. Meaning is made from something in the

46. Or its purpose, or intent, or function or aim or effect or whatever else you want to say.

47. *Id.* at 360-62 (Stevens, J., dissenting).

48. *Id.* at 361 (Stevens, J., dissenting).

49. Another way to understand the oddness of the Court's result is to imagine that in 1980 Congress had changed the currency referred to in 38 U.S.C. § 3404(c) from dollars to schmallers, a new currency set at 60% of the value of the dollar. Clearly the *Walters* Court would then have faced the question of which exchange rate to use—one indexed to 1868 or 1985.

50. Justice Scalia's opinion in *Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1990), is a good

foreground (text) and something in the background (context). To preserve meaning, both grounds must be tracked.

So how then should reading at a (contextual) distance proceed? How can the effect of changing context be neutralized? In what follows, I begin by sketching a way to speak of the question, and I then use this vocabulary to hazard an answer.

How can we describe "context"? I have said that context affects meaning, and that gaps between the context of writing and context of reading make meaning vulnerable. But obviously not every change in context makes meaning vulnerable. Meaning is only selectively vulnerable because some changes in context just do not matter. And if meaning is only selectively vulnerable, then we need a way to speak of those changes that matter to meaning, distinct from those changes that do not.

Others have offered conceptions of context that range from the very broad to the quite narrow.⁵¹ For our purposes "context" will be relatively narrow. "Context" is just that range of facts, or values, or assumptions, or structures, or patterns of thought that are relevant to an author's use of words to convey meaning.⁵² Consider some examples. When a Briton says, "Meet me in Canbridge," meaning Canbridge, England, an understanding about the referent of the word "Canbridge" is relevant to the text's meaning, just as the time she spent in Cambridge may also be relevant to the text's meaning (at least for her). When the diplomat belches at the table after dinner, a particular custom of etiquette is relevant to the text's meaning, just as the heartiness of the belch may be relevant to its meaning. When a legislature sets a ceiling on the price of gasoline, the market price of fuel may be relevant to the text's meaning (that it is below the ceiling), but so too may the effect on a re-election bid be relevant to its meaning. In each case, depending upon how broadly one wants to understand "meaning," the facts mentioned are arguably relevant to understanding the author's use of the words. I will identify these facts as "elements" of the text's context.

So understood, a context is comprised of elements arguably relevant

example. There, the eight-year litigation was shown to be premised upon a simple misreading of the grammar of the statute. *Id.* at 78-85.

51. For Becker's attempt to catalogue contextual elements, see Becker, *supra* note 35, at 136. Gadamer would include within these contexts "prejudgments" or "pre-understandings," terms that connote the perspective of the interpreter much more than "context." Eskridge, *Spinning Legislative Supremacy*, *supra* note 32, at 351 n.121. In what follows, I ignore everything the reader contributes to context, though I confess I am ignoring something significant.

52. Cf. T. Tymoczko, *Translation and Meaning*, in *MEANING AND TRANSLATION* 29, 36 (F. Guenther & M. Guenther-Reutter eds., 1978) ("Obviously, communists and capitalists disagree. What I am arguing is that such disagreement can [affect] semantic analysis. Truth and meaning are not separate topics. The actual economic practices of a society play a crucial role in the determination of a correct assignment of meanings to its economic discourse.").

to the use and interpretation of a text. These elements may change. They change, or differ, whenever the context against which a text is read changes or differs—that is, either when a text is juxtaposed against a foreign context, or when the context from which the text emerges changes or evolves. Elements evolve in the same way that the components of a particular context are understood to evolve. For example: when the relevant contextual element is the understanding of another conversant, that element changes when the conversant or her understanding changes; when the contextual element is a particular custom of etiquette, that element changes when the custom evolves, or the community changes; when the contextual element is a particular cost of production, that element changes when the component costs of that production change. *Why* or *how* such an element changes is for now unimportant—an understanding, for example, may change because it is discovered to be mistaken, or because the preferences that underlie it themselves come to change. It is enough to note that they change, and that this change may inatter to meaning.

So much describes what “contexts” are and that they may change, and that if they do change, meaning may change. But when does meaning change? How can we tell whether a changed context has changed meaning?

Doubtlessly, no formula will reveal when meaning between two contexts has changed, and nothing of what follows is meant to suggest anything to the contrary. The judgment that meaning has changed is interpretive, and its boundaries cannot be set in advance. And, as will become clear when I discuss translation below, what changed meaning *is* may best be understood as a function of the purposes of the text read.

Nonetheless, we need a way to speak of how meaning may change. Even without a formula to divine changed from unchanged meaning generally, we can use what amounts to interpretive heuristics to understand at least some conditions under which we would say that meaning has changed. We can then use that understanding to model a practice in law that would accommodate those changes. That, at least, is my intent here, and in what follows, without purporting to suggest necessary or sufficient conditions for changed meaning generally, I propose at least one way to observe that meanings have been changed by context, to prepare for our exploring ways to accommodate that change.

I have identified context as comprised by those elements arguably relevant to an author’s use of a particular text. Among those elements, some will no doubt be more significant than others. We can say that the most significant elements are not just relevant to an author’s use, but are indeed relied upon by the author when using the text—relied upon in just the sense that *had they been other than they were when the author first used these*

words, then the author would have used words other than she did.⁵³ For example, imagine I say to my friend, "Meet me in Cambridge tomorrow." One could imagine that the price of a ticket to Cambridge is arguably relevant to my request (the higher the price, the more significant the request I am making). One could also imagine that the fact that my friend speaks English is relevant to my request (if she only spoke French, then she would not have understood what I said). Finally one could imagine that the difference between these two arguably relevant conditions could be that the latter is relied upon in a sense that the former is not. It could be that *had my friend not spoken English, I would not have used the words I did*, while had the price of a ticket been greater, I still would have used the words that I did. If this is so, then her speaking English was relied upon in a sense that the price of a ticket was not.

I will call the elements of a context relied upon in the sense just described a *presupposition* of the author's use of a text.⁵⁴ While any element of an original context may change, and thus change something about the significance of the text, when a presupposition changes something more significant happens. When a presupposition changes, we imagine that the author would have accommodated that change when she first used the text, at least had she had the chance. Or alternatively, a presupposition marks out those elements of an interpretive context that, had they been different, would have led to a change in text. So in the example just given, my friend's ability to speak English was a presupposition of my request that she "meet me in Cambridge tomorrow" in just the sense that had she not spoken English, I would have said something different—for example, "Rencontre-moi demain à Cambridge."

So understood, I will use "presupposition" as a shorthand for tracking changed meaning. If between two contexts a presupposition has changed,

53. Compare Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*:

It is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration [impairments of contracts] was introduced into that instrument. . . . It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

17 U.S. (4 Wheat.) 518, 644-45 (1819).

54. Compare Collingwood's description: "Whenever anybody states a thought in words, there are a great many more thoughts in his mind than are expressed in his statement. Among these there are some which stand in a peculiar relation to the thought he has stated: they are not merely its context, they are its presuppositions." R.G. COLLINGWOOD, AN ESSAY ON METAPHYSICS 21 (1940).

then I will say that the same text in the second context has a different meaning. And where meaning has changed in this sense, a problem of interpretive fidelity is raised—that is, the reader must accommodate for this changed presupposition if she is to be faithful to the text's original meaning.

This formulation of changed meaning needs careful qualification, and even as qualified, it is only a partial understanding and, in some ways, quite misleading. First the qualifications: As I suggested before, I do not claim that changed meaning is coextensive with changed presuppositions, at least if "coextensive" means that a changed presupposition is a necessary condition of changed meaning. Again everything depends upon one's conception of meaning,⁵⁵ and depending upon that conception, meaning may change even when a presupposition has not. But everything that follows in this Article can stand while remaining agnostic about a particular conception of meaning, as long as our conception remains broadly contextualist. So long as the conception is contextualist at some extreme the problem that is the focus of this essay will arise, and when it does, the need for something like the response of this Article will be presented as well.

More qualifications: As I have narrowed the notion of presuppositions, my analysis hangs on the idea that a text in an original context would have differed had that context differed in relevant respects. One could well be skeptical about this judgment⁵⁶ (though I think that there are limits even to this skepticism): how could we *know* what would have been done? Must we imagine that the author (a person or a collective) would actually have redrafted the text in a particular or different way? What possible relevance could an author's possible response to a changed presupposition have for us now? These questions are devastating if one conceives that the first virtue of the interpreter is certainty, determinability, or full confidence. One cannot be certain about these judgments; these judgments will not lead to a determinate answer; and whatever answer these judgments yield, neither the answer nor the judgments will inspire the confidence of all who understand them.

But the premise of this exercise is that a different virtue stands first in the interpreter's schedule—the virtue of fidelity to meaning. Fidelity may well impose high costs on certainty and determinism,⁵⁷ and it may

55. And I expect no clear guidance from a chameleon term such as "meaning"; Ogden and Richards collect some 16 definitions of this arch-ambiguity. C.K. OGDEN & I.A. RICHARDS, *THE MEANING OF MEANING* 186-87 (8th ed. 1947); see also E. Allan Farnsworth, "Meaning" in *the Law of Contracts*, 76 *YALE L.J.* 939, 940-42 (1967).

56. See Brest, *supra* note 32, at 221 ("When the interpreter engages in this sort of projection, she is in a fantasy world more of her own than of the adopters' making.").

57. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 163 (1990) ("We must not expect too

well be that those costs dominate any benefit that fidelity may confer. But before we reckon the costs, we must understand what the method of fidelity would be. And to do that, we must put to one side questions of certainty and determinism, at least until the outlines of the fidelitist's method are clear.

A final oddity must be noted. I have suggested that we could imagine a changed text following from a changed presupposition, as if presuppositions could be individuated and separately accounted. No doubt this suggestion is greatly misleading. One presupposition will never change alone, and it will never be clear how to account for any number of presuppositions that could change at a given time. And despite the relative simplicity of the model so far sketched, the whole aim of the ten examples that follow is to reveal something about the complexity that emerges from multiple changes in a text's presuppositions. Again, despite the picture of a method of mechanics, the fidelitist's method will be an art of judgment.

These qualifications made, and some saved for later, we can turn now to the application of these general ideas to interpretation in law. If this idea of contextuality is a general feature of meaning, then what follows will be a particular application to meaning in legal texts, informed by a practice designed precisely to accommodate changes in context—translation.

III. Step One of Fidelity: Contextualists

Turn now from the question of how meaning may change and consider the notion of fidelity—the promise to constrain the range within which meaning may change. Firm within our legal culture is the conviction that if judges have any duty it is a duty of fidelity to texts drafted by others, whether by Congress or the Framers; that applications of those texts, as Levinson suggests, be drawn from the “existing legal material”⁵⁸ however defined, and that the aim must be to preserve that material. That, as Judge Easterbrook describes this, judges carry out decisions they do not make.⁵⁹ That is the ideal; the question is how the ideal is to be realized.

Our discussion of contextualism suggests that if the aim is fidelity, then the initial step must be to read the text in its originating context, finding its meaning there first.⁶⁰ Nothing compels us to select that

much of the search for original understanding in any legal context. The result of the search is never perfection; it is simply the best we can do”).

58. Levinson, *supra* note 13, at 417.

59. See Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984); see also Farber, *supra* note 32, at 281-82 (discussing the extent to which judges are constrained by statutory language and legislative intent).

60. See Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, in INTERPRETING LAW AND LITERATURE, *supra* note 31, at 115, 122 (“A different approach is taken by the contextualist, who does not begin with the text alone. His approach

context—we could, for example, choose to read the text against the current context, or some other context.⁶¹ But if the choice of context affects meaning, then for a fidelitist, there is something deeply troubling about this unhitched way of reading normative texts. If we could pick the context, we could pick the meaning. Reading, as one originalist put it, would become “a picnic to which the framers bring the words and the judges the meaning.”⁶²

Thus among fidelitists, the first step of reading is contextual. But after this first step, practices separate. Indeed, two very different approaches have emerged, one that I will call “one-step fidelity,” and the other “two-step fidelity.”⁶³ Even if both types of fidelitists agree that fidelity begins with a contextualist reading, after this first step the one-step and two-step diverge. For with this first step, the one-step believes the problem of fidelity both begins and ends—that once we find meaning in the originating context (the context of writing) we simply apply that meaning in the context of application (the context of reading) as if any differences between the context of writing and the context of reading just did not matter. Fidelity, the one-step believes, means applying the original text *now* the same as it would have been applied *then*. As Robert Bork puts it: “What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law’s enactment.”⁶⁴

But this approach, the two-step believes, ignores a crucial step, and to see just why, we need to say something more about the nature of the texts the two-step reads.

requires him to begin with the text together with its surroundings. He must build a theory of meaning that links text and context.”). The appeal of such a method may be obvious, though as I describe below, a contextualized reading is neither the only reading, nor is the contextualist the only reader.

61. Aleinikoff discusses the approach of those who would read the statute as if passed today in Aleinikoff, *supra* note 32, at 49-51. Such a way of reading is the literal import of Justice Brennan’s injunction, speaking of the Constitution, that “the ultimate question must be, ‘What do the words of the text mean in our time?’” Brennan, *supra* note 32, at 17. Professors Redish and Drizin, moreover, have explicitly advanced such a way of reading the Constitution, under the theory of the “modern understanding” textualist. Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 20 (1987) (“[I]n most instances the Constitution’s textual limits can reasonably be derived from modern understanding of the specific terminology.”). Finally, this may be the best way to read *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), in which the Court permitted the Department of Health and Human Services to adopt a reading of an abortion-related statute that most likely would not have been permissible in the context of the statute’s enactment. *Rust*, 111 S. Ct. at 1788 (O’Connor, J., dissenting). For a discussion of this decontextualized way of reading, see ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 386-87 (1988).

62. Meese, *supra* note 31, at 38 (quoting Brief for the United States at 24, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (No. 84-495)).

63. As should be clear, these two types of fidelitists are ideal types. No one is a pure one-step or a pure two-step. My aim in describing the world of fidelitists like this is simply heuristic.

64. BORK, *supra* note 57, at 144.

The lawyer reads normative texts. What distinguishes normative texts from other texts is that normative texts are not just *read* in context, but are also *applied* in context. A tort system, for example, may have a statute that says, "Exercise reasonable care." As applied in, say, the context of authorship, a court could conclude that *D*, who drove sixty-five miles per hour down a narrow, curving road and caused an accident, did not exercise reasonable care, and is therefore liable. The text's meaning (the meaning of the words "exercise reasonable care") is derived against the original context; the application's meaning (*D* is liable) is derived against the original context as well. In that original context we can say that the application's meaning must be *consistent with* the text's meaning.

If we speak of the application's meaning, then we must consider the application itself to be a text. And as with any text, its meaning is a function of its context. Here, then, begins the problem faced by the two-step. For while contextualism teaches that we read the original text in the original context, we have no choice but to make an application, not in the original context, but in the current context. If the original and current contexts differ, then the meaning of the same application in the two contexts may differ as well. So again (and obviously), if in the second context, *D* was driving sixty-five miles per hour down the same road that has been straightened and widened to standards of a major artery then our application of the text (*D* is liable) should be different (*D* should not be liable). And if we applied the text in the second context just as we applied it in the first context, the application in the second context would be inconsistent with the meaning of the text in the first.

This potential inconsistency, raised by the different contexts of application, we can call the problem of dual contexts. We can summarize the problem by saying that with any normative text, there are in effect two texts, a normative text and an application whose meaning is to be consistent with that normative text. If the context between the normative text and the application changes, then the meaning of the application may now be inconsistent with the normative text's original meaning.

What distinguishes the two-step fidelitist from the one-step is that the two-step seeks a way to preserve the meaning of the *application* in just the way the one-step agrees we should preserve the meaning of the *text*. The one-step and two-step read a text against its original context so that its meaning in the original context is preserved; the two-step reads the meaning of the application *as applied in the current context* so that the meaning of the application is the same in the original and current context.⁶⁵ Thus, while the one-step applies the text now and here just as it

65. See Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication*, 82 NW. U. L. REV. 226, 230 (1988) ("[J]udges are to apply the rules of the written constitution in the

would have been then and there,⁶⁶ the two-step asks how to apply the text now and here so as to preserve the meaning of an application then and there—how, that is, to make the meaning of the current application equivalent to the meaning of an original application,⁶⁷ or alternatively, how to *translate* the original application into the current context.⁶⁸

To help see the difference between the methods of the one-step and the two-step, consider a recent case interpreting the scope of the Eighth Amendment, *Harmelin v. Michigan*.⁶⁹

The Eighth Amendment proscribes punishments that are cruel and unusual.⁷⁰ Though inspired by the practice of some English courts to apply

sense in which those rules were understood by the people who enacted them." (emphasis in original)); David A.J. Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489, 515 (1985) ("Original understandings of application are just that: the way in which one age, in its context and by its lights, construed these abstract intentions.").

66. See *Carroll v. United States*, 267 U.S. 132, 149 (1925) ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted . . ."); Raoul Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1, 25 (1986) (quoting the Senate Judiciary Committee report on the Fourteenth Amendment to say that "[a] construction which would give the phrase . . . a meaning differ[ent] from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution" (ellipsis in original)); Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1030-31 (1977) ("[S]ince the authors of the Constitution proposed, and the people accepted, a certain document as the supreme law of the land, what was meant at that time should still be legally controlling."); Richards, *supra* note 65, at 505 (stating Raoul Berger's stance that if history shows language would apply to X and not Y "the failure to apply the language to X or its application to Y is a wrong and abusive interpretation of the meaning of the constitutional text").

67. Compare Pollack's discussion of the practice of hermeneutics. See Pollack, *supra* note 18, at 1007-08 (concluding that the nearest we can come to an "original" understanding of the Constitution is by transposing original conceptions into our contemporary conceptual framework); see also Peter Goodrich, *Historical Aspects of Legal Interpretation*, 61 IND. L.J. 331, 347 (1986) (stating that in Gadamer hermeneutics is the doctrine of translation and suggesting that the doctrine "has a peculiar relevance to legal hermeneutics"); Sunstein, *supra* note 32, at 494-95 (discussing the judicial construction of statutes that have been rendered ambiguous by changed contexts).

68. This notion that the meaning remains constant while the applications change, to account for changed contexts, is of course familiar. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1197 (1987) ("[T]he reader, even in assessing arguments about 'plain meaning,' will understand that she is reading a constitutional text, which implies that the language is situated in an interpretive tradition and must be read with at least a tacit awareness of the range of extratextual concerns that constitutional interpretation conventionally takes into account."); Wofford, *supra* note 28, at 521 ("[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 367 (1926))); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 451 (1934) (Sutherland, J., dissenting) ("[M]eaning is changeless [while] application . . . is extensible.").

69. 111 S. Ct. 2680 (1991).

70. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

punishments far outside any statutory sanction,⁷¹ as applied to federal courts the original English proscription would have been empty—not in the sense that the Third Amendment (prohibiting the quartering of troops) has been *rendered* empty by changing contexts⁷²—but in the sense that it *never* would have had a constitutional function, again, as applied to federal courts. Since there is no federal criminal common law,⁷³ the only punishments federal courts could impose were those prescribed by statute. Any attempt to assess a stricter penalty would violate the Due Process Clause of the Fifth Amendment.

For the Eighth Amendment to have had any meaning in the American scheme, then, it must have had a meaning other than its original English meaning. This much even the staunchest of the Supreme Court's originalists believes.⁷⁴ But the question is how much more the amendment proscribes. To answer this, the one-step looks to the original context of its application and asks how it would have been applied there—what, in the original context, was viewed as cruel and unusual. And having completed this step, the one-step then applies the text as it would have been applied *then* to the punishments that are being assessed *now*. Since it was not then viewed as cruel to punish any felon, regardless of the offense, with death, the one-step could conclude *proportionality* was not originally seen as a factor relevant to the determination whether a punishment was cruel or unusual. Since proportionality was not then a factor, it is not now a factor, and hence now it is permissible to punish a felon with life in prison, even when the felony is, say, mere possession of an illegal narcotic.⁷⁵

This was the reading of the Court's most consistent originalist—Justice Antonin Scalia—and it suggests a general methodology that Scalia has not been slow to apply. When, as enacted, the constitutional text resolved a question or, more precisely, when a practice was not proscribed at the time the provision was enacted (here disproportionate punishment) then that ends

71. *Harmelin*, 111 S. Ct. at 2687-91.

72. The Third Amendment reads: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

While the Amendment has been invoked as evidence of constitutional protection of individual privacy from governmental intrusion, *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967), it has in general been "ignored because it is of no current importance whatsoever." Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 641 (1989).

73. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). *But see* Gary D. Rowe, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919 (1992) (asserting that federal common-law criminal jurisdiction did exist until *Hudson & Goodwin*).

74. *Harmelin*, 111 S. Ct. at 2691-92 (Scalia, J.).

75. In *Harmelin*, the Court upheld a Michigan statute that imposed life imprisonment without the possibility of parole for possession of an illegal narcotic (in *Harmelin's* case, about 22 ounces of cocaine). *Id.* at 2681.

the constitutional inquiry from that time forward. Contra Justice Frankfurter's view that "basic rights do not . . . become petrified,"⁷⁶ Justice Scalia believes that they do—at least until democrats intervene.

But note that even this one-step fidelitist is not unflinching, and from his grimaces we may catch a glimpse of the problems with one-step fidelity itself. Consider Justice Scalia's first consideration in print of the scope of the Eighth Amendment's Cruel and Unusual Punishments Clause—not the Court's *Harmelin* decision, but his essay on originalism published two years before.⁷⁷ There Justice Scalia discussed flogging—a punishment common at the time of the Founding (though not at the time of the Fourteenth Amendment)⁷⁸ and hence not a punishment that would have been considered "cruel" or "unusual." Since a punishment must be *both* cruel and unusual, and flogging was then neither, for the originalist flogging would seem to be a clearly constitutional mode of punishment.

But Justice Scalia blinked. Okay, so flogging was a perfectly respectable punishment in 1791. But come on—flogging today? Few federal judges, said Scalia, would stand for it in a society such as ours.⁷⁹ Even he, Scalia seemed to confess, would be "weak" enough to find something problematic in a statute (certainly constitutional in 1791) that, for example, required public flogging for adultery.⁸⁰

Now what would explain this hesitation in originalism's leading jurist? Is the problem here anything more than weakness of the will, a kind of judicial *akrasia*?⁸¹ Is not the flogging example a paradigm of constitutionality, under the one-step fidelitist's conception?

The difficulty the consistent one-step faces is revealed if we return to the discussion of why meaning may change. As I said, a text's meaning may change when context changes. Here the text is an application, and as I have suggested, the meaning of an application is no less a function of context than is the meaning of a text. But the one-step does not focus on the meaning of the application in context, or indeed, on the context of application itself, so any change in the meaning of an application due to a change in the context of application will be wholly missed by the one-step.

76. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (Frankfurter, J.).

77. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

78. Amar and Widawsky rely on scholarship showing that "by the mid-nineteenth century, the lash was considered too 'cruel' for the punishment of 'free men,' but was still commonly used on slaves." Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1375 n.65 (1992); see also *State v. Cannon*, 190 A.2d 514, 516 (Del. 1963) (remarking on Delaware statutes that had limited the number of crimes for which the punishment of whipping could be imposed).

79. Scalia, *supra* note 77, at 861.

80. *Id.* at 864.

81. Or again, weakness of the will. Cf. Robert D. Cooter, *Lapses, Conflict, and Akrasia in Torts and Crimes: Toward an Economic Theory of the Will*, 11 INT'L REV. OF LAW & ECON. 149 (1991).

She will apply the text now as if now were then, with the result that (at times) the meaning of the application now will be different from the meaning of the application then.

More concretely, the reading here is an application of the constitutional proscription against "cruel and unusual punishments." Such a proscription must embrace something about the presuppositions of a culture—namely what that culture views as cruel and unusual. At one time, flogging was not viewed as cruel; for us, now, flogging is "cruel and unusual." If we were to proscribe "cruel and unusual punishments" now we clearly would be proscribing flogging. If the reader ignores this change in presuppositions, then her reading will change the meaning of the text. An application of the Eighth Amendment that permitted flogging would be an application that permitted, rather than proscribed, cruel and unusual punishments.⁸² Or again, reading the amendment in the same way in this different context would be to read into the text a different meaning.

Now of course I don't mean to suggest that all texts are like the Cruel and Unusual Punishments Clause, nor that no other issues matter when addressing the interpreter's virtue of fidelity. Plenty—perhaps most—legal texts are more or less autonomous from the cultural context in just the sense that aspects of the nonlegal context can change without drawing into question those "relatively autonomous" texts. For these texts, little or no accommodation is required to account for changes in the cultural context; for them, "translation" would have little role. And even if fidelity were to require translation, there may be other, independent reasons for limiting or rejecting such accommodation: fidelity, that is, may be trumped by other values.

My only point thus far is to isolate what it is about the one-step's method that leads to the conclusion that she will systematically defeat the ideal of fidelity. Something does: In at least some cases, the one-step originalist, by ignoring changes in context, changes rather than preserves meaning. In these cases, the one-step originalist defeats rather than advances fidelity.

82. Scalia responds to this idea, arguing that as between a reading of "cruel and unusual for the age in question" and "cruel and unusual in 1791" we have no "textual or historical evidence" of which reading the Framers intended. Scalia, *supra* note 77, at 861-62. But besides the point just made—that it would be at a minimum odd for a "*Constitution*" (in the emphatic sense of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)) to permit a cruel and unusual punishment simply because it was not "cruel and unusual" in 1791—there is at least the textual evidence suggested by the failure of the clause to say "*the* cruel and unusual punishments." And if there is textual evidence suggesting one reading over the other, one might wonder whether at a minimum the burden should shift to one who would maintain the contrary.

IV. Step Two of Fidelity: Translation

One-step fidelity—originalism in some of its forms—fails to preserve meaning across interpretive contexts. It fails because, although sensitive to the effects of context upon meaning in the *original* context, it is blind to the effects of context upon the *application* meaning in the *application* context. If context counts in one case, it ought to count in both, or so the two-step argues.

The same insight that helped isolate the blindness of the one-step thus provides a clue to the method of the two-step. For if the failure of the one-step was her neglect of context in application, then the hallmark of the two-step is her attention to context in application. Like the one-step, the two-step understands that changed context can affect meaning; unlike the one-step, the two-step applies this understanding to the meaning of an application. The two-step's aim is to preserve original meaning, not just *in the original context but as applied in the current context*.

What the two-step needs is a method to neutralize the effect of changed context on an application's meaning. As we shall soon see, the method the two-step suggests is a device called *translation*.⁸³ In what follows, I develop a sketch of this practice of translation and suggest its link to a practice of interpretation in law. Once this sketch is complete, I will turn to examples in legal interpretation which I believe manifest this practice that the two-step hopes to model.

