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## Fidelity and Constraint

Lawrence Lessig

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## Fidelity and Constraint

### Cover Page Footnote

Thanks to Curtis Bradley, Rosemary Coombe, Jack Goldsmith, Larry Kramer, Alan Meese, Richard Posner, Arti Rai, Anthony Sebok, Peter Strauss, and Ruti Teitel for guidance on much of this, and especially the University of Colorado at Boulder's Legal Theory Workshop, the Columbia Legal Theory Workshop, the University of Virginia Legal Workshop Series, and NYU's Sager/Eisgruber Colloquium, for helpful criticisms of the Erie-effect. I am indebted to David Strauss for help on the equal protection argument in particular. Funding for this project was provided by the Douglas Law and Government Fund and the Sarah Scaife Foundation. Excellent research assistance was provided by Ashley Parrish.

# FIDELITY AND CONSTRAINT

*Lawrence Lessig\**

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## INTRODUCTION

HERE are two ideas, apparently unrelated, that I want to argue are, from the perspective of a theory of interpretive fidelity—or fidelity theory—intimately connected.

First: Judges live life subject to constraints. They judge subject to constraints. These constraints, for the most part, are the same sort of constraints that we all face. They are the constraints of how they, and how we, *see* the world. They are a function of the things we take for granted—the things we don't think much about; that we argue, subject to; that we contest, relative to. Judges judge subject to these constraints. These constraints change. And judgments (and judges) are vulnerable to these changes.

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\* Thanks to Curtis Bradley, Rosemary Coombe, Jack Goldsmith, Larry Kramer, Alan Meese, Richard Posner, Arti Rai, Anthony Sebok, Peter Strauss, and Ruti Teitel for guidance on much of this, and especially the University of Colorado at Boulder's Legal Theory Workshop, the Columbia Legal Theory Workshop, the University of Virginia Legal Workshop Series, and NYU's Sager/Eisgruber Colloquium, for helpful criticisms of the *Erie-effect*. I am indebted to David Strauss for help on the equal protection argument in particular. Funding for this project was provided by the Douglas Law and Government Fund and the Sarah Scaife Foundation. Excellent research assistance was provided by Ashley Parrish.

Second: Readings of the Constitution change. This is the brute fact of our constitutional past. The Constitution is read at one time to mean one thing; at another, to mean something quite different. These changes track no change in constitutional text; nor do they follow confessions of earlier mistake. How, we should ask, could these changes be consistent with a theory of interpretive fidelity?

We have been debating this question of interpretive fidelity for a very long time.<sup>1</sup> It is late in this argument's day. So if there is something new to be added to this debate, one has a duty to put the new up front. So here is the new that I want to argue: That any theory of interpretive fidelity must account for the first point; and that accounting for the first point is a way to understand the second. That understanding how changed readings can be readings of fidelity depends upon understanding how the constraints of context matter in a theory of interpretive fidelity.

Most theories ignore the first point, and simply hide the second. Most proceed as if this stuff taken for granted can, as it were, be taken for granted. Others (within the cruder forms of the "it's all politics" school) presume such constraints are all that there is—as if constitutional law were simply epiphenomenal upon social and political context. But constraints of context are neither nothing, nor everything. They are something more interesting than either extreme allows. My claim is that we can say something useful about how and where they matter; and that saying something useful about how and where they matter is essential if a theory of fidelity is to be complete.

Put most crudely, my account will track readings as a function of three states (as in the "states" that water may take—solid, liquid, gas) that contexts may take. The first is the state when things are taken for granted—when matters, in a way that I will describe more fully below, stand relatively uncontested in the present interpretive context. The second is when things stand contested—when, again in a way that I will describe more fully below, they are understood, in the present interpretive context to be the subject of dispute. And the third is when things change from contested to uncontested, or uncontested to contested.

These states, and the constraints that they yield, will matter, I suggest, to a range of changed readings in our constitutional past; they will reveal a pattern in these changed readings; and they will suggest something about how we might expect readings to change in the fu-

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1. The best of the early vollies is in Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980). Compare Edwin Meese III, *Address Before the D.C. Chapter of the Federalist Society Lawyers Division*, reprinted in *Interpreting Law and Literature: A Hermeneutic Reader* 25 (Sanford Levinson & Steven Mailloux eds., 1988) with Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

ture. In what follows, I sketch this pattern and how it will matter to a theory of interpretive fidelity.

The theory of fidelity that I describe is an account grounded in a practice of translation. Again, my broader claim is that any theory of fidelity must describe the constraints I discuss here. But a theory of fidelity as translation makes sense of just why such an account is needed. In the first section below, I describe the theory briefly, and incompletely, for its idea is quickly grasped (and I have described it in tedious detail elsewhere). In the second section, I then explore the place that these constraints of context have in the account of fidelity as translation, and the place they must hold in any account of interpretive fidelity.

### I. FIRST STEPS

Readings of the Constitution have changed. A theory of fidelity must explain at least this. It must explain, that is, why readings change, whether such changes are changes of fidelity, and more generally, how we could know whether such changes are changes of fidelity.

A theory modeled on translation is one such account. It uses "translation" as a heuristic for suggesting just how changed readings could be changes of fidelity. It uses this heuristic for guiding this change to assure that they are. The heuristic is modeled upon linguistic translation, or what we ordinarily mean by "translation," but the pattern it invokes is much broader than that. As George Steiner puts it, "[w]hen we read or hear any language-statement from the past . . . we translate."<sup>2</sup> Translation, in this sense, is a practice to understand a contextually distant text, whether a text written in a different language, or a text written at a different time. It is translation in this broader sense that I mean to model, and the ethic that this practice invokes that I mean to draw upon.

But we must be clear about the role that a theory of translation is to fill. It is not the only player in an account of interpretive fidelity or history. It is not an elixir of constitutional understanding. I don't believe that a theory of translation explains all changed readings in our constitutional past: Some readings change for reasons unrelated to the understanding of translation. Some change, for example, because the Constitution has changed—because it has, for example, been amended.<sup>3</sup> Some change because the interpreter is trying to synthe-

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2. See George Steiner, *After Babel: Aspects of Language and Translation* 28 (1975).

3. *Brushaber v. Union Pac. R.R.*, 240 U.S. 1 (1916), is a simple example. *Brushaber* changed the reading of the taxing power offered in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). *Brushaber*, 240 U.S. at 18-19. It did so because between the reading offered in *Pollack* and the reading offered in *Brushaber*, the Sixteenth Amendment was ratified. *Id.* at 20.

size an amendment into the unchanged Constitution.<sup>4</sup> Some change because an earlier reading turns out to be a mistake.<sup>5</sup> Or some change because of simple politics.<sup>6</sup> If these are the five reasons that readings may change, then translation is one of four *justified* reasons why readings change. It is an account that seeks to explain a residual—to explain changes that amendment, or synthesis, or mistake, don't.

This is the positive use of a theory of translation. There is a negative use as well—one which perhaps motivates the positive theory, and best introduces the role that the positive theory must play. The negative use is in response to what might seem an intuitively attractive account of interpretive fidelity. Its aim is to dislodge this initial intuition. So let me begin with this negative use, by arguing what fidelity is not.

#### A. *What Fidelity Is Not*

Fidelity on any account implies a certain constancy; the question is what sort of constancy this is. One might think that the faithful reader is the one who does just what the author would have done—or in our case, that the faithful interpreter of the Constitution is the one who does just what the Framers would have done. This is fidelity at the level of results: We can imagine the Framers confronted with the questions we must answer; we can imagine what they would answer; fidelity (so understood) demands that we give the same answers that they would have given.

We can call this one-step originalism, and distinguish two different forms. One is historical: it concerns questions that the Framers *did* confront—paradigm cases, we might say, that expressed their understanding of the Constitution's original meaning.<sup>7</sup> The other is counterfactual: it concerns questions that we imagine the Framers confronting—questions like, What would Madison say to this question? In either form, we are returning, in a sense, to a place or person long gone, and putting a question there, or to them, to see what their answer was, or would be. That answer, this form of fidelity says, is the answer that we too must adopt.

It is true that no theorist of fidelity, whether judge or academic, has ever adopted such a theory for every kind of constitutional question. But it is not true that no one is a one-step originalist, at least for a

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4. This is my view of *Bolling v. Sharpe*, 347 U.S. 497 (1954). See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *Stan. L. Rev.* 395, 409-10 (1995) [hereinafter Lessig, *Understanding Changed Readings*].

5. The recent reversal of the question whether Victim Impact Statements are admissible is defended as a change grounded in a mistake. See *Payne v. Tennessee*, 501 U.S. 808, 830 (1991).

6. A better understanding of the same case may be just politics. See *id.* at 844, 850 (Marshall, J., dissenting).

7. See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 *Yale L.J.* 1119, 1169-71 (1995).

broad range of important cases.<sup>8</sup> One-step originalism is alive and well in our legal culture. But whether general or not doesn't matter for my purposes here. The point of the category is to make plain one conceptually possible theory of fidelity, and then to make plain just why such a conception can't be fidelity in any meaningful sense. This we can see either from a reflection in the form of an example, or in the form of a theory.

The examples are many, but one should suggest the point. The one-step says that we look to what the Framers would have said to determine what the Constitution means. So does the Constitution include the power to regulate commerce in meat? If one answered that question by returning to the Framing, and putting the question to a select few of the Framers, the answer would have been "no." At the time of the Framing, the slaughter business was local: Meat could not be shipped any great distance without great spoilage; its market was restricted; and because its market was restricted, a clause that gave Congress the power to regulate commerce among the several states did not give Congress the power to regulate slaughtered meat.

Early in the nineteenth century, cold-storage transport was invented; by the mid-nineteenth century, it was the dominant mode of transporting slaughtered meat.<sup>9</sup> This transport carried slaughtered meat far beyond the limits of its local area of production. Indeed, after the establishment of cold-car transport, the market for meat became quite national. Meat was shipped in interstate commerce across the country, and the quantity of meat produced increased dramatically.

All this is obvious. But the obvious should remind us about what is within the practice of a faithful reading of the commerce power. Under any plausible modern reading of the commerce power, it includes the power to regulate the sale of this meat,<sup>10</sup> because readings of the commerce power depend upon something about the world the commerce power functions in. Readings must be made with reference to that world. But on the method of the one-step, they are not. On the method of the one-step, the question is answered in 1791, cold-car transport notwithstanding.

Now again, no one takes this extreme one-step position—consistently at least with respect to commerce, even though the rhetoric

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8. While Justice Scalia's views are more subtle than this, his writing does at times suggest one-stepism. See *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Ollman v. Evans*, 750 F.2d 970, 1038 n.2 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) [hereinafter *Scalia, Originalism*].

9. See Oscar Edward Anderson Jr., *Refrigeration in America: A History of a New Technology and Its Impact* 65 (1953).

10. At least as to its transport across state lines. As for the bucking of the old Court in what might be thought to be related areas, see *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

among originalists often suggests something quite close.<sup>11</sup> But my point is not to defeat a movement with a single example. It is instead to establish what seems to me an inescapable conclusion: that once one rejects this clean, one-step originalist view, one is launched on a very difficult task: to separate out changes in the interpretive context that will matter to interpretive fidelity from changes in the interpretive context that won't. How one does this is an extremely important question.<sup>12</sup> However one does that, my point so far is just this: That fidelity must include something more than just asking what they would have done.

That is the example of why one-step originalism can't be a theory of fidelity. The theory follows just about as neatly. The Framers said what they said in order to say something; what their words said was set in part by the context within which they said them. Had that context been different, then, to say the same thing, they would have had to speak differently. Their words, their meaning, hung upon this context.

In interpreting their words, then, no doubt the original context sets an anchor. It sets the orientation, or the direction, or the meaning, of what they wrote. It determines the measure against which all that happens afterwards must be set. It is the baseline that should guide later readings.

What should this guidance be? For the one-step originalist, the guidance is the result; the result is the beginning and the end; it sets the original and current answer. But if meaning hangs on context, then this method creates an odd result. For if the context within which this original answer is applied changes, then the meaning of the original answer may change. If we do the same thing as they did, then the meaning of what we do may be different. And if fidelity is to preserve meaning, then this means that the one-step originalist's method is a method that *changes the Constitution's meaning*.

For the translator, in contrast, this first moment is just a beginning. With it as a baseline, the translator then constructs a text—a *reading*—that in the current context has the same meaning as the original text in its original context. Contexts change, so readings must change. The aim of the translator is to find a reading that neutralizes the change in context.

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11. *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1525 (1995) (Thomas, J., concurring).

12. Michael Klarman suggests that any such division will be "arbitrary." See Michael J. Klarman, *Anti-Fidelity*, 70 S. Cal. L. Rev. (forthcoming 1997). I don't believe so if the division is supported by reason. If Klarman's point is that reasons never matter, because reasons are mere pretext, then perhaps, but so what? Ours is an enterprise that presupposes the negation of just that view. Global skepticism can't touch local arguments.



*How* is a difficult question. But the point so far is just that sometimes it must. It must, that is, if meaning is contextual, and if meaning is what the fidelitist must preserve. This is the negative use of a theory of translation. It should get us going on a search for a theory a bit more thick.

### B. *The Idea of Translation*

A positive theory of fidelity is such a theory. It uses the model of translation to describe just why changes in readings can be changes of fidelity. Begin then with this practice (translation) that the theory (fidelity as translation) models.

In its simplest, perhaps crudest form, the translator's task is this: She is presented with a text that is written in one language. This is the source text; the language is the source language. Her aim is to write another text in a second language—the target language, and her text, the target text. If the translation succeeds—if it is a good translation—then there is an important relation between the two texts, in these two contexts: naively put, their “meaning” is to be “the same.” Different texts; different contexts; same meaning.

My claim is that judges face a similar task. Like the linguistic translator, the judge is faced with a text (say, the Constitution), written in an original or source context (America, late eighteenth century); she too must write a text (a decision, or an opinion) in a different context (America, today); this decision, in its context, is to have the *same meaning* as the original text in its context. Of course, unlike the linguistic translator, the judge can't simply rewrite the original text. *That* text must remain the same. But the judge does change *readings* of that original text: The judge gives a reading of the original text that in the current context yields the same meaning as the original text in its original context. For the legal translator, the *reading* is to the original text as, to the linguistic translator, the *target text* is to the source text.

This process is not automatic. But neither is it automatic for the linguistic translator. There is no obvious, or complete, mapping of one language onto another; no simple formula will carry meaning from one to another. Always the linguistic translator, like the legal translator, makes a certain judgment about how best to carry the meaning of one world into second. And always this judgment requires choice.

The choices are of two kinds. First there is a choice about the kind of fidelity that a particular type of translation requires. No single practice of translation governs the full range of texts that can be translated. Bibles, instructions to children's toys, plays, political slogans—while there is a practice of translation that can apply to each of these, the ends of these practices are very different. These differences in ends suggest differences in means. Thus the first choice that a translator must make is a choice about the end that his translation is to serve.

A second choice is about the constraints on the practice, whatever the end that has been selected. And here, the links with linguistic translation are quite rich. For translators struggle with a tension that defines the tension confronted by the judge: If translation requires creativity—if there is no such thing as “mechanical” translation—then some counsel the translator to a kind of humility.<sup>13</sup> Humility means this: to avoid translations that the translator believes make the text a better text; to choose instead translations that will carry over a text’s flaws as well as its virtues. This counsel to humility is offered as a virtue in the translator’s practice. It is an integrity—to be faithful to the strengths of a text as well as the vice; to exercise the power of the translator in a sense *not* to change the text translated, while in a sense changing the text translated fundamentally.<sup>14</sup> On this view of the translator’s task, fidelity requires a certain restraint—the restraint to minimize the voice of the translator in the text being translated.

This is the integrity of the linguistic translator<sup>15</sup>—an integrity that guides and constrains the translator in the practice of translation. Both dimensions of this integrity—setting the end of the translation, and practicing humility within that end—link the practice of the linguistic translator with the practice of the judge. For the judge as well must select the kind of fidelity that her reading will preserve, and she must pursue that fidelity constrained by an analogous form of humility.<sup>16</sup>

But a nagging difference remains. The translator moves between two texts written in two languages; the judge moves between two texts written in one. The constitutional interpreter is reading a text in English that was written as a text in English. What gain could there be in modeling a process of reading a text in the same language on a practice of reading a text from a different language?

The gain in part is the gain from being able to draw on a body of related interpretive theory, to guide analogous problems in these two interpretive practices. But in the main, the gain is a certain discipline, or analytic clarity, that comes from separating out two steps where a less careful method might see just one.

The two steps are these:<sup>17</sup> The first is to locate a meaning in an original context; the second is to ask how that meaning is to be carried

13. This, for example, was Samuel Johnson’s view. See Bayard Quincy Morgan, *Bibliography: 46 B.C.-1958*, in *On Translation* 275 (Reuben A. Brower ed., 1966).

14. See Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165, 1189-1211 (1993) [hereinafter Lessig, *Fidelity in Translation*] for a discussion of the parallels between translation and legal interpretation.

15. Not to say all do this. See Morgan, *supra* note 13, at 277 (“[T]he live Dog better than the dead Lion.”).

16. See Lessig, *Fidelity in Translation*, *supra* note 14, at 1206-11.

17. By distinct, I do not mean that the translator does not alternate between the two steps. The claim is not that one step is complete before the other is taken. The

to a current context. One asks something about then and there; the other asks about what is possible now and here.

The first step is difficult enough.<sup>18</sup> To locate meaning in an original context, one must reconstruct, in a sense, that original context. One must reconstruct it imaginatively, to see just how the word read fits there, and to see just how it functions. One must avoid reading the word, or text, as if it were a word, or text, written here. For though its meaning then *may be* the same as its meaning now,<sup>19</sup> often it will not, and it is this difference that one is searching.

To avoid this meaning-homilism requires a certain discipline, a need that is greatest when “translating” between two texts of the same language. But even between two different languages, the problem of meaning-homilism exists. For once again, one must take care that the meaning of the translated text be meaning derived first from the writing context, and not the meaning of the reading context.

A story might better make the point. Jurists from Russia are told that constitutional democracy requires a “judiciary”—“judges” and “courts” and a system of “laws” enforced by these courts. A Russian might wonder just what that could mean, since Russia, even Soviet Russia, has always had “courts” and “judges” and “laws.” But while Russians have always had “courts,” for example, what a “court” is is quite different within the two different regimes. A translator must show the reader the difference. She must, that is, put the word “court” in its context, and show its difference there from its meaning here.

*How*, again, is a difficult question. One Russian judge explained to me how she came to see the difference. For twenty-five years she had been a judge in the Soviet system; after twenty-five years, she thought she understood well what a “court” and “judge” and “legal system” were. But after she had spent just one month observing a federal district court in Minnesota, she “saw” the differences in these three words. When she saw the respect, and power, and apparent independence of a federal district court judge, she understood what it meant to say that Russia needed “courts” and “judges.” How those words functioned in these two different regimes differed dramatically.