A. Step Two: The Link to Translation

In its commonsense meaning, translation is that process by which texts in one language are transformed into texts of another language, by constructing a text in the second language with the same meaning as the text in the first. As one commentator has put it, "To translate from one language into another is to express in one language what is said in the other. This involves the formulation of sentences in one language which have the same meaning as sentences of the other."⁸⁴

How can this commonplace practice answer the two-step's need?

The two-step seeks a process that neutralizes the effect of *changed context* on a text's meaning; translation is a practice that neutralizes the effect of *changed language* on a text's meaning, where language is just one part of context, and changed language is just one kind of change in context.⁸⁵ If translation is a device developed to accommodate contextual

83. See *supra* Part II.

84. Howard Sankey, *Incommensurability, Translation and Understanding*, 41 PHIL. Q. 414, 416-17; see also Goodrich, *supra* note 67, at 348 (stating that hermeneutics provides the rules for rediscovering the intent of the original author of a text).

85. Language change may or may not be the most extreme kind of change. For example, a

changes of one type (language), the two-step suggests, perhaps it can be adapted to contextual changes of other types as well.

The two-step sees in commonsense translation a model for interpretive fidelity generally, just as theorists of translation see in translation a clue to communication generally. As one theorist has put it, one need move very little from commonsense translation to see how it is just a special case "of the process of communication and reception in any act of human speech."⁸⁶ For in every act of reading or understanding, we read what was said against the background of some context, find a meaning, and carry that meaning into a context of our own.⁸⁷ If these interpretive contexts differ, not just in language, but also "by distance in space and time within a single language,"⁸⁸ then, in a sense, translation of some form always occurs. Commonsense translation is just a special case of the process of translation that occurs everywhere.⁸⁹ Or again,

In using language one shapes old words into new contexts . . . pushing old language into the present. All language use is in this sense translation to some degree; and translation from one language to another is only the extreme case.⁹⁰

Every act of communication, the theorist of translation asserts, is an act of translation. And if so, then what distinguishes among communications is simply the extent to which this process of translation is more or less self-conscious, or the extent to which the translators are conscious of the role the background has on meaning in the foreground. So as a matter of description, we could array cases along a dimension that tracks the closeness of the interpretive contexts between the source and target texts (so that at one end stand cases of translation between languages, and at the other cases of communication within a community). And when so arrayed, we would also have aligned cases by the extent to which a process of trans-

conceptual change between English and French today may be less significant than the change between the English spoken in 1540 and the English spoken today.

86. GEORGE STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION* 414 (1975); see also Rainer Schulte & John Biguenet, *Introduction to THEORIES OF TRANSLATION* 1, 7-8 (Rainer Schulte & John Biguenet eds., 1992) (discussing the view that language itself is essentially a form of translation due to the plurality of meanings for all words).

87. See Cohen, *supra* note 32, at 271.

88. Reuben A. Brower, *Introduction to ON TRANSLATION*, *supra* note 35, at 3; see also MACINTYRE, *supra* note 61, at 372 ("[W]hen a tradition is expressing itself within a linguistic community whose language is not the originating language of that tradition, . . . it can only present its relationship to its past through a recognition of the presence of the originating language, and indeed of any intermediate languages, within the language in which it is now spoken and written.").

89. "There are always two worlds, the world of the text and that of the reader, and consequently there is the need for Hermes to 'translate' from one to the other." RICHARD E. PALMER, *HERMENEUTICS* 31 (1969).

90. Becker, *supra* note 35, at 135; see also STEINER, *supra* note 86, at 47 ("[I]nside or between languages, human communication equals translation." (emphasis omitted)).

lation is ordinarily self-conscious or apparent.⁹¹ At one extreme (where languages differ) the process of translation is quite explicit; at the other (where speakers are contemporaries) the process of "translation" is implicit. Between the extremes are cases that are more complex—constitutional interpretation, for example, where the language is nominally the same but the interpretive contexts are radically different. In such cases, the theorist of translation suggests, we could advance fidelity by acting as if this intra-language reading were interlanguage translation, focusing explicitly on the differences in interpretive context and the effect such differences have on meaning.

This understanding suggests that the link between translation and legal interpretation operates on the level of theory.⁹² But it is not just this link in epistemology that draws the legal interpreter to the practice of translation. In addition to theory, the legal theorist is drawn by the translator's practice itself. On the level of practice, because translation offers a relatively well-developed craft and long-developed history, it may guide a method for reading contextually distant legal texts. Two aspects of the translator's practice are crucial to the two-step's practice in particular, and we should flag them here to help us understand something of translation's appeal—first, the translator's power to change text; second, the methodological maturity and apparent neutrality of the translator's craft.

Consider first the power to change text. The translator accommodates one type of contextual change, a change in language. Until this contextual change occurs, the translator is powerless; once this change occurs, the translator is empowered to *change text*. On one level this change is just nominal—at a minimum the translator must change word *X* in language *A* to *Y* in language *B*. Think of the scene from *Fail Safe*,⁹³ in which the President (Henry Fonda) is holed up in a closet-like room with only his translator (Larry Hagman), and they are speaking via the hot line to the Soviet Premier about the nuclear holocaust they are about to unleash. In no situation could the words of the Soviet Premier be more important, and yet, to reach across the gap in interpretive contexts, this low-level bureaucrat, apparently not even thirty, *changes* the Premier's words to convey the Premier's meaning to the President. The Premier says *X*, the translator says the Premier says *Y*, and the fate of the world hangs on there being a relationship of a particular kind between the meaning of *X* in Russian and *Y* in English.

91. Cf. STEINER, *supra* note 86, at 392-93 ("The delineation of 'resistant difficulty,' the endeavour to situate precisely and convey intact the 'otherness' of the original, plays against 'elective affinity,' against immediate grasp and domestication.").

92. Rainer Schulte and John Biguenet make a similar point with respect to interpretation generally. See Schulte & Biguenet, *supra* note 86, at 7-9.

93. FAIL SAFE (Columbia Pictures 1964).

This sanction to change text is precisely the sanction the two-step fidelitist seeks—the power, in effect, to change an original text in light of a changing interpretive context (though, fortunately, the two-step need not often confront issues of nuclear war). The legislature *said X*, and the two-step, respecting the change in interpretive contexts, wants to *say Y*, because only *Y* will mean now what *X* meant then. The two-step seeks a practice that empowers her to change in the name of fidelity, and translation is the model for any such practice.

A second aspect of the translator's craft is also crucial to translation's appeal. At first glance, the practice of translation appears quite unproblematic: it appears to invite little judgment or discretion by the translator, it appears to be objective, and it appears to provide a clear methodology for the radical transformation that it effects. We trust the translator in *Fail Safe*, at least in part, because the process seems to require little judgment from him: the Soviet Premier speaks in Russian, and a translator, apparently automatically and without thought, says the same thing in English to the President. The two-step seeks this appearance of neutrality and objectivity—the appearance of engaging little judgment or discretion as she transforms one application of a legislative text into another. The more the process appears a process of *translation*, the more the two-step hopes to adopt translation's unproblematic nature.

Both elements of the ordinary translator's practice are crucial to the two-step fidelitist. For put both together and they suggest an immense power in the translator that nonetheless, by its nature, appears to be constrained: the power to rewrite the words of others, constrained by a methodology that promises to keep the product the product of its author, not the translator. Fidelity as translation takes on all of the attraction of a pre-Realist judicial mind: powerful, though neutral; flexible, though serving the will of others.

This hope for the peace of the pre-Realist mind, together with the duty of fidelity, invites further exploration of the translator's craft. What can law gain from the lessons of the practice of translation? Or at least, what can fidelity in law gain?

B. Step Two: The Practice of Translation

To understand what can be learned from the practice of translation, we need to look more extensively at that practice itself. In this section I outline some of the questions raised by the practice of translation itself and connect these queries back to what I believe are the same questions in the practice of legal interpretation. Translation and legal interpretation share, I suggest, a common core of interpretive problems, and by exploring this link, even if we weaken preconceptions about the strength of translation, we may strengthen notions of the strength of legal interpretation. What

will emerge from this sketch is first, and unsurprisingly, the immense power that the translator has to recreate a text that preserves meaning; and second, and more surprisingly, that because of a responsibility that this power suggests, the translator act with an ethic that I will call "humility." Both of these elements will be crucial to the two-step's practice in law.

While the history of translation, both as a practice and as a subject of critical reflection, is long, the number of significant ideas is, as one commentator put it, "meagre": "Over some two thousand years of argument and precept, the beliefs and disagreements voiced about the nature of translation have been almost the same. Identical theses, familiar moves and refutations in debate recur, nearly without exception, from Cicero and Quintilian to the present-day."⁹⁴

In part this history describes a conflict over how best to achieve fidelity—what fidelity is and how it is practiced.⁹⁵ And perhaps unsurprisingly, as one considers the vast range of translated texts (poetry, prose, instruction manuals for Christmas toys), no simple or obvious formula for fidelity has emerged.⁹⁶ Among theoretical contenders we can select three general approaches. At times, a practice of strict literalism or word-for-word translation prevailed; at other times, a more liberal practice of faithful but autonomous restatement that captured the meaning of an original work with a text more natural to the target language; and finally, at times a far less restrained practice of imitation, namely creating parallel texts within the idiom of the target text.⁹⁷ Dryden, whose most extensive output as a poet was translation,⁹⁸ describes three similar approaches:

94. STEINER, *supra* note 86, at 238-39. For an exceptional historical overview of translation theories, see Hugo Friedrich, *On the Art of Translation* (Rainer Schulte & John Biguenet trans.), in THEORIES OF TRANSLATION, *supra* note 86, at 11, 11-16.

95. For a general discussion of this history, see STEINER, *supra* note 86, at 236-38.

96. See *id.* at 254-56 ("The true road for the translator lies neither through *metaphrase* nor *imitation*. It is that of *paraphrase* . . ." (emphasis in original)); Bayard Q. Morgan, *A Critical Bibliography of Works on Translation*, in ON TRANSLATION, *supra* note 35, at 271, 275 (listing several 18th-century and 19th-century formulations of definitions, typologies, and problems of translating); Edwin Muir & Willa Muir, *Translating from the German*, in ON TRANSLATION, *supra* note 35, at 93, 94 (contrasting the difficulties posed by translating various types of prose and poetry from one language to another, and from one style to another); Nida, *supra* note 35, at 12-13 (listing four basic principles of "accurate translating"). Walter Benjamin describes the different possibilities of translation depending upon the text in Walter Benjamin, *The Task of the Translator* (Harry Zohn trans.), in THEORIES OF TRANSLATION, *supra* note 86, at 71, 72.

97. See STEINER, *supra* note 86, at 253 (describing the three classes of translation: strict literalism, "trans-lation" by faithful but autonomous restatement, and "imitation, recreation, variation, interpretive parallel," which "covers a large, diffuse area"); see also *id.* at 236-38 (describing the history of translation practices). Rainer Schulte and John Biguenet suggest that more creative methods have dominated during the 19th and 20th centuries with Vladimir Nabokov as the "only major exception," maintaining that "only a literal translation, a word-for-word translation, is a valid one." Schulte & Biguenet, *supra* note 86, at 6.

98. WILLIAM FROST, DRYDEN AND THE ART OF TRANSLATION 1 (1955) (quoting JOHN DRYDEN, *Preface to the Translation of Ovid's Epistles*, in ESSAYS (W.P. Ker ed., 1900)).

metaphrase, or word-for-word, line-for-line renderings; paraphrase, his own method, "where the author is kept in view by the translator, so as never to be lost, but his words are not so strictly followed as his sense; and that too is admitted to be amplified, but not altered"; and imitation, which he describes in terms that would apply as accurately to Pope's Horace or Johnson's Juvenal as to the seventeenth-century examples he cites.⁹⁹

Now the contest over method in translation, like the contest over method in legal interpretation, cannot be resolved in the abstract. And indeed, once we step away from generalities and begin to work with particular instances of translation or, as I will describe them, institutions of translation, we see that the differences in method track differences in the purpose or function of translation more than they track any useful philosophical commitment to one method or another.

Hence our question here will not be what method of translation makes sense in general or for all texts, but rather how best to craft a practice of translation for the normative texts of law.¹⁰⁰ And to understand this question we will consider the practice of translation as the result of two distinct processes (two steps): first, the understanding of the material to be translated (a process of finding *familiarity*), and second, the process under which sameness in meaning is found (a process of finding *equivalence*).

1. *Aspects of Translation: Familiarity.*—The first dimension of a practice of translation touches the conditions under which translation proceeds—the knowledge that one has of the source text and context, the target text and context, and the relationship between the two. These conditions flow, in a sense, directly from the understanding of contextualism already sketched, and would be an aspect of any practice of translation—or at least one would so expect.¹⁰¹ Together they describe a practice of *familiarity*, in which the translator must engage, with both the culture from which the source text derives and the culture to which the target text will apply.¹⁰²

99. *Id.* at 31-32.

100. See HANSON, *supra* note 37, at 33 (maintaining that the interpreter should be able "to explain why the interpretation chosen is the right interpretation"); Emilio Betti, *On a General Theory of Interpretation: The Raison D'Etre of Hermeneutics*, 32 AM. J. JURIS. 245 (1987) (stating that every new science must establish the relevant goals of truth to be attained and must determine the cognitive methods by which such goals are to be pursued).

101. Though there have been important exceptions to this understanding. See STEINER, *supra* note 86, at 356-61 ("Some of the most persuasive translations in the history of the *métier* have been made by writers ignorant of the language from which they were translating . . .").

102. See MACINTYRE, *supra* note 61, at 373 (observing that a translator must realize that linguistic expression is the product of "beliefs, institutions, and practices" at a "particular time and place"); Reuben A. Brower, *Seven Agamemnon's*, in ON TRANSLATION, *supra* note 35, at 173, 173 (depicting the translator of poetry as attempting to make "the poetry of the past into poetry of his particular

Familiarity is found when one understands something like the *character* of each context, as well as of those for whom and to whom the text speaks. As James Boyd White describes, familiarity is found when the translator is “at home” in both contexts,¹⁰³ understanding from where and to where meaning is to be carried.

Now what it means to have a knowledge of the character of a context, or for that inatter, of a person, is not an easy question, and for our purposes is a question best left to one side.¹⁰⁴ Suffice it that one knows the character of a context (a person, a friend, a lover) when one knows something about the interrelationships of ideas or understandings or presuppositions that give texts meaning in that context. One has familiarity when one knows much more than a single text; when one knows how that text interrelates with others near it, and the context within which it sits—when one

present”); David C. Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 136, 138 (1985) (“To understand is to grasp the relevant context that determines the possible parameters of the sentence or expression.”); Powell, *supra* note 32, at 675 (arguing that an interpreter who wants historical illumination on the meaning of a text must place the text in its historical setting); Raffel, *supra* note 35, at 53 (“If then there is any overarching lesson to be learned from my remarks, it is . . . that the literary translator is necessarily engaged with far more than words, far more than techniques, far more than stories or characters or scenes. He is . . . engaged with worldviews and with the passionately held inner convictions of men and women long dead and vanished from the earth. A large part of his task, and perhaps the most interesting . . . , is the mining out and reconstruction of those worldviews, those passionately held and beautifully embodied inner convictions.”).

103. See White, *Judicial Criticism*, *supra* note 32, at 404. As White notes, however, complete familiarity cannot be achieved. *Id.*

104. When we say that someone has a knowledge of another’s character, we can understand that claim as a claim about a certain kind of facility with counterfactuals about that person. I know a person—I understand her character—when I can tell you something about how that person would act or would have acted differently in a hypothetical situation. A friend walking down the street hands a homeless person one dollar. Someone asks me whether I know the character of my friend. I say I do, and one way I manifest that knowledge is to describe how my friend would have acted had the context of that act of generosity differed: it would not have mattered had that person been black instead of white; it would not have mattered had she been a man instead of a woman; it would have mattered if she had been a Rockefeller rather than destitute; it would not have mattered if it was the last dollar my friend had with her, and so on. I have a knowledge of my friend’s character—I understand her—when I can to some degree answer these questions. Virginia Woolf suggests something similar:

And this, Lily thought, taking the green paint on her brush, this making up scenes about them, is what we call “knowing” people, “thinking” of them, “being fond” of them! Not a word of it was true; she had made it up; but it was what she knew them by all the same. She went on tunnelling her way into her picture, into the past.

VIRGINIA WOOLF, *TO THE LIGHTHOUSE* 258 (1927).

Professor Fuller describes the process as applied to statutory interpretation. See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 667 (1958) (recommending the use of hypothetical cases to assist the process of interpreting statutes). For a general discussion of the role of counterfactuals in the law, see Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339 (1992). See also E.D. Hirsch, Jr., *Counterfactuals in Interpretation*, in *INTERPRETING LAW AND LITERATURE*, *supra* note 31, at 55, 55 (arguing that acknowledgement of the need for counterfactuals clarifies some difficult problems of interpretation).

knows, for example, its purpose, the assumptions that underlie it, the scope of its reach, and theories it embraces.¹⁰⁵ And as these aspects of character are found "only in their contextual environment," familiarity requires that the translator "develop modes of thinking that reconnect them with the dynamic fields of words, modes of thinking that will allow them to explore meaning associations within a word and meaning connections created by words in a specific context."¹⁰⁶

2. *Aspects of Equivalence: The Problem.*—Familiarity—that the translator knows from where and to where the text must be carried—thus defines the first step in a practice of translation. The second step is to find *equivalence* in meaning between the two contexts. In this section, I explore this idea of equivalence, and conclude that within it, as it has been understood by theorists of translation, is the potential both for an extraordinary degree of flexibility in finding equivalence in meaning and the beginnings of a constraint on that practice of creativity. Both creativity and its constraint will be essential to the two-step's practice in law.

As an ideal, the notion of equivalence may appear quite unproblematic. As one commentator has put it, the duty is to construct in the target language what the author in the source language would have written, had that author been in the target context,¹⁰⁷ or more succinctly, "[I]f *Virgil* must needs speak English, it were fit he should speak not only as a man of this Nation, but as a man of this age."¹⁰⁸ The translator has "to invent formal effects in his own language that give a sense of those produced by the original in its own."¹⁰⁹ Or, as Gadamer describes, the translator's aim "must never be to copy what is said, but to place himself in the direction of what is said (*i.e.*, in its meaning) in order to carry over what is to be said into the direction of his own saying."¹¹⁰ Or, as Benjamin describes, it is the finding of "that intended effect upon the language into which he is translating which produces in it the echo."¹¹¹

But once one attempts to carry this ideal into effect, one trips over two obvious obstacles. First, there is no sense of *equivalence* in the abstract

105. See generally Tymoczko, *supra* note 52, at 36 ("What a language can mean depends upon the environment of the language users . . .").

106. Schulte & Biguenet, *supra* note 86, at xi.

107. Morgan, *supra* note 96, at 274 (paraphrasing Letter from Orinda to Poliarchus (Letter XIX), in *LETTERS FROM ORINDA TO POLIARCHUS* (Katherine F. Philips ed., 2d ed. 1729)).

108. SIR JOHN DENHAM, *Preface to The Destruction of Troy*, in *THE POETICAL WORKS OF SIR JOHN DENHAM* 160 (Theodore H. Banks ed., 2d ed. 1969) (emphasis in original).

109. Jackson Mathews, *Third Thoughts on Translating Poetry*, in *ON TRANSLATION*, *supra* note 35, at 67, 67.

110. HANS-GEORG GADAMER, *Man and Language*, in *PHILOSOPHICAL HERMENEUTICS* 59, 68 (David E. Linge ed. & trans., 1976).

111. Benjamin, *supra* note 96, at 77.

that could guide any practice of translation in particular; second, even if we could specify a sense of equivalence for a particular practice of translation, translators will confront unavoidable interlinguistic gaps.

Consider the first: Whether a translation produces an equivalent meaning will depend upon the function of the translation itself—crudely what the translation is for. This purpose is defined within an institution of values, values not defined by “translation” itself but by the institution within which translation functions. As these institutions differ, so too will the sense of equivalence differ. The translator must select—or a practice of translation must select—the nature of the equivalence that it will demand before translation can proceed.

The following examples of equivalence in translation may make this ambiguity more clear, by comparing three practices that could be described broadly as practices of translation. The first is an eighteenth-century English practice for translating French and Spanish novels. As described by critic Helen Hughes:

It was their habit to adapt to English taste alien products, to reflect British standards of manners and morals by means of interpolations and alterations, in some cases changing the scene from Paris to London, sometimes substituting for French names typically British cognomens, often in greater or less degree modifying speech and thought and even most critical and characteristic acts to suit the purposes of entertainment plus instruction to which British fiction was so generally dedicated.¹¹²

Now the justification for these extreme practices of translation is one that should be familiar to jurists. Although an extreme form of change, the eighteenth-century translator claimed that these changes were justified, not just by the aspiration to make significance more plain, but instead on moral grounds. Here is just one example:

The Translator flatters himself with the Hope, that those who have a Sense of Virtue, will pardon his having, in the Course of this Work, sometimes check'd the Sallies of his Author's Wit, when it began to grow prophane, and the Lusciousness of an Expression, when tending to corrupt or debilitate the Mind of the young Reader: That they will pardon him, if in any Instance where Profaneness and Lewdness have been united, he has broke the Conjunction; and by presuming to alter a Word or two, has given a different Turn to a Thought, or clothed an Expression with greater Decency.¹¹³

112. Helen S. Hughes, *Notes on Eighteenth-Century Fictional Translations*, MOD. PHILOLOGY, Aug. 1919, at 49, 49.

113. *Id.* at 54 (quoting THE BEAU-PHILOSOPHER; OR THE HISTORY OF THE CHEVALIER DE MAINVILLERS ix-x).

Compare this practice then to a second, as exemplified by Clarence Jordan's translation of the "Good Samaritan" story, included as part of his "Cotton Patch" version of the Bible:

But the Sunday school teacher, trying to save face, asked, "But . . . er . . . but . . . who *is* my neighbor?"

Then Jesus laid into him and said, "A man was going from Atlanta to Albany and some gangsters held him up. When they had robbed him of his wallet and brand-new suit, they beat him up and drove off in his car, leaving him unconscious on the shoulder of the highway.

"Now it just so happened that a white preacher was going down that same highway. When he saw the fellow, he stepped on the gas and went scooting by.

"Shortly afterwards a white Gospel song leader came down the road, and when he saw what had happened, he too stepped on the gas.

"Then a black man traveling that way came upon the fellow, and what he saw moved him to tears. He stopped and bound up his wounds as best he could, drew some water from his water-jug to wipe away the blood and then laid him on the back seat. He drove on into Albany and took him to the hospital and said to the nurse, 'You all take good care of this white man I found on the highway. Here's the only two dollars I got, but you all keep account of what he owes, and if he can't pay it, I'll settle up with you when I make a pay-day.'

"Now if you had been the man held up by the gangsters, which of these three . . . would you consider to have been your neighbor?"

The teacher of the adult Bible class said, "Why, of course, the nig—I mean, er . . . well, er . . . the one who treated me kindly."¹¹⁴

114. CLARENCE JORDAN, *THE COTTON PATCH VERSION OF LUKE AND ACTS 46-47* (1969). By way of contrast, I offer the King James version:

But he, willing to justify himself, said unto Jesus, And who is my neighbour?

And Jesus answering said, A certain *man* went down from Jerusalem to Jericho, and fell among thieves, which stripped him of his raiment, and wounded *him*, and departed, leaving *him* half dead.

And by chance there came down a certain priest that way: and when he saw him, he passed by on the other side.

And likewise a Levite, when he was at the place, came on and looked *on him*, and passed by on the other side.

But a certain Samaritan, as he journeyed, came where he was: and when he saw him, he had compassion *on him*,

And went to *him*, and bound up his wounds, pouring in oil and wine, and set him on his own beast, and brought him to an inn, and took care of him.

And on the morrow when he departed, he took out two pence, and gave *them* to the host, and said unto him, Take care of him; and whatsoever thou spendest more, when I come

Jordan's method too aims to preserve something of the significance of the text translated, at least for its intended audience. He explained his method of translation as follows:

Why a "cotton patch" version? While there have been many excellent translations of the Scriptures into modern English, they still have left us stranded in some faraway land in the long-distant past. We need to have the good news come to us not only in our own tongue but in our own time. We want to be *participants* in the faith, not merely spectators. . . . So the "cotton patch" version is an attempt to translate not only the words but the events. We change the setting from first-century Palestine to twentieth-century America. We ask our brethren of long ago to cross the time-space barrier and talk to us not only in modern English but about modern problems, feelings, frustrations, hopes and assurances.¹¹⁵

Finally there is a practice that—perhaps only by translation—may be called a practice of translation. This approach is suggested by Judge Richard Posner's image of the field commander who adapts orders given by his superior to conditions encountered in the field, even when the adapted orders are apparently inconsistent with the direct orders given.¹¹⁶ In a sense very similar to Jordan's and the practices described by Hughes, the practice of the field commander is a practice of translation, the justification for which resonates with one offered by John Adams when speaking of the discretion of a foreign minister to change Congress's orders. Adams told Congress in 1782:

I see no way of doing my duty to congress, but to interpret the instruction, as we do all general precepts and maxims, by such restrictions and limitations, as reason, necessity, and the nature of things demand. It may sometimes be known to a deputy, that an instruction from his principal was given upon information of mistakeu facts. What is he to do? When he knows, that if the truth had been known, his principal would have given a directly contrary order, is he to follow that which issued upon mistake? When he knows, or has only good reason to believe, that, if his principal were on the spot, and fully informed of the present state of facts, he would give contrary directions, is he bound by such as were given before?

again, I will repay thee.

Which now of these three, thinkest thou, was neighbour unto him that fell among the thieves?

And he said, He that shewed mercy on him.

Luke 10:29-37.

115. CLARENCE JORDAN, *THE COTTON PATCH VERSION OF PAUL'S EPISTLES 7* (1968).

116. POSNER, *PROBLEMS*, *supra* note 32, at 269-73; POSNER, *LAW AND LITERATURE*, *supra* note 32, at 253; *see also supra* note 32.

It cannot be denied that instructions are binding, that it is a duty to obey them, and that a departure from them cannot be justified; but I think it cannot be denied, on the other hand, that, in our peculiar situation, cases may happen, in which it might become our duty to depend upon being excused (or, if you will, pardoned) for presuming, that if congress were upon the spot, they would judge as we do.¹¹⁷

How can we evaluate these three extreme examples of translation? Are all infidelities? Or fidelities? Is a commitment to reject one a commitment to reject all?