A translator is one who understands these differences, and who uses them to construct a text in the reading context that helps the readers see them as well. She writes a text, that is, that reveals in the reading

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claim instead is about the logic of the practice—that one moves in two different ways in completing the interpretive task.

18. See Scalia, *Originalism*, *supra* note 8, at 856-65.

19. Professor Dworkin gave the example of the best translation of the 35 year old requirements is that it is a stipulation of chronological age, not emotional age, see Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev. 1249, 1252 (1997), which is, I presume, just how we would read it today.

context the differences that word-homilism hides. And she does this, whether the differences are the product of a text coming from a different language and culture (Russia), or the product of a text coming from a different culture only (eighteenth century America).

For this is the insight of the translator: That there is no difference in principle between reading a text in a different language—foreign because of a distance in culture—and reading a text from a different time—foreign because of a distance in time. We are foreigners vis-à-vis Russia, just as we are foreigners vis-à-vis eighteenth century America.<sup>20</sup> The aim with both is to find a way to overcome this foreignness; to understand despite these distances.

To overcome this foreignness requires alienating the text read from the current context. The first step is to understand the words in an original context. Modeling the practice on linguistic translation reminds one of the difference that context can make. One is directed, that is, to keep these terms in their place, and to understand their place as a way of understanding the terms.

That is the problem of context, the first moment of translation. But a second moment is important as well. This is the question of how that original meaning gets carried into the current context. And here it is important to distinguish between different kinds of translation.

Remember I suggested above that translation requires a choice of ends—a decision about what the translation is to do. This choice differs widely across the range of texts translated, but we can consider two important kinds. With one, the end is to carry a reader to a different interpretive context—to help him to understand that different place. With the other, the end is to carry the message of that different context to the reading context—to help it guide in this present interpretive context. The first is about understanding then or there; the second is about guiding now and here.

Consider two such texts to make the difference plain—(a) the instructions on a child's toy, written originally in Japanese, and (b) a play about the Bolshevik revolution, written originally in Russian.

In both cases, the first step of translation is to locate the original meaning in an original context. In case (a), we could imagine that lots in the original text reflects lots about the original context. One might note, for example, the "register" in which the text originally speaks, denoting something about the status of the intended audience relative to the author. Perhaps the text makes reference to particular cultural features of Japan, or to common icons in the Japanese society. A complete execution of this first step of translation would identify these features, so as to understand the text.

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20. Compare the argument of Derek Parfit, who argues that we are closer to our contemporaries than to our earlier selves. See Derek Parfit, *Reasons and Persons* 199-347 (1984). The argument here might be considered an analog to that argument.

But in all likelihood, it would do no more with them. If the aim of this translation of the instructions to a child's toy is simply to instruct about how to assemble, or use, that toy, then these features of this original context will not matter much in the translation. Indeed, these features would most likely simply get in the way. A perfectly adequate translation would, in this case, strip away all this from the original context, and simply restate the most basic features of the original text. For this text, the carrying over that is required is a carrying over of the meaning of the instructions, into a different context. The guidance that is needed is in the reading context.

The aim of the translation might be very different in case (b). Here again we imagine that the translator works first to identify the meaning of the text in its original context. Once again, there are many aspects of this meaning that could be noted: whether communist leaders spoke in a formal or familiar grammar; the significance of references to Russian events, etc. All of these features must be noted by the translator if the translator is to understand the original text.

But unlike case (a), here we could imagine that a good translation would do something more than simply note these original features. Here we could imagine that a good translation would then preserve them. For here we could well imagine that the translation has as its aim not so much the carrying of the Revolution to us, as the carrying of us back to the Revolution. Like any good literature, the aim is to make it possible for us to get into the world being described; its objective is to make understandable a foreign world, by emphasizing, and explaining, its foreignness. Translation with case (a), then, is carrying the text in (a) to us, while translation in case (b) is carrying us to the text in (b).

Now I don't mean to suggest that it couldn't be the other way around—that case (a) couldn't be translated in the manner that case (b) is; or that case (b) couldn't be translated in the manner of case (a). Anthropologists might be more interested in case (a) translated in a way to help the reader understand the Japanese culture; communists might be more interested in case (b) being translated in a way that would carry forward the passion of the Revolution. My point is not, therefore, that texts carry with them their proper form of translation. My aim instead is simply to suggest differences in these two methods. One carries a text to us; the other carries us to the text. Which method is the proper method depends upon the conception of fidelity at stake.

For the sake of clarity, we might distinguish between these two executions of the second step of translation by calling the first (in case (a)) *forward* translation, and the second, *backward* translation. Forward translation carries meaning into this context; backward translation lets us travel back to the meaning in an original context. Nothing in the nature of the text itself compels the translator to pick one kind

of translation over the other; what compels such a choice is the function, or purpose, the translation is to serve. As an empirical matter, one might say that normative texts are generally forward-translated, while non-normative texts are not. But whether or not that generalization holds, the more general claim is simply this: That what compels such a choice is the aim of fidelity in this particular interpretive context, or for this particular interpretive institution.

My claim about fidelity in our constitutional tradition is that we have been forward translators. Our aim has, for the most part, been to extract normative significance from an ancient constitutional text and preserve that significance as much as possible. What the constraints on this "as much as possible" are is something I describe in the second part of this essay below. But the important point here is to distinguish this kind of fidelity from a very different kind of fidelity—fidelity as, again, backward translation.

My claim is that in constitutional law we have not been backward translators, though some of the very best in historical writing about American constitutional law speaks as if we were.<sup>21</sup> My aim in the balance of this essay is to give a positive account of the alternative—forward translation. A complete account—one that justifies forward rather than backward translation—would require a normative as well as a positive account. But my aim here is fit, not justification. It is to describe a practice that describes what our tradition has been.

### C. *How Much Translation Explains*

So much for theory and for pedigree: The test of translation as a practice of interpretation in constitutional theory hangs upon the results—upon how well it fits, and justifies, the history of our constitutional practice; and upon how well it helps us understand how best to go on. In this section, I sketch some examples of translation applied. My aim is to suggest its potential. I move from the least creative, to the more; from what we might think of as obvious, to what is less obvious.

#### 1. TVs and Airforces

The Constitution doesn't speak much about televisions or airforces. The First Amendment speaks of the freedom of the "press";<sup>22</sup> and Article I speaks of the "army" and "navy."<sup>23</sup> How should these words—"press," "army," "navy"—be read today?

The originalist might puzzle the question. Since his method is single step, he might survey the doctrine, and the text, and say, with a bit of

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21. For example, Jack Rakove, *Original Meanings: Ideas in the Making of the Constitution* (1996).

22. U.S. Const. amend. I.

23. U.S. Const. art. I.

impatience, something like this: "The text of the First Amendment makes no distinction between print, broadcast, and cable media, but we have done so."<sup>24</sup>

The translator, however, can well understand this apparent anomaly. For her method takes two steps. First, she notes this: At the time all three ("press," "army," and "navy") were written, all three marked out the full range of each kind. There were no televisions, but likewise, there was no device of publication in 1791 that was not within the reach of "the press." There was no airforce, but "army" and "navy" marked out the full range of the armed forces. Both terms when written were exhaustive of the category that they described.

The second step is to carry these exhaustive terms into the present. No reason presents itself for not including televisions or airforces into the terms of the original grant. The translator, therefore, includes them. The "text" now is about an army, navy and airforce, or about the press and the broadcasting media. The Framers gave every reason to believe such terms would be included; they could not at the time exclude them; therefore, they should be included.<sup>25</sup>

Everyone agrees with these conclusions,<sup>26</sup> so it is useful to remark how sharply they diverge from what a plain language jurist might say. They force the plain language jurist to account for the significance of time. These words were "plain," but the change in circumstance justifies our looking beyond them to understand their meaning now.

It is useful as well to mark some limits: It is because the category of TVs and Airforces did not exist that it is an easy case to include them. If our Constitution were drafted today with the very same words, the interpretive question would be quite different and difficult. To make it easy, two steps to reading must be taken.

## 2. Commerce I

A second easy case is a bit less easy. The Framers gave Congress the power "To regulate Commerce . . . among the several States."<sup>27</sup> They also gave Congress the power "To make all Laws . . . necessary and proper" to the regulation of "commerce . . . among the several States."<sup>28</sup> The extent of both powers turns upon something important in the world—viz., the extent of "commerce" "among" the several states. To the extent that there is more interstate commerce, there is a

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24. *Denver Area Educ. Telecomm. Consortium v. FCC*, 116 S. Ct. 2374, 2419-20 (1996) (Thomas, J., concurring in part, dissenting in part).

25. This, of course, leaves open the way they were to be included—whether protected to the same degree or differently.

26. Though as we see below, in a directly analogous question, Chief Justice Taft adopted quite a different understanding—finding that the Fourth Amendment did not reach wiretapping, even though when written, there was, of course, no wiretapping. See *Olmstead v. United States*, 277 U.S. 438, 465-69 (1928).

27. U.S. Const. art. I, § 8.

28. *Id.*

greater reach to Congress's power. To the extent that there is less, there is less. In either case, the power is contingent upon some fact in the world.

This understanding of the nature of the clause is original—meaning from the origin, at least if Marshall is original. It is the understanding sketched in *Gibbons v. Ogden*<sup>29</sup> and *McCulloch v. Maryland*,<sup>30</sup> and it is the practice of the early cases. From the start, it was the interplay between commerce and the Necessary and Proper Clause that defined the scope of Congress's power to regulate commerce. As the extent of that commerce expanded, so too did the power.

Of course, how one measures the extent of commerce; how one knows what is interstate versus intrastate; how one relates these economic notions to constitutional ideals—all these are tough questions, poorly answered over the past two centuries. But the point is that *however* they are answered, the relationship between economics and power stands. The Framers were realists in this sense about the Necessary and Proper Clause at least, ceding to Congress the judgment about whether a measure was really necessary and proper. And despite some honorable and understandable formalism in the late middle republic (about that, more later), we can't help but be the same sort of realists today. We can't help but conclude (as a partial solution at least) that the scope and reach of the commerce power expands as the economy it tracks expands.

### 3. Privacy

Before there were televisions and airforces, there were also no telephones, and therefore, no wiretaps. One lived one's life face to face; what one wrote—in letters or diaries—and kept a hold of, was protected. One was protected because all this was one's property; and one's property—person, home, papers and effects—could not unreasonably be searched.

When telephones and wiretaps came around, this formula for protection got challenged.<sup>31</sup> For one could tap my telephone without violating my property rights. Thus the question: Was such a violation within the scope of the Fourth Amendment?

In its first consideration of the question, the Supreme Court said no. Said the Court, the Fourth Amendment protected against trespass;

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29. 22 U.S. (9 Wheat.) 1 (1824).

30. 17 U.S. (4 Wheat.) 316 (1819).

31. This account itself, one might well argue, is anachronistic. As the case I am about to describe came to the Supreme Court, it was not at all plain that the amendment was just about property. The best example that it was not is *Ex parte Jackson*, 96 U.S. 727 (1877), where the question was whether the Fourth Amendment prohibited the post office from inspecting the contents of a mailed letter. No claim of property could establish this protection—the post office didn't want to seize the letter, just the information contained in it. *See id.* at 733-37.



wiretapping was not a trespass; so the Fourth Amendment didn't protect against wiretapping. This was, for the Chief Justice, an easy case; and with that opinion, life on the wire became life in public.<sup>32</sup>

This is classic one-step originalism.<sup>33</sup> But matched with that classic is a paradigm of two-step translation—the dissent of Justice Brandeis.<sup>34</sup> Said Brandeis, the Fourth Amendment was meant to protect the privacy of people, not the sanctity of property. To that end, given the technologies of the late eighteenth century, it selected the means it did. But as the technologies of invasion have changed, Brandeis said, so too should the techniques of protection change. The Fourth Amendment (we might paraphrase, or better, translate) had to be translated to give citizens in the twentieth century the sort of protection that the Framers gave citizens in the Eighteenth.

The Court eventually followed the intuition of Brandeis's dissent.<sup>35</sup> In *Katz v. United States*,<sup>36</sup> it held that the Constitution protected "people, not places."<sup>37</sup> And while one could well question the technique used by *Katz* in this effort at translation,<sup>38</sup> one can't mistake its motive. Its aim was a certain equivalence, forged between worlds that had become quite distinct.

#### 4. Federalism, Herein Commerce II

I said above that it was an easy case that the power of Congress under the Commerce Clause (tied to the Necessary and Proper Clause) would increase over time, tracking, as the clause suggests it should, an increasingly integrated national economy. Taken in isolation, that is true. But the power clauses don't stand in isolation. In context, they have an effect upon a second aspect of the framing design—federalism. As the scope of federal authority is enriched, by an expanding commerce power, the reach of exclusive state authority is impoverished. Granting the growth of federal power means yielding to the withering of the power of the state.

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32. Not that the oddness of the result was unremarked upon at the time. Many, including the telephone companies, the Justice Department, and many in Congress, immediately questioned the opinion. Telephone companies said they would not cooperate with government wire taps; the Justice Department announced it would only use this power in extreme cases; and members of Congress moved quickly to introduce legislation to restrain federal use of wire taps. See James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* 141-59 (1990).

33. See *Olmstead v. United States*, 277 U.S. 438 (1928).

34. Holmes wrote a separate dissent. See *id.* at 471 (Holmes, J., dissenting).

35. *Olmstead* strikes people as an easy case—easy, that is, for the dissent. It is an easy case for the translator, no doubt. But what it is not is a paradigm of Fourth Amendment jurisprudence. For the Court has not followed Brandeis' methodology; it has not continued to extend Fourth Amendment protections to new technologies. See Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 *Emory L.J.* 869, 906 n.105 (1996) [hereinafter Lessig, *Reading the Constitution in Cyberspace*].

36. 389 U.S. 347 (1967).

37. *Id.* at 351.

38. I do in Lessig, *Reading the Constitution in Cyberspace*, *supra* note 35.

This conflict raises a second question of translation. For the question now is how best to read the commerce power, to preserve something of the original balance in the federal design. Of course one might argue that there is no conflict at all; one might say, that is, that this growth of federal power was originally intended. Perhaps. But assume for the moment it was not. The question for the translator is how to accommodate this conflict.

The history of the Commerce Clause (both negative and positive<sup>39</sup>) tells a nice story of this conflict. At first federal power grows quite extensively—a function of the easy translation I sketched above. But in a second stage, the Court engages in a bold, if abortive effort to cut back. This was the “Old Court,” in the struggle that ended in 1935. In a series (though not many) of cases, it imposed artificial and formal limitations on the scope of Congress’s power in the name of Constitutional federalism. These limitations were said to flow from the constitution itself; they were driven by the observation that the Framers gave us a Constitution of enumerated powers, yet now power seemed unlimited. But however true this motive may have been, the Framers didn’t give us the kinds of tools that the Old Court used to cabin federal power. These tools that Court made up, at least in the sense that they are nowhere found in the Framers’ text.

This is not to criticize, for I am a big fan of makings-up in the name of fidelity. But it is to emphasize what we have been led to forget: That while the ends of this Court may have been conservative, its means certainly were not. In its effort to impose limits on federal power, in the name of preserving something of the Framing balance, it put firm and wholly constructed limits on Congress’s power;<sup>40</sup> it dissembled about the original and historical understandings of that power; and it pretended to find firmness and clarity in a practice that was anything but. But it did this to restore—to reclaim a balance that time had shifted.

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39. I link these two halves of the commerce question in Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Sup. Ct. Rev. 125 [hereinafter Lessig, *Translating Federalism*].

40. These are techniques the translator must admire. The boldest is the practice of forgetting—for example, the forgetting of the Necessary and Proper Clause. Obvious to any realist, the real problem with the enumerated powers is the flexibility given by the reading of the Necessary and Proper Clause given us by Marshall. So understood, Congress would have the power (by the late nineteenth century at least) of regulating just about anything. But the problem is that there is no other obvious way to read the clause that would do any better. So what the Court did, during its short run at constraining Congress, was forget it. Dropped from the federal power calculus was consideration of the clause at all. See *id.* at 185-94.

## 5. Takings

A final example will complete the sketch. Of all the examples so far, this is the richest, and clearest, and best. It is also not my own.<sup>41</sup> I borrow it here to fill out an account of a practice of translation, in one sense perhaps the best that practice could be.

The example is the Fifth Amendment's Takings Clause. At the founding, this much is clear: That this clause, neither demanded by the states, nor common in state constitutions, protected against the taking of property only. It did not protect against regulation that had the effect of reducing a property's value. The Framers were not idiots; they understood that the value of property may be reduced just as its title may be taken; they had plenty of regulations that reduced the value of property, just as they had a history that included many examples of regulation that took the title to property. But though both kinds of interference with the rights or interests of individuals existed, they chose, constitutionally, to protect just one. They chose, through the Takings Clause, to restrict the government only in the context where the government takes property.

For the one-step originalist, this should create a fairly simple problem. As the Court consistently did through 1922, the one-step should insist that the reach of the clause extends no further than the taking of title.<sup>42</sup> Regulations are, under this view, untouched. For the consistent one-step originalist, regulations should be without the scope of the clause.

But there is something fairly unsatisfactory about this response—enough so to move Holmes, for example, in 1922, to push the clause far beyond its original reach. In *Pennsylvania Coal Co. v. Mahon*,<sup>43</sup> the Court for the first time recognized a right against the state when state regulations unreasonably affect the value of an individual's property.

A number of arguments might support this conclusion: The first is Holmes's. For Holmes, property was value. If property is value, then the clause should protect value, not just property; so when the government acts to destroy value, it should compensate those whose value has been destroyed. It makes no sense to have a regime that requires 100% compensation for taking 5% of someone's property, but 0% compensation for reducing the value of someone's property by 95%.

There are other arguments as well. One turns on the expansion of the government's power to regulate: It is true that at the time of the Framing, governments regulated the value of property just as they

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41. I draw the example from William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995).

42. Compare *California v. Hodari D.*, 499 U.S. 621, 624-25 (1991) (stating that the meaning of the Fourth Amendment's "seize" is determined by the common law understanding of "seize").

43. 260 U.S. 393 (1922).

took it. Thus it is true that the Framers were well aware of the impairment of value that property suffered at the hands of regulation. But nonetheless, the significance of this power that government has always had is different. By the late nineteenth century, the economy had changed dramatically; integration of the economy made more feasible economic regulation. This increase in feasibility increased the extent of economic regulation. And this increase in the extent of economic regulation demands a comparable increase in the protection of the Takings Clause.

A third argument is slightly different: The original understanding, this argument acknowledges, understood that the value of property might be reduced by regulation. But this regulation had to be "legitimate." Legitimate regulation was regulation designed to stop a "nuisance." A nuisance was a use of the property that was harmful to others. In a world where the category of nuisance is well cabined—where the examples of nuisance are quite small—this exception to the protection of property is quite few. But when the "nuisance" ground for regulation is relaxed—when the very concept becomes so expansive as to exclude nothing—then this exception to the protection of property begins to swallow the rule.

While all three arguments are similar in effect, it is the second two that trigger arguments from translation. The first does not turn upon something that has changed to make it necessary in 1922, any more than 1791, to see property as just value. Not that such an argument couldn't be constructed—maybe the nature of our understanding of "property" had changed, justifying, the argument would be, the changing scope of the Takings Clause.<sup>44</sup> But change is not the predicate to Holmes's argument, yet it is at the core of the latter two.

But the problem with the latter two is, as William Treanor has recently argued,<sup>45</sup> that both fail to account for an important limitation in the original clause. The original clause, in a context where the effects of regulation were well understood, chose not to protect all property from governmental regulation. It chose instead to protect against a subset of those threats to property protection. If we are to carry over this original choice, we must make sense of these limits.

Treanor's argument does just that. In making an argument of "translation,"<sup>46</sup> he first aims to understand the principle that explains the limit the Framers imposed on the protection of property. That limit, Treanor argues, is grounded in an understanding of the failures of the political process.<sup>47</sup> The Framers aimed constitutionally to protect property in just those contexts where they believed the political

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44. See Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 70 (1991).

45. See Treanor, *supra* note 41, at 782.

46. See *id.* at 856-59.

47. See *id.* at 859-60.

process would not. In his understanding of the limit, the aim was to correct the political process in exceptional cases, not to override the political process generally. The question is then to identify the principle that identifies the exceptional case.

Treanor's second step is then to locate, in the current context, the rule that might best continue that original aim. This, he argues, would be a rule that identifies cases where we might expect the political process to fail, and then extends the protection of the Takings Clause to those cases alone.<sup>48</sup> This rule would be both more, and less protective, than the current rule. It would protect against some regulation that would not be touched under the current rule and permit regulation that now would be forbidden. But the line it would draw would resonate with the principles animating the original clause, with a resulting regime closer to the Framers' ideals than the current.

Treanor's argument is elegant and compelling. It marks well the space between, on the one hand, one-step originalism, and on the other, an unlimited development of a partial constitutional principle. A translation of the Fifth Amendment is between the extremism of Epstein,<sup>49</sup> who in effect recognizes no limit in the takings principle, and the zero-ism of the one-step, which recognizes no trouble with limiting the clause to its original bounds. Treanor's argument lies between these two extremes and is linked with a principle implicit in the Framing design. His aim is to "translate"<sup>50</sup>—better, forward translate—these principles into this interpretive context.

That's the praise. Here's the question: There is a tone to Treanor's argument that I want to note, for it raises a question that will be the focus of the second part of this essay. The tone is direct. In selecting the theory, or the hybrid of theory, that best translates the Framers' clause, he openly works out a conflict among possible public choice theories to find the one that fits best. The conflict is in the open, and his ultimate choice, however compelling, remains a choice among these contested accounts. And in the end, however convincing the hybrid seems, one is still left with a feeling that there is something very odd about the exercise just performed. Or at least, there is something odd in imagining it as an exercise performed by a court. Treanor's answer may well be correct, but (odd as this may sound), he seems too honest in the process of getting it. One wants to say constitutional law *can't* turn upon contested theories of public choice. Or if it does, one doesn't want to have to think that it does.

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48. In addition to this public choice interest, Treanor also identifies an educative function that the clause is to serve. *See id.* at 878-80. I don't consider that aspect of his argument here.

49. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

50. Again, these are his words. *See Treanor, supra* note 41, at 856-57.

Treanor is a historian first. Of course he's also a lawyer and was a law clerk, but his excellence is his sense of the past and the relation between that past and the present. What's missing, however, is a sense of the limits of the present—or better, a sense of the limits of the interpretive context into which this rule must be carried. This requires not so much the skill of a historian, but the sensitivity of a law clerk—the timid hesitation of one trying to say what is right in the least disruptive way. Treanor may well have identified the correct rule, but he has not reckoned the costs in saying it.

As a criticism of a law review article, this is of course unfair, and again, there is little in this article that I would quibble with. But I want to use the point to introduce the focus on a second part of the translator's task—the part that figures out how to say what the translator discovers is right, on how to carry forward the commands of the past.

This “figuring out how to say” is a response to a second demand on a practice of fidelity. A theory of fidelity must understand how the truth that it discovers gets integrated into the practice that it regulates. Speaking truth is rarely costless; and an institution charged with speaking the truth must budget the truth that it can speak. One committed to the translator's task will have a choice to make. That choice is involved doesn't make the case special: law is always about choosing among outcomes. But the choice here is special. For in choosing among competing public choice theories, there is little outside of the Court that seems to direct the choice in one way or another. The choice is among competing theories; among theories reasonable people can disagree about. And while the Court, like other reasonable people, can choose which among these it likes best, there is no way in making that choice for the Court, credibly, to suggest that its choice is not driven by its view of the best policy. To choose among these theories when no theory is clearly dominant is to suggest that the choice is really about policy.

My argument is that for the Court to display this political choice is costly. It is institutionally costly for the Court because (1) it makes the Court seem less like what we consider to be a Court (executing the commands of others) and more like a policy maker (choosing what policy to make), and (2) the social meaning of this subjectivity is negative for a court within our political tradition. All things being equal, a rule that reveals a political choice is a worse rule than a rule that does not. There is a pressure to select rules that don't reveal this political choice.

#### D. *The Constraints on Forward Translation*

I have tried, in these five examples, to give a quick taste of the capacity that an account of fidelity as translation might offer. The examples suggest its range. If we were to extend the argument generally, I

suggest that both in the contexts of powers cases and rights cases, the activism in our Court's history would track this account of fidelity in translation. Put differently: in the litter of changed readings that is our constitutional past, among those that are not explained either by amendment, or synthesis, a large proportion is explained by translation.

And this, regardless of politics: The use of translation has not been ideological. There are activists, and passivists, on both sides of a political divide. (Brandeis, in the context of privacy, was an activist; in the context of the Fifth Amendment, a passivist. Rehnquist in the context of individual rights is a passivist; in the context of federalism, increasingly an activist.) Translation is a practice that both sides have engaged; or alternatively, it is a practice that can be engaged both for (what are seen to be) liberal and conservative ends.

But however much translation explains, as we have described it so far, there is much that it seems nonetheless to miss. Put most simply, if translation responds to changes in context, sometimes the changes in reading have been much quicker than the changes in context; sometimes they have not been quick enough. There is a gap in the account that translation offers—a limit to how much it explains so far.

This gap, I want to argue, flows from the special problems of forward translation—more precisely from constraints imposed upon forward translation in the context of law. These constraints have two sources. The first ties to the specific institution making the translation—to the costs that institution faces in making a translation. Our focus here is the judiciary. Judicial action, like any action, has a social meaning.<sup>51</sup> That social meaning is in some sense fixed in the context within which the Court acts—fixed in the sense that the Court is not free, at the moment of action, simply to change it. It is a reality that constrains and defines actions within it.<sup>52</sup>

The second source of constraint is that aspect of the interpretive context that I referred to at the start as *relatively uncontested*. My claim is that shifts in this world of the uncontested in some cases limit, and in other cases expand, the possible forward translations. Forward translation, in a sense, is subject to the world taken for granted, and it is disturbed when something that was uncontested now becomes contested.

In the second part of this Article, I develop the significance of these two different complaints. As a hint, and put most crudely, we could summarize their effects like this: Translation, in this account, is subject to two sorts of constraints. The first is this constraint of institutional cost. A court will select among forward translations to find the

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51. See *Meaning and Context: Quentin Skinner and His Critics* 79-96 (James Tully ed., 1988).

52. Jon Elster, *The Cement of Society: A Study of Social Order* 109 (1989).

one that minimizes this institutional cost. The second is the constraint of the uncontested: A forward translation must acknowledge, or accept, what is relatively uncontested in the present interpretive context. It must accept this, my claim is, whether or not the idea accepted was accepted at the time of the Framing.

## II. THE CONSTRAINTS OF CONTEXT

Step back for a minute: There are two types of changes that fidelity might trouble. The first is changes of constitutional text, or meaning. For these, the question is how to recognize and integrate changes into a constitutional tradition. This I understand as the problem of amendment and the problem of synthesis.<sup>53</sup> The second is changes in the context of constitutional interpretation—the change that has been the focus of the discussion of fidelity above. Here the question is not how to recognize, but how to neutralize change—how to preserve a constitution's meaning. This I have called the problem of translation.

Context can change in many ways, and not all such changes will count in a calculus of fidelity. That cold-car transport is invented will matter to the scope of the commerce power; that Pennsylvania elects a governor called Ridge will not.

I want to focus here on one type of change in the interpretive context that plays a central role in explaining much of our constitutional past, but which is strikingly absent from interpretive accounts. Elsewhere I have described this change as the change of uncontested discourses—from uncontested to contested, or contested to uncontested.<sup>54</sup> In what follows, I will expand this idea somewhat, both in its definition, and application.

The point of the distinction is this: As I have just argued, the problem of constitutional fidelity is in part institutional. It is the problem of how, and whether, a particular institution—here, the courts—can carry into effect a practice of interpretive fidelity. Such a practice has costs, and these costs are constraints on the practice of fidelity. To understand the potential of the practice, we must focus more carefully on the nature of these costs, and the nature of the institution that will bear these costs.

Costs in this context are of two kinds, each quite important to institutional survival, but only one of which will be my focus here. The first kind we might call *legitimacy costs*. Legitimacy costs are incurred when a court resists political pressure in a way that appears wholly appropriate for that court. These are cases where a court does that

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53. I have studiously ignored this problem in the account I offer here. Indeed, I have no doubt distorted a complete account in my effort to pretend all is just translation and its constraints. The best of synthesis is Bruce Ackerman. See Bruce Ackerman, *We the People: Foundations* (1991).

54. See Lessig, *Understanding Changed Readings*, *supra* note 4, at 410-14.



which, in context, has a social meaning appropriate for the court, but which nonetheless risks something. *United States v. Nixon*<sup>55</sup> is the best example here: What the Court did was appropriate; yet it risked Nixon's snub. And had Nixon ignored the Court, the institutional consequences may indeed have been great.<sup>56</sup>

The second cost we could call *illegitimacy costs*. These are costs that a court suffers when, in context, it acts in ways that appear inappropriate for a court—actions that have a social meaning inappropriate for a court. The easiest example here is (from our present perspective) *Lochnerizing*—where the court seems to weigh competing political interests within the economic sphere, and override the same judgment by a legislature. When a court “does what is right” in the face of strong political opposition, it suffers a legitimacy cost. When it “does what is easy”—for example, when it decides a case for what appears to be a political reason, it suffers an illegitimacy cost.

Legitimacy costs are important in emerging constitutional democracies; the ideal strategy for them is to suffer them just shy of the point where a political reaction is provoked. They are investments in institutional capital. Illegitimacy costs are important in an extant, stable constitutional democracy; the ideal strategy for them is, all things being equal, to avoid them.

My focus in what follows is upon illegitimacy costs. It is both to identify the essence of “illegitimacy” for us—what is the action that yields that social meaning—and to understand what creates the conditions when this illegitimacy exists. Illegitimate actions are “political,” but the content of that appellation is quite varied. My aim is to understand what this charge might mean.

To do this, I focus on a subset of all these cases where judicial action might be “political.”<sup>57</sup> These are cases where judicial action is at one time legitimate, but is later *rendered* illegitimate or political. My claim is not that the action *is* political. (I don't know what it would mean to say that in the abstract, and even if it could be said, I don't care whether it is or is not.) My focus is on institutional cost, and institutional cost is suffered by how the decision appears, not by what it is.<sup>58</sup> The question I want to consider is just what is it for us that makes a

55. 418 U.S. 683 (1974).

56. Nixon's Chief Domestic Policy Advisor, Melvin Laird, feared Nixon would not obey a court order. See John Herbers, *Nixon Loses Again; One Court to Go*, N.Y. Times, Oct. 14, 1973, § IV, at 4. Alex Bickel expressed the same concern. See Alexander Bickel, *The Tapes, Cox and Nixon*, The New Republic, Sept. 23, 1973, at 13. This weighed heavily on Elliot Richardson, when he was called upon to decide what to do with the special prosecutor, Cox. See Elliot Richardson, *The Creative Balance* 34-47 (1976).

57. The broader category (that I will not address here) includes the politics implicit in the Frankfurter constraint, which I discuss in Lessig, *Translating Federalism*, *supra* note 39, at 170-80.

58. Compare Deborah Hellman, *The Importance of Appearing Principled*, 37 Ariz. L. Rev. 1107 (1995).

decision appear illegitimate. Precisely: First, how is it that a reason that may at one time be legitimate is rendered illegitimate, and second, how does a court then respond when faced with this illegitimate reason.

#### A. *Rendered Meanings: The Rate-Making Cases*

I want to approach this question by considering it in the somewhat obscure context of the rate-making cases of the late nineteenth, early twentieth century. For in the story of these cases we will see something of a pattern that reaches far beyond these cases alone. It is this pattern that will explain what translation seems to leave out.

Substantive due process under the Fourteenth Amendment was born in the battle over legislative control of rates—rates of both (1) public utilities and railroads, and (2) businesses affected with a public interest. The ability of states to regulate both was upheld in the gaggle of cases decided under the name of *Munn v. Illinois*,<sup>59</sup> but it was only the lead case, *Munn*, that really raised any great concern at the time.

It was well accepted that the rates of railroads and public utilities could be regulated by the state: Under the rights/privileges distinction, the state's power to regulate the rates of public utilities and railroads followed quite naturally from the state's responsibility for creating them. (Or at least, the power followed so far as the state was responsible—through subsidies, or through delegating the powers of eminent domain, or through corporate charters).

But the power to regulate "businesses affected with a public interest" was, at the time, more questionable—both the grounds of the power, and its reach. There seemed always to be a perspective from which a business was affected with the public interest;<sup>60</sup> thus it seemed possible that the prices of any business would be within legislative control. This implication of *Munn* begged for limit and the Court was quick to supply it.

The first hint was in *The Railroad Commission Cases*,<sup>61</sup> where the Court deployed a pretext analysis for testing the legitimacy of a state regulation.<sup>62</sup> But the real change came in *Chicago, Milwaukee & St. Paul Railway v. Minnesota*,<sup>63</sup> where the Court held that judicial review of the "reasonableness" of governmentally imposed rates was required.<sup>64</sup> The Constitution henceforth protected not just property (in the common law sense of possession and title) but also the value of property (not a common law concern).

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59. 94 U.S. 113 (1876).

60. This was Field's problem with the case. *See id.* at 139-41 (Field, J., dissenting).

61. 116 U.S. 307 (1886).

62. *Id.* at 331.

63. 134 U.S. 418 (1890).

64. *Id.* at 456-58.

The only question was how to draw the line—between reasonable and unreasonable, or between “regulation” and “confiscation.” For the jurists of the late nineteenth century, in the era of formalism, or conceptualism, this was no mean feat. The jurisprudence of the time demanded categorical rules, but there was no categorical line to divide the reasonable from the unreasonable.

After a few years of struggle, the Court finally fixed on a test. The case was *Smyth v. Ames*.<sup>65</sup> Nebraska had ordered a reduction in intrastate rail rates by an average of 29.5%.<sup>66</sup> This, the Court found, was too much. It was too much under any number of the then competing theories for determining whether a regulation was a confiscation, but Justice Harlan used the case to fix upon one of these competing theories. What was determinative, Harlan said, was “the fair value of the property being used,” and to determine that fair value, Harlan listed what to us will seem just a hodgepodge of factors.<sup>67</sup>

In context, however, this list had a very specific meaning. As Stephen Siegel has argued, by selecting this list, Harlan was also selecting a test known as the reproduction cost approach to rate regulation.<sup>68</sup> The reproduction cost approach evaluated the fairness of rates by comparing them to the present value of the assets being regulated, understood by some to be the replacement cost. The main competing theory at the time made the “fair return” depend upon the original cost of the assets. The political significance of the difference between these two theories was plain: In a time of falling prices, the original cost theory would protect rates more than the replacement cost theory; and in a time of inflation, the replacement cost theory would protect rates more than the original cost theory. This fact was not lost upon the theories’ proponents, and Siegel describes well the embarrassing flips that proponents of either theory had to take as the economy moved from a deflationary to an inflationary period.<sup>69</sup>

For our purposes, however, the significance of both theories is not the disagreement between them but the common ground that both presumed. This common ground was a theory of economics. Both the original and replacement cost theories were born out of classical (as opposed to neoclassical) economics. Classical economics viewed value as “intrinsic.” Prices may vary, but they varied around a “natural quantity.”<sup>70</sup> This natural quantity—the value of an asset—was divided into its exchange value (represented by its price) and “natural value,” “toward which exchange value gravitated in the long run.”<sup>71</sup>

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65. 169 U.S. 466 (1898).

66. *Id.* at 499.

67. *Id.* at 546-47.

68. Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 Va. L. Rev. 187, 227 (1984).

69. *See id.* at 222-23.

70. *Id.* at 244.

71. *Id.* at 246.

So understood, value was a fact. If it was "intrinsic," then it was something that could be found, or discovered. The finding, or the discovery, might be difficult, but that didn't change the ontological status of what was being sought. There was something objective here, which could be discovered without disturbing what was being discovered.

This view about value was not just the view of the dominant theory of the time, but of every leading economic theory. If value could be "found," then there was no reason in principle that courts could not facilitate that discovery. Where the question was a question of fact, there was nothing *illegitimate* about a court making that factual finding. Courts might get it wrong, or might even (because of incapacity) systematically get it wrong. But error does not establish illegitimacy.<sup>72</sup>

"Value" was a fact, because classical economics so viewed it, and because classical economics was presupposed by the major competing theories of valuation at the time of *Smyth*. Late in the nineteenth century, however, this presupposition began to change. By the end of the nineteenth century, classical economics was dying, and with it, the theory of value that made the value of an asset "intrinsic."

Born in the work of Marshall, neoclassical economics quickly replaced classical economics as the dominant school of economic thought. As Phyllis Deane put it, by the early twentieth century "all mainstream English and American economists had adopted its fundamental points."<sup>73</sup> Central among these fundamental points was a new view of value: Value, for the neoclassicist, or marginalist economist, was not "intrinsic" or "natural." No single force drove it towards equilibrium. Instead, "value [was the] product of joint causation—the resolution of the relative strength of many conflicting influences."<sup>74</sup>

Among these "conflicting influences" was one that was quite relevant to the constitutional inquiry into "reasonable rates." For the "value" of an asset, according to neoclassical economics, was in part a function of the price the asset was permitted in the market. Whether by law, or as the result of competition, an asset's value depended upon how much its product could be sold for in the market. Thus, the "value" of a power plant was a function in part of the rates the power plant could charge for the electricity it produced. But the rate the power plant could charge was the very thing at issue in the rate-making cases.

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72. So, for example, with little faith that they will not reach erroneous decisions consistently, we still find it legitimate to have juries in patent cases. Compare Gregory D. Leibold, *In Juries We Do Not Trust: Appellate Review of Patent-Infringement Litigation*, 67 U. Colo. L. Rev. 623 (1996) ("No warrant appears for distinguishing the submission of legal questions to a jury in patent cases from such submissions routinely made in other types of cases.").