I take it most would share Hughes's skepticism about the English practice described; I also take it that many at least see something of the reason or attraction behind Jordan's isomorphic endeavor with the Bible; finally, I imagine most would agree with Adams's pragmatic conception of the necessity of liberal translation by the foreign minister, at least under the conditions of the eighteenth century. All three practices, however, in important respects, are the same practice of translation: each aims to carry as much as possible from the foreign text into the domestic context; each aims to replicate the experience and sense of the source text in its target context; each is designed to assure that any gap between the interpretive contexts not undermine the purpose or function of the original text in its original context. How then could our intuitions about the correctness of these applications differ if the practice in each is, in essence, the same?

One way to understand—and perhaps justify—these differences in intuition is to look to the different institutions within which each translation proceeds. First, the texts are indeed different—the novels critiqued by Hughes are fiction (or as she might say, fiction twice over);¹¹⁸ Jordan's text is a normative text (its aim is to tell not simply a story, but a lesson, and to tell a lesson requires connecting more directly with the receiver than a novel must);¹¹⁹ Adams's texts are orders, normative texts in a more direct sense. Second, the institutions within which each text functions are different—the aims or purpose of those who participate within the institution are different, novels less coercive than foreign ministries. And each translator might suggest it is these differences in the nature or purpose of the text that explain whether one method of equivalence is acceptable over another.

But to start speaking in this way about the different institutions within

117. LEONARD D. WHITE, *THE FEDERALISTS* 130 (1959) (quoting 8 JOHN ADAMS, *WORKS* 11-12 (1856)).

118. Hughes, *supra* note 112, at 225 (stating that the translated 19th-century novels were "garbled abridgements and revisions which often completely metamorphosed in English guise their Spanish and French originals").

119. See *supra* note 115 and accompanying text.

which the translation proceeds is to draw to the fore precisely the point about equivalence that was hinted at at the start. The differences in institutions suggest how "equivalence" is endogenous to a practice of translation, and that the practices themselves determine what will be considered equivalent. Practices will differ, and if practices differ, "equivalence" will differ. Nothing in the bare notion of translation could arbitrate among these different conceptions of equivalent translations; all that can resolve such a dispute is something about the practice of which each is a part.

What these differences suggest is that no fixed, or practice-independent, conception of equivalence is available to guide a practice of translation. Instead, whether self-consciously or not, each practice incorporates norms of equivalence, and it is to these norms that our attention must be turned. Finding equivalence is in part the setting of the norms of equivalence.

Setting norms of equivalence is the first obstacle to a practice of finding equivalence. Consider now the second problem. As is commonplace, languages, whether understood in a limited sense (English, Korean, Russian) or in a less-limited sense (the language of the legal formalists, the language of the critical legal theorists), will not map¹²⁰ one on the other. And indeed, as James Boyd White has most carefully shown, the same language over time does not map on itself.¹²¹ This characteristic of language gives rise to translative gaps: ideas well or simply expressed or constituted in one language will be invisible or distorted or mangled in another. And where these gaps occur, the translator will confront an unavoidable, but important, interpretive choice. In trying to find equivalents between two relatively autonomous systems of meaning, the translator—despite her traditional mechanic guise—must *judge* how the gap will be filled. No clear method will reconstruct meaning in a second or target language, and any such link will require of the translator something more creative—will at times, that is, require her to construct a text in the target language that will carry the same force or significance as the text in the source context, creating something more than a simple replication of words from an original text to replicate its meaning.¹²² As Alasdair

120. See STEINER, *supra* note 86, at 28-29 (pointing out that interpretation necessarily requires translation); Arthur Schopenhauer, *On Language and Words* (Waltraud Bartscht trans.), in THEORIES OF TRANSLATION, *supra* note 86, at 32, 36 ("Not every word in one language has an exact equivalent in another. Thus, not all concepts that are expressed through the words of one language are exactly the same as the ones that are expressed through the words of another."); see also MACINTYRE, *supra* note 61, at 375 ("The characteristic mark of someone who has . . . acquired two first languages is to be able to recognize where and in what respects utterances in the one are untranslatable into the other.").

121. WHITE, JUSTICE AS TRANSLATION, *supra* note 32, at 239-41; White, *Judicial Criticism*, *supra* note 32, at 393; see also STEINER, *supra* note 86, at 28 ("The time-harrier may be more intractable than that of linguistic difference.").

122. See FROST, *supra* note 98, at 17 ("[A] good translation will be both a poem, or piece of

MacIntyre says, speaking even of proper names, translation will require "gloss and explanation as an indispensable part of its work."¹²³

Consider just three examples of translative gaps. Each presents problems the translator has no obvious tool to fill, and each parallels a gap present in the law.

The first gap results from an *underdetermined source*. Here are two examples. To translate "Gorbachev went to New York" into certain dialects of Zapotec, the translator needs to know whether Gorbachev had ever been to New York before.¹²⁴ To translate "I hired a worker" into Russian, the translator must know whether the worker was male or female.¹²⁵ Each is an example of an *underdetermined source*, since in each, the translator needs information from the source context that is not presented by the words of the text. In such cases, the translator must locate in context (or construct) the missing element before the translation can be completed.

The second example is an *apparently overdetermined source*. One example would be the reverse of the example translating "worker" into Russian—translating what appears to the English to be "female worker" in Russian into English. From the perspective of the English speaker, the fact that the sex of the worker was specified suggests that it is significant; but from the perspective of the Russian, because it is necessary to specify the sex, the sex is not significant.¹²⁶ In this situation a translator must decide from the context whether the specificity is needed or not, and supply or drop it accordingly. But of course whether specificity is necessary is again not apparent from the text.

The third example is of a *transformed significance* of some selected term. Professor White notes, for example, "The German 'Wald' is different from the English 'forest,' or the American 'woods,' not only linguistically but physically: the trees are different."¹²⁷ Because of the transformed significance of the term "woods" the translator may have to pick a wholly different term, or construct a wholly different phrase, to capture

literature, in its own right and an interpretation of its original . . ."); Richmond Lattimore, *Practical Notes on Translating Greek Poetry*, in ON TRANSLATION, *supra* note 35, at 48, 48-49 ("[The translator] must use all his talents, his understanding of the language and of the meaning of his original and his own skill in verse, to make a new piece of verse-work which represents, to him, what the original would be, might be, or ought to be, must be, in English.").

123. MACINTYRE, *supra* note 61, at 378.

124. See Nida, *supra* note 35, at 22-23 ("When, as in the Villa Alta dialect of Zapotec, spoken in southern Mexico, it is obligatory to distinguish between actions which occur for the first time with particular participants and those which are repetitious, one must make a decision, despite the lack of data in the source language.").

125. Roman Jakobson, *On Linguistic Aspects of Translation*, in ON TRANSLATION, *supra* note 35, at 232, 236.

126. *Id.*

127. WHITE, JUSTICE AS TRANSLATION, *supra* note 32, at 235.

the sense of the source term in the target context. Rabassa suggests another example, where the source text is significant because it coined the phrase translated, a significance the translated text will certainly lose.¹²⁸

These of course are not the only gaps within translation, nor are they necessarily the most significant. But note how they parallel similar gaps facing the legal interpreter.

The underdetermined source: A statute provides for the shifting of "a reasonable attorney's fee as part of the costs,"¹²⁹ but is written in a context in which statutes did not distinguish between expert witness fees and attorney's fees. When read in a context in which statutes do distinguish attorney's fees from expert witness's fees, the legal interpreter, just like the translator, must decide which of two possible readings—that the shifting permits shifting of expert's fees or that it does not—is more faithful to the meaning of the statute as written.¹³⁰ Whatever the correct result, it is clear the result cannot be derived without considering this change in context and reading back to the original context meaning that may or may not have been there originally.

The apparently overdetermined source: Imagine a response to the following argument: "The Constitution gives Congress the power 'to raise and support Armies' (but only for two years),¹³¹ and the power 'to provide and maintain a Navy' (not so limited),¹³² but it nowhere speaks of an air force. Therefore, the Air Force is unconstitutional."¹³³ Such an argument assumes that the decision to exclude an air force at the Founding was deliberate—certainly if a constitution were written today that specifically mentioned a navy and an army but not an air force, a strong argument would exist that an air force is unconstitutional. But of course, since there was no such thing as an air force in 1789, it is absurd to read the gap as a proscription.¹³⁴

128. See Gregory Rabassa, *No Two Snowflakes Are Alike: Translation as Metaphor*, in *THE CRAFT OF TRANSLATION*, *supra* note 35, at 1, 9 (noting the challenge of translating an author who "like James Joyce," because his "mind was broader than the language, went about inventing neologisms and restructuring the tongue in quite a logical way so as to express thoughts and feelings that lay beyond the norms of its expression").

129. 42 U.S.C.A. § 1988 (West Supp. 1992).

130. See *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1140-46 (1991) (distinguishing other statutes that allow shifting both attorney's and expert witnesses's fees and holding that fees for services rendered by experts in civil rights litigation could not be shifted to the losing party pursuant to § 1988); cf. Monique Michal, Comment, *After West Virginia: The Fate of Expert Witness Fee Shifting in Patent Litigation*, 59 U. CHI. L. REV. 1591 (1992) (asserting that the same language in the fee-shifting statute allows expert witness fees to be awarded in exceptional patent cases).

131. U.S. CONST. art. I, § 8, cl. 12.

132. *Id.* cl. 13.

133. POSNER, *PROBLEMS*, *supra* note 32, at 263.

134. See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1232 (1987) (arguing that an originalist could not provide

As Chief Justice in Massachusetts, Holmes faced a similar problem, interpreting a clause of the Massachusetts Constitution providing that voting was to be taken by "written vote."¹³⁵ The question facing the Massachusetts Supreme Judicial Court was whether this provision proscribed voting by machine. If a law were passed today requiring voting by "written vote" it would reasonably be read to exclude voting machines, since voting machines are now present and are apparently excluded by a clause requiring "written votes." But given that the clause in the Massachusetts Constitution was written in 1780, when there were no voting machines, Holmes reasoned that the provision did not exclude voting machines. Reading the clause restrictively would be to read it anachronistically.¹³⁶

Compare the emending reading described above with a reading of the Eighth Amendment.¹³⁷ The Eighth Amendment explicitly incorporates a proportionality limitation on fines, but not on jail sentences. Therefore, like the conclusion that the Air Force is impermissible, or the conclusion that voting machines are impermissible, one could conclude that a proportionality limitation on jail sentences is impermissible. But of course, in 1791, just as there was no such thing as an "air force," nor such thing as a "voting machine," there was no such thing as prison, or at least anything at all like our current prison practice. As with the English common law, criminal sentences were primarily either death or fines.¹³⁸ Thus, when read in a context in which a third punishment option is presented—prison terms—the interpreter must decide which of two options (reading proportionality to apply to prison terms or not) is more faithful to the original design. Just as with the air force example, the mere fact that proportionality was not explicitly extended to prison terms does not resolve the interpretive matter. As with the apparently overdetermined source above, the translator here must do more to understand the significance of the source text. Recall: If in Russian one had to mention "female worker" then the fact that "female" was mentioned need not be essential to the translation; so too, the fact that air force, or "written," or proportionality for prisons was not mentioned, need not be essential to the translation.

The transformed significance: The Second Amendment protects the

a historical answer to the question of the Air Force's constitutionality).

135. See *In re House Bill No. 1291*, 60 N.E. 129, 131 (Mass. 1901).

136. See POSNER, PROBLEMS, *supra* note 32, at 267 (discussing Holmes's resolution of the case); see also Holmes, *supra* note 39, at 419-20 (stating that in interpreting statutes "the only thing to do is find out what the sovereign wants").

137. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

138. See ADAM J. HIRSH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA 4-5 (1992) (referring to Massachusetts as an exemplary American colony where "[b]y far the most prevalent forms of criminal sanction . . . involved monetary penalties, admonitions, physical battery, or capital punishment").

right to bear "arms" the better to support a "well regulated Militia."¹³⁹ The scope of that "purpose" clause turns on the meaning of "militia." When the amendment was written, "militia" referred to every able-bodied male; as understood today, it refers to a segregated semiprofessional standing army.¹⁴⁰ The interpreter thus faces the gap created by this change in meaning when applying the scope of the purposive clause. If, as David Williams argues, the purpose of the clause was to place an anti-government force in the people,¹⁴¹ then this shifting meaning of "militia" critically undermines the amendment's purpose—to serve the ends of the current "militia" alone would be wholly to defeat the purpose of the original amendment. It may be to understand the meaning of this clause today, the interpreter must read it to serve the purposes of everything but what we understand the "militia" to be.

These examples provide a flavor at least of the kinds of gaps faced by the legal interpreter and the similarity of those gaps with those faced by the translator. How the translator in law fills these interpretive gaps is a question addressed below.

3. *Aspects of Equivalence: Creativity.*—The search for equivalence must confront first the problem of gaps. If equivalence is relative to a practice, and if gaps are inevitable, then two consequences follow for a practice of translation applied to law. First, the practice must be self-conscious about the norms of equivalence that it constructs—about what between the two contexts we aim to preserve. And second, the practice must be self-conscious about the method it embraces—about the inevitable choice that will be unavoidably thrust on the translator.¹⁴² These two consequences together suggest a duty of the translator that I will call the duty of *creativity*.¹⁴³ Acknowledging the choice, both in the specification of

139. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

140. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 553, 574-75 (1991).

141. *Id.* at 553-55, 575; see also Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 214-18 (1983) (explaining that the Framers' understanding of "militia" casts doubt on an interpretation of the Second Amendment that limits it to protecting a state's right to arm organized military units); Levinson, *supra* note 72, at 646-47 (contending that "militia" refers to all of the people, or at least all of those treated as full citizens of the community).

142. See Rabassa, *supra* note 128, at 7 (describing the translator's choice); see also Renato Poggioli, *The Added Artificer*, in ON TRANSLATION, *supra* note 35, at 137, 141 ("[O]ne must reject the notion that the translator's is a voice singing tunes that others have composed for him. . . . [W]hat moves the genuine translator is not a mimetic urge, but an elective affinity . . .").

143. See WHITE, JUSTICE AS TRANSLATION, *supra* note 32, at 257-59 (describing "translation" as "the creation of texts in response to texts, meant to honor the other and assert the self"); Lattimore, *supra* note 122, at 49 ("Right or wrong, I think verse translation is . . . author plus translator."); Brower, *supra* note 88, at 7 ("[T]he translator is a 'creator'. . ."); see also Dudley Fitts, *The Poetic*

equivalence and in the execution of particular translations, the translator has a duty to work creatively with the text translated to preserve as much meaning as context will allow. She must "take liberties" with a text to preserve its meaning, to preserve what the author "wants to say."¹⁴⁴ She may have to rework the text to act creatively to capture in the target language what was meant in the source;¹⁴⁵ she may have to ignore the plain language of the text in one context to convey the same meaning in a second. "The motive is invention, not imitation."¹⁴⁶ She must reach beyond the text at times, transform the text at times, and ignore the text at times. All this is necessary if meaning is to be preserved.¹⁴⁷

Now what is most interesting about the practice of translation when one links it to equivalent problems in the law is that despite this need for creativity—despite the artifice of the criteria, and despite the inevitable gaps in the execution—what follows is not chaos. (Indeed, because gaps are predicated on a judgment that there is no single way to fill them, a translator is insulated from the charge that she went on in a way unfaithful to the original.) Without firm foundations, there are still translations, there are better and worse translations, there are even right and wrong translations, and within any practice, practitioners make such distinctions all the time. Thus, in practice, even if not in theory, translation proceeds without foundation and yet functions to constrain those within its play.

4. *Aspects of Equivalence: Humility.*—The nature of language requires that the translator act with what I have described as creativity. But creativity itself suggests no limit. The license to create-to-preserve quickly becomes indistinguishable from the license simply to create. And indeed, as part of this inevitable debate about the license to create, there has also been a perpetual debate among theorists of translation about the extent to which a translator may make her text over to make her text better.¹⁴⁸

Nuance, in ON TRANSLATION, supra note 35, at 32, 34 ("Largely, then, we must take the translator on trust, granting him a kind of vatic authority."); *cf. LON L. FULLER, THE MORALITY OF LAW 87-88* (rev. ed. 1969) (acknowledging that judges are allowed some interpretive freedom when applying statutes so long as their interpretation is guided by the original problem the law was intended to address).

144. Rabassa, *supra* note 128, at 3; *see also* Fitts, *supra* note 143, at 39 (stating that "alterations and refinements" during the translation of a Spanish poem "are the legitimate, even necessary, prerogatives of the translator").

145. *See* WHITE, *JUSTICE AS TRANSLATION, supra* note 32, at 257-58 (arguing that the point of translation is not to imitate or replicate the original text, but rather to create a new text that "bear[s] a relationship of fidelity" to the originals).

146. Mathews, *supra* note 109, at 67.

147. *See* MACINTYRE, *supra* note 61, at 379-81.

148. As Lattimore presents the question: "[B]ut if you honestly find him less good than his own standard, should you improve him? This is more difficult." Lattimore, *supra* note 122, at 49. The dilemma is, as Croce puts it, between "Faithful ugliness and faithless beauty." Morgan, *supra* note

This was the debate adverted to above, in the discussion of the metaphrasists, the paraphrasists, and the imitators,¹⁴⁹ but the conflict is broader than that. Throughout this conflict runs an ethic cautioning the translator that even though empowered to be creative, she should not “improve” the text translated, or that if she does improve it, she has not translated it.¹⁵⁰ “‘A translator is to be like his author,’ wrote Dr. Johnson in reference to Dryden, ‘it is not his business to excel him.’ Where he does so, the original is subtly injured. And the reader is robbed of a just view.”¹⁵¹

Consider how one commentator describes this resistance to improvement:

The ethos of the translator is a perfect blend of humility and pride. His two greatest virtues . . . are the reverence he feels toward the author or work he translates, and the sense of his own integrity as an interpreter, which is based on both modesty and self-respect. . . . There is no literary worker more respectful of the property of his fellow artist, none less willing to infringe on what takes the legal name of copyright. The translator always gives full credit, sometimes even more credit than is due, to the maker of a blueprint that he could not use without considerably changing and adapting it. All these characteristics indicate that the translator is perhaps the only modern artist who acts and behaves as if he were only an artisan, . . . serving with simple and single-minded devotion a beauty to which he cannot give his name, and yet not unaware of the nobility of his calling, of the dignity of his task.¹⁵²

The translator acts *as if* she were only an artisan—she must act, as I will describe it, with appropriate *humility*. But why? Others certainly reject this attempt to limit the creative improvement the translator may offer the original author. What reason could there be for a translator to carry over the warts as well as the virtues? If the translator must have the power to change the text in any case (as a function of creativity), why not make the text the best text that it can be?¹⁵³

96, at 278 (quoting BENEDETTO CROCE, *AESTHETIC* 68 (Douglas Ainslie trans., 1922)).

149. See *supra* notes 112-19 and accompanying text.

150. Poggioli, *supra* note 142, at 146.

151. STEINER, *supra* note 86, at 402.

152. Poggioli, *supra* note 142, at 145; see also Morgan, *supra* note 96, at 275 (quoting Samuel Johnson's view: “A tr[anslator] is to be like his author: it is not his business to excel him.”); Vladimir Nabokov, *The Art of Translation*, 105 *NEW REPUBLIC* 160, 161 (1941) (“[A translator] must possess the gift of mimicry and be able to act, as it were, the real author's part by impersonating his tricks of demeanor and speech, his ways and his mind, with the utmost degree of verisimilitude.”); STEINER, *supra* note 86, at 302 (“Fidelity is ethical, but also, in the full sense, economic.”).

153. For, of course, the tradition in translation itself has not been monotonic. See John Hollander, *Versions, Interpretations, and Performances*, in *ON TRANSLATION*, *supra* note 35, at 205, 206 (“Every literary document that purports to be a translation . . . makes a kind of contract to be correct, but it is traditional to regard any such contract, if filled to the letter, with a bit of contempt and suspicion.”);

One way to understand this self-imposed ethic on the practice of translation is this: If "equivalence" cannot be defined in the abstract, then neither can the appropriate limits to creativity be established in the abstract. It is wrong, then, to say humility is or is not part of a translator's practice generally, for here again we must distinguish among the different kinds of translation and the different purposes that translation may serve. For some of these practices humility will be a virtue; for others, perhaps not. Consider the following. If one is translating instructions for assembling a child's toy, there is little vice in making the translated text even clearer (better) than the original; here humility would be unnecessary.¹⁵⁴ Conversely, if one is translating an author's prose so that students can evaluate the author's skill, there indeed may be vice in improving the text translated; humility here would be a virtue. Whether humility has a role is in part a function of the purpose of the translation, just as the nature of equivalence is in part a function of the purpose of the translation.

Like equivalence, then, the question is not about humility in general, but about whether humility should have a role in the translation of normative texts in law. But even so limited, the answer may appear unclear. There is of course a strong intuition that if, for example, one is translating a normative text, the translation ought to be the best normative translation possible—that if you have translated the words of a moral person such that she no longer appears moral (because, for example, the notion of morality has shifted between the two contexts, and her words in the old context appear insensitive or offensive in the new) then you have failed to translate her words properly.¹⁵⁵ On such a view, humility should not constrain creativity; the translator should work to make the translation the best possible normative text.¹⁵⁶

But a second intuition may draw this idea—the notion that we should avoid humility and make the text the best it could be—into doubt, and in the remainder of this Part, I describe one possible argument for humility within a practice of translating normative texts. Depending upon the practice, and depending upon the institution within which the practice is a

Morgan, *supra* note 96, at 277 ("I am persuaded that . . . the Translator . . . must re-cast that original into his own Likeness. . . . [T]he live Dog better than the dead Lion.") (quoting Letter from Edward Fitzgerald to J.R. Lowell (Dec. 12, 1878), in 2 LETTERS OF EDWARD FITZGERALD 260, 261 (William Wright ed., 1894)).

154. Unless of course there were tort liability consequences.

155. Think again of the 18th-century translation of French novels into English—if the acts named by the English translator were not "immoral" in France but were immoral in England, the translation would preserve the "morality" of the text on both sides of the Channel. See *supra* note 112 and accompanying text.

156. Obviously, this is intended to suggest something of Dworkin's structure, in particular his belief that the judge should make the law the best it could be. See the discussion of Dworkin *infra* note 350 and accompanying text.

practice, a practice of translation may have what I will call *institutional consequences*. These consequences may suggest reasons to limit the scope of translative creativity just so the practice of translation need not be limited in other ways as well.

By an institutional consequence I mean just this: Think of the power to translate as a delegated power from an author to an agent. As with any delegated power, the delegator faces an agency problem—the problem how to control the actions of the agent. For some institutions, it may be critically important to assure that the agent not exceed the scope of her delegated authority.¹⁵⁷ Were lines of authority clear, the agent could easily steer clear of the boundaries. But where the lines of delegated authority are unclear, the agent may seek ways to assure the delegator of her willingness to stay well within the bounds of the delegated authority—ways, that is, to signal obedience.

It is against this background that we should consider once again the scope of the translator's creativity. For it may be that a more creative translative practice may change the author's willingness to leave questions open to translation, which may, in turn, narrow the scope for translation left the translator by the author. Consider one example that may make this clear.

Imagine that Congress, after a long and political struggle, passes a statute providing funds for family planning clinics. The statute is to be administered by a special agency established by the act itself, with the agency heads appointed by the President. In the decision to pass the statute, basic policy choices were made—at a minimum, whether family planning should be provided at all—and Congress no doubt now wants that policy choice respected. But beyond basic policy, there is a range of detail left unaddressed that someone must resolve. About this detail, Congress has little concern, save that it be resolved by someone, and preferably someone other than Congress.

Now obviously, the extent to which Congress will delegate these decisions of detail depends upon how much Congress trusts the agency to respect those decisions that Congress has not delegated. For it is always within the power of a delegate to act to undermine policies that were not in fact delegated, and the wider the scope of delegated authority, the more easily could the delegate so act. Thus, if Congress could trust the agency to respect Congress's policy choice absolutely, then Congress would be quite willing to delegate all other issues to the agency's discretion. But if Congress did not trust the agency's willingness to uphold Congress's policy choice, then Congress would limit the range of the agency's discretion.

The scope of discretion granted the agency, then, is in part a function

157. Recall the *Fail Safe* example discussed above. See *supra* note 93 and accompanying text.

of the degree to which the delegator trusts the agency to respect the decisions not delegated. It is this endogeneity that raises the institutional consequences for translation. For if the scope of delegation to the agency is in part a function of trust, then an agency would want ways to signal that it is worthy of trust, to increase the scope of authority delegated. To the extent that the delegate can signal, through procedures or practice, that she will respect undelegated decisions—that she will not either directly or indirectly take actions that undermine their significance—she will induce the delegator to increase the scope of delegation. Respectfulness in one area may increase license in another.¹⁵⁸

How does this example connect with the point about humility in translation? If, in the example just given, creativity stands for the scope of delegation and humility stands for the signals that the delegate can send to indicate that she will respect decisions not delegated, then the argument is that it may, for some institutions, make sense for the translator to embrace a practice of humility so as to induce trust in the delegator. For without humility there may be no clear distinctions between those acts of creativity that make a text “better” and those that are instead attempts to undermine a nondelegated choice. As long as there is no such clear distinction, the delegator cannot know which the translator is doing. In such a world, the translator may have reason to adopt a practice that signals institutional respect¹⁵⁹ so as to induce the delegator to accord a wider range of discretion to the translator.

The constraint of humility may then make sense for particular institutions of translation—in particular, those where the translator acts as the agent for an author’s normative intent (the agency translating Congress’s will into action), or those where the translator acts as the agent for a practice generally and not the author in particular (translating foreign prose for comparative purposes; a secretary typing a student’s exam so the professor can read it). Or more generally, humility makes sense where the dimension about which the translator acts with humility is that dimension for which the institution believes the author should be held responsible, or alternatively, that dimension along which the author is being measured, or the author is to speak most genuinely. Again, if we are trying to implement Congress’s choices, then the translator must be humble with respect to those choices; if we are trying to measure the author’s skill, then the

158. For a discussion of the problems of agency, see ROBERT C. CLARK, *CORPORATE LAW* 114-23 (1986).

159. There are of course many examples of this sort of constraint. Consider a lawyer forbidding a typist permission to “improve” the brief, while permitting him to correct errors. To the extent the lawyer trusts the typist to make such a distinction, the scope of the errors she will allow him to correct increases; to the extent she does not trust him to respect the line, the review she insists upon will increase.

translator must be humble with respect to issues of style and craft; if we are trying to reproduce the poet's final words, the translator best presents them as stated. Conversely, if we care not at all about the author's skill or craft, the translator has little reason to act with humility with respect to the author's words or craft—a reporter, for example, recounting the witness's account of the story may have little reason to refrain from improving the grammar of the statements made; a field commander has little reason not to improve the clarity of the instructions to his troops; a manufacturer has little reason not to improve the clarity of the warning label attached to the product it imports.