73. Phyllis Deane, *The Evolution of Economic Ideas* 99 (1978).

74. Siegel, *supra* note 68, at 245.

If value turns in part upon the rate permitted by law, then that institution—the courts—charged with setting the rates faced an “inescapable circularity.”<sup>75</sup> The “value” of the asset *depends* upon the rates the owners may charge. It is not something independent of the rates. Thus there is *no* fact of the matter about what the value of an asset *is*, without resolving first what the rates will be. No “natural” or “intrinsic” value anchors the asset’s value; value is just what the rates allow. And thus, as economics was coming to teach, there was no independent way of determining what the value of an asset was, as the necessary predicate to determining whether rates were too low.

All this meant that from the perspective of neoclassical economics, the setting of a rate would in part determine the value of the asset. It would therefore reflect a question of policy—how much *should* the asset be valued. It would be a matter of judgment,<sup>76</sup> the stuff of policy, not a matter of fact. Put most crudely, nothing external to the court would determine it, yet to sustain a judicial appearance, the court needed something external to rely upon. As James Bonbright put the economists’ point:

[C]ourts refer to the determination of a rate base as one of “*finding out*” what the “present value” or “fair value” of the property *really is*, whereas the economists refer to the same problem as one of *choosing* a proper rate base—of *deciding* how much the property *should be* permitted to be worth rather than of *discovering* how much it actually *is* worth.<sup>77</sup>

Against the background of neoclassical economics, then, the determination of an asset’s “value” seems more a choice, than a finding; against the background of classical economics it was the reverse. This difference in theory then matters greatly to the rhetorical position of a court deciding a rate-making case. A theory in economics changed, and the legitimacy of court action changed as well.

The significance of this story is this: It does not matter whether neoclassical economics was really taken for granted by all at the time; it does not matter whether it was contested or not. All that matters here is that the legitimacy of the old way of finding value hung upon classical economics. Whether classical economics had been defeated or merely effectively questioned, it was certainly the case that it had been successfully drawn into doubt. It was a contested discourse, and its very contestedness created a cost for jurists continuing the practice

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75. Under the neoclassical view, “[v]alue was the equivalent of exchange value; exchange value was the equivalent of capitalized earnings; capitalized earnings were dependent upon rates. Without the notion of intrinsic value, the circular relationship between value and rates was inescapable.” *Id.* at 246.

76. *Missouri Ex. Rel. Southwestern Bell Tel. Co. v. Missouri*, 262 U.S. 276, 289 (1923) (Brandeis, J., dissenting).

77. 2 James C. Bonbright, *The Valuation of Property* 1081 (1937) (emphasis added).

of determining whether rates were reasonable or not. For of course, if the court followed the old views of classical economics, its finding was a "finding." But in a world where classical economics is just one of a number of competing views, a court so disposed would have to first *choose* to follow classical economics. That choice could not pretend to be a choice of fact. In the highly contested and politically charged context within which this battle got litigated, the choice to follow classical economics would be seen as a political choice. A choice of policy, taken because of pragmatic consequences, is just the sort of stuff courts are not to consider when such considerations compete with the equivalent considerations of a legislature. Once the matter is viewed as a matter of policy, it follows quite quickly that the matter is a matter for legislatures, not courts.

This change in the discourse of economics, then, had a radical effect on a discourse within law. It had this effect because the change *rendered illegitimate* an activity that before the court could quite easily engage. Continuing an active police of legislative rates would create, after the questioning of classical economics, what I called above, illegitimacy costs. These in turn would drive the Court to adopt a more deferential attitude towards legislative judgment. "Reasonableness" would become an excuse for deference rather than a justification to intervene.<sup>78</sup>

A contested discourse (here, economics) yielded a more deferential attitude by the Court. One might be tempted to generalize from this conclusion, to the view that wherever matters are contested, this contest calls for deference by the Court. (I have been so tempted, and this seems to be a siren that is quite catching.)<sup>79</sup> But the inference is a mistake, as I explore at length in the last section of this Article. The story I have just sketched about the response to contestation turns *not* upon the fact of contestation so much as the *relative position* of the Court versus other institutions, given this contestation.

As I will argue below, the (legitimate) judicial response to contestation is sometimes to defer; but in an extremely important class of cases, the legitimate response is just the opposite. In some contexts, the response to such a change (where a reason moves from appropriate to inappropriate) is for the court to become less active, more deferential; in other contexts, the response is for the court to become more active, and less deferential.

But this is to get ahead of the story. To understand this difference, and to understand how such differences track constitutional doctrine,

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78. The relaxation happens in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) and *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942).

79. I was expansive about deference in Lawrence Lessig, *The Path of Cyberlaw*, 104 Yale L.J. 1743 (1995). For an additional discussion about deference, see Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4 (1996).

I need first to say a bit more about this notion of contestation. That I do in the balance of this part. In the next part, I then describe contexts within which this change induces judicial passivity. Finally, in the last section, I describe contexts within which this change induces activism. In both contexts, the change I am describing is a change in the context of interpretation; the effort then is to understand how, and why, a theory of fidelity as translation responds as it does.

### B. *How Contests Render Meaning*

My account here rests upon a certain sociology of knowledge. The claim is that from a given perspective, discourses will appear either contested, or uncontested (obviously, relatively contested, or relatively uncontested, but for ease of exposition, I will stick with the simpler description). By "contested" I mean a discourse where fundamentals in that discourse appear up for grabs; that participants in that discourse acknowledge the legitimacy of disagreement about these fundamentals; that disagreement is a sign of normalcy for a participant, not oddness.

An uncontested discourse is much the opposite. Here people don't, in the main, disagree about fundamentals. In the main, they don't think much about fundamentals at all. People act, or argue, instead, taking these fundamentals for granted. Life here is normal science. One could conceivably question fundamentals; one could legitimately express doubt. But if one insisted upon these doubts, or was relentless in these questions, then one would mark oneself as odd; somehow outside the discourse. Doubts are "doubts" only because some doubts are pathology.

Much more must be said to make the distinction here useful (or even clear). But an example may suggest its essence. Think about the difference between discourse about abortion, and discourse about infanticide. People have views about abortion that they believe are correct; they also understand that views about abortion are contested. It is normal to find someone who disagrees with you; disagreement is expected. All know what they think; and all know that what they think is contested.

The same is not true about views about infanticide. People believe, with relatively little contest, that infanticide is wrong. Again, conceivably, in a philosophy seminar perhaps, one could imagine disagreement about whether infanticide is morally just or not; one could even imagine cases where most would agree that it is perfectly justified. But these two qualifications don't undermine the category: Views about infanticide are just not on the table of dispute in the way that views about abortion are. If one seemed genuinely puzzled about the question of infanticide; if one announced to the world his genuine belief that infanticide is just fine, then one would do more than mark oneself as an opponent. Worse, one would mark oneself as odd.

Now oddness is not perpetual—think about the odd birds at Chicago whose views are now quite mainstream. For neither is it stable. Indeed, we better understand the instability I want to describe if we complicate the story a bit. A more complete account would distinguish both between whether a discourse is contested (an empirical question about the extent of agreement within a particular community), and between whether a discourse is in the foreground, or background, of social consciousness (another empirical question about whether the discourse is a “visible” issue, or one for the most part ignored). The possibilities would be described by the following matrix:

|                   | <i>contested</i>        | <i>uncontested</i>     |
|-------------------|-------------------------|------------------------|
| <i>foreground</i> | [1]: abortion           | [2]: sexual harassment |
| <i>background</i> | [4]: button-down shirts | [3]: infanticide       |

Discourses in box [1] are paradigms of contested terrain. They not only mark out areas of actual disagreement (hence “contested”) but they are also areas where the disagreement is presently manifest in social life. About these issues, there are on-going arguments; people pay attention to these arguments; people have beliefs about them, but they also understand that others will disagree. (These, we might say, are the sorts of arguments one should not engage at a dinner party.)

Discourses in box [2] are different. These are present in social life; they represent issues that are being worked out. But the premises of the resolution are not themselves fundamentally contested. Quid-pro-quo sexual harassment here is an example: this (1) still occurs in the world, (2) people talk about it and struggle with it, and yet (3) views about it are relatively uncontested. It is present in the social consciousness, and to the extent that it occurs, it is resisted; but the fact that it occurs, and draws our attention, does not show that it is contested. (These are the arguments of dinner parties of relative strangers, rather than friends.)

Box [3] is the opposite of box [1]. It represents discourses that are settled, and not currently at the forefront of society’s attention. One might ask people about them, and one would expect a fairly consistent response. Infanticide is an example, as already described. So too with petty theft. These are things we wouldn’t think to question.<sup>80</sup> And if they are questioned, the questions are put to rest, quickly, and without much interest. (The arguments of either failed dinner parties, or parties of foreigners.)

80. *United States v. Virginia*, 116 S. Ct. 2264, 2291-92 (1996) (Scalia, J., dissenting).



Box [4] might seem to be the unprovided for case, though once seen, one sees that it is not so uncommon. It represents discourses where, if one were to inquire, disagreement would be revealed; but for whatever reason, this disagreement does not manifest itself, or if it does, it is generally ignored. By definition, it is hard to come up with examples of this. But here's one that I've recently noticed.

What is a "button-down shirt"? I should have thought the meaning of a "button-down shirt" was clear—it is a shirt where the collars are attached to the front of the shirt with buttons. A colleague disagreed, and at her urging, and with the most unscientific methods possible, we tested the disagreement. We asked twenty people on the street to define "button-down shirt." All but three gave the following response: a "button-down shirt" means a shirt where there are "buttons" "down" the front of the shirt.

This is the disagreement of box [4]. The disagreement reveals a contest in views, but it is a contest that is not noticed in the social sphere. The disagreement is unnoticed, and for the most part we can go on without conflict. But sometimes, the conflict is revealed, and a contest can emerge. (These are, of course, the most dangerous but best sorts of arguments for any sort of party.)

Of these four boxes, the most important is box [3], for it will establish, as I argue below, a judicial attitude at the core of the account I offer here. But the most interesting is box [4]: for here rest the potential political battles; here are the struggles about to break.<sup>81</sup> An issue may start in box [4]; contest-entrepreneurs may succeed in getting it thrown into box [1]; after a period of dispute, it may get resolved in some way, but remain in the public's eye; it then moves to box [2]. And after some time of stable resolution, it finally falls into the background, resolved and unnoticed; something taken for granted by others; often unnoticed (box [3]). Of course, nothing assures that a particular dispute will move through all four boxes—a discourse might, that is, get stuck (as the discourse about abortion seems to have gotten stuck); or a contest might never rise to the level of contested (a fate that dooms, no doubt, my button-down shirt example.) But the point is that there is movement here—from one box to another.

One might be skeptical about the value in introducing this notion of contested and uncontested discourses as a way to understand changed readings of the Constitution. No doubt the line between contested and uncontested is fuzzy, and no simple way to make the fuzzy clear seems apparent. But that there is an effect here I don't think can be denied, and that we can't discern the effect with perfect accuracy does not mean we should ignore it.

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81. I have not tried to link this matrix with more mature descriptions in social theory, though the connections should be obvious. See especially the introduction to Jean Comaroff & John Comaroff, *Of Revelation and Revolution* (1991).

If you doubt the effect, think about just one example—the rise of “sexual harassment” in discrimination law. Before the late 1970s, there was no such thing as “sexual harassment” in discrimination law—or better, before 1980, the law would not have seen sexual harassment as sex discrimination.<sup>82</sup> This of course has changed. In large part, the change is the product of perhaps the most important contest-entrepreneurs of the last decade—feminists, Catharine MacKinnon in particular. Through a series of legal challenges to practices that we would now call harassment, MacKinnon succeeded in taking a wrong that was before unnoticed (by the law), and rendering its permissibility contested. After a (relatively) short time of contest, this wrong was recognized as a wrong, and now, though the wrong still stands in the foreground of public attention, it is no longer a contested feature of public debate. Everyone is now, in this regard at least, a MacKinnonite; all concede the discrimination in sexual harassment.

There is a change here. The world is in this sense different from how it was just twenty years ago. It is a change that occurred extremely quickly. An idea was thrown before the legal system, and the legal system got it. Why it got it (while not getting other similar ideas about equality<sup>83</sup>) is a complex question. But that it did shows something of the power of an idea to destabilize other ideas.

Discourse about harassment, however, has not moved through a full cycle. It still stands in the foreground of society’s attention. There is, however, another ready example of a discourse that has moved through all four stages. For reasons that will become apparent later, I want to sketch that progression here.

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82. See generally B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. Rev. 1 (1993) (reviewing sexual discrimination law). For a history, see Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 816-26 (1991) (sketching development of claim). Within law, it was Catharine A. MacKinnon who constructed the category and linked it to employment discrimination. See generally Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) (recounting the history and development of the concept of sexual harassment).

83. Professor MacKinnon, for example, defines inequality as follows: “Inequality means practices that disadvantaged traditionally subordinated peoples through imposing inferiority on them, on a group basis.” Catharine A. MacKinnon, Symposium, *Fidelity in Constitutional Theory*, Fordham University School of Law 197 (Sept. 21, 1996) (transcript on file with the *Fordham Law Review*). I completely agree with this definition. What interests me, however, is why certain such inequalities are seen as inequalities, and others are not. For example, “attractiveness” or “hideousness” are statuses imposing inferiority or its opposite on people on a group basis, that are not now conceived of as “inequality” for purposes of the Equal Protection Clause. One wants to know why, or more importantly, one wants to understand the process that includes some of these inequalities, while excluding others. See Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 Harv. L. Rev. 2035 (1987).

The example is the history of psychiatry's treatment of the topic of homosexuality. For some time, psychiatry treated homosexuality as a pathology; this view within psychiatry was fairly well established.<sup>84</sup> That it was pathological was taken for granted by most within the profession. It is a discourse, then, that begins in this matrix at box [3].

Sometime in the late 1960s, however, it began to be clear that judgments about homosexuality were no longer uniform. Doctors began questioning the traditional understanding of homosexuality. Privately, they adopted different techniques of treatment. But for the most part, the issue was invisible from social, or psychological, life. The dissent, to the extent it existed, was not registered. This period may be thought of as within box [4].

In the early 1970s, gay activists took advantage of this dissent; it began to be registered; they had regulated it. Through a series of events, both political and scientific, they forced psychologists to reconsider the medical status of homosexuality. Quite quickly, this moved the discourse into box [1].

This battle first occurred in the context of the American Psychiatric Association ("APA"), the body charged with determining the content of psychiatry's Diagnostic and Statistical Manual of Mental Disorders ("DSM").<sup>85</sup> The DSM defined homosexuality as a disorder.<sup>86</sup> In 1970, during the annual meeting of the APA in San Francisco, gay and lesbian activists organized large and effective protests of this DSM categorization. These protests continued at the next meeting, and in 1972, for the first time, the APA organized an open panel on the nonpatient homosexual. The following year, discussion focused on "the extent to which heterosexual biases had colored the work of psychiatrists."<sup>87</sup> The same year, the board and membership of the APA approved a change in the psychiatric status of homosexuality, ending its classification as a psychopathic condition.<sup>88</sup>

After the APA resolved the question as it did, and after its resolution was accepted, the discourse about the status of homosexuality moved to box [2]. The issue remained for a number of years at the center of the APA's attention.<sup>89</sup> But it remained there resolved in just the opposite way from when it was in box [4]. The

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84. I discuss this cycle in Lessig, *Understanding Changed Readings*, *supra* note 4, at 415-19. Again, this is not to deny that there were dissenters. *See id.*

85. *See* American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994).

86. American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 44 (2d ed. 1968).

87. Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnoses* 112 (1981).

88. *Id.* at 137.

89. Immediately after the first resolution, "conservatives" in the field tried to get the question reopened in the next APA meeting. They failed. *Id.* at 4.

practice of psychology had to be reformed by this new understanding; and for a time, it was.

Psychiatry is now at a stage when the status of homosexuality has fallen back to box [3]. It is taken for granted now, that is, that homosexuality is not "psychopathic." One within this field who said that it would not just be expressing a dissenting view, as he might when the discourse was in box [1] or [2]; he would be instead marking himself as an outsider.

I have described this cycle from the perspective of people within the field of psychiatry. From the perspective of law—that is, from outside the perspective of psychiatry—the cycle is a bit less complex. It is when the discourse is backgrounded that law can rely upon its judgments; and when the discourse is foregrounded, law must avoid taking sides in its dispute. When the discourse is foregrounded, law treats the discourse as it might treat contested facts, in a motion for summary judgment; but when the discourse is backgrounded, it can take the facts of the discourse for granted in resolving whatever question it may need to resolve.

But how, in an example like the example of the APA, could this contested discourse matter to law? One way it might matter is suggested in an opinion interpreting the Immigration Act in 1982.<sup>90</sup> The Immigration Act of 1965 made ineligible aliens "afflicted with a psychopathic personality, or sexual deviation, or a mental defect."<sup>91</sup> Those terms originally had a medical origin—they were drawn from the then existing medical understandings of the condition of homosexuality.

By 1982, those medical understandings had changed. As I described, the APA had redefined its status, and in 1979, following that lead, Surgeon General Julius Richmond announced that "homosexuality per se will no longer be considered a 'mental disease or defect.'"<sup>92</sup>

This created a problem for the INS: Under its procedures, an alien suspected of homosexuality had been referred to a public health service doctor, who would certify that the alien was homosexual, and therefore (under the medical understanding of the time) had a "mental defect." The implication was automatic from the DSM judgment about homosexuality, and the finding that a person was a homosexual.

But once psychiatry changed, the implication was not so easily drawn. Indeed, doctors within the Public Health Service refused to draw it. And if doctors refused to draw it, then, Judge Aguilar held,

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90. *Lesbian/Gay Freedom Day Comm. v. INS*, 541 F. Supp. 569 (N.D. Cal. 1982), *aff'd*, 714 F.2d 1470 (9th Cir. 1983).

91. *Id.* at 572.

92. *Id.*

homosexual aliens could not be excluded under this statute.<sup>93</sup> The statute relied upon the judgment of science; when that judgment changed, law would have to change as well. Law was *subject to* these discourses, and vulnerable to their change.

We can draw the conclusion so far like this: Legal discourse in part rests upon discourses outside of law. It is, in a sense, *hostage* to these discourses outside law. It relies upon them to sustain the appearance of legitimacy within its own, plainly legal, sphere. But it is vulnerable when they change.

In the examples we have seen, these backgrounded, non-legal discourses permit a discourse within law to make judgments about the world that appear true, and not political; fact-like, not policy-driven. But if these backgrounded discourses change—if they become contested, or are drawn into doubt—then just as certainly they can render a discourse within law political by removing the supports to a particular judgment that before had been supplied by the absence of contest within a given non-legal discourse. So again, when classical economics was relatively uncontested, judges could “find” the value of regulated assets; when psychiatry condemned homosexuals to pathology, judges and legislators could simply exclude them as sick. But when these earlier discourses became contested, judges could not so easily “find” what before they could: When finding value seemed more like making value, it rendered the judges’ position vulnerable; when science plainly did not (or did not plainly) support the exclusion of homosexuals as sick, judicial exclusion appeared as prejudice.