These considerations suggest the possibility that a practice of translation for legal texts should be conditioned by a constraint of humility. And when I sketch the practice as applied to law below, I will examine again whether in fact a constraint of humility should be imposed. My aim so far is not to conclude that it must be imposed, or even yet that it should. It is only to suggest the reasons that may exist to justify its constraint. These reasons, like the reasons that give shape to equivalence, derive first from the institution within which the translation functions.

V. Two-Step Fidelity: Finding Equivalence

As sketched so far, the practice of translation moves in two stages: first, understanding the contexts between which the translator must move; and second, locating something called an equivalence between the two contexts. In finding equivalence, the practice must first specify the sense in which translations for that practice are equivalent; it must acknowledge the necessity of creativity; and finally, it may have reasons to constrain creativity with an ethic of humility.

Using this sketch, I will outline below a model of judicial¹⁶⁰ translation for interpretive questions in the law. Already, though, the similarity in the interpretive problems should be apparent. Like the interlanguage translation of texts, interpretation in law proceeds first by understanding the sense or meaning of the text at issue in its original context (familiarity); the problem of fidelity is how to preserve that significance in the current context (equivalence). Like interlanguage translation, ordinary notions of interpretation in law reflect the relativity of the concept of equivalence and echo both the requirements of creativity and the limitations of humility. The aim of the subparts that follow is to build on this similarity to develop a model of translation applicable to law.

160. As should become clear, the practice may be quite different for other kinds of institutions. Thus, the constraints on an agency could be different from those on a court. See *supra* note 158 and accompanying text.

A. *Two-Step Fidelity: A Model*

The first step of fidelity is familiarity, both with the context of *authorship* and with the context of *application*. As Jefferson Powell states: "We can understand the original meaning of the Constitution . . . only by 'plunging [ourselves] into the systems of communication in which [the Constitution] acquired meaning.'"¹⁶¹

Familiarity, then, is the common step of both the one- and two-step fidelitists—the practice of the contextualist. As Justice Scalia describes,

Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material. . . . And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices, and loyalties that are not those of our day.¹⁶²

Obviously the needed degree of familiarity is a function of the cultural distance that the translation is to cover. If that distance is great, then so too must the exploration of the originating context be great; if it is small, then so may the exploration be as well.

Disagreement among fidelitists begins in the second stage, the process of finding equivalence. The translator's second step is to reconstruct a text in the application context that replicates the meaning of the application in the original context.¹⁶³ But here emerge the two most obvious differ-

161. Powell, *supra* note 32, at 675 (ellipsis in original) (quoting Joyce Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. (3d ser.) 20, 28 (1986)). Powell suggests to understand the meaning of constitutional clauses the interpreter must "place them in a complex and unfamiliar setting: classical-republican thought about the autonomous and virtuous citizen, the British Country ideology . . . , notions ultimately derived from ancient Greece concerning the inevitably redistributive tendencies of democracies, common law and Whig ideals about the traditional English liberties, and so on." *Id.* (citation omitted).

162. Scalia, *supra* note 77, at 856-57; see also Richards, *supra* note 65, at 519 ("[T]he interpretation of constitutional law . . . must . . . engage in a complex historical reconstruction of our constitutional traditions."). For this reason, Scalia has argued, we must understand, for example, the original Constitution against the backdrop of the common law. See *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1672 (1991) (Scalia, J., dissenting) (reminding that "the Fourth Amendment's prohibition of 'unreasonable seizures' . . . preserves for our citizens the traditional protections against unlawful arrest afforded by the common law.>").

163. Of course, as some have argued, once we know presuppositions have changed, we know too that we can do nothing more with the statute being read. Changing presuppositions entail the death of fidelity, not any possibility of translation. See, e.g., Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672, 731-32 (1987) ("[C]ourts will give expansive purpose-based scope to words or phrases

ences in the translative practices. First: for the interlanguage translator, this reconstructed text is a *different text* in a different language; for the legal translator, the reconstructed text is an *application* of the text in a different context; for the interlanguage translator, the source text is an original text in a foreign language; for the legal translator, the source text is a first (or first hypothetical) application. Therefore, while for the interlanguage translator it is the meaning of the two texts that must be preserved, for the legal translator it is the meaning of the two applications that must be equivalent.

A second difference between interlanguage translation and legal translation is more difficult to accommodate. For the interlanguage translator, there is a relatively clear signal that translation is required when the languages are "different." For the legal translator, differences in language are not so clear, and thus there is no clear way to identify the predicate for an act of translation. Always there will be some change, but perhaps only rarely will change merit translation.

To remedy this, the legal translator needs a way to speak of those changes that remark the need for translation. Based on the previous discussion of how context changes meaning,¹⁶⁴ I will use the device of the changed presupposition to identify those cases where meaning between two contexts has changed. Where we imagine that those who first used the text would have used a different text if some fact of the original context changed, then we will understand that fact as a presupposition, and focus on how that changed presupposition engenders a problem of translation. Again, this is just one way of understanding this notion of a presupposition, and indeed, it is narrower than I believe makes sense. But I use this narrow sense simply to help track how a model of translation will function. Once the pattern is clear, the need for that restriction will fall away.

The method that I outline begins by identifying presuppositions that have changed between the two contexts and constructing an accommodation to account for that change. Often (always?) there will be more than one possible accommodation—more than one way to restructure the application to preserve its meaning. Among these alternatives the translator will have to choose. In outlining this choice below, I make a crucial assumption: Among the possible accommodations, I assume that the translator has a duty to select the change that is most *conservative*. The translator is to find the accommodation that makes the *smallest* possible change in the legal material and still achieves fidelity.

This principle of conservatism is of course not inherent in the notion

so long as the prevailing conditions and assumptions of the time of enactment hold substantially true. After that, however, manifest intent . . . becomes meaningless.”).

164. See *supra* notes 29, 43-49 and accompanying text.

of translation—it derives, if it derives at all, from a legal practice external to translation. Moreover, the meaning of the notion “the smallest possible change” will not be seen fully until we have considered a number of examples. But note that at times the smallest change may require changing the outcome in a particular case (reversing an application) while at other times it may require preserving the outcome in light of the changed circumstances. Given the theoretical commitment to the smallest possible change, there is no way a priori to know which of these options will be preferred, but what is important for our purposes is simply to flag that merely because outcomes are different in some cases and not in others does not yet demonstrate an inconsistency in method. The method aims for minimal change consistent with maximal preservation. What that will be is not clear in the abstract.

Summarizing again: A problem of translation is presented when, between the authoring and application context, there is a change in context of a certain kind. That change I have described as a change in presuppositions, a change which, had it occurred in the authoring context, would have required a change in the text in that context for the meaning in that context to be preserved. If a presupposition changes, then the translator must accommodate that change in the current context if fidelity is to be achieved. In accommodating that change, the translator will strive to make the smallest possible change necessary to preserve as much from the original context as is possible.

B. Two-Step Fidelity: Translations

The ten examples that follow apply this model of translation to the law. I have divided these examples into two categories—those that account for changes in what can be called legal presuppositions and those that account for changes in nonlegal presuppositions. A legal presupposition is simply a presupposition internal to the legal culture; a nonlegal presupposition is one derived from or dependent upon the social or political culture. Of course no clear line divides the two; some may appear to be a bit of both, and whether they fit into one category or the other is not important. The process applied to both is the same, and the division I make here is simply for exegesis.¹⁶⁵

In each example, the hope is not so much to convince about the particular outcome sketched. I in no way intend to endorse the particular outcomes sketched below. My aim instead is to suggest how broad is the class of interpretive problems linked by what I believe is a common inter-

165. Fred Schauer points to a similar distinction. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 416 n.46 (1985).

pretive structure. In each of the following examples, the question is how to accommodate a change in a presupposition, so as to preserve as much as possible from the original context. Some results will appear conservative, some liberal. But it is a strength of the approach, I suggest, that it links both conservative and liberal outcomes alike.

1. *Legal Presuppositions: Overruling.*—The first insight of the two-step is that sometimes changing an application may be an act of fidelity and that sometimes preserving an application may be an act of infidelity. To see how change can be fidelity, and constancy can be infidelity, we need a simple and clear example. The simplest—and most trivial—is the change required to account for the overruling of an earlier case.

Begin with the originalist bias—to apply the text the same way, to make no change—and note how odd this bias is in the case of overruling. No doubt, not all overrulings are alike—not all are explicit, not all rely on a similar justification, not all are what they say they are. In analyzing Supreme Court overrulings, Dean Geof Stone has isolated three classes: first, where subsequent experience shows that the initial decision on its own terms was a mistake; second, where circumstances change such that one can imagine that the same Justices would not have reached the same result; and third, where the Justices simply disagree with the result on its own terms.¹⁶⁶ Of these, Stone rightly concludes the third is most problematic.¹⁶⁷ To this list, Professor Jerold Israel would add a fourth category (perhaps encompassed within Stone's second) of overrulings to account for changes in supporting precedent—where the overruled decision explicitly hangs upon a precedent that has itself subsequently been overruled.¹⁶⁸ This is the class of overruling that I describe.¹⁶⁹

When a court overrules a precedent that itself rested upon a precedent that has been overturned, there is certainly a change in the application of that earlier text or legal principle. But the fidelitist's question is whether that change is a transformation (where the court adds something to existing legal meaning), or simply an accommodation (where the court accounts for changes made elsewhere, by another court or by a legislature). If the outcome in case *X* rested on an overruled precedent *Y*, then precedent *Y* can be understood to be a presupposition of case *X*. If *Y* is a presupposition, then the fidelitist asks what decision would have been reached by the origi-

166. Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 71-72 (1988).

167. *Id.* at 71.

168. See Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 223-26.

169. I put to one side the question whether the precedent overruled was itself overruled on grounds of fidelity.

nal court in case *X* had the precedent overruled *now* been overruled *then*. If the court imagines that the earlier court would have decided *X* differently, then the court acts with fidelity if it *now* decides *X* differently. Given the change in *Y*, a presupposition, overruling *X* is an act of fidelity to *X*.¹⁷⁰

*Elkins v. United States*¹⁷¹ provides an example of this kind of fidelity in overruling.¹⁷² At issue in *Elkins* was the continued validity of the "silver platter doctrine," under which the fruits of searches conducted by state officials that would have been illegal under federal law had they been conducted by federal officials, but that were legal under state law, could nonetheless be used in a federal criminal trial.¹⁷³ *Weeks v. United States*¹⁷⁴ announced the presupposition underlying the silver platter rule—the nonincorporation of the Fourth Amendment. Because the Fourth Amendment did not apply against the states, the search was not illegal, and there was no special reason to exclude its fruits in federal court.¹⁷⁵ The issue became one of choice of law, and no overriding state interest required that state law be displaced.

Thus, the silver platter doctrine rested upon the presupposition of nonincorporation. In *Wolf v. Colorado*,¹⁷⁶ that presupposition changed, for in *Wolf* the Court incorporated the Fourth Amendment against the states, and state officials as well as federal officials were subject to the requirements of the Fourth Amendment.¹⁷⁷ After incorporation, the question facing the fidelitist was whether *changing* the earlier applications of the silver platter doctrine was fidelity, or whether *preserving* the silver platter doctrine was fidelity.

To answer this, we need to think for a second more about what fidelity would be. As Sanford Levinson suggests, one way to understand this notion of fidelity is to ask which act adds the least to the "existing body of accepted legal material."¹⁷⁸ Our discussion so far should suggest at least that change is not always addition—that if presuppositions change, change

170. As Israel points out, one implication of this is that the opinion now deemed incorrect could have been correct when decided. *Id.* at 223.

171. 364 U.S. 206 (1960).

172. A second example is provided by the Court's overruling of *Maryland v. Wirtz*, 392 U.S. 183 (1968), in *National League of Cities v. Usery*, 426 U.S. 833, 854 (1976).

173. *See* *Byars v. United States*, 273 U.S. 28, 33 (1927) ("We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account.").

174. 232 U.S. 383 (1914).

175. *See id.* at 398.

176. 338 U.S. 25 (1949).

177. *Id.* at 27-28. State officials were not, however, subject to the same remedies. The requirements of the exclusionary rule were not incorporated against the states until *Mapp v. Ohio*, 367 U.S. 643 (1961).

178. Levinson, *supra* note 13, at 412.

may be required if one wants to avoid adding to the existing body of legal material. *Elkins* is a plain example of this point.

As the Court held, here at least change was fidelity. Once the Fourth Amendment had been incorporated, the Court held, “[t]he foundation upon which the admissibility of state-seized evidence in a federal trial originally rested—that unreasonable state searches did not violate the Federal Constitution—thus disappeared,”¹⁷⁹ and once gone, the act of overturning the doctrine (as *Elkins* did) was the act that would be faithful to the legal material that then existed. Thus, though abandoning a long line of Supreme Court precedent, *Elkins* was itself, trivially, an act of fidelity in light of the changes in the legal presupposition of *Weeks*. To have held otherwise would, in the words of Levinson, have added legal material to the existing stock; the Court would have been amending by its refusal to change.¹⁸⁰

Conforming the example to the model sketched so far: between the two contexts, the presupposition changed was the incorporation of the Fourth Amendment; this change was a changed presupposition if, had it been changed in the original context, the outcome in that context would have been changed as well. The argument for *Elkins* must be that overruling the silver platter doctrine added least to the legal material in the second context—that fidelity required, in light of the overruling, a change in the application of the earlier doctrine.

I have described this conclusion as trivially true, and in a sense it certainly is. But I have offered it to make plain what are the first critical points for the translator: (1) that change in light of changed presuppositions is the essence of fidelity; and (2) that refusing to change in light of changed circumstances would be infidelity. So however trivial the example, it belies what is at the core of the confusion about fidelity. Sometimes change is essential for fidelity.

One final qualification before we move on. Note that the analysis of fidelity is transitive—that despite the binary nature of the discussion of contexts above (original and current contexts), the analysis proceeds by assuming that every step up to the penultimate was legitimate, and asks whether the change in the current step is legitimate as well. Of course this is a partial analysis of an inquiry of fidelity, for there are many antecedent steps that could be questioned as well. But my point again is not to claim finally that any of the examples offered are correct translations; it is instead simply to sketch how translation proceeds.

179. *Elkins v. United States*, 364 U.S. 206, 213 (1960).

180. Levinson, *supra* note 13, at 411-17.

2. *Legal Presuppositions: The APA.*—The simple point so far is just this: from a change in the foreground, one cannot conclude that there has been a violation of fidelity; if fidelity is fidelity to meaning, one must count the foreground and background before one can reckon changed meaning. And the practice of translation is a practice to focus attention on the salience of the background.

But changes in controlling precedent are a facile example of interpretive fidelity. More interesting are examples that rely on changes more diffuse than a single controlling precedent, where the change that leads to the changed application is a change wholly in the background of the particular issue or text—an example, that is, that reveals a greater significance to contextualism.

Such an example was suggested by Justice Scalia (when he was still Academic Scalia) discussing the Supreme Court's decision in *Vermont Yankee*.¹⁸¹ The article begins with what could only be described as a conservative's relish for the Supreme Court's bridling of an errant D.C. Circuit. For years, Scalia wrote, the D.C. Circuit had fashioned revisions to the settlement enacted by the Administrative Procedure Act (APA),¹⁸² against constant and repeated warnings by the Supreme Court to interpret the statute as written.¹⁸³ Finally, in *Vermont Yankee*, the Supreme Court, in as explicit a rebuke as possible, drew the line, instructing lower courts to uphold the bargain Congress struck in 1946, and not to develop a common law of administrative rulemaking. If the bargain struck by Congress was flawed, then it was Congress's job to correct it. Neither the Supreme Court, nor the D.C. Circuit, was to tinker with that bargain.¹⁸⁴

Scalia, however, went on to ask the question implicit in the approach of fidelity, namely whether the Supreme Court's interpretation of the APA, in its *current* context, best effected the bargain struck by Congress in 1946. For between 1946 and 1978, as Scalia argued, the legal "landscape" underlying the APA had not remained constant: by the mid-1970s, "vast numbers of issues of the sort of which in 1946 would have been resolved in a formal adjudicatory context . . . were being resolved in informal rule making and informal adjudication."¹⁸⁵ In consequence, Scalia wrote,

181. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

182. Pub. L. No. 89-554, 80 Stat. 381 (1946) (codified as amended at 5 U.S.C. §§ 551-706 (1988) and other scattered sections of 5 U.S.C.). Enacted in 1946, the Administrative Procedure Act (APA) is in essence a mini-constitution for the administrative agencies, governing procedures for rule-making and adjudication. See Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 253 (1986).

183. Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 359-75.

184. *Vermont Yankee*, 435 U.S. at 545-47.

185. Scalia, *supra* note 183, at 377.

It may indeed be true, as the Court said (quoting a 1950 case), that the Act “settled ‘long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest.’” But if they have remained at rest since 1946, the landscape has moved beneath them. The APA is of course not remotely a self-contained statute, but assumes an entire underlying jurisprudence and practice—which have in the interim drastically altered, as reflected in the decisions of the Supreme Court itself.¹⁸⁶

When the APA was enacted, the settlement that Congress reached was forged in a context radically different from the one faced by the D.C. Circuit in the mid-1970s. In response to this change in context, the D.C. Circuit had gone beyond the statutory text—imposing additional procedural requirements upon agencies, for example, in an attempt to erect functionally equivalent protections as would have been enjoyed before the context had been so radically changed. As Scalia suggested, “[r]ealistically, [these changes] should be regarded as an affirmation, rather than a repudiation, of the 1946 ‘settlement.’”¹⁸⁷ They were changes “designed to preserve rather than destroy the status quo of procedural treatment.”¹⁸⁸ For in light of the changes in the legal landscape, Scalia argued,

[T]here seems to me little to be said for the Supreme Court’s assumption that its *Vermont Yankee* opinion represents a firm adherence to the “settlement” of the APA. That is so only if one considers the APA’s abstract principles rather than the concrete dispositions it was expected to produce.¹⁸⁹

Recast as an argument of translation, Scalia’s point is quite telling. As applied in its initial context, the APA required strict adherence to the procedural rules inscribed within the statute. Though the statute nowhere makes those rules exclusive, in that context, their exclusivity could be presumed. But that context—or as Scalia called it, that landscape—changed. Most critically, the mix of formal and informal rulemaking changed, and, as Scalia suggested, the very rules that guided procedure were in a sense premised on the type and mix of agency rulemaking.¹⁹⁰ Once that mix changed—once issues that were presumed to be subject to formal rulemaking became issues within the scope of informal rulemaking—a court resolved to be faithful to the initial compromise struck by

186. *Id.* at 375 (quoting *Vermont Yankee*, 435 U.S. at 523).

187. *Id.* at 378.

188. *Id.*

189. *Id.* at 381.

190. *Id.* at 378.

Congress was faced with a problem of translation: how best to accommodate this changed presupposition of the APA.

Arguably, then, the D.C. Circuit's accommodation was an accommodation in light of the change in a presupposition to the initial bargain—that is, a response that aimed at fidelity. And arguably too, the Supreme Court's attempt to avoid nominal change itself effected a real change. If so, then it was the Court that had in effect taken up the legislative pen and rewritten the APA by allowing it to be applied in the same way in a legal context that was radically different. Just as applying the silver platter doctrine in the same way in light of *Wolf* would have been to change then-existing Fourth Amendment law, applying the APA the same way in light of the radical change in formal/informal rulemaking would have been to change the meaning of the APA.

Here again, accommodation was necessary to avoid infidelity. Concededly, the predicates to both changes could be questioned as an original matter—one could question *Wolf* as well as the Supreme Court cases leading to the shift in informal rulemaking—but once both had taken place, the accommodation described by Scalia and taken by the D.C. Circuit can be seen as an accommodation of fidelity.¹⁹¹

3. Legal Presuppositions: Article V.—A third example of translation to account for changes in legal presuppositions addresses a presupposition more completely background than either of the two just sketched. In the

191. At this point, one could raise what amounts to a metaquestion about the response of fidelity. It could be argued that accommodation of the APA is not appropriate because Congress had a clear intent that the Court would not engage in such "tinkering"; that to the extent the meaning of the statute in the transformed context changed, Congress *intended* it to change, or intended it to correct it itself, and it would be an infidelity to that intent for the Court to accommodate nonetheless.

The type of meta-intent described above is the opposite of Aleinikoff's notion of a statute enacted with the meta-intent of a nautical interpretation—that its meaning is to change according to the "mores" of the day. See Aleinikoff, *supra* note 32, at 21 (constructing the nautical model of statutory interpretation, which "understands a statute as an on-going process (a voyage) in which both the shipbuilder and subsequent navigators play a role"). Aleinikoff's approach is distinct from the one sketched here in that he fully rejects any attempt to ground current meaning in an "archeological" past. Statutes are read as if enacted "yesterday," though his approach requires important qualifications.

As a reading of congressional intent, this view of the APA is certainly plausible. Indeed, the Seventh Amendment is a good example of this meta-intent. See Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 296 (1989) (discussing the Framers' awareness of the changing scope of Seventh Amendment protections). Workers' compensation statutes may be a second example. CALABRESI, *supra* note 32, at 40. It may be that many provisions, statutory or constitutional, are constrained by a similar meta-intent. It may even be that there is good reason to presume that all are. But for the purposes of these examples, I will presume there is no such meta-intent shown (how could the plain-meaning interpreter ever discover such an intent?). For before we know whether we should accommodate for the sake of fidelity, we should understand how such accommodation would proceed. After we understand the nature of such accommodation, we can then ask whether such accommodation is permitted, and more fundamentally, intended.

first example, the presupposition was contained within the translated text itself—the earlier and overruled opinion; in the second example, the presupposition was background to the practice constituted by the statute enacted; in this example, the presupposition affects the norms for interpreting a constitution generally.

Ordinarily, when a normative text prescribes a list of methods to alter or amend that text, that list is taken to be exclusive. Ordinary canons of construction such as *expressio unius est exclusio alterius* suggest as much, as might common sense. Such a presumption is not irrebuttable: for example, if the text were a contract, and the text provided for one way to alter the contract, but the practice of that particular industry was always to imply a second way to alter the contract, it would not follow from the mentioning of the one that the other was excluded.¹⁹² Instead, whether the second was a valid method of alteration would depend upon the context within which the text was drawn. So too, even if the background presumption were to disappear, such that in this industry, now, a contract that listed one method for alteration would be presumed to intend that as the exclusive method, an interpretation of a contract drawn in the earlier period would be read to include the alternative method, if fidelity to the parties' intent were the primary objective of the adjudicator's method.

So much is commonplace, and I have no concern here to draw into question these ordinary conventions of interpretation.¹⁹³ But against this background, consider the enumeration in Article V of the means by which the Constitution can be amended. Few would doubt (in this legal culture at least) that this list is the *exclusive* means by which the Constitution can be amended.¹⁹⁴ Those words, read in the current era, would convey to any lawyer a message of exclusivity.

But Akhil Amar argues that was not their meaning when written. Citing numerous examples of state constitutions drafted and construed at the time, as well as the Framers' own understanding of the revolutionary power of the people, Professor Amar argues that an eighteenth-century

192. See *Merk v. Jewel Foods Stores*, 945 F.2d 889, 900-01 (7th Cir. 1991) (Easterbrook, J., dissenting) (arguing that an oral agreement to renegotiate the terms of a labor agreement, as opposed to a common commercial contract, required "flexibility"), *cert. denied*, 112 S. Ct. 1951 (1992).

193. No doubt one could. Compare SUNSTEIN, *supra* note 5, at 111-57 (asserting that judicial interpretation of regulatory statutes is the easiest means to correct "regulatory malfunctions" and challenging "widely accepted propositions about statutory construction" that define courts as agents of the legislature, unable to look beyond the words of the legislature to interpretive norms) with POSNER, PROBLEMS, *supra* note 32, at 279-82, 292-93 (contending that under the substantive canons of construction proposed by Sunstein, the "principles of judicial action are so patently political [that] the gains over ad hoc adjudication are questionable, and we have not the substance but the shadow of formalism and the rule of law").

194. Indeed, Bork goes so far as to describe the exclusivity of Article V procedures as a "necessary implication," at least for judges. BORK, *supra* note 57, at 143.

constitutionalist would not have understood the Constitution to presume to limit the powers of the people to amend or abolish it.¹⁹⁵ Any such list notwithstanding, it was understood that a background right of amendment survived—a right the eighteenth-century constitutionalist would have viewed as inalienable. For the Ratifiers, Article V may have been understood to list some of the means by which the document could be amended, but not all. It may, for example, list the ordinary means by which *ordinary government* can alter the document, but not the *extraordinary* means, by which the people can.¹⁹⁶ As the Supreme Court said of the Eleventh Amendment, behind these words too are “postulates which limit and control” their meaning,¹⁹⁷ and as Amar argues, one such limiting postulate was that normal government could not limit the means of its own alteration.

Let us assume that Amar’s history is correct,¹⁹⁸ and imagine, as Amar does, an amendment ratified by popular vote, in a referendum contrary to the procedures of Article V. How does a fidelitist assess the validity of such an “amendment”? If she read the text of Article V as if it were written today—if she ignored its original context—then she would find within it a presumption of exclusivity, and the “amendment” would be invalid. But if she read the text of Article V according to its original context, she would find within it a presumption of *nonexclusivity*. If following a practice of fidelity, she would select the latter reading first.

But that is just the first step. Next she must ask whether a change in that presumption constitutes a change in a *presupposition* of the original context—whether, had the presumption been then as it is now, the Framers would have explicitly reserved the people’s residual right of amendment.¹⁹⁹ And here the fidelitist must make a judgment of character. Would, she must ask, the Framers and Ratifiers, already skeptical of centralized power, whether in Philadelphia (the capital) or London (the Crown), have given ordinary government the sole ability to initiate the amendment process, by not reserving amendatory power to themselves? Would they have allowed a constitution to be established that presumed to alter the very premise of the people’s right to alter or abolish the Articles

195. Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988).

196. *Id.* at 1054.

197. *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). See *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2581 (1991) (reading the Eleventh Amendment according to the “presupposition of constitutional structure which it confirms”).

198. It is unimportant here to resolve that one way or another.

199. Maybe they did in the Tenth Amendment. What other “powers” could have been reserved to “the people” except this power?

of Confederation without following the path prescribed by the Articles of Confederation?²⁰⁰

If Amar is correct, then it is at least not absurd to conclude that a reading of fidelity must find in the text an implicit reservation of power to the people—a reservation that would not be implied were the same text written today—and enforce that reservation against all who would claim the only means by which the Constitution could be amended is Article V. If a judgment of the *character* of the Founding is that such a power would have been reserved explicitly, fidelity would require that reservation not be defeated merely because our political consciousness has invisibly transformed in two centuries.

Note, however, that the accommodation to preserve the original meaning of Article V is not without limits. Amar raises the idea that a referendum might, under original conceptions, be a legitimate method of amendment.²⁰¹ But the original conception of an “amendment” outside ordinary forms was that of change by a convention,²⁰² and a central aspect of convention was *deliberation* “out of doors.”²⁰³ If the power to dislodge ordinary government was thought to rest only in the extraordinary institution of the convention, then it would not follow that *any* extraordinary means of amendment would be consistent with this conception. In particular, it would not follow that a means which short-circuited the implicit postulate of deliberativeness in the original design—for example, a referendum—would be consistent with the original understanding. Thus Amar may be right in principle, but he may be wrong to suggest that if Article V is not exclusive, a referendum may satisfy its demands.²⁰⁴

Finally, note that the example simply applies the text *now* as it would have applied *then*. So how is this an example of translation, for the result would be the same under the two-step fidelitist’s model as under the one-step model?

The example helps distinguish between those cases in which the response of fidelity to a changed presupposition is simply to apply the text in the same way, and those cases where the response is—as with the APA example above—to apply it differently. The difference in the two cases is not definable in the abstract; it turns instead on a judgment about which change preserves the most. Here, the translator imagines the Framers hold

200. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 532-33 (1969) (“If the Federalists were to accomplish their revolution, they would necessarily have to circumvent the Articles of Confederation whose amendment legally required the unanimous consent of the state legislatures.”).

201. See Amar, *supra* note 195, at I044.

202. See WOOD, *supra* note 202, at 306-43.

203. *Id.* at 319-28.

204. Amar suggests this possibility. See Amar, *supra* note 195, at I064 n.79.

a view about a fundamental if implicit right reserved in the people to alter or abolish their constitution, and contrasts that view with a modern view that no such implicit reservation is essential, and concludes that the text (Article V) would have included an explicit reservation of such right if the presupposition then were as it is now. The text would have included such a reservation, the translator suggests, in part because the alternative—no reservation at all—would have required a radical reconceptualization of the founding generation's political theory and theory of sovereignty.²⁰⁵ That change is the radical change; the change in Article V, the conservative change. The translator opts for the conservative move every time.

With the APA, the story is similar even if the conclusion is somewhat different. Again, the translator treats as exogenous the presupposition reflecting the values served by the particular procedural protections provided, given the existing mix of formal and informal rulemaking. When that mix changed, the translator imagines the framers of the APA adopting a different mix of procedural protections, in part because the alternative—giving up the values manifested by the protections actually given—is a far more radical change than is the change of increasing the protections. The result is an application in the current context that increases the procedural protections—a different application. Again, the difference turns on which accommodation is the smallest change—it would save more, the claim must be, to make this change than to allow the background change to proceed unchecked.

4. Legal Presuppositions: States' Rights.—Isomorphic with the APA example given above is the constitutional battle over a concept called “states’ rights.” To see the link, we must first place the debate in context.

Article I, section 8 of the Constitution provides in part: “The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁰⁶

The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²⁰⁷

It follows that the “power” to regulate commerce “among the several States” rests with the federal government. But what is the scope of that power? And is the Tenth Amendment relevant to determining its scope?

On two readings of the Tenth Amendment, it is; on a third, it is not. Take the third reading first. According to what we can call a residualist

205. The absence of such a reservation would have made the Founding illegal as well. *See id.* at 1047-49 (discussing the illegality of the Framers’ actions in light of the Articles of Confederation and then-existing state conditions).

206. U.S. CONST. art. I, § 8, cl. 3.

207. *Id.* amend. X.

reading, the Tenth Amendment states a tautology: we simply ask first whether something is within a federal power. If it is, then the federal power dominates. According to this reading, one need look no further than Article I, section 8²⁰⁸ to resolve any federal power question.

This form of residualism flourished when the Court had a clear conception of the scope of the commerce power—that is, after the New Deal, when its conception was that the commerce power was essentially unlimited.²⁰⁹ It is similar to another form of residualism that flourished before the New Deal,²¹⁰ when the scope of the commerce power was unclear. Under this approach (the first of my three readings), the Court looked at whether it was clear at the Founding that the particular power at issue was a power that the states had exercised. If it was, then it could not be exercised by the federal government, since of course, it must have been a power “reserved to the States.”²¹¹

Both kinds of residualism are similar in form; both embrace a similar methodology. They are similar in form because each solves the power question statically, as if the Constitution stated rules of accounting, by looking to the half of that accounting relation that the Court feels most confident about and then solving for the other half. They embrace a similar methodology because each ignores the significance of a changed interpretive context: each proceeds as if the meaning of either clause is independent of the context within which it is read, as if we can be faithful to the original regulatory balance struck by the Framers without actually considering how that balance has changed. Thus, under the first kind of residualism (does this affect commerce?), the Tenth Amendment is not relevant to the solution; under the second kind of residualism (is this a traditional function of the state?) the Tenth Amendment is dispositive.

Distinct from both forms of residualism is a method very much like the method of the translator, a view best articulated by Justice O'Connor in her dissent in *Garcia v. San Antonio Metropolitan Transit Authority*²¹² (the second of my three readings). In *Garcia* the Court overruled its decision in *National League of Cities v. Usery*²¹³ in which the Court had held nine years earlier that an otherwise permissible exercise of federal power was limited by the Tenth Amendment if it regulated “states

208. Or any other federal power.

209. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

210. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936) (“[T]he national powers of legislation were not aggregated but enumerated—with the result that what was not embraced by the enumeration remained vested in the states without change or impairment.”).

211. *Id.*

212. 469 U.S. 529, 580 (1985) (O'Connor, J., dissenting).

213. 426 U.S. 833 (1976).

qua states."²¹⁴ *National League* was one attempt to revive a nonresidualist reading of the Tenth Amendment; Justice O'Connor's dissent in *Garcia* is a better statement of the argument.

What is striking about *Garcia* is that both the opinions of Justice Blackmun for the Court and Justice O'Connor in dissent structure the question as one of translation. As Justice Blackmun conceded, citing *Monaco v. Mississippi*,²¹⁵ "[i]n order to be faithful to the underlying federal premises of the Constitution, courts must look for the 'postulates which limit and control'" its meaning.²¹⁶ The search for "postulates which limit and control" is the search of the translator. As Justice O'Connor explained, one such postulate was that there would be a domain of regulation left to the state because not granted to the federal government under the original and limited understanding of the commerce power—a domain of state autonomy within which the state would be free to determine itself.²¹⁷ This autonomy, O'Connor suggested, was a presupposition of the original design, in just the sense that had the commerce power been understood then as it is now, the amendment would have more clearly limited the scope of federal power over commerce, in at least some areas. Thus, the commerce power may have expanded, but O'Connor argued, the Court has a duty to fashion doctrines in the current context to protect this domain of state autonomy, and thereby protect an essential element of the original constitutional deal. As she said:

Incidental to this expansion of the commerce power, Congress has been given an ability it lacked prior to the emergence of an integrated national economy. Because virtually every *state* activity, like virtually every activity of a private individual, arguably "affects" interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers.

. . . .

It is not enough that the "end be legitimate"; the means to that end chosen by Congress must not contravene the spirit of the Constitution. Thus many of this Court's decisions acknowledge that the means by which national power is exercised must take into account concerns for state autonomy. . . . [S]tate autonomy is a relevant factor in assessing the means by which Congress exercises its powers.

214. *Id.* at 847.

215. 292 U.S. 313 (1934).

216. *Garcia*, 469 U.S. at 547.

217. *Id.* at 580-81 (O'Connor, J., dissenting). Justice O'Connor made this point most forcefully in *FERC v. Mississippi*, 456 U.S. 742, 775-91 (1982) (O'Connor, J., concurring and dissenting) (suggesting that state autonomy should be weighed as a factor in the balance when interpreting the means by which Congress can exercise its authority on the states as states).

This principle requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power.²¹⁸

Thus, just as with the APA above, the landscape of federal power has been transformed by a more expansive understanding of the commerce power.²¹⁹ In light of that change, the Court must adopt a different reading of the Tenth Amendment, she argues, so as to preserve something of the meaning of state autonomy from the original design. If the Court does not “take into account concerns for state autonomy”²²⁰ something crucial from the original design will be lost. Fidelity to that design, O’Connor suggests, requires accommodation.

The Court, through Justice Blackmun, does not deny the shift in the power of the federal government to regulate interstate commerce. And nowhere does the Court deny that Justice O’Connor’s corrective would be an attempt at accommodating to that shift. The Court’s unwillingness to accommodate is instead based on simple pragmatics—the Court should do nothing to restrike the balance, Blackmun argues, because anything it would do would require it to make judgments that are either beyond its capacity or inherently political.²²¹ The Court had tried before, Blackmun insists, in other similar contexts (for example, when drawing the governmental/proprietary distinction in the intergovernmental tax immunity cases),²²² and always the Court had to confront the embarrassment that such distinctions “inevitably invite[d] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.”²²³ Instead the Court leaves to the political branches the defense of states’ rights.

More recently, however, Justice O’Connor proffered a new technique for checking this invasion of state autonomy, one perhaps less difficult for judges to enforce. In *Gregory v. Ashcroft*,²²⁴ the Court, again acknowledging the dual structure of the Constitution’s original design, and again confessing its inability to police the border between permissible and impermissible regulation of state functions, reaffirmed that that border is best policed by Congress.²²⁵ Nonetheless, said the Court, it will not

218. *Garcia*, 469 U.S. at 584-87 (O’Connor, J., dissenting).

219. Whether that expansion was proper is a separate question:

220. *Garcia*, 469 U.S. at 585 (O’Connor, J., dissenting).

221. *Id.* at 545-47. Compare the discussion of the limitations of capacity and structure *infra* note 328 and accompanying text.

222. *Garcia*, 469 U.S. at 545 (citing *South Carolina v. United States*, 199 U.S. 437 (1905); *Ohio v. Helvering*, 292 U.S. 360 (1934)).

223. *Id.* at 546.

224. 111 S. Ct. 2395 (1991) (O’Connor, J.).

225. *Id.* at 2400.

presume that Congress crosses that border carelessly.²²⁶ Therefore, where a statute only ambiguously indicates Congress's intent to regulate traditional state functions, the Court will presume Congress intended no such regulation. Instead, if Congress intends to regulate state functions, the Court will presume that Congress articulates that choice clearly. Only where Congress speaks clearly will the Court hear it to regulate traditional state functions.²²⁷

The clear statement rule, then, functions as a device to accommodate Tenth Amendment interests in light of expanded federal power and in light of a growing judicial timidity to make what are considered political judgments. It is a reading of the amendment in the current context that is no doubt different from the reading in its original context, but that arguably better achieves its aim in this context given contextual changes. Like the D.C. Circuit's administrative common law, the clear statement rule acts to buttress original values in a transformed legal context. Like the D.C. Circuit's change, arguably this too is a change of fidelity.

5. *Legal Presuppositions: The Exclusionary Rule* (Mapp).—One final example will fill out the catalog of translations to account for changes in legal presuppositions. This is the example of the exclusionary rule.²²⁸ Under current Supreme Court doctrine, (some) violations of the Fourth Amendment entitle the criminal defendant to the exclusion from her trial of any evidence which is the fruit of that violation.²²⁹ Under the Fourth Amendment as originally understood, no such exclusion was implied. Indeed, no remedy for Fourth Amendment violations is mentioned at all. Thus, the question for the fidelitist is whether creating this remedy today can be understood as an act of fidelity.²³⁰

To say that the original Fourth Amendment specified no constitutional remedy for its violation is not to say that there indeed was no remedy for a Fourth Amendment violation. When originally enacted there was at least one remedy for what we would think of as violations of the Fourth Amendment: the common law of trespass. And we might presume that when enacted, the common law of trespass was viewed as sufficient to guard

226. *Id.* at 2405-06.

227. *Id.*

228. For the suggestion of a similar translation, see Albert W. Alschuler, *Fourth Amendment Remedies: The Current Understanding*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 197, 197-98 (Eugene W. Hickok, Jr. ed., 1991) [hereinafter *THE BILL OF RIGHTS*].

229. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Davis v. Mississippi*, 394 U.S. 721 (1969).

230. The question whether the exclusionary rule was really a new rule at all is not itself settled. See Donald E. Wilkes, Jr., *A Critique of Two Arguments Against the Exclusionary Rule: The Historical Error and the Comparative Myth*, 32 WASH. & LEE L. REV. 881 (1975). See generally Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983). In what follows, I ignore this "principled" basis.

against government intrusion into private spheres. But to see how the remedy was sufficient, we must rehearse briefly some history of the common law.²³¹

As many have agreed, the aim of the Fourth Amendment as originally conceived was not to define the scope of privacy that the Constitution guaranteed to the individual, but rather to limit the kinds of *immunity* the federal government could grant federal officials against state common-law causes of action arising out of their official acts of search and seizure.²³² The warrant was one such immunity: with it a state actor was protected from civil actions for damages arising out of any trespass committed in the course of his official duties.²³³ If the constable had a warrant, he was privileged from suit; without a warrant, he was strictly liable for trespass unless he actually found contraband in the course of his search or had *ex ante* a good reason for the search—that is, he was liable unless he could convince a jury that the search was reasonable.²³⁴ The aim of the Fourth Amendment's Warrant Clause²³⁵ was to limit the grounds upon which a warrant could be issued—limit them, that is, to probable cause, and thereby to make unavailable the general warrant.

Thus, as many originalists have argued, in its present incarnation the Fourth Amendment has little apparent relation to this original aim.²³⁶ But to understand whether the appearance is merely appearance, we must look more closely at the original presuppositions of the amendment.

Essential to the Fourth Amendment was a structural incentive, one built in by the common law. As originally conceived, the police (or their equivalents) had a very strong personal incentive to secure a warrant before searches or seizures, for without a warrant, they were liable personally for

231. For further discussion of this point, see Justice Scalia's concurring opinion in *California v. Acevedo*, 111 S. Ct. 1982, 1992-94 (1991) (Scalia, J., concurring) (sketching the history of Supreme Court holdings on Fourth Amendment remedies, beginning with the common law of trespass).

232. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 17 (1975); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 21-50 (1969); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1178-80 (1991) [hereinafter Amar, *The Bill of Rights*]; Akhil R. Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1506-07 (1987) [hereinafter Amar, *Of Sovereignty*]. See Bradford P. Wilson, *The Fourth Amendment as More than a Form of Words: The View from the Founding*, in *THE BILL OF RIGHTS*, *supra* note 228, at 151, 156-60.

233. See *Acevedo*, 111 S. Ct. at 1992 (Scalia, J., concurring) (citing *Bell v. Clapp*, 10 Johns. 263 (N.Y. 1813); 4 WILLIAM BLACKSTONE, *COMMENTARIES* *288 (1769)).

234. See *id.* (citing *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763); Amar, *The Bill of Rights*, *supra* note 232, at 1178-80).

235. U.S. CONST. amend. IV (“[N]o Warrants shall issue, but upon probable cause . . .”).

236. The purpose was apparently different in the context of arrests. While warrants were not required for felony arrests (at least whenever there were reasonable grounds to believe both that a felony had been committed and that the arrestee had committed it) they were generally required for misdemeanor arrests not committed in the officer's presence. See *United States v. Watson*, 423 U.S. 411, 418, 422 n.11 (1976).

their trespass.²³⁷ And of course essential to this incentive was a common-law system of remedies that actually made it true that the police had an incentive—that is, a common-law system through which the wronged citizen could get damages for the wrongful search or seizure by the state official. As Amar notes, “The structure of these cases is illustrative of the myriad ways in which constitutional ‘public law’ protections are intricately bound up with—indeed, presuppose—a general backdrop of ‘private law’ protections”²³⁸

Now again, as originally structured the Fourth Amendment applied to the federal government, not the states, but the common-law remedy of trespass was a state remedy. Thus, as originally structured, there was no opportunity for the government restricted (the federal government) to undermine the effect of this restraint (a limitation on possible immunity from trespass actions) by redefining the trespass action itself to exclude governmental officials: the federal government, that is, had no power to define state trespass actions, and hence had no ability to interfere with the protection trespass actions provided. Its power was restricted by a common-law protection, which it had no power to limit, either by granting itself immunity or by redefining the underlying common-law right.

But obviously, once incorporation occurred,²³⁹ this critical division of power was undermined. For now the government restricted (the state), though limited in the *immunity* that it can erect against plaintiffs, has the power to redefine the cause of action of trespass itself. Unlike the federal government before incorporation, the state government can change the constitutional protection itself in spite of incorporation, not by expanding the defenses to a trespass action (by expanding immunity), but by changing the common-law action of trespass itself. After incorporation it is possible that the state could escape the restrictions of the incorporated amendment by a formalistic trick: rather than authorizing general warrants, or granting an immunity from prosecution to its own police, the state could simply redefine the right against trespass to extend only against private actors—trespass by state actors would be defined not to be “trespass.” The state could escape the Fourth Amendment limitations on the immunity it can grant its officials from violations of individual rights simply by redefining those rights not to extend to state officials.²⁴⁰

237. See *supra* notes 233-34 and accompanying text.

238. Amar, *Of Sovereignty*, *supra* note 232, at 1507.

239. See *Wolf v. Colorado*, 338 U.S. 25 (1949).

240. Though perhaps the first clause of the Fourth Amendment entrenches the state's original definition of trespass. See *Wolf*, 338 U.S. at 28 (“Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.”).

Of course so much is simply a *reductio ad absurdum* on the premise of the exercise—for as incorporated, it would make little sense to understand the amendment as leaving unreviewed the scope of power that a state has to redefine its trespass protections. If the existing common-law system was integral to the proscription of the Fourth Amendment as applied to the federal government, and an essential presupposition of that scheme was the inability of the federal government to control the state's definition of trespass, then it should follow that as incorporated against the states, a state could not, by redefining the common-law right, eliminate all liability of state actors for illegal searches and seizures.²⁴¹ Just as the original Fourth Amendment had a structural protection in the division of federal and state power, such that the federal could not control the state grant of rights,²⁴² so too must the incorporated Fourth Amendment include a limitation on the state's power to control the scope of the rights protected. Were a state to grant itself immunity by redefining the right, then a central legal presupposition of the original amendment would have been undermined and its essential structural incentive eliminated. A translator aiming to preserve the meaning of the original structure would have to find other means to preserve the common-law remedy—an alternative remedy, for example—so that the structural incentives originally settled by that amendment could be preserved.

Return now to reality. In this world, the states have not redefined “trespass”; no state *action* or rule such as I describe works to immunize directly state officials from liability for wrongful invasions of privacy. Nonetheless, state *inaction* may have effectively achieved the same result. For if the costs of seeking a common-law remedy for state violations of liberty exceed any possible recovery, and if the state has not enacted cost-shifting measures to permit those costs to be avoided, then the state has *in effect* granted an immunity to state actors for their wrongful invasion of privacy by depriving victims of any possible incentive to pursue protection of their rights. It is as if the state has eliminated the common-law right itself. And if the right has in effect been eliminated by the changing

241. Compare *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2892 (1992), where the Court, speaking of the Fifth Amendment Takings Clause, said that “if the protection against physical appropriations of private property was to be meaningfully enforced, the government’s power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.”

242. Of course all this is contingent upon facts about the costs of common-law adjudication that I only assume are true here. While a fair evaluation of the actual costs is beyond the scope of this essay, I do not mean to suggest this idyllic common law was costless. For example, Alschuler has counted some 40 stages at which fees were required in a common-law civil case, but as he notes crucially, these were borne by the losing party. See Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1857 n.200 (1986).

availability of a common-law remedy, then we can say the state has in essence removed a central presupposition of the Fourth Amendment's protection.

It is against this background that the extension of the exclusionary rule to state proceedings begins to make sense—not as the creation of new rights, but as the creation of a different remedy, a translation aimed to preserve old protections in a new legal context.

This, at least, was the rationale of *Mapp v. Ohio*,²⁴³ which extended the protection of the exclusionary rule to the states. As the *Mapp* Court claimed, no longer was the common law a sufficient remedy for illegal state action, and consequently, an alternative remedy was required to restore the original constitutional balance.²⁴⁴ The Court selected the exclusionary rule, no doubt an imperfect and systematically biased remedy,²⁴⁵ as an alternative remedy to fill in the gaps left by the eroded common law.²⁴⁶ Thus, while in 1791, the amendment would not have been read to imply an exclusionary remedy, in light of the transformed social and legal context²⁴⁷—transformed by the loss of a presupposition essential to the original design—a different application of the amendment is now required, one that substitutes a remedy where the state has withdrawn the old remedy.²⁴⁸

243. 367 U.S. 643 (1961).

244. *See id.* at 652 ("The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States."); *see also* *Wolf v. Colorado*, 338 U.S. 25, 42-43 (1949) (Murphy, J., dissenting) (commenting that the measure of monetary damages in trespass actions provides no viable remedy for violations of the Fourth Amendment).

245. In *Wolf*, Justice Frankfurter remarked on the bias inherent in the exclusionary rule:

Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford.

Wolf, 338 U.S. at 30-31.

246. *Mapp*, 367 U.S. at 653-55. Note that the incentives under a current damages regime would be different from those under the original regime, not just because of the judge-grown doctrine of officer immunity, but also because of the wide reach of indemnification statutes. While I agree that the former distortion is a real distortion, there are good reasons to believe that indemnification statutes would be less distorting. Certainly the police departments, or cities, who bear the costs of the damage remedy are in an adequate position to police the behavior of their own police. Indeed, they may be better cost allocators than common-law courts. *See* Amar, *Of Sovereignty*, *supra* note 232, at 1488. *See generally* PETER H. SCHUCK, *SUING GOVERNMENT: CITIZENS REMEDIES FOR OFFICIAL WRONGS* 100-121 (1983) (urging the expansion of governmental liability for official misconduct).

247. Of which of course I have only begun to address. Nothing so far begins to account for much relevant change—for example, changes in technology, law enforcement, and organization. *See* Alschuler, *supra* note 228, at 200-03; *see also* Kamisar, *supra* note 133, at 571.

248. *Wolf*, 338 U.S. at 30-31 (Frankfurter, J.). Admittedly, the Court might have chosen the wrong translation. Judge Posner argues that a lodestar method would have been cheaper. *See* Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 53-58 (1982) (arguing that

If it is true that the incorporation of the exclusionary rule is justified because of the continued need for a supplemental remedy, then this provides a clear test of my thesis that the extension of such a remedy is best understood as an act of translation. For imagine that a state enacted the equivalent of a workers' compensation statute for violations of privacy by state actors—providing, say, a simple and cheap remedy for wrongful searches and seizures. With this alternative remedy in place, the state petitions the Supreme Court to exempt it from the requirements of the exclusionary rule. In support of its petition, the state points to evidence demonstrating that the remedial effect of its statute far exceeds the remedial effect of the exclusionary rule, and does so at less social cost.²⁴⁹ More illegal searches are prevented, that is, through the use of remedies that impose fewer costs on society. Faced with such a petition, the Court would have little reason not to rule in favor of the state, if in fact the extension of the exclusionary rule was grounded on a fidelitist's commitment to the original structure of incentives. For the fidelitist, once the state acts to restore the original structure, there is no continued sanction for an alternative remedial prophylactic.²⁵⁰

So understood, a central enigma for conservatives can be reconceived as a fidelitist's response to the change in the structure of incentives underlying the Fourth Amendment. Moreover, such a reconception identifies a means for eliminating the constitutional justification for the prophylactic exclusionary rule. If the exclusionary rule is understood as an act of translation, then translation suggests a means by which it can—or should—be replaced.²⁵¹

6. *Nonlegal Presuppositions: Safeguards Against Self-Incrimination* (Miranda).—The previous five examples have tracked translation in the

making a tort remedy feasible would produce "optimum deterrence" of unlawful searches at less social cost than does the exclusionary rule). Also, I ignore what is no doubt the far more significant factor accounting for the undermining of the common-law remedy: the ever-expanding, court-created doctrine of officer immunity. See Amar, *Of Sovereignty*, *supra* note 232, at 1487 (noting that courts "have opened up a wide remedial gap by creating expansive official immunities").

249. See Posner, *supra* note 248, at 71-75.

250. This conclusion is resisted by scholars LaFave and Israel, but as they note, the notion is supported by the Court's later position in *United States v. Calandra*, 414 U.S. 338 (1974), and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 107-08 (2d ed. 1992); cf. Kamisar, *supra* note 230, at 664-67 (asserting that the exclusionary rule should be maintained irrespective of the existence of other remedies).

251. Note finally that to the extent the exclusionary rule remains only so long as legislatures fail to restore the constitutional baseline, the charge of counter-majoritarianism remains weak. See BORK, *supra* note 57, at 130 ("The rate of constitutional revisionism picked up with the New Deal Court and became explosive with the Warren Court. The Courts after Warren's . . . showed little significant slowing. We observe, therefore, the increasing importance of the one counter-majoritarian institution in the American democracy.").

context of changes in *legal* presuppositions. But unless law were absolutely autonomous,²⁵² there should also be examples of translation engendered by changes in nonlegal presuppositions. The Cruel and Unusual Punishments Clause example described above demonstrated one such change;²⁵³ the examples that follow sketch five others. In each, a translation is made in light of a change in a nonlegal presupposition of the originating context. Again, by nonlegal presupposition, I simply mean a fact about the social context not primarily constructed by or constituted by legal norms. Of course, no sharp line divides the two types of presuppositions, and the first example discussed below comes close to the border, appearing alternatively as a legal and nonlegal presupposition. Nonetheless, for reasons that should emerge, I will treat it here as a nonlegal presupposition.

Few decisions of the Warren Court have attracted the derision of the originalists as has *Miranda v. Arizona*.²⁵⁴ Out of whole cloth, it is said, the Court constructed this constitutional "right" to an arbitrary set of warnings, a construction unprecedented in our constitutional history. It was a "*trompe l'oeil*," in the words of Justice Harlan,²⁵⁵ and "[a]t odds with American and English legal history" according to Justices White, Harlan, and Stewart.²⁵⁶ But for its amazing constitutional entrenchment, as well as broad acceptance by law enforcement officials, *Miranda* would be the first sacrifice in the originalist's crusade. Its very heresy, however, makes it an irresistible subject for a fidelitist's review of changed constitutional readings. Can *Miranda* too be understood as translation rather than free verse?

Professor Yale Kamisar has for some time sketched the argument that suggests *Miranda*'s translative pedigree,²⁵⁷ and after the examples so far presented, we can recast his argument quite easily. What has changed to justify the change of *Miranda*?

As Kamisar argues, quite a lot, but to see just what we should return to what was before. At the time the protections of the Fifth Amendment

252. See Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 624-26 (arguing that law is not autonomous, but rather that social attitudes and values, such as racism, often give rise to legal rules reflecting those attitudes and values).

253. See *supra* notes 77-82 and accompanying text.

254. 384 U.S. 436 (1966).

255. *Id.* at 510 (Harlan, J., dissenting).

256. *Id.* at 531 (White, J., dissenting).