These examples are not isolated cases. They mark, I want to argue, a pattern pervasive in American constitutional law. This pattern helps explain what may appear to be gaps in translation’s account of constitutional fidelity. And it points to what I have suggested is missing in much of constitutional theory, whether fidelitist or not—to the place, that is, of these contested and uncontested discourses in an interpretive context.

In the remaining two sections, I want to sketch the effect of this pattern in two very different contexts. The first will seem much like the two examples that I have already reviewed: In these, there is a discourse that becomes contested; this renders a juridical discourse political; this then raises the illegitimacy costs for the Court engaging that discourse, and the response is for the Court to adopt an attitude that is more deferential—or as I will call it, passive.

But contest in the second context yields precisely the opposite judicial response. Here the effect is not to induce judicial passivity. Instead, in this context, the effect emboldens the judicial response. Here, the Court gambles with a kind of legitimacy, rather than

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93. *Id.* at 584.

illegitimacy cost. The response is activism, though an activism perhaps tempered by prudence.

### C. *Rendering Passive: Erie, et al.*

So far my story has been about contestation in discourses outside of law. Judges from within law, the story goes, respond to this cycle of contestation in discourses without law, when contestation renders decisions within law "political."

In this section, I examine contests *within* law—discourses within law that become contested, and hence render the same, or a different, discourse within law "political." As we will see the pattern is similar. For reasons that will become plain, I call the pattern the *Erie-effect*, though the consequences of its effect are quite different in two different contexts.

The model is the case of *Erie R.R. v. Tompkins*,<sup>94</sup> and the changes that *Erie* yields. You recall the basic story: For more than ninety-six years, federal courts had been "finding" what was called a federal general common law. They were doing so under an authority ratified by Justice Story in *Swift v. Tyson*.<sup>95</sup> *Swift* was a reading of the Rules of Decision Act of 1789, permitting federal courts to ignore state court judgments in matters of "general common law." As Story there wrote:

It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts . . . , and especially to the questions of general commercial law, *where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.* . . . The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield . . . to be in a great measure, not the law of a single country only, but of the commercial world.<sup>96</sup>

*Erie* put an end to that practice. There was no "federal general common law,"<sup>97</sup> the *Erie* Court said; federal courts must follow state courts interpreting state common law, just as they must follow state courts interpreting state statutes. No longer could federal courts simply divine what the common law was, as if appealing to some oracle brooding in the background; law "in the sense in which courts speak of it today," the Court then said, "does not exist without some definite

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94. 304 U.S. 64 (1938).

95. 41 U.S. (16 Pet.) 1 (1842).

96. *Id.* at 18-19 (emphasis added).

97. *Erie*, 304 U.S. at 78.

authority behind it.”<sup>98</sup> And unless the federal court could point to the state law authority for the common law they were announcing, it was the Court that, quite unconstitutionally, was providing this authority.

There is a drama to the opinion in *Erie* that is difficult to resist. An idea of philosophy—about the nature of “law”—changes, and a practice 100 years old is reversed. On the authority of the retired Holmes, Brandeis shows us our mistake; jurists before thought the common law found, we now see it is made.<sup>99</sup>

Drama, but perhaps too much drama. It is the story of a grand misunderstanding—the Hope Diamond found to be quartz. (One can just see the PBS episode recounting the story: Brandeis and his clerks working late into the evening; Brandeis, in a flash, says “Wait. Just a second. I’ve got it. The common law isn’t *found*; the common law is *made*. *Swift* is *unconstitutional!*,” music rises; the clerks cheer; credits role; lights fade as “excellent, my dear Watson” echoes mysteriously in the room.)

Ideas don’t change like this, misunderstandings of Kuhn notwithstanding. The practice that had grown out of *Swift* was a mistake, but it was not a 100 year old mistake, discovered in a flash. To understand it, we must put it in context. And in the next few pages to follow, I want to describe the development of the ideas later associated with *Swift*, by understanding something about this context. I then describe their undoing, for it is this undoing that is the key to the *Erie-effect*.

As *Swift* came to be understood, it invited related questions. Its rhetoric said that the common law was “found,” but this just invited two sorts of skepticism: First—really *found*? How do we know? How do we know the judge didn’t just pretend to find it? (This is realism’s question.) Second—found *where*? What was the source of the law that the federal common lawyer looked to. (This is positivism’s question.) By the time of *Erie*, both questions pressed hard: it was neither plausible that judges were really being guided by anything; nor if they were being guided, that what was guiding them was a proper source of authority.

But it took a long time for these skepticisms to mature. If we can pick out three understandings of the common law that competed during these hundred years, then we will see that these two skepticisms don’t press the same against all three. I will discuss them in their order of dominance, but all three echo in the writings of the period.

The first is the understanding of Story in *Swift*—an understanding of the common law which, if properly understood, should be quite untroubling for even the most committed positivist. The key to this

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98. *Id.* at 79.

99. Compare William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 Tul. L. Rev. 907, 934 (1988) (referencing 1830s commentator that judges should be subjected to democratic electoral controls because judges were in fact making the law).

first understanding is the concept of "customary law." At the time of the Founding, and certainly at the time of *Swift*, the common law at issue in *Swift* in large part (though not exclusively<sup>100</sup>) was "customary law." But just what "customary law" means is an idea we have lost. We emphasize the *law* half in the two part phrase; we would do better to focus the *custom* half. Customary law at the time of *Swift* is more like contract than law; it is more like the obligations of implied contract than the rules of an external sovereign. The aim in finding customary law was not to impose rules of custom on unwilling parties; rather the aim was simply to protect the expectations of the parties to an exchange, by recognizing the understandings that these parties brought to the transaction themselves. Customary law was a set of defaults which the parties, through express agreement, were always free to modify. They were understandings that the law treated as agreements.

Within the narrow domain that *Swift* purported to sweep—what we call commercial law or the law merchant—the *Swift* practice then simply empowered federal courts to engage in the wholly unremarkable power of finding what the agreement, or understanding, between the parties in a commercial transaction was. In this sense, the court was to *find* the agreement, and hence the law. But in this sense, courts "find" the understandings of the parties to a voluntary transaction all the time. This is the sense in which federal courts today, sitting in diversity, "find" the implied terms of a contract when determining how to enforce a contract.<sup>101</sup> In both cases, the law that is found is simply the will of the parties—a source of authority within this domain at least that should not trouble the positivist, and a practice of finding which continues today.<sup>102</sup>

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100. Common law in this sense would not have included torts, which were primarily local concerns. See Randall Bridwell & Ralph U. Whitten, *The Constitution and the Common Law: The Decline of the Doctrines of Separation of Powers and Federalism* 121 (1977).

101. The same, for example, with the finding of the laws of nature. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1301 (1996).

102. Compare Bridwell and Whitten's view:

The characteristic of the common law that we saw in earlier chapters prevented violations of federalism and separation of powers restrictions by the federal courts in diversity cases was its private or customary character. The enforcement of customary rules by the federal courts did not implicate the sovereign lawmaking authority of any government, because common law rules were not the product of a sovereign voice. Whether they were of a long standing or relatively recent character, or of a general or local character, they originated in the private behavior of parties. They were "created" or adverted to by the parties within the "spontaneous order" of the common law process, which judicially enforced the expectations of the participants to a variety of transactions, rather than permitting judges to promulgate legislative-like rules to govern party behavior *ex post facto*.

Bridwell & Whitten, *supra* note 100, at 115.



This however is not the *Swift* that *Erie* overturned. Before we get to *Erie*, the practice born in *Swift* changed in important ways. Late in the century—after, as Bridwell and Whitten say, 1860<sup>103</sup>—the federal general common law of *Swift* took on a very different sense. It changed in important ways, but it is important to keep focused at least one way in which it remained the same.

The constant part was the “finding” part—that throughout the later evolution of the practice that *Swift* began, courts still maintained that they were being *guided* in their work by an external source. Law, in this sense, was still “found.”<sup>104</sup> But from *where* it was found changed quite dramatically. While at first it was found (1) in the understandings of the parties, later it was found (2) in the logic of conceptualism, or formalism, and later still it was found (3) from the practice of other courts. The history of the practice that *Swift* began then is a history of the changing *sources* of the common law; but common throughout is the view (whether believed or not is a separate question) that courts were still *finding* this law, whatever the source.

Why the common law shifted in the sources it appealed to is an extraordinarily rich question, beyond the scope of this essay (and capacity of this author). The broad themes are well known: After 1870, the range and complexity of the economic transactions regulated by the common law grew tremendously. This no doubt put great pressure on a practice that tracked custom, both because customs don't exist in times of change, and because the capacity of the court to find them depends in large part on the understanding the court might have of these practices. That understanding is weakened in this period, and one expects judges were pulled to find another way to articulate what the common law was.

Science, here, was a model.<sup>105</sup> But science in the mid-part of the nineteenth century was more about ordering and logic than about ex-

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103. *See id.* at 141.

104. *See* Casto, *supra* note 99, at 934.

This conceit that judges do not make law was still a powerful force in 1921 when Judge Cardozo delivered his Storrs Lectures on the judicial process. Although he candidly rejected the old dogma, Arthur Corbin reports that Cardozo was mildly concerned about publishing the lectures and humorously remarked, “If I were to publish them I would be impeached.”

*Id.* (footnotes omitted).

105. *See, e.g.*, William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* 30 (1994) (explaining pre-Civil War view of common law as a science conforming to Baconian model). Indeed, some believed that *unless* the common law were considered a science, the common law would be tyranny. *Id.* at 35 (“If law were not a science (that is, ‘if the subjects of law,—the nature of man, the situation, wants, interests, feelings, and habits of society,—cannot be classified upon general resemblances’), then the judge’s opinion ‘is absolutely law.’”); *see also* Daniel Mayes, *Whether Law Is a Science*, 9 *Am. Jurist & L. Mag.* 349, 352-53 (1833) (“But if law is not a science . . . then the opinion of the judge is something more than evidence, it is absolutely law . . . . He is not the interpreter, but the maker, of the law; and in

periment and discovery.<sup>106</sup> In the first wave of reform, the effect of scientism was to drive the common law jurist to find organizing and general principles to unite a disparate body of precedent.<sup>107</sup> The search was for the foundations to the collection of cases the common law jurist came to know—a collection of cases rendered unfathomably large in 1870 by the birth of the West Reporter system.<sup>108</sup>

One can well understand the pressure that would push common law courts to something less empirical.<sup>109</sup> When cases were limited to the few that the courts could recall, adapting a particular rule to the facts or understanding of the parties was relatively easy. But when cases were reported, and when parties had access to these reports, flexibility and adaptability become more difficult. Courts were penned in by this flood of “precedent,” and in response they sought a different authority. This was the authority of logic, and formalism—where rules would be deduced in an exercise of logic rather than discovered from the messiness of the cases to consider.<sup>110</sup>

This formalism, or conceptualism, is the second stage of this common law evolution—though again, I don’t mean to suggest a progression, nor do I want to argue about when one idea might have been dominant over the other. The third stage—launched by Langdell—can be seen to mix these two traditions. For Langdell’s idea was a kind of science for the common law; but it wasn’t the pure science of deductivism. Rather Langdell wanted to add the empirical study of what courts actually do to the practice of developing general and formal rules of the common law. Langdell was building a law school;<sup>111</sup> it may have been no accident then that he was also creating a demand for a certain kind of legal scholar—the scientist, removed from practice, who would investigate the reported cases from an area of the

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him resides that despotic power, which some political writers imagine must be committed to some body of magistracy.”).

106. See LaPiana, *supra* note 105, at 30; Mayes, *supra* note 105, at 349; President Quincy, *President Quincy’s Address on the Occasion of the Dedication of Dane Law College*, 9 Am. Jurist & L. Mag. 33, 52 (1833); see also Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 Law & Hist. 293, 298-99 (1985) (“By ‘scientific’ nineteenth-century economists meant the careful classification and definition of terms; they did not mean the process of hypothesis-formation and testing that we would today say defines the scientific method.”); *Customs and Origin of Customary Law*, 4 Am. Jurist & L. Mag. 28, 33 (1830) (“The scientific study of jurisprudence then, in our view . . . is the consideration of its original purpose . . . so as to determine whether any particular case is within the scope of its authority . . .”).

107. See Bridwell & Whitten, *supra* note 100, at 125.

108. See Casto, *supra* note 99, at 938-40.

109. See *id.* at 947.

110. Of course, other changes were going on as well. The common law was expanding to include more, and states were becoming more activist in the areas traditionally reserved to commercial law. See Clark, *supra* note 101, at 1290-91.

111. In a sense he was changing the nature of law school. Harvard, where Langdell was dean, long predated him.

common law, and synthesize them into principles that might be said underlay them. If the first stage of the common law was empirical, and the second, logical, the third was a kind of empirical logic, which we could call inductivism.

The importance of this story, though, is less in the details of the historical account—less in the richness of which competing source was dominant when—and more in the commonality again that unites this dispute. Common law jurists certainly contested how best to conceive of the source of this common law authority. But what they didn't contest was that the enterprise of the common law was one where judges were ultimately to be exogenously guided—where judges didn't "make" law in the sense that they decided what was best, but rather "made" law in the sense that they discovered it in the proper common law way. As Scalia put the point in a very different context:

I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.<sup>112</sup>

As the nature of this external source shifted—as it moved further and further away from the understandings of private parties—the legitimacy of this source of authority was left, more and more, open to doubt.<sup>113</sup> And it was this doubt that Holmes picked up on. The doctrine still associated with *Swift* began to draw the fire of many,<sup>114</sup> most furiously on pragmatic grounds,<sup>115</sup> but most famously, on philosophical grounds as well.<sup>116</sup> Against *Swift's* progeny, and the source of law

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112. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

113. See, e.g., John C. Gray, *The Nature and Sources of the Law* 235-36 (2d ed. 1921) (describing critique).

114. See Tony Freyer, *Harmony & Dissonance: The Swift & Erie Cases in American Federalism* 92, 99 (1981) (describing attack).

115. See, e.g., *id.* at 18 (describing "forum shopping").

116. See, e.g., *id.* at 92-96 (describing the controversy surrounding *Swift*); see also LaPiana, *supra* note 105, at 34-35 (elaborating on the distinction between cases as law or cases as evidence of law); Armistead M. Dobie, *Seven Implications of Swift v. Tyson*, 16 Va. L. Rev. 225, 231 (1930) (discussing whether judges make law or find it); Roscoe Pound, *The Spirit of the Common Law* 181 (1921) (positing that American law is developed through judicial decisions). William C. Chase, in *The American Law School and the Rise of Administrative Government* (1982), recounted that:

By the beginning of the twentieth century, Holmes' view of the judge as a policy maker operating always with an eye to what is expedient was still too starkly stated for most lawyers. But the sense that he expressed of a judicial discretion to improvise in the face of changing conditions was gaining acceptance . . . .

As his conception of the judicial function came increasingly to resemble the expedient behavior of administrative agencies in deciding cases, . . . the legal scholar could not escape the conclusion that the agencies possessed judicial power. It soon was accepted as irrefutable.

*Id.* at 16-17.

that it now seemed to presuppose, Holmes wrote in 1917: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign . . . ."<sup>117</sup>

Nine years later, his attack was trained directly (if unfairly) on *Swift*:

Books written about any branch of the common law treat it as a unit . . . . It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. *If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was.* But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State . . . .<sup>118</sup>

This is the attack of Holmes the positivist, and it hit the common law practice at its weakest part. For once cut from the source of authority implicit in *Swift* (the customary understandings of the parties), the source of the authority behind this common law becomes more questionable. The positivist insists that the ultimate source be named; but the mystery of conceptualism, even when tied to the inductivism of Langdell, didn't have a clear answer.

But as well as a question about the source, what these dissents manifest is skepticism that judges are being *guided* by this source, whatever it is. Quibbles about the source became battles about whether the source was mattering at all. What seemed more and more plain was that judges were simply deciding what the common law should be, and dressing it up in the pretense of law finding.<sup>119</sup> The common law was becoming more *rationalizing*; but in becoming more rational, the judgment within its building was also becoming more plain.

This is the attack of Holmes the realist. In Holmes's conception, in the emerging language of the time, the common law flowed not from *facts* found but from *choices* made. More and more it seemed both that *federal* courts were exercising the power of *state* legislatures (a federalism concern revealed by positivism), and that *federal courts* were exercising the power of *state legislatures* (a separation of powers

117. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917).

118. *Black & White Taxicab v. Brown & Yellow Taxicab*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (emphasis added).

119. See, e.g., Clark, *supra* note 101, at 1263 (describing later view that judges did not discover common law, but rather created it).

concern, revealed by realism).<sup>120</sup> This meant, under Holmes's view of what the common law was, that federal courts were exceeding constitutional limits, twice over.<sup>121</sup>

This was a contest about what the common law was. It was in part a battle over an idea. The legitimacy of the enterprise hung upon making it plausible that courts were externally guided.<sup>122</sup> But by 1937, the plausibility of this idea had been drawn fundamentally into doubt. The discourse of common law finding had become contested, and this contest had consequences. What before had seemed plainly permissible now, Justice Brandeis said in *Erie*, rested upon a "fallacy": "The fallacy underlying the rule . . . is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'"<sup>123</sup>

There was no such body of law. Said Justice Brandeis, (again echoing Holmes), "law in the sense in which courts speak of it today does not exist without some definite authority behind it."<sup>124</sup> The language had changed ("courts speak") in part perhaps because our view of

120. As Dobie concluded:

Did the fathers of this Constitution ever contemplate that the federal courts should have power to declare the unwritten law of the states in suits touching merely the private rights of persons when such rights and such suits were not in any field entrusted to the federal government and in no way involved the statutes, treaties, Constitution, or even the powers or activities of the United States as such? An emphatic negative.

Dobie, *supra* note 116, at 238-39.

121. On the question of constitutionality, *Erie* was decidedly unclear. Some suggested that under Article III, Congress had the power to specify rules of decision, even where Article I didn't give it substantive power. See Alfred Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U. L. Rev. 427, 439-49 (1958) [hereinafter Hill, *The Erie Doctrine and the Constitution*]; Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 Harv. L. Rev. 1013 (1953) [hereinafter Hill, *The Erie Doctrine in Bankruptcy*]; see also Akhil R. Amar, *Law Story*, 102 Harv. L. Rev. 688, 699 (1989) (Book Review) (addressing the scope of judicial power under *Erie*). But regardless of Congress's power, Holmes's view stands relative to courts. Holmes did not, however, think *Swift* should be overruled. *Stare decisis*, in his view, compelled retaining it, but limiting its reach.

122. I am glossing over a significant complication here. I am making it sound as if the common law practice would be perfectly permissible so long as courts were actually guided by some external authority—that the flaw reversed in *Erie* was that in fact, they were not so guided. But of course it matters *what* that external authority was. The practice in *Swift*, within the domain of private law, is unproblematic both because it plausibly did form the basis of a custom that could guide the court, and because it was within a domain where private law making was untroubling. But if the domain were not one where private law making was appropriate (say, industrial codes under the NIRA), or if the source was somehow improper (imagine if the courts decided to follow the common law of England), then the source itself may raise questions, even if the common law courts were plausibly still guided.