257. See Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966), reprinted in YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 41, 41-55 (1980) [hereinafter Kamisar, *Dissent*]. Kamisar made the same arguments just before *Miranda* was decided as well. See Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1 (A.E. Dick Howard ed., 1965), reprinted in POLICE INTERROGATION AND CONFESSIONS, *supra*, at 27-40 [hereinafter Kamisar, *Equal Justice*].

were carved into the constitutional text, there was no generalized bureaucracy of investigation of the sort we know today as the police. The powers of the common-law police analogs were quite limited and distinct: they were empowered to quell disturbance and restore order, and to secure offenders for presentment to a court and later a magistrate. As Kamisar describes, it was a time "when 'local prosecuting officials were almost unknown,' and a 'primitive constabulary . . . , consisting of watchmen rather than police officers and wanting in any detective personnel, attempted little in the way of interrogation of the persons they apprehended.'"²⁵⁸ Or, as Kamisar further describes:

[T]here were simply no "police interrogators" to whom the privilege could be applied. . . . "[C]riminal investigation by the police, with its concomitant of police interrogation, is a product of the late nineteenth century"; in eighteenth-century America . . . "there were no police [in the modern sense] and, though some states seem to have had prosecutors, private prosecution was the rule rather than the exception."²⁵⁹

So if not the police, who were the interrogators? First note, as we seem long to have forgotten, that before the time of the Founding, the English common law forbade the defendant from testifying at trial as a witness *at all*, whether to confess or claim his innocence.²⁶⁰ Thus, if the text of the Fifth Amendment ("nor shall be compelled in any criminal case to be a witness against himself")²⁶¹ is read in its most limited sense (as applying to witnesses at trial), it had no application when adopted, since, again, when adopted criminal defendants could not be witnesses. As Dean Griswold argues, "the *importance* of the privilege against self-incrimination [at the time of adoption] was in investigations, in inquiries, and with respect to questioning of the defendant by the judge in criminal cases, such as had been made notorious by Judge Jeffreys."²⁶² Thus, concludes

258. Kamisar, *Dissent*, *supra* note 257, at 47 (omission by Kamisar) (quoting LEWIS MAYERS, *SHALL WE AMEND THE FIFTH AMENDMENT?* 86 (1959)).

259. Kamisar, *Equal Justice*, *supra* note 257, at 36 (alteration in original) (footnote omitted in original) (quoting Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 *YALE L.J.* 1000, 1034, 1041 (1964)).

260. This fact was forgotten in *Miranda* itself. See Kamisar, *Dissent*, *supra* note 257, at 50 (noting that, although Justice White's *Miranda* dissent relied on a law review article that discussed the common-law prohibition against defendant testimony, Justice White nonetheless ignored this information in his dissent).

261. U.S. CONST. amend. V.

262. Erwin N. Griswold, *The Individual and the Fifth Amendment*, *THE NEW LEADER*, Oct. 29, 1956, at 20, 22 (emphasis in original) (quoted by Kamisar, *Dissent*, *supra* note 257, at 50). Griswold is referring to George, Baron Jeffreys, more commonly known as Judge Jeffreys. Jeffreys's judicial exploits are infamous. See P.J. HELM, *JEFFREYS: A NEW PORTRAIT OF ENGLAND'S "HANGING JUDGE"* 198 (1966) (stating that the combination of his "wide eyes," "powerful voice," and "volatile

Kamisar, the privilege is given sufficient content if it is viewed as protecting "an accused *not sworn as a witness* from interrogation by prosecutor or judge at the trial . . . or as protecting an accused from questioning *before trial*."²⁶³ Thus the primary locus of interrogation against which the clause was directed was either at trial by the judge, or before trial by magistrates.²⁶⁴

The world of the Framers has dramatically changed. As Kamisar describes, "[e]ventually, 'but *wholly without express legal authorization*,' interrogation became the function of the emerging organized police and prosecuting forces."²⁶⁵ Slowly investigation shifted outside the control of the court, into the control of the police, an increasingly bureaucratic purgatory—an interregnum between liberty and judicial process. With this shift there opened a crucial gap in constitutional protection. At the Founding, the privilege protected at least that place where the vast amount of the wrong to be avoided (interrogation) occurred (at trial). But now the place where the wrong to be avoided occurs (the stationhouse) has changed. And the question becomes how the fidelitist is to account for this drastic change—whether to ignore it or to incorporate it into existing constitutional norms.

Kamisar argues that *Miranda* represents one response of fidelity: as the locus of investigation shifted from the courtroom, to the preliminary investigation by the magistrate, to the bureaucratic police, the protection of the Fifth Amendment too must (and did) shift, if the same protection afforded by the Founders is to be afforded to the Founders' progeny. As Kamisar quotes, "If the police are permitted to interrogate an accused under the pressure of compulsory detention to secure a confession . . . , they are *doing the very same acts which historically the judiciary was doing* in the seventeenth century but which the privilege against self-incrimination abolished."²⁶⁶ Only by extending the privilege to interrogation by police does one preserve the original meaning of the privilege.

temperament" was "an explosive one and there is no doubt that Jeffreys deliberately used it to alarm, when he thought that fear would help him to uncover the truth"). Legend has it that Judge Jeffreys carried out questioning of a witness from the bench, allowing counsel only an occasional contribution. See E.S. TURNER, *MAY IT PLEASE YOUR LORDSHIP* 86 (1971) (recounting that "[c]onstantly Jeffreys called on Heaven to witness the impossibility of getting the truth out of a lying Protestant knave").

263. Kamisar, *Dissent*, *supra* note 257, at 51 (emphasis in original) (citing Lewis Mayers, *The Federal Witness' Privilege Against Self-Incrimination: Constitutional or Common Law?*, 4 AM. J. LEGAL HIST. 107, 114 n.20 (1960)).

264. However, there is some evidence that the clause was meant to reach interrogation by the executive before trial, as had occurred in Virginia during the Revolution. *Id.*

265. *Id.* at 47 (emphasis in original) (quoting MAYERS, *supra* note 258, at 86).

266. *Id.* at 53 (quoting ALBERT R. BEISEL, *CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT* 104 (1955)).

Miranda's translative pedigree thus rests upon at least one critical change in the interpretive context between the Founding and today—the locus of interrogation.²⁶⁷ The two-step would claim that to preserve the meaning of the original protection in this fundamentally changed context requires something like the *Miranda* accommodation.²⁶⁸ Indeed, *Miranda*'s accommodation only appears odd to us because we are focused on reading the Fifth Amendment's text out of context—today, a criminal defendant can be a witness, and today, investigation and interrogation occur both within and without the judicial process; thus today, a text that required that no one “shall be compelled . . . to be a witness against himself” would reasonably be limited to the courtroom (giving the witness the choice to testify) and not apply to the police. But this out-of-context reading does not yield the text's meaning, for when written its protections were complete, given the practice of the time.²⁶⁹

The question for the two-step resolves to this: Given the protection the Fifth Amendment provided in context, and assuming the presupposition of the primary locus of investigation was then as it is now, would the Framers have accommodated this difference by making clear the broad application of their protection? And if one could believe that they would, *Miranda*'s claim would be made.

7. *Nonlegal Presuppositions: Protection of Privacy.*—The change in *Miranda* tracked a change in the locus of criminal interrogation, a change that again was made for reasons independent of the constitutional text: in the context of the Founding, the two-step claims, the protection extended fully against the evil opposed; *Miranda* was required to assure that pro-

267. As Schulhofer points out, this shift was conceded even by the Meese Justice Department. Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 438 & n.9 (1987).

268. For a more recent instance of the continued need to preserve the Founders' right in the present context, see *Cooper v. Dupnik*, 963 F.2d 1220, 1248 (9th Cir.) (holding that a willful police attempt to deny “*Miranda* rights” gives rise to a § 1983 claim), *cert. denied*, 113 S. Ct. 407 (1992). For an excellent discussion of the nature of the remedy *Miranda* supplied, see generally David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

269. Schulhofer's more careful analysis of the case distinguishes three elements of the *Miranda* decision. First, “that informal pressure to speak . . . can constitute ‘compulsion’ within the meaning of the fifth amendment. Second, [that this ‘compulsion’] is present in any questioning of a suspect in custody. . . . Third . . . that precisely specified warnings are required to dispel the compelling pressure of custodial interrogation.” Schulhofer, *supra* note 267, at 436. My analysis applies most directly to the first (and least controversial) of these three elements. But so too, I suggest, does it apply to the last two. For these last two are pragmatic accommodations to the dramatically changed context of police interrogation in which there exists a much greater risk of compulsion. *Id.* at 460. These accommodations are thus understandable as rules requiring the cheapest cost avoider bear the burden of assuring that compulsion is not present. *See id.* at 449. As the *Miranda* Court explicitly remarked, if the democratic branches disagree about these accommodations—if there are better, or more efficient, methods of accommodation—the opinion in *Miranda* was not to stand in the way. *See Miranda v. Arizona*, 384 U.S. 436, 490 (1966).

tection continued to extend fully against the evil opposed as that evil transformed.

The particular form of *Miranda's* example suggests a second and more famous example of translation to accommodate a change in nonlegal presuppositions. This example, though, lives only in Justice Brandeis's dissenting opinion in *Olmstead v. United States*.²⁷⁰ Because the example is so well known, and because the translative pedigree of Brandeis's opinion has been so completely discussed before,²⁷¹ its treatment here can be abbreviated.

The Fourth Amendment protects the right "of the people to be secure in their persons, houses, papers, and effects" against unreasonable "searches and seizures."²⁷² When adopted, the domain secured by the amendment's protection was quite extensive, though as applied its protection was not complete. Eavesdropping, for example, was a form of invasion that was not a trespass,²⁷³ as the scope of the amendment was limited to physical invasions of property. Remember the functional structure of the amendment discussed above: its role was to limit the scope of immunity that could be granted by federal law,²⁷⁴ but there need be no immunity where there is at common law no wrong. Hence without the predicate of a common-law trespass, the amendment had no role to play.

Thus, at the Founding the amendment's protection, while not complete, was quite wide. In principle, the Fourth Amendment protected only against physical invasion. Realistically, however, given the crude state of surveillance technology, the only possible invasions were physical. Thus, in practice, the amendment protected against the vast majority of possible state invasions.

By the time the Supreme Court decided *Olmstead*, the technology of possible state invasion had of course changed. New technology permitted the state to extract all the information it could ever want without ever crossing trespass law's barrier. And hence, when *Olmstead* was decided (and if not by then, certainly soon thereafter), the practical effect of a protection that extended only against physical invasions was very little at all. Because of a change in *facts* alone, without any corresponding self-conscious change in the scope of legal protection of citizens, a reading of the Fourth Amendment that applied it now as it was applied at the Founding would be a reading that remade the amendment's protection: for

270. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

271. James Boyd White, for example, offers an exceptional account in WHITE, JUSTICE AS TRANSLATION, *supra* note 32, at 149-57.

272. U.S. CONST. amend. IV.

273. See *Berger v. New York*, 388 U.S. 41, 45 (1967) ("Eavesdropping is an ancient practice which at common law was condemned as a nuisance." (citing BLACKSTONE, *supra* note 233, at *168)).

274. See *supra* notes 232-34 and accompanying text.

at one time the amendment protected citizens against all or practically all of the possible means of invasion by the government, and at another it protected against only some, or better, few, of the government's means of invasion.

Yet in *Olmstead*, Chief Justice Taft, writing for the Court, construed the amendment in precisely this limited way, using language that fits precisely the model of the one-step fidelitist sketched above. For him the question was "what was deemed an unreasonable search and seizure when [the amendment] was adopted."²⁷⁵ The text of the amendment itself, Taft assured us, "shows that the search is to be of material things."²⁷⁶ But the thing taken here—the words of another through a wiretapping device—is not a physical thing. The amendment applied *then* only to physical things; so too must it apply *now*.

In a justly famous dissent, Justice Brandeis understood the amendment's protection differently, in part because Justice Brandeis's method took the second of the fidelitist's steps. Quoting *Weems v. United States*,²⁷⁷ he wrote,

Legislation . . . is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.²⁷⁸

He then continued.

When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken," had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers Protection against such invasion . . . was provided . . . by specific language. . . . But "time works changes" Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.²⁷⁹

275. *Olmstead v. United States*, 277 U.S. 438, 465 (1928) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

276. *Id.* at 464.

277. 217 U.S. 349 (1910).

278. *Olmstead*, 277 U.S. at 472-73 (Brandeis, J., dissenting) (quoting *Weems*, 217 U.S. at 373).

279. *Id.* at 473 (Brandeis, J., dissenting) (citation omitted).

To protect against this new risk of invasion, to preserve the same amount of protection as originally afforded, Brandeis argued that the protections of the Fourth Amendment must be applied to acts that fall outside the literal scope of the text.²⁸⁰ If, counting eavesdropping, the amendment protected citizens against ninety percent of the practical means of governmental invasion when adopted, so too must it be applied to protection against ninety percent of those means today. Thus states the argument of translation.²⁸¹

8. *Nonlegal Presuppositions: Support for Established Religions.*—A third example of translation to account for a change in a nonlegal presupposition is adverted to in a recent article by Michael McConnell, discussing the Supreme Court's Establishment Clause jurisprudence. McConnell notes: "One of the most important eighteenth-century abuses against which the no-establishment principle was directed was mandatory support for churches and ministers."²⁸² This was an abuse because it was, as McConnell describes it, "support for religion *qua* religion."²⁸³ Stated differently, the Founders considered this practice abusive for "it singled out religion as such for financial benefit."²⁸⁴ In a world where government benefits were slight, where the federal government provided essentially no welfare support, any spending that directly benefitted religion would necessarily mean support for religion as religion.

Upon what did that conclusion—that mandatory support for churches meant government support for religion—hang? As McConnell argues, it

280. *Id.* at 478-79 (Brandeis, J., dissenting).

281. Finally, note one more obvious example of translation in the context of the Fourth Amendment, *Tennessee v. Garner*, 471 U.S. 1 (1985). At common law, officers were permitted to use deadly force to apprehend a "fleeing felon." *Garner*, 471 U.S. at 13. The question in *Garner* was whether this immunity survived. It did not. Said the Court, while it had often looked to the common law to determine the reasonableness of police activity, it had "not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment." . . . Because of sweeping change in the legal and technological context, reliance on the common-law rule . . . would be a mistaken literalism that ignores the purposes of a historical inquiry." *Id.* (quoting *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980)). Instead, two critical presuppositions had changed between the Founding and 1985—first, unlike at the Founding, few felonies were punishable by death anymore, *id.* at 13-14; second, "[t]he common-law rule developed at a time when weapons were rudimentary." *Id.* at 14. The Court held that these changes justified a limitation on the use of force to situations where "such force . . . is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat . . ." *Id.* at 3. The suspect in *Garner* was apparently unarmed. Thus, the Court found that the rule permitting the use of deadly force on the fleeing "felon" in *Garner* was not "reasonable" within the meaning of the Fourth Amendment. *Id.* at 11.

282. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 183 (1992); see also DEREK DAVIS, ORIGINAL INTENT 47-48 (1991) (describing the broad interpretation of the Establishment Clause as a "no aid" approach).

283. McConnell, *supra* note 282, at 183.

284. *Id.*

rested upon the presupposition that the government did not generally provide benefits for social services to the nonprofit sector. In that context, aiding religious organizations *meant* aiding religion since the government aided no one else.²⁸⁵

But the presupposition that the government aided no one else was, of course, contingent. And by the 1940s, that contingency had radically changed. By then the government provided a wide range of benefits to the nonprofit sector.²⁸⁶ And thus, when the question whether the government could supply churches just as it supplied nonreligious nonprofit benefit providers was raised after this change, this change should have mattered. Or at least it should have been accounted for somewhere in the Court's reasoning. Instead, as McConnell argues, the change was ignored:

When government funding of religiously-affiliated social and educational services became a constitutional issue in the late 1940s, the Court properly looked back at the religious assessment controversy. But it missed the point. The Court did not notice that the assessments against which the advocates of the disestablishment inveighed were discriminatory in favor of religion. Instead, the Court concluded that taxpayers have a constitutionally protected immunity against the use of their tax dollars for religious purposes. This immunity necessitated discrimination against religion, thus turning the neutrality principle of the assessment controversy on its head.²⁸⁷

McConnell then concludes,

The Court's analysis failed to recognize the effect of the change in governmental roles. When the government provides no financial support to the nonprofit sector *except for churches*, it aids religion. But when the government provides financial support to the entire nonprofit sector, religious and nonreligious institutions alike, on the basis of objective criteria, it does *not* aid religion.²⁸⁸

To determine the difference, the interpreter must look then to the context of the initial determination; and once that context had changed in this significant way, McConnell should agree that fidelity would require a changed application as well.

Thus, the history of the Establishment Clause provides another example of a change that is required to preserve something from the original context.²⁸⁹ The presupposition here was nonlegal (the amount of

285. *See id.*

286. *Id.*

287. McConnell, *supra* note 282, at 183-84 (footnote omitted).

288. *Id.* at 184 (emphasis in original).

289. A similar point is made by Donald Giannella:

other spending); given its change, the fidelitist must ask what effect this change would have had on the original judgments that informed the Establishment Clause. If the meaning of the original proscription hung upon the fact that aid to religion would have been discriminatory (since the government aided no one else), then continuing that proscription when government aid is no longer discriminatory would change the meaning of the original proscription. As many have noted, it would be to transform the First Amendment from neutrality to hostility.²⁹⁰ Because of its method, this change the one-step would miss; because of its method, this change the two-step must accommodate.

9. *Nonlegal Presuppositions: Abandoning State-Imposed Segregation.*—Finally, and most famously, is the example of *Brown v. Board of Education*.²⁹¹ As an example of translation, it is true to say both that *Brown* provides the most self-conscious example of translation in light of changes in nonlegal presuppositions, and that nonetheless, its utility to a theory of translation is just slight. No one questions *Brown's* result (anymore).²⁹² Indeed, so completely has the legal system reoriented itself after the decision that it may not even be possible to find the legal material with which to mount a serious challenge to its conclusion. In a world where a conservative like Justice Scalia says the correctness of the decision "leaves no room for doubt,"²⁹³ it is difficult to reconstruct the world where liberals such as Professor Herbert Wechsler could worry that no principled opinion could be written to support it.²⁹⁴

So overdetermined, thus, *Brown* may provide no more than a purely negative test of an interpretive theory: no theory of interpretation can

[A]ny thoroughgoing effort to interpret the religion clauses of the first amendment by resorting to the original understanding of the authors and ratifiers . . . is apt to be regarded as a misguided, if not dangerous enterprise. . . . For when we turn to Madison's theories concerning religious freedom and non-establishment, we must inevitably find them encrusted with certain implicit assumptions which were products of prevailing social, political, and economic conditions. Doctrinal formulations designed to achieve certain ends may achieve indifferent or perverse results when the assumptions on which they rest change.

Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development (pt. I)*, 80 HARV. L. REV. 1381, 1383 (1967).

290. See, e.g., Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1003 (1990) (arguing that a formally neutral law, such as Prohibition, can actually lead to religious persecution).

291. 347 U.S. 483 (1954).

292. Well, almost no one. See, e.g., Graglia, *supra* note 1, at 1040, 1037-43 ("It is even possible that segregation would have ended more quickly in the deep South without *Brown* and the ten-year grace period for compliance afforded by the 'all deliberate speed' formula.")

293. *Rutan v. Republican Party*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting).

294. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-34 (1959).

survive as a theory of interpretation of this Constitution unless it can justify *Brown*. But as these limitations acknowledged, I still believe there is some utility to exploring whether and how the theory of fidelity sketched above could accommodate *Brown*.

In *Plessy v. Ferguson*,²⁹⁵ the Supreme Court upheld a state statute requiring railroads to segregate passengers on the basis of race. Professor Tushnet has argued that *Brown* can be understood as a translation of *Plessy*.²⁹⁶ Translation explains *Brown*'s result, Tushnet argues, because of the changing importance of education between the two periods. In short he argues that even if it was permissible to segregate schools when they were insignificant, barely state-run, institutions, schools are not that now.²⁹⁷ As Chief Justice Warren wrote for the *Brown* Court, "[W]e cannot turn the clock back to 1868 We must consider public education in the light of its full development."²⁹⁸ Schools now are the very center of state government, as clearly emblems of state action as any state action could be.

But the problem with this argument is that it fails to explain the per curiams of the Court following shortly after *Brown* itself, in which the Court summarily struck down all forms of de jure segregation.²⁹⁹ If it was the *significance* of education that explained *Brown*, then what was the significance of public golf courses that explained *Holmes v. City of Atlanta*?³⁰⁰

These questions invite a second understanding of the translation in *Brown*.

Brown changed the application of the Fourteenth Amendment articulated in *Plessy*. To understand *Plessy*, it is extraordinarily important to understand the argument with which the Court was confronted. Homer Plessy's argument focused not so much on the social importance of riding in one car or the other; rather, Plessy's argument was about the construction of social meaning and, in particular, the state's responsibility for that construction. Plessy did not complain about the social status of blacks in America in general. He complained instead about the state's responsibility for that social status.

At the center of Homer Plessy's case was a claim about the social meaning of this legally imposed segregation: that the law's support of the

295. 163 U.S. 537 (1896).

296. Tushnet, *supra* note 32, at 800-01.

297. *Id.*

298. *Brown v. Board of Educ.*, 347 U.S. 483, 492 (1954).

299. *See, e.g.*, *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf courses); *Mayor v. Dawson*, 350 U.S. 877 (1955) (per curiam) (beaches).

300. 350 U.S. 879 (1955).

“social usage” of segregation “confirmed” the inferiority of the “black man’s” status. If so, then the social meaning of being black, Plessy argued, was affected by the law’s intervention, and affected for the worse.³⁰¹ It was for this reason, he argued, that Louisiana was not giving him equal protection of the law—not because Louisiana did not provide equal access to public accommodations, but because Louisiana was itself contributing to and responsible for the disability of the “black man’s” status.

Justice Brown, writing for the Court, joined issue with Plessy on precisely this point. Like Plessy, he was not concerned with the importance of riding in one carriage versus another. Instead, Justice Brown argued,

We consider the underlying fallacy of [Plessy’s] argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but *solely* because the colored race *chooses* to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption.³⁰²

Justice Brown believed that Plessy was wrong to believe that the social meaning of being black was affected by anything the state did; wrong to think that the stigma that he suffered was due at all to the actions of the state; and wrong because Plessy’s stigma was created by Plessy himself, and thus was fully within Plessy’s power to remove. Plessy’s stigma was “solely” a function of Plessy’s choice and not at all a function of anything the state enactment did. Thus, because the stigma was self-created, it was not a *burden* requiring remedy under the Equal Protection Clause.

301. As attorneys Phillips and McKenney argued the case,

Sir Walter Scott reports *Rob Roy* as announcing proudly that *wherever he [sat], was the head of the table*. Everybody must concede that this is true socially of the White man in this country, as a class. Nor does anybody complain of that. It is only when social usage is confirmed by statute that exception ought or legally can be taken thereto. The venom to free institutions comes in just there. A spirit of independence is even nourished in the poor man by observing the exclusive airs of good society. He can return it indifference or ita disgust with interest, leaning upon his sense of the impartiality of THE LAW to both. But when law itself pronounces against his humble privileges the case becomes specifically different. What was mere *fact* yesterday, . . . becomes *precedent* today. A pernicious *down-grade* is established.

Brief for Plaintiff in Error at 9, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210).

302. *Plessy*, 163 U.S. at 551 (emphases added).

Behind Justice Brown's argument is a conception of social meaning that we could call libertarian—that social meaning is wholly within the control of any individual to construct or reconstruct; that it is, to borrow unfairly from Roberto Unger's terminology, fully plastic³⁰³ not just socially (that is, through collective action), but also individually (through the action of one person alone). Justice Brown claimed that the social meaning of being segregated was plastic in just this sense,³⁰⁴ and if it were plastic in this sense, then the state would indeed not be responsible for any meaning of stigma attached to segregated train cars.

So was Justice Brown's understanding correct? Perhaps one could imagine a time when social meaning was plastic in just this sense, and maybe it was so in 1896, though I doubt it. Nonetheless, none could deny that social meaning was no longer plastic in this sense by 1954. It was (at least) by then clear that, as Justice Harlan argued in *Plessy* itself,³⁰⁵ the actions of a government enforcing a separation because of race marked one race with a badge of inferiority,³⁰⁶ and that the social meaning of inferiority was not constructed, or reconstructable, by any one individual acting alone.

Plessy's "fallacy" then became the premise of Chief Justice Warren's argument in *Brown*: harm in the form of a stigma did flow from the actions of the state,³⁰⁷ since the social meaning of this stigma was in part state-created. If the stigma was state-created, then the Equal Protection Clause required its elimination, or at least it required the elimination of that part for which the state could be held responsible. So held *Brown*.³⁰⁸

303. See ROBERTO M. UNGER, *PLASTICITY INTO POWER* 153 (1987) (defining plasticity as "the facility with which work relations among people . . . can be constantly shifted in order to suit changing circumstances, resources, and intentions").

304. See CHARLES LOFGREN, *THE PLESSY CASE 178-79* (1987) (characterizing Justice Brown's conclusion in *Plessy* as being that "racial instincts exist, and . . . are sufficiently rooted in man's nature as to be impervious to alteration through legal schemes").

305. See *Plessy*, 163 U.S. at 555-56 (Harlan, J., dissenting).

306. See Brief for the United States on the Further Argument of the Question of Relief at 6, *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (No. 1).

307. Or at least, reviewing the procedural posture of the case, nothing showed that the finding below of stigmatic harm was false. One could well doubt whether such an important constitutional issue should depend on the fact-finding of a particular tribunal. But the lawyer's appeal to procedural posture has not been so limited. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 680 (1981) (Brennan, J., concurring) (arguing against the majority's "supposition that the constitutionality of a state regulation is determined by the factual record created by the State's lawyers in trial court"). *Brown* itself was understood as a finding of fact (rather than ruling of law) by at least one federal court. See *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F. Supp. 667, 678 (N.D. Ga. 1963) ("The Court holds that the existence or non-existence of injury to white or black children [from integrated or segregated schooling] is a matter of fact for judicial inquiry and was so treated in [*Brown*]."), *rev'd*, 333 F.2d 55 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964). Obviously the sense in which the finding about the nature of the state's construction of meaning must be a different kind of fact than was spoken of there.