123. 304 U.S. 64, 79 (1938) (emphasis added) (footnote omitted).

124. *Id.* (quoting Justice Holmes) (emphasis added).

reality had changed,<sup>125</sup> and in part because our view of law had changed. Whatever the view before, *today* law is not conceived except as the expression of a political will. Thus, to say, as the court of appeals reversed by the Court in *Erie* had suggested, that federal courts were “free to exercise an independent judgment as to what the common law of the State is,”<sup>126</sup> was to say that federal courts could exercise an independent judgment about what the law “should be.”<sup>127</sup> It was no longer plausible to believe that the practice the courts had developed was actually guiding or determining how the common law would develop. Evolving a federal general common law was as much law making as was the law making of state legislatures. If this is what the *Swift* doctrine meant, then the *Erie* Court held, it had to be rejected.

We should pause to remark about the extraordinary nature of this change, for its nature is central to all that follows: Premised on a change in philosophy, and upon its effect on a legal culture, the Court declared a practice with at least a ninety-six year pedigree unconstitutional.<sup>128</sup> A way of speaking, and therefore, a way of understanding, and therefore, law itself,<sup>129</sup> had changed, not through the deliberation of anyone, not through the democratic ratification of any legal body, but through a transformation in legal discourse. One discourse died,

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125. It is useless to digress into philosophy here. Of course our view of reality is itself language contingent. So when I say it depends on our view of reality, that just means it depends on how we are speaking in some other domain of our discourse. The domains have cross-border implications. One such implication is that we cannot anymore ignore that finding is making, and hence that federal judges were now acting as state legislators.

126. *Erie*, 304 U.S. at 71.

127. *Id.*

128. The same point about *Erie* was made by Hill, *The Erie Doctrine and the Constitution*, *supra* note 121, at 443-44; Hill, *The Erie Doctrine in Bankruptcy*, *supra* note 121, at 1032, 1050; Edward S. Stimson, *Swift v. Tyson—What Remains? What is (State) Law?*, 24 Cornell L.Q. 54, 65 (1938); Bridwell & Whitten, *supra* note 100, at 130; see also Casto, *supra* note 99, at 955-56 (discussing the different approaches of federal courts in *Erie* and *Swift*). As Akhil Amar describes the change:

The *Erie* Court’s answer to this question can also be seen as influenced by legal realism. If common law decisions penned by state judges represented state policy just as much as statutes written by state legislators, then it made little sense for federal judges to defer to the latter, but not the former.

Amar, *supra* note 121, at 695. Amar points to Hart’s similar view. *Id.*; see also Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 Pace L. Rev. 263, 283 (1992) (“This follows from the way in which Holmes and his realist successors changed our understanding of common law judging. We have come to see that even the fundamental principles of the common law were ‘made’ by judges.”). For skepticism about the genuineness of this change, see Freyer, *supra* note 114, at 2-3.

129. As stated by Gray, in expressing his concern over the structure of the Harvard Law School:

“But now I want to say the profession is right.” Gray told Eliot that law was not at all like the natural sciences whose “truths and the best means of applying them are independent of opinion.” Law was quite different because “in law the opinions of judges and lawyers as to what the law is are the law.”

LaPiana, *supra* note 105, at 19.

another replaced it, and it is from this change of discourse that *Erie* gets its sanction. Common law law making now *appeared* differently from what it had *appeared* to be before, a difference in appearance that derives from a change in a background, taken-for-granted discourse about what the common law was.<sup>130</sup>

The change in this background is not that realism or positivism became uncontestedly dominant. Holmes and Brandeis cannot be taken to be reporting what everyone believed was true. Formalists and anti-realists abounded, but none of that matters. Instead, the relevant change is a change from a background contested discourse, to a foreground contested discourse. This change weakens the continued practice of federal common law law making—not because of the ascendancy of uncontested and emerging doctrines, but rather because of the effect the contestation has on an earlier practice. The illegitimacy does not depend upon it being plain that courts are simply making it up. The illegitimacy depends upon there being a question about whether courts are making it up—depends, that is, upon it *not being plain that courts are not making it up*.<sup>131</sup>

That question, in the face of the competing claims of the state, forces the reallocation of authority that *Erie* effects. Once the skepti-

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130. How did the discourse in law change? There are two accounts. One looks to a change in ideas alone. Here is just one: the naturalism and universalism inherent in Justice Story's conception soon gets drawn into doubt by two fundamentally different schools of thought—positivism on the one hand, see Freyer, *supra* note 114, at 95-96 (describing schools of thought), and the common law as custom school on the other. James C. Carter, *Law: Its Origin Growth and Function* 120 (1907); Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court* 181 (1942). Positivism entailed that law is just the command of a sovereign, and a sovereign is free to command as he wishes; it followed under this account that common law judges were simply continuing the sovereign's law making. Common law as custom entailed that the common law was simply the reflection of common custom of the time and place; it followed under this account that the expansive notion of a general federal common law, applying universal rules to a wide range of conditions, made very little sense. See Freyer, *supra* note 114, at 97 (discussing the "historical school"). For Holmes, of course, the theory was the emerging pragmatism of American philosophy. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *Stan. L. Rev.* 787, 789 (1989).

But a history of ideas alone will not suffice as an account of the transformation that gave us *Erie*. For what is central to the dynamic that I describe is a change in the legal culture more generally, and this was, in large part, the result of the emerging law school. See LaPiana, *supra* note 105, at 70-78; William C. Chase, *The American Law School and the Rise of Administrative Government* 18 (1982); William E. Nelson, *The Roots of American Bureaucracy, 1830-1900*, at 145 (1982); Robert Stevens, *Law School* (1983). Indeed, it was this truth that enraged the more traditional American Bar Association in the late nineteenth century, when law schools began to turn away from the scientific conception of the common law, to a more realist, and hence less "legal" conception of law. LaPiana, *supra* note 105, at 138. All understood: Change the training, and you change the reality. And once you change the reality of what law was, much else would change as well.

131. For a comparable, and extremely convincing, argument, see Hellman, *supra* note 58.

cism was strong enough, once the contest had been sufficiently established, the Court was pressed to reallocate the authority before exercised by federal courts.<sup>132</sup> Henceforth, federal courts would be properly *federal* (by following states in state domains) and properly *courts* (by following rather than making law). The practice born in *Swift* was then overturned.

The pressure was the pressure of what I have called illegitimacy costs. Contestation had rendered a practice within law illegitimate, and the Court reallocated that practice to avoid this cost. These two steps—contestation raising illegitimacy costs, and a reallocation to avoid these costs—constitute a pattern. Elsewhere I have called this pattern the *Erie-effect*,<sup>133</sup> and have argued that the *Erie-effect* explains a wide range of changed readings from our interpretive past. My aim here is not to repeat that argument, by replaying those examples. But I will summarize two to make clear the pattern. For in the last section of this paper, I want to extend the pattern to a different type of case.

*Chevron*: *Chevron U.S.A. Inc. v. Natural Resources Defense Council*<sup>134</sup> is the *Erie-effect* applied to reading. It had long been the duty of the Court to say what statutes mean, whether administrative law statutes or not.<sup>135</sup> Over time, this practice became more contestable, as statutes became more extensive or complex, and as the constructive aspect of this interpretive practice became more plain. Interpretation seemed less law finding than law making,<sup>136</sup> and this law making by courts raised an illegitimacy cost. In *Chevron*, the Court acknowledged this cost, at least in the context of ambiguous statutes. And to avoid it, the Court established a rule that shifted interpretive law making with ambiguous statutes to the agencies charged with the implementation of those statutes. The stronger democratic pedigree of those agencies, the Court wrote, justified their engaging in this law making practice rather than the Court.<sup>137</sup>

*Independent Agencies*: Justice Scalia's argument against independent agencies is the *Erie-effect* applied to executive power. Independent agencies were born of a time when it was thought that there could be "genuinely 'independent' regulatory agencies, bodies of impartial experts whose independence from the President [did] not entail corre-

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132. Stone viewed the change in judicial philosophy as the only justification for finding the holding of *Swift* unconstitutional. See Casto, *supra* note 99, at 928.

133. See Lessig, *Understanding Changed Readings*, *supra* note 4, at 426.

134. 467 U.S. 837 (1984). For an excellent account of this now "generally accepted" view, see John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 Colum. L. Rev. 612, 626 (1996).

135. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

136. See *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991).

137. I describe this argument more fully in Lessig, *Understanding Changed Readings*, *supra* note 4, at 436-38. For a much more subtle argument of the same form, see Abner S. Greene, *Adjudicative Retroactivity in Administrative Law*, 1991 Sup. Ct. Rev. 261.



spondingly greater dependence upon the committees of Congress” and when it was thought that “the decisions of such agencies so clearly involve[d] scientific judgment rather than political choice.”<sup>138</sup> But modern administrative lawyers are skeptical of both views. Independent agencies, as we understand them today, are not in this sense independent, and policy making is not in this sense scientific. Both changes render problematic the unaccountability of these bodies. It renders contestable, that is, their claim to independent executive power. In response to this contestability, Scalia argues that the Court should either read statutes purporting to insulate independent agencies narrowly, or strike them down. Either move would reallocate this decision-making power to make it answerable to a democratically-responsible officer—the President.<sup>139</sup>

Each of these examples has a common form. In each, there is a discourse that, within law, becomes contested. In each, the contest is about the source of decision for some institutional actor. In each, when that source no longer appears external, or better, when the credibility of it being external becomes contested, this creates, for that institution, an illegitimacy cost. This contest renders illegitimate *relative to other institutional actors* the practice that before presupposed this exogenous authority. It induces a shift among these institutional actors, so that the practice is placed with the actor who least suffers this illegitimacy cost. In *Erie*, that actor was the state courts; with independent agencies, that actor is the President; in *Chevron*, that actor is the administering agency. In each, the receiving institution is one with greater political pedigree than the displaced institution. And in each, the shift finds its source in a contestation that renders problematic a practice within law. Thus the *Erie-effect*.

As I will argue below, the effect here is more general than these examples suggest. To hint: Sometimes the effect will counsel deference; sometimes, activism. But before this more general argument, we should pause to reflect again upon the contours of our judicial consciousness that all this should reveal.

When I have spoken about “politics” above, I have relied upon an intuition. That intuition now takes on a definition: What draws these cases together as cases where judicial action begins to appear political is that in each, the source of the authority for judicial action no longer appears external. Something has happened to undermine the credibility that a court or its equivalent is being guided, rather than guiding.

This feature of “courts” is quite deep within our tradition. It is a feature we share with other related traditions. What distinguishes us from the French, for example, is not any view of principle about what

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138. *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C.) (per curiam), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

139. See Lessig, *Understanding Changed Readings*, *supra* note 4, at 433-36.

a “court” ought to do; in both traditions, courts are to be guided by others; what distinguishes us from the French is the contexts within which we believe a court is being guided or not. We (the more realist) are more skeptical about the source of authority; they (enjoying still what to us seems a late nineteenth century formalism) are able to sustain the view that judicial reasoning is constraining. But how constraining reasoning is is a detail; the important feature is that in both, constraining it should be.

#### D. *Rendering Active: Equal Protection*

In the examples of the *Erie-effect* so far, authority is reallocated among governmental actors. The question is who, given the emerging contested discourse at issue, should best decide a particular issue. In some cases, that is an administrative agency; in some cases, the president; in some cases a (different) court.

In *Erie* the answer was state rather than federal courts. But we can understand the reallocation in *Erie* in a second way as well. For *Erie* is not just a (separation of) powers case; it is also a (states’) rights case. The pressure on the court came not just from the illegitimacy of federal courts making state law, but also the illegitimacy of federal courts making state law.

The states’ rights argument is commonplace: Federal power is enumerated; thus the federal government bears the burden of demonstrating federal authority before it can act on that authority. Where, as in *Erie*, the grounds for its authority are sufficiently weakened, there is pressure for the authority to then shift back to the states.

The picture is of a balance, with state authority on one side of the scale, and federal authority on the other. The scale is not balanced; a constitutional thumb is on the states’ rights side. That is the meaning of enumerated powers:<sup>140</sup> If there is no federal authority, the states win. Where the Constitution does place authority on the federal side, it outweighs state authority. In *Erie*, a weight that had been on the federal side gets removed, as the grounds for exercising the *Swift* federal common law making are eroded.

I belabor this commonplace of federal authority to help draw a parallel that will be important in what follows. For the value of the *Erie* case to the story that I am telling is precisely this duality, between separation of powers and rights. As a rights case (albeit, a states’ rights case), *Erie* suggests a pattern of activism that on the surface might seem inconsistent with the pattern of deference described above.

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140. Though admittedly, this is a modern understanding. One could work this default one step back, and ask first whether there is any power in the federal government to support a regulation at all. I have simplified the step by assuming at the default that there is, given the expansion of the scope of enumerated powers.

That pattern is this: A right is a trump.<sup>141</sup> It gives the holder a certain immunity from governmental action (at least), unless the government can justify that action with sufficiently strong reasons. That's the nature of "states' rights": Where there is a states' right, the state has an immunity from federal interference, unless the federal government can provide a sufficient justification to invade that immunity.

As applied to states' rights, this formulation may sound a bit odd.<sup>142</sup> It would have been odd at the founding, since at that time, the conception of power allocation was much more binary—either a power was state, or it was federal. But as the complexities of divided powers have grown, the Court's treatment of states' rights is closer to this balance than to any binary. Regretful as some may think this to be, states have rights except where there are strong federal reasons for them not to.

As applied to individual rights, however, the formulation is much more familiar. With "non-preferred" federal rights—for example, the right to liberty under the Due Process Clause—an individual has a right to liberty, unless the government can show a justification to invade that right. With economic liberty, the necessary showing is quite slight. With the liberty to travel, the necessary showing is quite heavy. In either case, the point is this: Regardless of how strong the showing must be, the mechanics of both state and individual rights is the same. If the government cannot make a sufficiently strong showing, then the defaults are to the liberty or immunity protected in the right.

It is this structure of defaults that is central to the mechanics of the *Erie-effect*. In the *Erie-effect* examples so far, contestation yielded passivity, *but this passivity flowed from these institutional defaults*: Under *Erie*, states have authority unless the federal government can show countervailing authority; when the ground of that federal authority became contested, the shift was back to the states; with removal, the President has the right to remove, unless there is some sustaining constitutional reason not; a statute giving an executive officer a ministerial task would be a reason to circumscribe the President's power, but when the belief that the act is, in the relevant sense, ministerial erodes, the shift in authority is back to the President. In each case, contestation weakened the *unless* clause—the exception from the default—which in turn, strengthens the default. In these cases, to strengthen the default is to make the actor acting in the breach more passive.

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141. See Ronald Dworkin, *Is There a Right to Pornography?*, 1 Ox. J.L. Stud. 177, 211 (1981).

142. Mark Tushnet would disagree. See Mark Tushnet, *Civil Rights and Social Rights*, 25 Loy. L.A. L. Rev. 1207, 1213 (1992). And so may have the Framers. See Rakove, *supra* note 21, at 301-04.

In rights cases,<sup>143</sup> however, this structure is flipped. For here, the contestation affects not the relative position of one institutional actor versus another, but rather the authority of government to act at all. Here, the presumption is against governmental action, in favor of the right; contestation weakens not that presumption, but the justification for invading the right. Contestation here can *strengthen the claim of the right*.<sup>144</sup>

We can summarize the point like this: *Erie-effect* cases are cases where contestation within a certain discourse undermines the authority of an earlier practice or claim. In what I will call *Erie-effect type I* cases, this contestation forces an institutional reallocation of authority among governmental actors. *Erie-effect type I* cases are division of powers cases. The contestation produces an illegitimacy cost; that illegitimacy cost induces an institutional reallocation. This reallocation manifests itself as a kind of deference.

*Erie-effect type II* cases are different. Like *Erie-effect type I* cases, they get going because of the contestation of a given discourse. But these cases get raised in the context of rights, not institutional powers. In the context of rights, the default is in favor of the right, unless a sufficiently strong governmental interest can be shown. Here, however, the contestation weakens the countervailing governmental interest. This weakening, then, works to the benefit of the default position, which is the support of the right. This yields *activism* by the Court. This activism has a cost; but it is not an illegitimacy cost. Instead, the cost that *Erie-effect type II* cases produce are *legitimacy* costs: The costs a court suffers when it must act against a strong institution, but for (what in context appears to be) legitimate, or principled, reasons.

In this last section, I outline an example of an *Erie-effect type II* case, or perhaps set of cases, to complete the account of the *Erie-effect*. The context of these cases is the Equal Protection Clause. The vitality of this most important Civil War amendment was affirmed, to a limited degree, just last term in two cases of extraordinary importance—*United States v. Virginia*,<sup>145</sup> and *Romer v. Evans*.<sup>146</sup>

The latter case had the most to teach about the continuing vitality of equal protection. There, for the first time, the Court recognized a

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143. This framework works for, at least, some rights. This analysis does not work for all "rights" within the Bill of Rights. My claim so far is limited to preferred rights, such as equal protection, and free speech rights.

144. I say "can" because there may be cases where the contestation undermines the very nature of the right itself, rather than any justification for its invasion. I realize of course that these are hard lines to draw, but I want to insist for the moment that we can hold clear the distinction between a right whose application is rendered uncertain, and a justification for invading a right that becomes uncertain. I discuss, in the context of cyberspace, the former in Lessig, *Reading the Constitution in Cyberspace*, *supra* note 35.

145. 116 S. Ct. 2264 (1996).

146. 116 S. Ct. 1620 (1996).

principle of equality as applied to the interests of gays and lesbians. The former tells us much about the reason for this now recognized principle.

Both cases, but *Romer* more than *Virginia*, puzzled, and perhaps disgusted the Court's most conservative justices. Some think the disgust pure prejudice. I don't believe it is that. My view is that the frustration of the most principled among these dissenters comes from their view that these changes in the reach of the Equal Protection Clause cannot be changes of fidelity; that the continuing productivity of the Equal Protection Clause is just so much judicial lawmaking; that at some point the transformative power of this clause must come to an end, and if anywhere, certainly here: with a class who has long been the target of animus and discrimination by America.

The thought that fidelity would not require these changes—or more precisely, the thought that fidelity would require that there not be these changes—is, in my view, understandable. It is also, in my view, mistaken. The view is understandable for the same reason that one-step originalism is understandable. But as it took little to dislodge the appeal of that initial thought, it should take relatively little to dislodge the appeal of this related thought.

What's needed is a principled account of why fidelity would require this ongoing review; an account that makes sense of the history of equal protection so far, and that makes it plain why this history of activism is not likely to end, nor should it end for someone committed to originalism, or more generally, fidelity. This is the account I mean to sketch here.

In his lone dissent in *Virginia*, Justice Scalia stated the question in a way that links directly with the analysis that I have sketched so far. As he is the principal, and principled, dissenter that I am considering, consider what he wrote, introducing his opinion:

Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: they left us free to change.<sup>147</sup>

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147. *Virginia*, 116 S. Ct. at 2291-92 (Scalia, J., dissenting).