308. It is of course an important and importantly troubling conclusion from the translation

Now I do not mean to argue that Justice Brown would have converted had we shown him a bit about the construction of social meaning. Brown's opinion in *Plessy* is obviously overdetermined, and there can be little doubt that had his argument not been available to him, he would have found another. But on its face, the opinion offers a rhetoric that the argument of fidelity can meet.³⁰⁹ If, as the rhetoric suggests, the decision in *Plessy* rests on a conception about the social meaning of being black, then *Brown's* denial of Justice Brown's premise suggests another example of a translation to account for a change in nonlegal presuppositions. In the context of *Plessy*, taking Justice Brown at his word, if he believed that the state-required segregation was not responsible for any additional harm to *Plessy's* self-imposed stigmatic harm because social meaning was individually reconstructable, then the notion of individually plastic social meaning was a presupposition of Justice Brown's argument. By the time of *Brown*, however, that presupposition was certainly rejected. According to the then-current view about the nature of social meaning, state-imposed segregation was clearly a stigmatic harm for blacks (at the least). In light of that changed presupposition, the application of the Equal Protection Clause had to change. If it changed to accommodate the change in presupposition, then it changed as an act of fidelity.³¹⁰

So much shows that a changed presupposition could explain the change from *Plessy* to *Brown*.³¹¹ One could ask whether there was a changed

argument for *Brown's* correctness that it may also imply *Plessy's* correctness in context. For just this reason, Justice Black rejected the argument. See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 677 n.7 (1966) (Black, J., dissenting) (arguing that the *Brown* decision was correct for the same reason Justice Harlan dissented in *Plessy*: the purpose of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments was "completely to outlaw discrimination against people because of their race or color").

309. Thus, I am open to the same charge of implausibility that Professor Klarman raises against Ackerman's isomorphic account of *Plessy* since "Justice Brown doubtlessly would have reached the same result even if deprived of [the incorrect] premises." Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 787 (1992) (reviewing BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991)). In response I would argue, as I believe Ackerman must, that the question is not what Justice Brown would have done, but rather what the structure of Brown's justificatory rhetoric is. Justification operates at that level, and not the level of individual psychology. For example, if a defendant successfully justifies the breach of a contract on grounds of impossibility, it is no reply to argue, impossibility notwithstanding, she would have breached the contract anyway and so should be held liable in damages. See also HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937*, at 288 (1991); cf. *Commonwealth Edison v. Allied-General Nuclear Servs.*, 731 F. Supp. 850, 860 (N.D. Ill. 1990) (Posner, J., sitting by designation) ("[S]upervening impossibility"—that is, impossibility arising after the promisor broke the contract—is a defense."). See *infra* note 311 for further discussion of Ackerman's argument.

310. Professor Hovenkamp suggests a similar difference between *Plessy's* context and that of *Brown*. As he forcefully argues, each opinion is consistent with the mainstream of social science of its time. Hovenkamp, *supra* note 252, at 624-26. His explanation, too, could suffice as a justification of a changed presupposition accounting for the differences in outcome between the cases.

311. As justification, this analysis might imply that both *Plessy* and *Brown* were correct

presupposition between the enactment of the Fourteenth Amendment and *Brown*—whether *Plessy*, that is, was wrong. For most assume that *Plessy* was consistent with the understanding of the framers of the Fourteenth Amendment, and hence most assume that a consistent one-step would have agreed with the outcome of *Plessy*.³¹² If that is correct, then the centrality of *Brown* in our interpretive constellation may draw additional support for the practice of the two-step.

Nonetheless, it is not important for my purposes to resolve whether the conventional wisdom about the original meaning of the Fourteenth Amendment is correct, or whether, as Michael McConnell now forcefully argues, the conventional wisdom about the original meaning is flatly wrong.³¹³ For as I hinted at the start, the focus of the two-step's method is incremental. The charge of justification comes when there is an apparent change, which *Brown* was relative to *Plessy*. And it is sufficient here, then, to suggest how *Brown* could be justified relative to *Plessy*. All the better if it need not confront *Plessy*'s embarrassment.

10. Nonlegal Presuppositions: Antitrust, Economic Theory, and Mis-translations.—My final example of translation is the transformation of antitrust doctrine effected by the courts over the century or so that antitrust has had a federal charter. It may also be the best example of the dangers of the practice of translation itself. For the best reading of the story I am about to relate is not a reading of fidelity; indeed, it may be a model of precisely the infidelity that the one-step seeks to avoid. All the more ironic then that the story that follows is the child of judges who are usually

interpretations for their times. The argument is similar in structure to Bruce Ackerman's, as presented in ACKERMAN, *supra* note 309, at 149. What distinguishes the two arguments is the difference in the presupposition said to change: Ackerman claims the changed presupposition was a conception about the proper role of an activist government; I claim that the changed presupposition was the conception of race and stigma. Compare *id.* at 146-48 with *supra* notes 306-10 and accompanying text. See also Klarman, *supra* note 309, at 786-87 (describing Ackerman's "nifty" argument that "[m]odern commentators miss the possibility that both cases [*Plessy* and *Brown*] were correctly decided . . . because they fail to appreciate that the Constitution was amended in 1937"). This difference is significant, since Ackerman's requires the pedigree of democratic change, while mine does not.

312. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY 126-27* (1977) (noting that an attempt to require state constitutions to provide a nondiscriminatory public school system failed soon after the Fourteenth Amendment was passed); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955) (suggesting the Fourteenth Amendment was not originally meant to apply to segregation); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374-76 (1990) (describing Bork's position that the framers of the Fourteenth Amendment did not intend to bring about social equality).

313. Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Conclusion of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1164-68 (1992) (arguing against the view that the principles of the Fourteenth Amendment constitute a radical departure from those of the original Constitution); Michael W. McConnell, *Originalism and the Desegregation Decisions* (1993) (unpublished manuscript, on file with the *Texas Law Review*).

committed one-steps in the context of constitutional interpretation.³¹⁴ But we save judgment to the end, on both the disciples and the discipline.

Born in the confusion of a statutory text that—standing alone—could not mean what it said, from the start antitrust law has looked outside itself for guidance in applying the proscription of “every” agreement “in restraint of trade” in a way that made sense.³¹⁵ As Justice Scalia has explained, the term had a common-law meaning, and the Sherman Act “adopted the term . . . along with its dynamic potential. It invokes the common-law itself, and not merely the static content that the common-law had assigned to the term in 1890.”³¹⁶

The common law’s dynamic potential serves to assure that the statutory proscription continues to make sense. What “makes sense,” though, is answered only by reference to a *theory*; therefore antitrust law has from the start been contingent upon the theory it embraces. As the theory has been transformed, so too has antitrust been transformed. But, as all change does not entail fidelity, we should ask whether this change was a change of fidelity.

Assume for a moment that the framers of the Sherman Act had one ideal in mind: that, as Judge Bork has argued, “Congress intended the courts to implement . . . only that value we would today call consumer welfare.”³¹⁷ As Judge Easterbrook described that common end chosen by Congress in 1890: “Members of Congress did not see themselves choosing between ‘efficiency’ and some other goal. The choice they saw was between leaving consumers at the mercy of trusts and authorizing the judges to protect consumers.”³¹⁸

314. These judges, former Judge Bork, Judge Easterbrook, and Justice Scalia, are three I will refer to as members of the “Chicago School.” Although Judge Posner is also from the Chicago School, he would not argue that current antitrust law emerges from any exercise of fidelity to the Sherman Act’s framers. POSNER, *PROBLEMS*, *supra* note 32, at 289 n.7 (understanding current doctrine not as an act of fidelity to the enactors of the Sherman Act, but as an adaption to “the socially preferable interpretation” of the statute).

315. Sherman Antitrust Act, 15 U.S.C. § 1 (Supp. III 1991). For a general account of the history of the Sherman Act that treats well its economic aspects, see HOVENKAMP, *supra* note 309, at 268-95.

316. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 732 (1988). Why this invocation of the common-law concept embraces the dynamic potential of the term, whereas the location of the common-law concept of “due process of law” or “seizure” does not invoke the dynamic potential of those terms, Scalia does not here explain. See *Schad v. Arizona*, 111 S. Ct. 2491, 2505-07 (1991) (Scalia, J., concurring) (arguing that, in interpreting the Due Process Clause, “[i]t is precisely the historical practices that *define* what is ‘due’”); *California v. Hodari D.*, 111 S. Ct. 1547, 1549-51 & n.2 (1991) (Scalia, J.) (relying on traditional common-law definitions of “seizure” in interpreting the Fourth Amendment).

317. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966).

318. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703 (1986). It may be that it makes no sense to speak of one purpose of the Sherman Act. If this is so, then the sense in which consumer welfare is a coherent limit falls away.

How one protects the consumers and how one pursues the value of consumer welfare are functions of the technology for pursuing welfare—*i.e.*, economics. Thus for the courts to know which practices and policies make sense as they are pursuing the value of consumer welfare, courts must look to the technology of economics.

The problem is that the guide of economics itself has not remained constant.³¹⁹ At first, the Sherman Act tracked a moralistic conception of the operation of the market; but as economics developed, so too did its application to legal doctrine change. From its beginning as a doctrine of moralism rather than economics (*e.g.*, attacking good or bad competition, trust busting),³²⁰ the antitrust doctrine came to incorporate more explicitly the objective of promoting competition itself as a means of advancing consumer welfare.³²¹ The last decades have seen the pinnacle of this progress, as the Department of Justice itself has adopted guidelines that track explicitly economic effects in allocating its own enforcement resources.³²² Easterbrook summarizes the result: “Modern antitrust law is a search for economic explanations of problematic conduct.”³²³

For the two-step, so much change appears quite unproblematic, especially as it turns on the discretion to allocate resources in prosecution. Here a statute that almost by necessity forced a focus outside itself has been applied in radically different ways as the doctrine it tracked (welfare) came to be understood differently (since economics was different). The transformation fits precisely the structure of translation: applying a context-dependent text differently as presuppositions of that context undergo radically important changes. According to this conception, then, one could well understand the history of antitrust law as the selection of alternative means to a common end, where the means chosen depend upon the context of choice, and the context of choice includes both the values Congress selected (protecting consumers) and the facts of the world (conceptions of economics). And so conceived, the history of antitrust doctrine provides

319. Easterbrook, *supra* note 318, at 1702 (“Economists in 1890 thought that cartels were inevitable, maybe even desirable, and dismissed the Sherman Act as political puffery. Not until the 1930s did the economic profession claim to have a partial equilibrium model of monopoly and oligopoly.” (citations omitted)).

320. *See id.* at 1702-03; *supra* text accompanying note 318.

321. *See* Easterbrook, *supra* note 318, at 1698 n.7 (citing cases in which the Supreme Court has utilized an antitrust approach strongly influenced by consumer welfare).

322. This change occurred first in the merger context. *See* Department of Justice Merger Guidelines (released May 30, 1968), reprinted in ABA ANTITRUST SECTION, MONOGRAPH NO. 7, MERGER STANDARDS UNDER U.S. ANTITRUST LAWS 209, 209 (1981) (establishing that the primary role of enforcement “is to preserve and promote market structures conducive to competition” and focusing on market structure chiefly because the conduct of individual firms in the market tends to be controlled by the structure of that market).

323. Frank H. Easterbrook, *Comparative Advantage and Antitrust Law*, 75 CAL. L. REV. 983, 983 (1987).

yet another example of translation accounting for changes in nonlegal pre-suppositions.

But as I said at the start, all this hangs either on the claim that the value entrenched by the framers was consumer welfare, or on the claim that the framers intended to delegate to the courts the power to choose the policy values that the statute would advance. For if the value chosen by the framers was "concern for farmers, laborers, or small businessmen"³²⁴ then the path pursued by the courts has been unfaithful to those values. And if unfaithful to those original values, then the courts are guilty of infidelity unless empowered to select new values.

As to the first possibility—that the framers chose consumer welfare as the underlying value of the Sherman Act—the Chicago School stands on weak ground.³²⁵ Historians have forcefully argued that, at best, there was a broad mix of ideals that underlie the Sherman Act's enactment, none of which stand firmly enough to trump all others.³²⁶ And if this is true, then the translations effected in the name of welfare may be technically perfect, but begin from a forged original. If antitrust was not single-mindedly focused on consumer welfare, translations that presume that it was fail fidelity.

But maybe the charge to the federal courts was not just to carry on the common-law progress of restraint of trade, but also to select the values that the antitrust doctrine was to advance. Perhaps Congress meant for the courts to decide, between consumers and laborers, who should prevail. And if so, then the final selection of consumers as the courts' chosen victors would not be the manifestation of infidelity, at least to Congress's original intent, but the implementation of Congress's delegated authority.

In the Parts that follow, I develop what may be an independent reason for a court focused on fidelity to disavow just such a power—the power to select the values to pursue. For now it is enough to see that the fidelity of the antitrust doctrine may hang on precisely this (otherwise scandalous) claim of judicial authority. Thereby do we also see the potential for translation's abuse. Whatever the virtue of the current antitrust doctrine, it may reveal the clearest vice of the translator's practice.

324. See Bork, *supra* note 317, at 26.

325. See Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1423 n.18 (1990) (reviewing BORK, *supra* note 57) (accusing Bork of having selective perception of the Sherman Act's legislative history); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 22 (1989) ("Not a single statement in the legislative history comes close to stating the conclusions that Bork drew."). *But see* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67, 151 (1982) ("The antitrust laws were enacted to become broad and flexible economic mandates to improve 'consumer welfare,' as Congress defined this term.")

326. See Hovenkamp, *supra* note 325, at 21-22 (arguing that high consumer prices, injuries to competitors, and concern that successful firms may be condemned as illegal monopolists were all prominent in the minds of the Sherman Act's framers).

VI. Two-Step Fidelity: Limits on Equivalence

As I have already pleaded, these ten examples are not offered for their truth—little hangs on whether in fact each describes a proper translation. Instead they are offered to sketch a pattern of argument, one consistent, I have argued, with a commitment to fidelity under one conception of meaning and change, and common, I suggest, throughout our legal culture.³²⁷ Arguments certainly remain for rejecting these particular translations. But the reason they stand together here is that whatever their ultimate weaknesses individually, all are at least understandable as illustrations, rather than violations, of a principle of fidelity.

Of the aspects of translation that I suggested would guide the two-step fidelitist, however, we have so far touched on just one—the creativity required to effect a translation. This no doubt is the empowering aspect of the practice, and suggests the potential for vast interpretive reconstruction. It no doubt also raises the conservatives' nightmare of activism run rampant. For nothing offered so far suggests how a practice of two-step fidelity could restrain the legal interpreter, in just the sense of restraint ordinarily understood by "judicial restraint."³²⁸ Indeed, nothing yet shows whether translation could accommodate practices of restraint.

But we have not yet completed the instruction that translation has to offer. For we have not yet focused on the limitation of humility that I suggested a particular practice of translation might import. In this Part, I explore some of these limitations.

Humility, as I described above, is a constraint on the translator's creativity.³²⁹ In terms of the two-step's practice, if translation functions by accounting for changed presuppositions, humility functions by limiting the scope of the presuppositions that the translator can reckon. For example, if translation could account for changes in presuppositions of

327. Other examples of arguments based explicitly on something like the model of translation sketched here include Justices Kennedy and Souter's approach to defining a "public forum" for purposes of the First Amendment. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711, 2718 (1992) (Kennedy, J., concurring) ("We have allowed flexibility in our doctrine to meet changing technologies in other areas of constitutional interpretation . . . and I believe we must do the same with the First Amendment."); see also Amar & Widawsky, *supra* note 78, at 1359 (translating slavery); Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989) (translating separation of powers); Eskridge & Ferejohn, *supra* note 32, at 523 (translating Article I, Section 7); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992) (translating the Establishment Clause after incorporation).

328. There are of course two importantly distinct conceptions of restraint: structural and judicial restraint. See POSNER, *supra* note 3, at 207-15. I address the latter. For the argument that "any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges," see Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 825 (1986).

329. *Supra* section IV(B)(4).

types *A* to *Z*, humility says, “Don’t account for presuppositions of types *W*, *Y* and *Z*.” Thereby humility limits the range of translations that can be effected, not because accounting for them would not advance fidelity in some sense, but because institutional constraints make this particular kind of change inappropriate for this particular translator to effect. So understood, humility describes a “second best” of fidelity—a constraint on an ideal of fidelity imposed by the nature of the institution effecting the translation.

As applied to legal institutions, the limitations of humility I describe will be of two sorts, one which I call “structural humility,” the other “humility of capacity.” *Structural humility* finds reason to limit the scope of translation in the nature of the presuppositions at issue—it restricts the extent to which the judge as translator may account for presuppositions of a particular *kind*. Structural humility says, for example, “Because this is a *political presupposition*, the judicial branch should not account for it.” *Humility of capacity*, on the other hand, finds reason to limit the scope of translation in the nature of the *institution* effecting the translation itself—because of the particular weaknesses of this translator, humility of capacity entails that certain types of presuppositions will remain unaccounted. While the two kinds of constraints are distinct, both point to the weakness of a particular translator (because the translator is the judicial branch, for example, it is unable to make the following translations) relative to a conception of an ideal translator.

One caveat is critical. My purpose in this section is not to endorse or justify any particular restraint of humility. Indeed, I believe that the constraints flowing from capacity should certainly be removed, so long as the institutional limitations described could be corrected. My purpose is instead simply to complete the picture suggested by the approach of the translator. A two-step fidelitist could well insist that a practice of fidelity should admit none of these constraints; but that would require reconceiving of much about the institution, the courts, effecting the translation. All I want to claim here is that a two-step fidelitist could admit at least these constraints, and perhaps more, as limitations on the scope of translation. Whether limitations of humility should be accepted, and ultimately what those limitations should be, is a question beyond the scope of this essay. It is enough here just to suggest why they could be incorporated into a conception of fidelity in translation.

A. *Translative Limits: Structural Humility*

Begin with the limitation of what I will call structural humility. As I discussed the term in the context of literary translation, humility requires that a practice of translation not “improve” the material translated; that it carry the weaknesses of the original text as well as the strengths into its

new context.³³⁰ We have already seen the somewhat controversial place this ethic holds in traditional translation.³³¹ The controversy there requires us to justify any role it might have in the two-step's practice.

One possible justification has already been hinted at. As I have described it so far, the predicate for a change of translation is a change in a "presupposition." A presupposition changes whenever the original text would have been different, had that presupposition been different when the text was authored. But so defined, should the two-step effect a translation *whenever* a presupposition changes?

Consider one example. It was a presupposition of the Founders' Constitution that a bicameral legislature was "best." Many modern constitutional democracies do not follow this model.³³² This may indicate that bicameralism is no longer considered "best," and if it is no longer best, then the presupposition relied on by the Founders has changed. If it has changed, then a two-step could ask, what would the Framers have done had they not thought bicameralism best? The answer to that question could be that the Framers would have embraced unicameralism; if so, the two-step could argue, a translation of the Framers' conception into the current context (where bicameralism is no longer thought best) would be to erase bicameralism.

Now clearly something has gone wrong, but not because the example does not fit the form of the two-step's practice. Instead the example forces us to ask whether, although fidelity requires accommodation for *some* changed presuppositions, it follows that fidelity requires accommodation for *all* changed presuppositions. Is it possible that within a particular translative practice some changed presuppositions should not be accounted for by a translator, depending upon the kind of presupposition at issue?

Translation need not be so unlimited, but to see why, return to the basics of humility. The constraint of humility says a translator is not to make the translated text "better." When we enjoin a translator from making a text better, we can understand this as a decision about the kind of judgment for which the author will be held responsible. And from the relativity of translation and equivalence sketched above, it follows that the kind of judgment is a function of the practice at issue. A better text for a poet is one that improves the poetry, thus it is fine if the translator improves the handwriting. A better text for a child is a neatly written text, thus it is not fine if the translator improves the handwriting. What

330. *Supra* notes 148-53 and accompanying text.

331. *Supra* note 148 and accompanying text.

332. Bulgaria, Costa Rica, Denmark, Finland, Greece, Honduras, Hungary, Liechtenstein, The Netherlands Antilles, New Zealand, Malta, Portugal, Rumania, Russia, Slovakia, Sweden, and Zimbabwe are all constitutional democracies with unicameral legislatures. See THE 1993 INFORMATION PLEASE ALMANAC 172-296 (Otto Johnson et al. eds., 1993).

humility requires, then, is a claim about the background understanding of what it is the author is being held responsible for. Against this background, humility counsels the translator to stay clear of presuppositions that touch the author's responsibility.

The role of humility is tied to a particular institutional or practical understanding—an understanding of the institution within which translation functions—and whether humility is required depends upon that understanding. A two-step fidelitist could embrace structural humility if there were a reason to assure a clear division of labor between the author (Congress or the Founders) and the translator (judges). And of course it is not absurd to claim that our legal culture requires precisely this division. If any part of the agency conception of judges is correct—the presupposition, remember, of the enterprise of fidelity itself³³³—it follows there is something the principal is to do that the agent should not. And if so, it would follow that there would be a protected domain of judgments that a translator should not invade. The question becomes how best to identify and insulate this protected domain.

As a first step to identifying the domain of protected presuppositions that humility requires judges to ignore, let me give these presuppositions a name. Those presuppositions that humility requires the judge to ignore I will call “political.” The intuition behind the category should be obvious—these are presuppositions that, between the judicial and legislative functions, seem clearly to be within the domain of the legislative. But a definition more precise than this is hard to conclude. One attempt, suggested by Roberto Unger, would focus upon what it was those who constructed the original text considered themselves to be battling over. Presuppositions within that terrain constitute the political, and without it, nonpolitical.³³⁴ But I want to explore a second way of conceiving of the distinction between political and nonpolitical presuppositions, one that focuses more upon our collective sense about the nature of the presupposition. This collective sense is, of course, not natural or unchangeable; I rely only upon it not seeming changeable at the moment.

By political I mean just this. A presupposition is a fact or belief that, were it otherwise, would have resulted in a different text. Obviously, there are at least two very different senses in which a presupposition “could have been otherwise.” One is that it could have been false, though once thought to be true (*e.g.*, a conception of law as naturalistic). Another is that it could no longer be thought desirable or best. By political presupposition, I mean a presupposition that is acknowledged because, in the sense just

333. See *supra* note 158 and accompanying text.

334. Roberto M. Unger, Lecture III of the Storrs Lectures at Yale Law School (1987) (tape on file with the *Texas Law Review*).

described, it is *best* rather than *true*. The claim of structural humility is that such presuppositions should not be accounted for in translation.

This distinction, between presuppositions that are acknowledged because they are viewed as best and those that are acknowledged because they are viewed as true, is no doubt hard to maintain. For of course what is viewed as best is a function of what is viewed as true; and what is viewed as true is a function of what is viewed as best. More importantly, the distinction rests not on some philosophical claim about the nature of the presuppositions themselves, but rather on the rhetoric about those presuppositions contingently available to speakers within a particular legal culture. My claim is just that at a particular time, there will be some propositions that will be considered truth propositions, and some that will be considered value propositions, and that the more a proposition seems to be a value proposition rather than a truth proposition, the less the translator constrained by structural humility may account for it.

We have already seen one relatively clear example of this distinction when discussing current antitrust doctrine.³³⁵ As I said there, if we conclude that consumer welfare was not the dominant political idea motivating the framers of the Sherman Act, then we must either conclude that the courts have not acted with fidelity in construing the act as they have,³³⁶ or that Congress gave to the courts the power to select which value the Sherman Act was to protect. Tracking these values would be an example of translation that accounted for political presuppositions in the sense I describe, and the claim is that structural humility may provide reasons why a court should resist such assignments.

But consider a second example that may make the distinction more clearly.³³⁷

In *County of Riverside v. McLaughlin*,³³⁸ the Supreme Court revisited the question of how long police could hold a warrantless arrestee

335. *Supra* section V(B)(10).

336. Whether the courts have acted sensibly is a separate question.

337. A third example may be Justice Douglas's notion of the different conceptions of equal protection fit:

We agree . . . with [Holmes] that the Due Process Clause of the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics." Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.

Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 669 (1966) (citations omitted) (emphasis in original).

The two-step constrained by structural humility would argue that if it is a conception of equal protection that has changed, and if the conception has changed for political reasons, then the Court should not adjust the constitutional notion of equal protection to track this change.

338. 111 S. Ct. 1661 (1991).

without presenting her to a magistrate. Earlier, in *Gerstein v. Pugh*,³³⁹ the Court had held that the presentation must be made “promptly”,³⁴⁰ the question presented in *Riverside* was how “prompt” was promptly enough.³⁴¹ In a closely divided vote, the Court held that forty-eight hours was presumptively promptly enough. Over a stinging dissent by Justice Scalia, the Court, through Justice O’Connor, held that as long as the reasons for the delay of forty-eight hours were not illegitimate, forty-eight hours was not an unreasonable delay.³⁴²

There are at least two distinct issues raised by *Riverside*: first, what reasons justify a delay, and second, given a delay for those reasons, how long can that delay be? What is striking about the case for our purposes is the sharp line drawn between these issues: for the former question—what reasons for delay are justifiable—reflects what I have called a political presupposition (what is best), and the latter question—how long can police delay when faced with justifiable reasons—reflects something close to what I have called a nonpolitical presupposition (what is a reasonable amount of delay for these reasons).

In his dissent, Scalia made the point most sharply. The Fourth Amendment had constitutionalized the common law, Scalia said, at least to the extent that the only legitimate *reasons* for a delay in presenting a warrantless arrestee to a magistrate were those reasons recognized at the common law.³⁴³ Those reasons included only the time necessary to bring the arrestee to a magistrate, and not, for example, the delay necessary to conduct further investigation.³⁴⁴

But while the *reasons* for delay were frozen at the time of the Founding, such that no further reasons or justifications for delay would survive, the length of the delay allowed by those reasons was a function not of what the delay would have been at the common law, but a function of what the delay should reasonably be today, given today’s technology. Scalia put it much better than could I:

The Court dismisses reliance upon the common law on the ground that its “vague admonition” to the effect that “an arresting officer must bring a person arrested without a warrant before a judicial officer ‘as soon as he reasonably can’ provides no more support than does [*Gerstein*’s] “promptly after arrest” language

339. 420 U.S. 103 (1975).

340. *Id.* at 125; see also *Riverside*, 111 S. Ct. at 1665 (“In [*Gerstein*], this Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest.”).

341. *Riverside*, 111 S. Ct. at 1665.

342. *Id.* at 1671.

343. *Id.* at 1672 (Scalia, J., dissenting).

344. *Id.*

This response totally confuses the . . . constitutionally permissible *reasons* for delay with . . . the question of an outer time limit [for a delay]. The latter—how much time, *given the functions the officer is permitted to complete beforehand*, constitutes “as soon as he reasonably can” . . . —is obviously a function not of the common law but of helicopters and telephones. But what those delay-legitimizing functions are—whether, for example, they include further investigation of the alleged crime . . . —is assuredly governed by the common law³⁴⁵

Given the legitimate *reasons* for a delay, set, again, by the common law, it was not the common law that set how long those legitimate reasons could delay. As Scalia said, that turned not on the technology of the common law, but on the technology of today—on “helicopters and telephones.”³⁴⁵

The distinction Scalia points to here is the distinction between the political and nonpolitical presuppositions that I adverted to above. Choosing *which reasons were legitimate* was to choose or acknowledge presuppositions because they were *best* at the time. Choosing *how long those reasons could reasonably delay a presentation* was to choose or acknowledge presuppositions because they were *true* at the time. When the latter presuppositions no longer are true, then the conclusions that rest upon them must be translated. Structural humility would suggest, however, that the translator should not adjust presuppositions that change because they are no longer viewed as best.³⁴⁷ Tracking and accommodating changed presuppositions about what is best is a task assigned, the two-step could argue, to political branches.³⁴⁸

345. *Id.* at 1673 n.1 (Scalia, J., dissenting) (emphasis in original).

346. *Id.* (Scalia, J., dissenting).

347. Now again I confess the wholly artificial sense of the distinction between presuppositions selected because *best*, and those acknowledged because *true*. *Riverside* itself reveals the inherent ambiguity: for certainly the reasons viewed as best were in fact viewed as best in part because of how long it took to satisfy them. It could then be argued that if, for example, a simple procedure that advanced an investigation could be performed in fifteen minutes, that a view of what reasons were “best” would also include that investigative procedure. Nonetheless, the separation in function between our understanding of the judicial and political branches leads to a separation in translations: the political branches—since unconstrained by the limitation of translation—will effect a different translation of the original meaning; and the judicial branches, since constrained by this structural limitation of humility, will effect translations that do not fully account for the change in presuppositions. That, it could be argued, is the whole idea: where political ideals change, where the view of the good is transformed, then political machinery is to be invoked, and thus is the judicial machinery disempowered.

348. Here again Scalia may be helpful:

A democratic society does not . . . need constitutional guarantees to insure that its laws will reflect “current values.” Elections take care of that quite well. The purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable.

To the extent, then, that a presupposition is a presupposition because it is acknowledged as best rather than because it is acknowledged as true, structural humility would suggest the translator not account for changes in such presuppositions, and this again for reasons internal to the particular institution of judicial review.

If structural humility were the practice of the two-step fidelitist, then it would provide us a way to distinguish the practice of the two-step fidelitist from the practice of others who have at times invoked something like the rhetoric of translation. Such a practice of fidelity would not be a practice by which one derives the "perfect constitution"³⁴⁹ because it would not adjust for flawed political judgments even if flaws were recognized. Nor would it transform the Constitution to accord to the current "best moral theory"³⁵⁰ because, again, some moral presuppositions would be political in the sense described above. Nor would it discard a statute merely because unsupported by a current congressional majority³⁵¹ since

Scalia, *supra* note 77, at 862 (emphasis in original); see also *Ollman v. Evans*, 750 F.2d 970, 1038 (D.C. Cir. 1984) (Scalia, J., dissenting) ("[T]he identification of 'modern problems' to be remedied is quintessentially legislative rather than judicial business . . . [R]emedies are to be sought through democratic change rather than through judicial pronouncements that the Constitution now prohibits what it did not prohibit before."), *cert. denied*, 471 U.S. 1127 (1984); *State v. Cannon*, 190 A.2d 514, 517 (Del. 1963) (arguing that whether whipping is constitutional should not be determined by the judiciary, but rather by the legislature, which can reflect the will of the people about the meaning of "cruel and unusual").

349. See Henry P. Monsghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 357-58 (1981) (criticizing those who uniformly derive "perfect" results from the Constitution).

350. See RONALD DWORKIN, *LAW'S EMPIRE* 397-99 (1986) (positing a system of "constitutional integrity," in which judges base their decision on the best available interpretation of American constitutional text and practice as a whole, an interpretation that explicitly includes political morality). Note, too, that in this way the approach of the two-step is distinct from Eskridge's. Eskridge does not attempt to distinguish among the kind of changes that empower a court to permit a statute to "evolve"—in his scheme, the change could be factual or not. Nor is he concerned with the need to assure some form of constancy in meaning across such evolution. See Eskridge, *supra* note 32, at 321-22 (arguing that "under any rigorous theory of statutory interpretation, legislative supremacy not only tolerates, but requires judges to interpret statutes dynamically—that is, in ways not contemplated by the original drafters"); see also William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (insisting that statutes should be interpreted "dynamically," that is, in light of their present societal, political, and legal contexts). But what distinguishes an approach of translation from other dynamic theories is the attempt to limit the kinds of facts that justify the interpretation's evolution. While the approach here is certainly "dynamic," it is dynamic in its effort to preserve meaning rather than evolve. If evolution means advancing politics or morality, then the translator wants to remain backward. Such advances are the domain of political, not judicial, departments.

351. Compare CALABRESI, *supra* note 32, at 118 (discerning that one option when deciding who should bear the burden of inertia in lawmaking is to force legislation to be reapproved to remain in force) with William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696-97 (1976) ("A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution."). Of course, that was precisely the Court's justification for the change the Court undertook two Terms ago in *Payne v. Tennessee*, 111 S. Ct. 2597, 2608 (1991) (stating that "social consensus" about the death penalty's relation to certain offenses is a limit imposed by the Eighth Amendment).

this is the core of any political presupposition. The product of the fidelitist is not guaranteed to be the best possible political product, and, humility would suggest, an important measure of the integrity of the practice is the extent to which it permits blemishes to remain, left for the political branch to correct.

It is particularly instructive to compare the practice of the two-step fidelitist and the practice described by Dworkin as "Law as Integrity."³⁵² For Dworkin, much of the practice of the judge of integrity is the practice of translation so far described.³⁵³ The judge is to make sense of a past practice through the dimension of "fit" first.³⁵⁴ But always, and essentially, there is a gap: a question that does not fit past practice, and hence a question that the judge must face, as it were, on her own. Here, Dworkin suggests, the judge is to resolve the question in light of the "best moral theory" then existing, resolving it in the way enlightened moral sensibility would then resolve it.³⁵⁵

The two-step fidelitist would reject Dworkin's conception.³⁵⁶ Although the two-step agrees that at times there are gaps, she is not allowed to make changes that turn on changing or current moral or political presuppositions. Tracking morality, or political correctness, is the duty of the political branch; structural humility, the duty of the translative branch.³⁵⁷

In this way, at least, the approach sketched here is distinct from Calabresi's far more ambitious and insightful effort. It is distinct in a second way as well. Calabresi does not engage the possibility that fidelity requires change when presuppositions change. He presumes, along with the traditional debate, that change based on changed presuppositions is just bad interpretation. Such an approach, he suggests, does "violence" to legislative intent or language and to "the core of honest interpretation." CALABRESI, *supra* note 32, at 35.

352. See generally DWORKIN, *supra* note 350, at 176-275.

353. Dworkin describes, for example, an "aesthetic hypothesis" that guides and constrains the practice of interpretation, distinguishing interpretation from "change." See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 149 (1985).

354. See DWORKIN, *supra* note 350, at 255 (noting that "[c]onvictions about fit will provide a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all").

355. See *id.* at 255-56 (noting that if more than one interpretation survives the "fit" inquiry, the judge "must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions . . . in a better light from the standpoint of political morality").

356. The two-step would also reject similar conceptions, such as those discussed in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966) (tracing how interpretation of the Equal Protection Clause has changed throughout history); Robert W. Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. CAL. L. REV. 647, 647-48 (1985) (comparing constitutional interpretations that call for "moral reevaluation and possible moral growth" in only individual rights cases with those calling for such moral interpretation in all cases); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975) ("It seems to me that the courts do appropriately apply values not articulated in the constitutional text, and appropriately apply them in determining the constitutionality of legislation."); Sandalow, *supra* note 32, at 1053 ("The values that have informed decisions under the equal protection clause, as under the due process clause, are those that each generation has thought appropriate to its time.").

357. From this assertion flow the well-known refrains. See Posner, *Statutory Interpretation*, *supra* note 32, at 818 ("It is not the judge's job to keep a statute up to date in the sense of making it reflect

Structural humility requires that the judge maintain an old-fashioned obstinacy to questions in that gap, in part adopting a practice that is the inverse of Dworkin's, by resolving the question as if the political presuppositions were as they were when the text being applied was authored—willfully blind to the currently best moral theory, and embracing instead the original moral or political theory, at least where not later altered by the political branch. Again, the translator's duty is to carry over the warts; the author's or her assign's duty is to erase them. In this way the practice of the two-step could stand between the originalist and the phantom the originalist most forcefully attacks—the proctor of that “continuing national seminar . . . in moral philosophy.”³⁵⁸ From the perspective of the two-step fidelitist, both the originalist and the Dworkinian are infidels.

Finally, we should be clear about one important restriction upon the limit of structural humility. Compare the following two ways in which moral values may underlie a particular text. In the first, a legislature proscribes an act because it is considered immoral—fornication, for example. In the second, a legislature delegates to a court the task of enforcing a law that embraces explicitly current moral understandings—the Mann Act, for example, which forbade transporting a “woman or girl” to engage in a group of listed activities or “any other immoral practice,” could be understood as a command to track what purposes are now deemed immoral.³⁵⁹ In the first case, humility would counsel that a translating court ignore the changed views about the morality of the proscribed act—if, for example, fornication was no longer considered immoral, humility would counsel the court ignore that change.³⁶⁰ In the second case, humility would have no necessary role. For in the second case, the command includes updating to account for changed moral views, and to update according to that command is not to make the statute “better”; rather it is simply to keep the statute the same. The limit to this practice would be a limit of separation of powers, not humility.

contemporary values; it is his job to imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations that they did not foresee.”)

358. Gerard E. Lynch, *Constitutional Law as Moral Philosophy*, 84 COLUM. L. REV. 537, 549 (1984) (reviewing MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982)).

359. See 18 U.S.C. § 2421 historical notes (1988). This language was removed in 1986. *Id.*

360. This analysis is distinct from the analysis pointed to by Daniel Farber when discussing the *cy pres* doctrine. Farber, *supra* note 32, at 310. Farber discusses Lesbian/Gay Freedom Day Comm., Inc. v. INS, 541 F. Supp. 569 (N.D. Cal. 1982), in which the court “declined to enforce a clear congressional mandate that homosexuals be excluded from entry into the country because Congress had acted on the outmoded understanding that homosexuality was a psychiatric disorder.” Farber, *supra* note 32, at 310 n.149. One could distinguish a changed view about the morality of homosexuality from a changed view about its pathology. Humility would constrain accounting for the former change, but not the latter.

Structural humility thus constrains the practice of the interpreter, again for reasons internal to the practice of the institution within which translation functions. As sketched above, the constraint would limit the range of presuppositions that the translator could account for in a translation. The translator may account for all presuppositions—save the political.³⁶¹

B. *Translative Limits: Capacity*

Thus far the limits on the translator's practice have derived from the nature of the presuppositions accounted for: structural humility limits the range of presuppositions because it is inappropriate for a court to account for this *type* of fact. But inappropriateness of type does not exhaust the reasons that a translator may have for refusing to effect a translation. Even if a presupposition is of a *type* that is appropriate for a translator to account, the very judgment required in the translation may be far too complex for the translator to complete. This possibility suggests the second dimension of humility—one that looks to the translating institution itself and limits the scope of presuppositions because the kind of judgment required would exceed the institution's ability.

This second limitation of humility, then, is a limitation of *capacity*, a recognition of the inability of a court as currently structured to account for certain kinds of changes in presuppositions, either because the material at issue is itself too complex, or because the resources necessary to track them are too great. While the plea of incapacity has been a frequent one over the courts' history,³⁶² and one we have already seen when discussing the Tenth Amendment,³⁶³ it is nonetheless a persistent (and perhaps exaggerated) one, and its persistence suggests its possible place in the two-step's analysis.

Here is just one example. One way to understand the Court's unwillingness to police the boundaries of interstate commerce is the Court's incapacity to make judgments about the actual effects of legislation on interstate commerce. Once beyond the categories of the nineteenth-century formalist, the Court quickly saw, as Cardozo warned, that every subject of regulation would eventually have some effect on interstate commerce, so

361. In this way, the two-step constrained by a practice of structural humility may resemble the method of originalism endorsed by Robert Bork. Bork concedes the need to permit constitutional law to "evolve" to adjust to, among other things, changing technology, but resists evolution to adjust to changes in politics. See BORK, *supra* note 57, at 167-70; see also *Ollman v. Evans*, 750 F.2d 970, 995-96 (D.C. Cir.) (Bork, J., concurring) (equating changes in First Amendment libel doctrine (in response to a changing culture) to changes in Fourth Amendment doctrine (in response to the technological invention of wiretapping)), *cert. denied*, 471 U.S. 1127 (1984).

362. See, e.g., *New York v. United States*, 326 U.S. 572, 581-82 (1946) (recounting the plaintiffs' argument that any decision as to immunity from federal income tax is beyond the capacity of the courts because it "brings fiscal and political factors into play").

363. *Supra* notes 221-22 and accompanying text.

that in principle no clear line could be drawn. Judge Posner describes Cardozo's view:

Every economic activity, however local, affects interstate commerce because of the chain of substitutions that connects all activities in a national economy. But Cardozo recognized that to infer from this that Congress could regulate all local activity would wreck the balance between state and federal regulatory power that the Constitution had struck in empowering Congress to regulate interstate and foreign—not all—commerce. He thought a line should be drawn that would, however crudely, balance the competing values of nationalism and localism.³⁶⁴

It would seem to follow from this, were fidelity the Court's sole aim, that the Court would strive, as Cardozo counseled, to find some workable line dividing interstate from intrastate commerce, if only to find some way to preserve the Constitution's division of power. Yet, since the New Deal, the Court has abstained from just such policing,³⁶⁵ no doubt in part because of the political nature of the judgment made (a reason of structural humility), but also perhaps because of the complexity of the judgment required (a reason of capacity). Under the latter reading, the Court was unwilling to second-guess Congress's determination, in part because it was in no better position to judge the actual economic effects of legislation that form the predicate for Congress's action than was Congress itself. Whether or not Congress could or did make the judgment, for the Court to make it would require it to engage an inquiry far beyond its institutional ability. Or at least the Court could so claim. And if this was the justification for its refusal to engage in substantive review of the limits on Congress's power, then this refusal would constitute a defense of necessity to the charge of infidelity—a refusal grounded in incapacity.

One final but critical feature distinguishing this type of humility must be noted. Humility grounded in incapacity is contingent in a way that humility grounded in the nature of the presuppositions accounted for is not. If fidelity is constrained by a limit of incapacity, then the fidelitist has a strong argument for institutions that eliminate this limitation of capacity, and thereby advance an objective of fidelity. But without this remedy, the limitation based on capacity provides a second way in which the structure of the judiciary limits the scope of fidelity.

364. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 122 (1990).

365. The Court abandoned its earlier attempts to make distinctions between intrastate and interstate commerce when it adopted the economic effects test for Commerce Clause questions in 1937. See *NLRB v. Jone & Laughlin Steel Corp.*, 301 U.S. 1, 40 (1937) (noting that, for purposes of deciding the constitutionality of the National Labor Relations Act as applied to a steel plant's labor practices, the relevant question is the effect of the labor practices on interstate commerce).

C. *Two-Step Fidelity: The Model Summarized*

We are in a position to draw together the model of two-step fidelity.

Both the one-step and two-step fidelitist begin the practice of fidelity with a contextualized understanding of the text being read. For both, the question is, "What was the meaning of the text when written?" Unlike the one-step, however, the two-step is sensitive to the effect of context in both the context of writing and the context of reading, or the context where the "text" is the application. Thus in the two-step's view, fidelity requires that the meaning of the application in the context of reading be as close as possible to the meaning of an original application in the context of writing. Thus does the two-step adopt a practice designed to preserve meaning across contexts, and that practice I have called translation.

Translation moves in two steps. First, the two-step becomes familiar with both the context of writing and the context of application, so that she has a sense of what I have called the character of each. Second, she seeks an equivalent in the application context to the original application in the authoring context. To identify those cases where a translation must be made, she adopts a method of analysis. First, she identifies changes in presuppositions between the two contexts. (Again, not all changes are changes in a presupposition; only a change that would have resulted in a different text in the originating context counts as a change in a presupposition.) And if a presupposition has changed, then second, she may be required to accommodate that change, by making the smallest change possible in the outcome or reading to preserve the most possible from the original context.

May, and not *must*. For despite a changing presupposition, the translator may be required to do nothing. A principle of humility may require her to ignore the changed presupposition, either if it is what I have described as a political presupposition, or if accounting for the change of that presupposition would exceed the institutional capacity of the two-step translator. Either way, values other than fidelity might trump that ideal of fidelity, and for these values, the two-step must allow the text translated to fall out of tune.

VII. Conclusion

Readings of the Constitution have changed, but standing alone, that says nothing about fidelity. Readings of the Constitution have remained the same, but again, standing alone, that says nothing about fidelity. Changed readings are neither necessary nor sufficient conditions of infidelity or fidelity. So much I have tried to argue.

There is a practice of interpretation that could conceivably meet a legal system's demands for fidelity. That practice is one I have called

translation. Translation is distinct from one-step originalism. For reasons tied to how meaning changes across contexts, one-step originalism as a practice must systematically defeat any ideal of fidelity. Blind to the effect of context on meaning, originalism allows context to change constitutional meaning.

Unlike one-step originalism, arguments from translation accommodate changes in context so as to preserve meaning across contexts. These arguments are familiar to the law, and have been made by jurists spanning the political spectrum. Where they have been limited, I have identified two types of limits, structural humility and humility of capacity, that may explain these constraints—constraints serving values other than fidelity. But beyond these, or to the extent the fidelitist could escape these, the fidelitist, I have suggested, would translate.

Thus one-step fidelity is distinct from two-step fidelity, but depending upon the constraints of humility, it might be that we consider both to be forms of originalism. What two-step fidelity adds to our ordinary understanding of originalism is a way to understand how originalism can be dynamic without it being unfaithful. What it also may add is a way to distinguish the emerging originalist jurisprudence of the middle Justices of the current Supreme Court. For what distinguishes the practice of originalism of at least Justices O'Connor and Kennedy, and perhaps Justice Souter,³⁶⁶ is its attention to issues that I would identify as issues of translation. Justice Kennedy, for example, has attacked the one-step originalist position of Justices Scalia, Thomas, and Rehnquist on the meaning of the "public forum" doctrine, arguing:

In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government

366. Consider his quite striking description of *Brown* in his confirmation hearings:

There certainly was no intent whatsoever in the enactment of the 14th Amendment to bring about school desegregation. And if in fact the meaning or the guarantee of equal protection were confined to specific intent, then of course, *Brown* . . . would have been a wrong decision. But my interpretive position is not that original intent is controlling, but that original meaning is controlling.

The Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, United States Senate, 101st Cong., 2d Sess. 161 (1990).

He later continued:

The majority who decided *Plessy v. Ferguson* in 1896 accepted as a matter of fact that in the context in which they were applying the 14th Amendment there could be separateness and equality. Whatever else we may see in *Brown v. Board*, there is one thing that we see very clearly and that is that the Court was saying you may no longer . . . ignore the evidence of non-tangible effects. When you accept that evidence, then you see that you cannot have separateness and equality.

Id. at 303.

property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.³⁶⁷

Likewise, and perhaps more significantly, in *Planned Parenthood v. Casey*, Justices O'Connor, Kennedy, and Souter offered an account of why two past Supreme Court reversals—*Brown's* reversal of *Plessy*, and the Court's change after the New Deal—were justified as acts of judicial fidelity in the face of changed understanding of *fact*.³⁶⁸ As I discuss with respect to *Brown*,³⁶⁹ to see such a change as nonetheless a change of fidelity requires an understanding consistent with the two-step's, and inconsistent with the one-step's. The one-step can only see the reversals of *Brown* and the New Deal as infidelity, however that infidelity is justified.

Two-step fidelity may then help map the currently emerging conservative middle. But does it show whether we should be fidelitists? For if anything, by sketching what fidelity is not (originalism), and suggesting something it might be (translation), we have only made plain an intuition present from the start of this Article: that perhaps the best picture of a practice of fidelity is a picture of a practice beyond our reach. We may understand enough to see what fidelity would be, but also enough to see why it is beyond what we could hope to achieve.

To put these aspects of skepticism into context, we must distinguish between two very different uses of arguments from translation, one negative, the other positive. The negative is this: We find ourselves now surrounded by a myriad of interpretations of a Constitution generations old. Some of them were interpretations of fidelity, some certainly not. The question for a fidelitist reviewing any past interpretation is whether it is an interpretation of fidelity. But as should be clear, fidelity is not binary. There will be more and less faithful, not faithful and unfaithful, readings. So in evaluating a reading, evaluation must always proceed by comparison (*i.e.*, is this reading more faithful than that?).

367. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711, 2717 (1992) (Kennedy, J., concurring). According to the one-step position adopted by Chief Justice Rehnquist, public forums—that is, those in which the government is most limited in the regulations it may impose—were just those and only those traditionally considered public forums. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2706 (1992).

368. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2812-13 (1992). The *Casey* Court noted that during the *Lochner* era, the Court's decisions regarding economic regulation were based on a *laissez-faire* theory of contractual freedom; the eventual repudiation of *Lochner* and related cases, the Court said, was justified by "the clear demonstration that the facts of economic life were different than those previously assumed." *Id.* at 2812. Similarly, the *Casey* Court noted that the holding in *Plessy v. Ferguson*, 163 U.S. 537 (1896), was based on a factual assumption—that separate did not imply inferiority—that was repudiated in *Brown v. Board of Education*, 347 U.S. 483 (1954). *Casey*, 112 S. Ct. at 2813.

369. *Supra* section V(B)(9).

In this comparison, the originalist presumed that the original reading would always trump any later interpretation. We have seen enough to see why this is not necessarily true. Indeed, as we get further removed from any original context, even a presumption in favor of an original reading may disappear: We may be so removed from that context that their applications presumptively may be not our own. But regardless of any presumption, the originalist's restoration must be compared with the current reading, and the question becomes whether the alternative is more faithful than the status quo.

Well, again, the originalist reading will not be more faithful simply because it was the original application. Its claim to fidelity must be made by showing that it—though identical with the original application—is the best translated application in light of the many changes in context between the original time and now. Faced with such a burden, the originalist aiming to restore original meaning faces a difficult task. As the changes in context multiply, the difficulty of that showing increases as well, and with increased difficulty goes a decreased likelihood of success. The originalist fails to demonstrate the original is still the faithful reading because demonstrating that an alternative is a better translation becomes an impossibly difficult standard to meet.

This suggests the sense in which translation can be used defensively as a shield against a current crusade of restoration organized under the banner of originalism and fidelity. But, in the same way, the argument suggests the weakness of translation as a tool of fidelity used positively—not as a shield against the crusaders, but as a sword against an interpretive status quo.

For the problem is always that the task of translation itself is despairingly difficult. To translate we must speak another language, which for constitutional lawyers is the language of the eighteenth century, synthesized with the restructuring of the nineteenth century. "Language" is more than words people use; it is their ideals, their hopes, their prejudices, their enlightenments—in short, it is their world. As the distance to that world increases, so too does the difficulty of the task of translation, not just in the sense that it becomes more and more difficult to understand who the Framers were, but also in the sense that it becomes more and more difficult to accept what they were about. Wittgenstein wrote, "If a lion could talk, we could not understand him."³⁷⁰ Can we anymore understand a generation for whom the Nobility Clause³⁷¹ was an organizing ideal of original

370. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 223 (G.E.M. Anscombe trans., 1953).

371. U.S. CONST. art. I, § 9, cl.8 ("No Title of Nobility shall be granted by the United States").

design? At some point does it no longer make sense to speak of *translation*, for at some point the contexts become so different that any understanding between them is lost? And if so, then at some point we must decide whether the enterprise itself—the enterprise of fidelity—continues to make sense.

To this skepticism, there are two standard responses. One is Justice Jackson's. Finding himself in the middle of the constitutional storm over the New Deal, Justice Jackson wrote:

True, the task of *translating* the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. *We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.* These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.³⁷²

In Jackson's view, the Court had no choice. Its job, however difficult, was precisely this "translating" even though it acts "not by authority of [its] competence" as translators "but by force of our commissions"³⁷³ as judges. However impossible, however underdetermined, however political, the Court must, Jackson thought, work to keep the Constitution alive.

The second tack is simply to confess the impossibility and look elsewhere for constitutional authority, or for substitutes for constitutional authority. This was Brest's response after sketching the outlines of a practice of translation and concluding that any such practice was too hopelessly complex.³⁷⁴ Because, Brest argued, the counsel of fidelity is so

372. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-40 (1943) (emphasis added).

373. *Id.* at 640.

374. Brest, *supra* note 32, at 234-37.

unpredictable and unknowable, better to fasten constitutional norms to ideals more familiar and predictable.

Maybe so. But a third response is also possible, one that looks for ways to rekindle constitutional authority. We come from a tradition when ordinary citizens, as Paine described, would carry copies of the Constitution in their pockets and refer to them in ordinary political debate.³⁷⁵ We live in a time when almost sixty percent of the American public cannot even identify the Bill of Rights.³⁷⁶ If the document has become so out of date that its meaning is no longer plain to all—if it has become impossible to imagine a world where ordinary people carry the Constitution in their pockets—then perhaps it is time to restore its meaning by, as Justice Stevens has recently suggested, amending the text to preserve the meaning.³⁷⁷ Perhaps, that is, it is time to rewrite our Constitution, written in a language long lost and forgotten, with ideals and expectations too far from the ordinary ken of constitutional readers, in a language we once again understand, with a meaning that is once again our own. We could struggle to understand what is the most faithful translation, but at some point the question becomes why? We are like the person who finds himself at the store, with a list he can no longer make out, struggling to reconstruct what it must have been that he wanted to buy; at some point it may make sense simply to decide again what he wants, to rewrite the list, to give up the obsession that it must be the same as the old list, to move on.

If fidelity is translation, then perhaps the lesson from the great distance in language is that we have come to the point when a translation of the whole would give us more than translation piece by piece could ever promise. And if not translation of the whole—if not an effort to recapture and restate constitutional meanings that would be ours—then perhaps the lesson of the great distance that separates us from the Framers is that fidelity cannot be our aim. Or at least it cannot be our aim anymore.

375. In discussing the Pennsylvania Constitution of 1776, Paine writes, It was the political bible of the state. Scarcely a family was without it. Every member of the government had a copy; and nothing was more common, when any debate arose on the principle of a bill, or on the extent of any species of authority, than for the members to take the printed constitution out of their pocket, and read the chapter with which such matter in debate was connected.

THOMAS PAINE, *RIGHTS OF MAN* 182 (Heritage Press 1961) (1791).

376. Ruth Marcus, *Constitution Confuses Most Americans; Public Ill-Informed on U.S. Blueprint*, WASH. POST, Feb. 15, 1987, at A13.

377. See John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 19-24 (1992).