Scalia frames the question just right. When the Fourteenth Amendment was passed, the framers took many things for granted. These things taken for granted—what Scalia calls, “not debatable”—change. In the terms that I have used, the discourses that constitute them become contested. Sometimes these contested questions become again uncontested, and sometimes uncontested in just the opposite way as before. The not “debatable” change, both by becoming debatable, and by becoming not debatable in a very different way. The question that Scalia rightly poses is this: What does fidelity require, when what they presupposed is no longer presupposed by us?

This, I believe, is the central question for fidelity theory, but a question for which we haven’t yet a good answer. We might imagine three sorts of responses. The first is the extreme one-step originalist response. For the one-step originalist, the question is: What would the Framers have thought? To understand that, one must presuppose what they presupposed. So the fact that we consider just nuts the stuff that they considered not even debatable is not, for the one-step, relevant. The question is what they think, not what we think. They, after all, were the Framers.

This one-step originalist response is not Scalia’s. He does not argue that we should decide these questions as if we had the presuppositions of the Framers. But neither does he argue for the opposite response—the translator, or two-step response. His response is between the one-step, and two-step. To see its place, consider the two-step, or translator’s, response first.

The translator reads what the Framers did, understanding it relative to that framing context; she then locates in this context the equivalent to their deeds there. So about the question of sex discrimination, the translator might argue (in a very crude form): The framers of the Fourteenth Amendment plainly thought that race should not matter to one’s civil rights. But about sex, they had a different view. In Scalia’s terms, they didn’t even think it “debatable” whether sex discrimination was justified.<sup>148</sup> Indeed, for many, the discriminations of the time would not have appeared as “discriminations,” just as for us, the discriminations in the minimum driving age don’t appear to us as “discrimination” against children.

But we, the translator would argue, have a different view. It is not just the case that for us that the matter of sex discrimination is *debatable*; if it were debatable, then perhaps there may be good reason for judicial deference. For us the matter is no longer debatable. Or better, it is as undebatable for us that sex discrimination is a violation of equality as it was for the framers of the Fourteenth Amendment that

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148. The best evidence of this might be words of one of the most radical of the Republican proponents of the amendment: Sumner, when asked about sex discrimination, said he genuinely didn’t know how the amendment would relate to discriminations of sex. No doubt the balance of the Senators had a fairly clear view.

racial discrimination was a violation of equality. No doubt *what* sex discrimination is, or how it applies in a particular case, is debatable. But that's the same with racial discrimination. Fray at the border does not of necessity undo the cloth.

The translator might then argue that because it is not debatable that sex discrimination is a violation of equality, we should read the Fourteenth Amendment to apply to sex just as we have read it to apply to race.

Scalia's view is in-between these two. He rejects the one-step originalist view in principle (though in effect the result might be the same): We are not tied to what they considered undebatable. But neither does he embrace the translator's view, which would update the amendment to reflect (at a minimum) what *we* now treat as non-debatable. His position is more agnostic: Those issues that the Framers took for granted but which now are debatable or non-debatable in a different way<sup>149</sup> are matters to which the Constitution does not speak. They are left to democratic politics. Any attempt now to constitutionalize them, by recognizing today a new set of undebatable beliefs, is illegitimate: Fundamentally, Scalia charges, "illiberal."

This is an entirely plausible view about constitutional fidelity in principle.<sup>150</sup> One might have strong grounds with this particular amendment to question (on originalist grounds) its application.<sup>151</sup> But in my view, we needn't resolve this abstract question about constitutional fidelity in general, or about the original intent of framers of the Equal Protection Clause in particular, in order to understand the continued vitality of equal protection jurisprudence. *Virginia* and *Romer* are understandable with far less of a showing.

The key is the *Erie-effect*—more precisely, *Erie-effect type II*. For what this abstract debate about equality forgets is the presumption—the "trump"—of a rights claim (or at least, of an equal protection rights claim). The burden for those who would discriminate is to demonstrate a sufficiently strong reason for that discrimination. They must offer, that is, a *justification* for this discrimination. But in offering a justification, the "undebatable" is critical. If the justification rests on what people think is undebatable, the justification is relatively

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149. This is a distinction that Scalia doesn't make, but which I think is critical. See Lawrence Lessig, *What Drives Derivability: Responses to Responding to Imperfection*, 74 *Tex. L. Rev.* 839, 863-71 (1996).

150. See, e.g., *id.* (comparing different positions on constitutional evolution through judicial construction).

151. That is, one could well question this position on originalist grounds. One could well argue, that is, that the framers of this amendment spoke in the terms that they spoke precisely because they didn't want to tie the amendment down to the particular level of closed-mindedness that they knew they suffered. On this understanding, the amendment is a constitutional commitment to open-mindedness, meaning whenever society comes to see that its old way of thinking was "closed-minded," the task of the enforcers of this amendment is to open minds up.

strong. If the justification rests on what people think is debatable, or contested in my terms, then the justification is relatively weak. Thus, if the justification for a discrimination rests upon what the Framers thought non-debatable, then *when that undebatable becomes debatable, so too does the justification*. When the undebatable changes, it *weakens the justification for the discrimination*. Contestation is in this sense transitive; it weakens what its absence supported.

At some point this contestation matters. At some point, as these justifications become weaker, the *Erie-effect* kicks in. As in rights cases perhaps generally, and as in *Erie* in particular, the contestation of a justification for invading a right yields a more active defense of that right. Contestation tilts to the default, and the default is active support of the right.

This is, I want to argue, the pattern in the history of the Fourteenth Amendment. Or better, it is a history that can be understood in light of this pattern. In the balance of this section, I want to sketch that history, and suggest how it fits within that pattern.

For one schooled in the jurisprudence of equal protection law, what follows will seem a bit strange. I have not attempted to fit the story that follows into the regime of modern equal protection law. I instead want to describe the history at a more general level, and this for two reasons. First, the categories of modern equal protection doctrine are drawn in such a way that any change seems suspect—presumptively the judges making it up. The categories of strict, intermediate, and rational basis review have carved up the universe of discriminations; any “additions” are made to seem amendatory, as if the court would be adding to the protections that the Equal Protection Clause originally gave. Casebook authors write things like “it is unlikely that the present Court will add new classifying traits to the list of suspect and quasi-suspect classifications,”<sup>152</sup> and this is no doubt correct. But one wants to ask why no other groups will be added to the heightened scrutiny list: Is this because equality has been achieved? Groups were added in the past 100 years; what reason is there to believe that the demands of the Equal Protection Clause won’t find their attention again on other groups, not yet recognized? Additions are always presented as *more* protection; but as I harped on at the start, additions may also be necessary to give the same protection, given what we now see to be discrimination.

The second reason I want to avoid the categories of modern equal protection law is that these formal categories don’t give us a sense of what this equality is about. This is the clear message of Koppleman’s recent work,<sup>153</sup> and its prominence promises a time when we will have much to rethink. My aim in what follows is to describe a theory at a

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152. Jerome A. Barron & C. Thomas Dienes, *Constitutional Law* 249 (1991).

153. Andrew Koppleman, *Antidiscrimination Law and Social Equality* (1996).



very low level of theory; to make sense of a process of change that generalizes in an understandable, and justifiable way; and possibly to describe a process that points to how we should go on.

One final word of qualification: In what follows I will speak of the Equal Protection Clause. This is my one concession to the modern understanding, but I concede this only for ease of exposition. The understanding that I sketch below I draw from what I believe is the full motivation of the Fourteenth Amendment,<sup>154</sup> not any one clause. Indeed, as John Harrison has recently made plain,<sup>155</sup> we have lost an extraordinary amount of that tradition by reading out of the amendment perhaps its most important clause—the Privileges and Immunities Clause. My reading of the amendment draws heavily on the understanding of equality he sketches.<sup>156</sup>

One way to tell the history of equal protection is to describe it as a gradual “expansion” of the scope of groups covered by the highly underspecified promise of the Fourteenth Amendment. This is the modern story; it begs the question, by what right does the court “expand” the scope of the amendment?

The story I want to tell is different. It acknowledges new protections; but it emphasizes a part too often missed: That these protections were in response to new discriminations; or better, in response to “discriminations” that *came to be seen as* discriminations. These are new protections in response to a new threat, or better, to a threat now seen to be a threat. The model for this is the understanding of Judge Bork, who, of the First Amendment said:

There is not at issue here the question of creating new constitutional rights or principles . . . . When there is a known principle to be explicated the evolution of doctrine is inevitable. Judges given stewardship of a constitutional provision—such as the first amendment—whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. . . . In a case like this, it is the task of the judge in this generation to discern how the framers’ values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application. . . . Perhaps the framers did not envision libel actions as a major threat to that freedom. I may grant that, for the sake of the point to be made. But if, over time, the libel action

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154. Well, not Section 2.

155. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L. J. 1385 (1992); see also Michael J. Perry, *The Constitution in the Courts* 140-43 (1994) (arguing for a broad use of the Privileges and Immunities Clause under an originalist approach); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 957-62 (1995) (discussing debate over interpretation of Fourteenth Amendment and the Privileges and Immunities Clause).

156. I don’t agree with Harrison that the best way to understand the scope of fundamental rights is to track Lockean theory. But for the purposes of this essay, that is a quibble.

becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines? Why is it different to refine and evolve doctrine here, so long as one is faithful to the basic meaning of the amendment, than it is to adapt the fourth amendment to take account of electronic surveillance, the commerce clause to adjust to interstate motor carriage, or the first amendment to encompass the electronic media? I do not believe there is a difference.<sup>157</sup>

In that context, the changing threats of libel actions justified, Bork argued, "new protections" against libel actions. And so too in the context of equal protection: Following Bork, the question we should ask is whether the changes in equal protection jurisprudence are just responses to what is now seen as new threats. For then, just as with the First Amendment, the "additional" protections would just be "the same" protections in a new context.<sup>158</sup>

That would be equal protection law's claim to interpretive fidelity. The Constitution applies as we *see* the world to which we are applying it. The question for constitutional theory is to understand something more about how this *seeing* changes. That, for equal protection, is the story I want now to tell.

The ideals of the Civil War notwithstanding, it is commonplace that the reality of America for the balance of the nineteenth century was deeply racist. But "racist" doesn't capture exactly the reality. "Racism" for us<sup>159</sup> seems a choice; a bad choice, an evil choice, a choice to

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157. *Ollman v. Evans*, 750 F.2d 970, 995-96 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

158. In what sense, though, are these threats "new." In what sense are these "discriminations" something that come to exist, but before were not? If the treatment of homosexuals is now seen to be discrimination, does my position mean that before it was not?

Yes, and no. The story I am telling is white-boy's history. It is a story about how a dominant class came to include others within its protections. In the middle of the nineteenth century, this dominant class announced to the world that it was going to respect a principle of "equality." And, in the story I am telling, over time it came to see how things it was doing were "discriminations." From the white-boy's perspective, the discrimination begins with the recognition. The contest about remedy starts thereafter.

But of course, from the perspective of everyone else, one can say the discrimination has always existed. It has always existed, whether recognized by the perpetrator, or victim, or not. Homosexuals were discriminated against in 1920, even if everyone who did that discrimination did it for what they perceived to be the most benign reasons possible.

I tell the story from the perspective of white-boy's history, because how else does one expect constitutional law to have developed? This is winner's history, and we (or I) can do no more than tell it from the self-satisfied, morally certain, perpetually virtuous, god-chosen perspective that is the perspective of those who have articulated constitutional law. Of course, we should read that description both with, and without, scare quotes; but it is lived always with the scare quotes left at home.

159. In moods most pessimistic, at least. What conservatives call political correctness might be an indication that in fact, racism is no more a choice. But I leave that aside.

be scorned, but nonetheless, a choice that society leaves open to its citizens. It is one among a number of such choices left open to individuals within a society.

For the intellectual elite of the late nineteenth century, however, it wasn't such a choice. Racism wasn't "political" in the sense of an optional feature of the world. Racism was instead a feature of reality. It wasn't something one chose to believe or not; it was how things were. Racism constituted how people saw the world—how normal people saw the world. To deny or question racism didn't make you curious, or clever. To deny it made you weird.

The reason this vileness was so powerful was not mere "politics." It was not just because a bunch of powerful politicians succeeded in stopping Reconstruction. I want to argue that racism had this irresistible influence because the views or judgments of racism were so diversely supported. There was, to misuse John Rawls's heuristic, an overlapping consensus about views on race. Not just within politics, but within biology, and social science, and anthropology, and psychology—views about the appropriateness of (what one would see as) the inequality perpetrated by law were dominant.<sup>160</sup> There was a naturalness to this inequality; a naturalness supported by these diverse discourses, and there was an appropriateness to supporting this naturalness. Views here were relatively uncontested, because they were so overwhelmingly supported, where overwhelmingly simply means supported from so many perspectives.

It was this overlapping consensus that made a case like *Plessy* almost easy.<sup>161</sup> Of course—then—a regulation that supported the separation of the races was "reasonable." Segregation was at the core of that society; its sensibility was supported from any number of perspectives; how could support for the norm be unreasonable? The obvi-

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160. See, e.g., Elazar Barkan, *The Retreat of Scientific Racism* 2-3 (1992) (anthropology); *id.* at 2 ("At the beginning of the twentieth century, the term 'race' had a far wider meaning than at present, being used to refer to any geographical, religious, class-based or color-based grouping. Although sanctioned by science, its scientific usage was multiple, ambiguous and at times self-contradictory."); John S. Haller, Jr., *Outcasts from Evolution Scientific Attitudes of Racial Inferiority, 1859-1900*, at ix-xi (1971) ("Most of the environmentalists were not outspoken racists. As leading physicians, anthropologists, educators, paleontologists, and sociologists, their views on race inferiority, at once assumed and 'proven' within the context of their framework, were not the primary subject of their concern but, rather, were elements which partially formed the foundation of their larger intellectualizations."); Nancy Stepan, *The Idea of Race in Science: Great Britain 1800-1960*, at ix (1982) ("That is to say, the language, concepts, methods and authority of science were used to support the belief that certain human groups were intrinsically inferior to others, as measured by some socially defined criterion, such as intelligence or 'civilised' behaviour. A 'scientific racism' had come into existence that was to endure until well after the Second World War.")

161. And which would have made it much more difficult in 1868. See McConnell, *supra* note 155, at 954.

ousness of the conclusion hid the plain inconsistency in the rhetoric supporting it.

Of course to say that there was this overlapping consensus of views then is not to say that there were no dissidents. Indeed, *Plessy* gives us one of constitutional law's most famous dissents. But as Leon Higgenbotham has quite eloquently reminded us, it is not an accident that the man who could write that dissent graduated not from Harvard or Yale law school, but instead from Transylvania Law School.<sup>162</sup> As Higgenbotham teaches, it is the odd man in an evil world who find the good.

Over time, of course, the dissidents in these discourses about race had an effect. In different areas, their questions, and challenges, eroded this consensus. This erosion was felt first within science, where the principles of scientific racism were effectively challenged.<sup>163</sup> Indeed, for the racists, enlisting science on their side was a bargain with the devil, for as science regurgitated its earlier conclusions, it soon abandoned the racist positions it supported. As science soon challenged racism, and as other areas of racism were challenged as well, the layers of this overlapping consensus began to thin. One by one, areas where science proved the inferiority of the black race were areas where this proof was drawn into doubt. The old views were rejected, or at least contested. Slowly, the natural of before now became simple prejudice.

The effect of this destabilization on racism in law, of course, was not immediate. Nor was it necessarily determinative. But the contestation did make *Brown v. Board of Education*<sup>164</sup> all the more likely. As the grounds outside of law for justifying racism disappeared, pressure fell to the grounds within law to sustain the earlier practices of inequality. To sustain the inequality of the late nineteenth century without the undebatables of the late nineteenth century became more and more difficult. The only support was precedent, and this, however, proved to be a very weak support. Contestation, or rejection of these views outside of law rendered it more and more difficult, within law, to sustain the same views.

The flip in race is the best known. *Brown* confronted, and resolved it. In a wide range of areas, at a minimum, the justifications for the discrimination against blacks had been either contested, or rejected; scientific racism had been displaced, by the one-two punch of science and Hitler: science didn't support it, and our defeat of Hitler's racism while maintaining segregated schools threw hypocrisy into the bargain. So when the Court finally faced the question whether the legally supported segregation of *Plessy* could, consistent with the Equal Pro-

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162. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. Pa. L. Rev. 1005, 1009 (1992).

163. See Barkan, *supra* note 160, at 10-11, 19, 119.

164. 347 U.S. 483 (1954).

tection Clause, be sustained, it found all the support for such a conclusion had vanished. It was not obvious to all, it was not commended by science, it was not consistent with the best of who America said it was: All that supported it was a remote and opportunistic doctrine of stare decisis, tied to the bare claim that the police power has always permitted states to order social spheres according to their perception of morality, tied to deeply held views of a democratic majority. But these justifications were just too thin. However controversial, the command of the Equal Protection Clause demanded an answer.

The flip occurs in *Brown*, and *Brown* marks a pattern that I want to suggest recurs throughout equal protection law. Put abstractly, the pattern is this: Law is shot through with discriminations—with distinctions that formally, at least, seem equivalent, but which doctrinally, are treated fundamentally differently. These discriminations are for the most part unnoticed. We don't see them as discriminations, for the world they cut up seems to us as natural. For example, we could "discriminate" in the admission of students to law school in any number of ways. We could: (1) select students based on race, (2) select students based upon their ability on some standardized test, (3) select students based on the communities they are likely to serve as lawyers, or (4) select students based upon whether their parents attended the same school. Formally, these are all "discriminations." But substantively, we are likely only to see two of the four as "discriminations." (Numbers 1 and 3).<sup>165</sup> Why we see these as "discriminations" ties, I am arguing, to something about how we see the world, and how we see the world is tied to the range, or thickness, of the "overlapping consensus" supporting that way of viewing the world. The thicker it is, or the more sustained, the less likely it is that we will see a "discrimination" as a "discrimination."

Or again: We punish overweight people in all sorts of ways. These punishments take the form of discriminations—erotic discriminations, social discriminations, political discriminations, civil discriminations. Few now see these discriminations as "discriminations." Instead, the opportunities we deny the overweight seem naturally denied to them. We speak of how awful it is for them to be overweight, and then say that if they feel awful, it is "solely because the[y] . . . choose [ ] to put that construction upon it."<sup>166</sup> They could do otherwise, we rationalize. Their burden is self-imposed.

My argument is that we can understand why these discriminations can exist without being seen as "discriminations" with a heuristic of an overlapping consensus. Again, it is where the formal "discrimination" seems supported by a large number of perspectives that we simply don't see it as discrimination. It only appears as discrimination when

165. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2580, and *cert. denied*, 116 S. Ct. 2581 (1996).

166. *See Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

the range of perspectives from which it is supported narrows, or weakens. Thus in the law school example, ideas about how intellectually difficult law is (the origin of this idea is a mystery), and general notions of individualized effort and merit combine to make it obvious that grades should determine admission; with the overweight, notions about self-control, or health, or self-respect, bolster us in our discrimination. In both cases, these supporting discourses are quite weak, yet they are pervasive and general, and they combine to support extraordinary suffering.

Even lawyers know enough history to know that over time, in some cases, the thickness of this consensus narrows. This narrowing occurs as discourses that were before relatively uncontested become contested. Or more precisely, it occurs when, from the perspective of law, these discourses appear contested. Within law, this contestation renders a judgment resting upon this discrimination more troubling. It increases, again, the burden on a court that is called upon to continue to support a discrimination. And at some point, the burden forces the court to flip; to find as “discriminatory” what before could not have even been seen as discrimination.

My argument then is that what is seen as “discrimination” depends upon a background discourse which law doesn’t directly control; that as this discourse changes, the justifications for these now recognized discriminations will change; and that as the strength of these justifications change, things that before seemed justified even if unequal will now seem unjustified because unequal.

To say this is not to say, however, that at any time, things that can be seen as “discrimination” can be made the subject of equal protection’s protection. This is emphatically not my argument. Social meanings limit equal protection, and the limits of social meanings are real. Discriminations based on race are “discriminations” meet for the Equal Protection Clause; discriminations based on sex as well; discriminations based on illegitimacy as well; discriminations based on sexual orientation perhaps as well. But discriminations based on “attractiveness” are not—even though the “status” that the attractiveness game plays constructs all sorts of social inequality. There is no difference in principle (though certainly in degree) between the inequality imposed on the “ugly” in this society, and the gay in a homophobic society: Both are denied social life on the basis of a stigma created by social meanings that society constructs.<sup>167</sup>

Race is just the first example of the pattern I am suggesting. Illegitimacy is a second. The justifications for discrimination against illegitimate children were narrower than the justification for race; but the pattern of its removal is similar nonetheless. Historically it was tied to three justifications: First, the support of English property structures

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167. See *supra* note 83 (describing MacKinnon’s definition of inequality).

that needed to control quite carefully lines of descent; second, the support of sexual mores, which strongly opposed extramarital sex; and third, the avoidance of a welfare burden on the state, imposed by illegitimate children. In England, these three justifications supported the (western) world's harshest penalties against the illegitimate.<sup>168</sup>

When the English law was carried over to America, the strength of these justifications weakened. First, there was not the same interest in protecting lines of descent as in England; estates were more egalitarian, citizens freer to alienate. Second, there was not (at least initially) the same passion for controlling sexual mores. Americans, at the founding at least, were, relative to the English, less puritanical. What remained was the welfare interest which did continue to create an interest in regulating illegitimacy, but which, standing alone, didn't support the very strong stigma that illegitimacy law seemed to support.

From the perspective of equal protection, however, the shifts in illegitimacy come much later—1968 is the first year. There, in an extraordinarily sloppy opinion by Justice Douglas, the court rejected these justifications as insufficient for continuing certain discriminations against illegitimates.<sup>169</sup>

Since 1968, perhaps in part because of the paucity of justification in that case, the equal protection history of protecting illegitimates is much less clear. But we needn't excavate the details to see the pattern. In 1968, of the three justifications that might have overlapped to make it plain why illegitimates should be treated as they were, one (the property justification) had been plainly undermined; a second (the welfare justification) didn't on the margin appear especially pressing; and the third (sexual mores) were at the time fundamentally contested. What Douglas no doubt felt, though had no way to say, was that the justification for treating these children as tradition had treated them was simply gone.

Gender discrimination follows a similar path even more plainly. Much of the naturalness of the rules, both legal and social, that kept women in the home came from a set of relatively stable views about an "appropriate" family, and family life. In the late nineteenth century, they were stable enough for the Supreme Court to point to them quite directly:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.<sup>170</sup>

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168. See the discussion in Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* ch. 6 (1985).

169. The case was *Levy v. Louisiana*, 391 U.S. 68 (1968).

170. *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872).

Even in the middle of this century, the same views were quite stable. As the Chief Justice recently wrote, "well into this century, legal distinctions between men and women were thought to raise no question under the Equal Protection Clause."<sup>171</sup> In 1961, for example, in upholding a differential jury list system, the court observed that the "woman is still regarded as the center of home and family life."<sup>172</sup>

In a sense, the overlapping consensus about sex was both more pervasive, and more unstable. Its pervasiveness was cultural as well as scientific—if there is a distinction to be drawn there. But as women entered the work force, and as marriage became more companionate, the ideological premises of this old structure were questioned. Its "truth" was quite quickly challenged. As women entered the workforce, traditional views were foregrounded, and contested. The discourse moved from box [4] to box [1].

This contest removed them from the reliable authorities that a court could point to when supporting gender discrimination. It threw into question assumptions earlier made about their proper place, and their proper role. It forced this arbiter of sexual propriety to identify himself—and in the swim of this battle, no one had the legs to claim that stand.

Once background discourses that implicitly supported sex discrimination were destabilized, or once at a minimum contested, this put great pressure on the court to recognize that laws that continued to rely upon these principles of inequality violated the Fourteenth Amendment's command. Because these views were contested, courts could see a discrimination where before discrimination was invisible. And quite late in the game, in an opinion that sparked little controversy, for the first time the Court found a law that discriminated on the basis of sex unconstitutional within the command of the Fourteenth Amendment.

That case was *Reed v. Reed*,<sup>173</sup> and the year 1971. It took eleven years before the Court would again find a statute unconstitutional on sex discrimination grounds. But in those years, the position recognized by *Reed* found broad and continued support in a wide array of contexts. There was a generation of work to work out the implications of equality, and it was a generation of contest with those who held "traditional" views. But where the tradition was not backed with reason, where the judgment of the present was nothing more than the fact that the same was said from time immemorial, the power of equal protection trumped. The traditional way was embarrassed, for what was undebatable before was now, at a minimum, quite debated.

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171. *United States v. Virginia*, 116 S. Ct. 2264, 2288 (1996) (Rehnquist, C.J., concurring).

172. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

173. 404 U.S. 71 (1971).



The same battle now exists in the context of sexual orientation, and there is little reason not to expect the battle will track the same pattern as well. For the battle over sexual orientation is the starkest example of the pattern that I am sketching. There can be no doubt that sexual orientation will enter the realm of protected equal protection classes. There can be no doubt that it will, but more importantly, there can be no doubt that it should, under a faithful reading of the equal protection right. When, how quickly, with what resolve—these are questions of prudence, and virtue, that the Court will no doubt confront. But the conclusion can't be doubted, at least if the pattern I have outlined tracks something real.

The pattern here begins in the beginning of this century. As I outlined when discussing this conception of contested discourses directly, until the early 1970s, homosexuality was considered a "disease."<sup>174</sup> If anything for us is uncontested, what we do with people with a disease is that thing: We "cure" them. We try to rid them of this disease, and we feel self-righteous in our ridding. So society, in many ways, erects barriers to the flourishing of the disease; it punishes its manifestation; it counsels its eradication (in England, for example, "Alan Turing was faced with the choice between going to jail and having hormonal treatment."<sup>175</sup>). Given the judgment of pathology, delivered to us by science, that homosexuality is abnormal, we can either reject science or reject homosexuals. None would think long about which society would do.

The pervasiveness of this view about homosexuality should not be forgotten. It was common ground for liberals as well as conservatives. Said Justice Douglas, of homosexuality: "[Homosexuals] are the products 'of heredity, of glandular dysfunction, [or] of environmental circumstances.' . . . The homosexual is one, who by some freak, is the product of an arrested development . . ." <sup>176</sup> It was, as racism was, as views of illegitimacy were, as sexism was, "undebatable" for all, or most, within this earlier time, in large part again because supported by this science.

Science has now rejected this earlier view. There was a battle about it; this battle was plainly "political"; but in the end, the dominant political view (among doctors) became truth. Henceforth, this discrimination, which is everywhere palpable in our society, draws no further justification from science. It has been cut off from this domi-

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174. See Michel Foucault, *Sexual Discourse and Power*, in Jeffrey C. Alexander & Steven Seidman eds., *Culture & Society Contemporary Debates* 199, 200-01 (1990); *supra* text accompanying notes 84-93.

175. Elster, *supra* note 52, at 109; see also Richard A. Posner, *Sex and Reason* 208 n.53 (1992) (noting that Turing agreed to undergo female hormone treatment to avoid imprisonment).

176. *Boutilier v. INS*, 387 U.S. 118, 127 (1967) (Douglas, J., dissenting).

nant source of authority in society, and must find, for its sustenance, other grounds.

We all know what these "other grounds" are. They are essentially two: first, the right to "regulate morality" and second, to a long-standing "tradition" against homosexuality in America. But these justifications, if we are faithful to our equal protection history, will not survive. *Standing alone* they have never been enough to sustain what comes to be seen as discrimination. Tradition alone is certainly not enough.<sup>177</sup> No theory of equal protection that gave it the trump could explain equal protection's past, for absolutely every group recognized under the clause has been the victim of tradition. "Tradition" has always been used as a justification for continuing discrimination against a group claiming equal protection. Unless we have a tradition of ignoring tradition until we reach the claims of gays and lesbians, "tradition" as a reason should be a non sequitur in equal protection arguments.

Nor will the "morality" argument be enough. This is the argument that we have always allowed regulation to advance conceptions of morality, and homosexuality is strongly against the dominant conception of morality.

For though we have indeed permitted such regulation, we have never permitted it (a) when it is against the substantial interests of some group of citizens, and (b) when *the moral views are not supported by other, overlapping discourses*. From the start, in a wide range of cases, equal protection has at first been blind to what later would seem plain discriminations, and it has struggled to test the strength of the reasons offered as justifications in its support. Equal protection is blind when, to use Justice Scalia's words, ideas that nobody thought "debatable" made the discrimination seem obvious; but over time, as these ideas not thought "debatable" became just that, the grounds, and the strength, of these justifications eroded. Slowly, the discriminations were seen as "discriminations." And eventually, the range of perspectives upon which discrimination can be justified narrowed to just a few—to the long standing tradition of discrimination, to the right of a people to regulate the morals of their community.

But what happens then? When we make such a comparative account, we notice something important. Morality has been a legitimate ground, *when supported by other, overlapping discourses*—it has not been sufficient when standing alone. Contrary to the rhetoric that suggests the "long standing tradition" in America supporting the "police power right to regulate in areas of morals," in fact, again we have no tradition of allowing such regulation against the direct and substantial liberty interests of citizens when the only justification for such reg-

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177. See *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

ulation is morality. When these overlapping grounds separate, when all that is left is this prejudice, equal protection law steps in. When morality stands alone, the claim of equality outweighs it.

Morality stands alone not only when other support has been rejected. Morality stands alone as well even when other support has been drawn into doubt. Contestation here, as in every other equal protection claim, undermines the justification for what is now seen to be discrimination. It weakens the justification for state actions that yield discrimination. And as it weakens these justifications, we observe, in each of these equal protection contexts, the same effect—what I have called, an *Erie-effect type II*. In each of these contexts, as the justification for invading a right disappears, the trump of the right remains. This trump induces a certain activism by the court—again, an activism to support this right in the face of, at best, contest to the contrary.

This is our tradition in equal protection law. It has not been a tradition that allows the government to express and enforce antipathy, when unsupported by other neutral reasons. It is a tradition of respecting “reasons” even if also supported by antipathy. When the reasons fall away, or are drawn into contest, the justification is drawn into doubt, antipathy notwithstanding. This is the insight of Justice Kennedy’s opinion in *Romer v. Evans*,<sup>178</sup> and this is the genius of its emphasis on tradition. Antipathy alone has not been enough; and so, faithful to that tradition, the Court in *Romer* held, nor should it be enough now.

The activism that this contestation induces invites, as I suggested at the start, a certain legitimacy cost. The Court faces a claim by the government to regulate which it must reject; it rejects it in the name of a principle well established in our constitutional tradition, because of what the government has not well established. In so rejecting the government’s claim of power, the Court invokes a picture of itself as resisting arbitrary power in the name of principle. And in invoking this picture, the Court acknowledges the threat it faces, but asserts the tradition that supports it in this act.

An analogy, perhaps overly lawyerly, may draw the point together. Constitutional law, we might say (not literally but by analogy) is decided at the level of the summary judgment motion. A question is presented which, because of the structure of the dispute, has an answer by default. The party resisting the default has a burden then to make a showing to the contrary. Where that showing can be made without invoking a material dispute, the party resisting the default prevails. Whether there is a material dispute, however, the question is resolved as the default would resolve it, and the issue is passed on to the next stage of the dispute—constitutional politics.

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178. 118 S. Ct. 1620 (1996).

In *Erie-effect type I* cases, the default is democratic. Power flows naturally to the body with the stronger democratic pedigree. Structures to the contrary (federal common law, agency independence, interpretive lawmaking) sustain themselves so long as sufficient grounds for the exception remain relatively uncontested. Contest in those grounds shifts authority back to democrats.

In *Erie-effect type II* cases, the default is non-democratic, and rights based. Power flows naturally to the rights claim. Arguments to the contrary (supporting structures that now appear to discriminate) sustain themselves so long as sufficient grounds for this justification remain uncontested. Contest in those grounds shifts authority back to the right as trump.

#### E. *What the Erie-Effect Explains*

Most of the time, most of what we know is stuff in box [3] of the matrix above. Most of the social world is background, uncontested. We don't notice it (that's the implication of it being background); we can't easily quantify it. But it is that stuff that constitutes how we see the world around us, and how we see the world has been made.

What is in box [3] moves; stuff moves out of box [3] into contested, and then openly contested terrain. Other stuff moves into box [3], after long contest, and then long resolve. This shifting of discourse background to a present consciousness is extraordinary difficult to notice let alone track; nonetheless, it is a shifting that matters to practices of interpretive fidelity. The content, and change of this box [3] affects the content, and change, of constitutional law.

My argument in this part might be summarized like this: That a theory of constitutional fidelity must have an account of the place of this stuff in box [3]; more particularly, it must have an account of how movement into and out of box [3] matters. I have argued that it matters to both the potential, and limits, of interpretive fidelity. It matters to the potential, because the richer and more extensive this world of taken-for-granted is, the greater the creativity a court relying upon them can be. Conversely, it also marks the limits, for the more that is drawn into contest, the more that is in doubt, the less a court can rely upon it setting either the scope, or limit, of a constitutional value. The uncontested sets the potential for what a court can say beyond institutional defaults; the contested forces the court back to institutional defaults.

This potential and limit, however, are on both sides of the translation practice. An uncontested discourse makes it possible more actively to extend a constitutional discourse that requires translation; on the other hand, an uncontested discourse makes it easier to limit the extent of a constitutional right, by pointing to a taken for granted justification for its limitation. The same is true of a contested discourse, but the other way round: A contest will limit the ability of govern-

ment to restrict the scope of an otherwise applicable right; but it will also limit the ability of the court to effect a translation within a contested domain.

My model, then, of fidelity as translation can be specified as follows: That translation proceeds *subject to* the constraints of contested discourses, and uncontested discourses. Sometimes these constraints explain shifts of deference, where the court backs away from creatively translating limits on federal or state power. Sometimes they explain shifts of activism, where the court rejects justifications for limiting the scope of a right because contest has infected these justifications.

What's left is to run, as it were, the regressions—to run the story of constitutional law's development through this model, to see how much the model fairly can explain. As I have argued elsewhere, there is enough to suggest that such an account does capture critical turns in the story—the New Deal, and the power of the presidency, to name just two. But I leave to another time just how much it explains, and most importantly, whether, if it does explain, the model it offers can be justified.

On justification, however, I will say this. This is not an account that tracks a moral debate; as I've said, "moral" questions pepper all four of the boxes in my matrix, and this is an account that tracks the very special effect of those boxes that contest. Rather than morality, this account tracks what we all know, and what we all know we dispute. It allows judges to speak confidently when they speak, or rely, upon what we all know; it directs judges to be cautious when they must rely upon what we all know to be in dispute.

Except when the Constitution has charged them to activity—when, for example, it has ratified some moral principle in the form of a right. For here, contested moral ideals do have a place within law; they have been ratified, and moved from box [1] to box [2]. Here they are held in the foreground of law's focus; they are used, when transformative, to remake part of society's life. Here is where law is driven by morality, and where its ends are defined by a moral understanding.

My argument here, however, suggests the important limit to this jurisprudence of morals. For even where the principle question is a question of morality, it is answered subject to the constraint I have called the contested. Its answer is conditioned by judgments of prudence, as well as by the limitations of the contested. Both parts matter. And just as it would be a mistake to focus, Frankfurter-like, on the constraints alone, missing thereby an affirmative command to act even when ultimate questions are unresolved, so too is it a mistake to focus, Dworkin-like on morality alone. An account of fidelity must tell us about both.

If there is a justification for this account of fidelity as translation, then the justification comes in the humility this account makes central. The account is not just an account of humility—it has a place for activ-

ism, in the face of doubt; but this activism it can tie to acts with strong democratic pedigree. Where it hasn't this pedigree, where questions are contested, it counsels not prudence, but deference.

### CONCLUSION

I have argued in this Article for a certain conception of fidelity. The conception is a practice that I have called translation. Translation captures, I suggest, the essence of the judge's task; it advises a creativity in recapturing what was said, it cautions a certain humility to assure that a translation says only what was said. It tracks well much of the shifts that constitutional law has seen; it understands them as efforts, however imperfect, at recapturing and preserving values from a different place, and time.

I have also argued, however, that translation leaves something out. If one looks for large changes in context that track large changes in constitutional law, often the context seems too quiet. Wild shifts within constitutional law seem to occur while nothing outside it seems to guide it. Translation seems to miss something, if it promises to explain the shifts.

My aim in the majority of this paper has been to point to what translation simpliciter leaves out. Structurally, what is missing, is an account of the institutional costs translation might occur; substantively, what is missing is an understanding of the source of this institutional cost.

The source is a constraint on the practice of fidelity as translation, which arises from a kind of change in context too easily missed, or ignored. This is the change in what I have called relatively uncontested discourses. My argument has been that we need to understand how contestation constrains the ability of a court properly to translate founding commitments. A contested discourse removes a rhetorical resource from the Court; the Court deploys its rhetoric subject to these constraints of the contested.

The class of cases where this question gets raised I have called *Erie-effect* cases. But these divide into two very different kinds. In some—where the question is one of institutional allocation—contestation weakens the institutional position of one actor vis-a-vis another. It induces a kind of deference in that actor, to the institutional judgments of another. The consequences of contestation in these cases then is retreat; a certain passivity, which disables the actor at issue from continuing a practice which before it had engaged without trouble.

The other *Erie-effect* case is quite different. Here—where the question involves an individual right—contestation weakens the justification for invading that right. Weakening this justification strengthens the claim of the right. And as the claim of this right is increased, the

judicial support for it, as against the government, increases as well. Here contestation yields a kind of activism, as the court sustains the force of this right (whether individual or state) in the face of changing understandings of what is, or is not, good reason to limit it.

