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Translation Before the Law: The Hermeneutics of Translation in the American Legal Context

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Abstract: This essay examines how American scholars, lawyers and judges interpret the Constitution. Discussed is how anxieties arise in view of interpretations deemed to be too free to serve the interests of law, and how the solution to that putative hermeneutic freedom is an imposition of interpretive rules. But those rules are profiled in terms of an appeal to "fidelity," and that appeal is relayed to the topic of translation. My essay offers a critical assessment of the problematic parallel made between legal interpreters and translators: the ethical principle translators are presumed to obey, that of fidelity, is conveniently—but too conveniently—transferred to legal interpreters. Despite the deep misgivings one might have about that presumption, and the equivalence model of translation it supposes, at issue for legal scholars is ensuring fidelity to the original meaning of the Constitution, and fidelity to the original intentions of those who wrote that foundational text.

Keywords: Translation, Legal hermeneutics, American Constitutional Law, Lawrence Lessig, Paul Brest.

1 Introduction

Many Americans are proud of their Constitution. It is a document of eloquent humanity and admirably lucid in its expression of democratic principles. Recently, however, the Constitution has risked becoming—to invoke Shakespeare—something of a scarecrow. That dignified text has become ragged and uncertain of its supreme perch as the topmost legal document. In the eyes of many, it's because Supreme Court justices, those who invoke the Constitution to make their rulings, have become flagrantly partisan. It has become normal to refer to Conservative justices and Liberal justices, and hence equally normal to assess their rulings in reference to political ideology. And the present Conservative super-majority has become a weapon deployed in the service of a Republican political agenda—an awesome weapon since that agenda now has the force of law behind it. Yet those who make that law, and effectively make political policy as well, are justices who aren't really democratically elected, and once they're appointed, they serve for life.

Small wonder, given the power of Supreme Court justices, that some prefer to implement a given political agenda not in the usual manner, namely by submitting that agenda to democratic debate, but by asking Supreme Court justices to bring that agenda into force by the performative activity of legal ruling. Small wonder, therefore, that debates and disputes between political conservatives and liberals don't always take place in the democratic forum, but often divert to contending interpretations of the ultimate document by which such rulings are authorized, namely the Constitution. Since the stakes are so high, one would hope that Supreme Court justices have an adequate notion of what it means to interpret the Constitution. How do they theorize (or, alarmingly, don't theorize) their ap-

proach to legal interpretation in general, and the interpretation of that text in particular? Is it possible to discern a Conservative versus a Liberal theory of interpretation? Naïvely, one might assume that it shouldn't be possible, since what should disbar ideologically-inflected hermeneutic positions is the text of the Constitution itself. Its meaning should be plain, and not subject to an interpretive contention that spills out of the domain of legal hermeneutics and falls into the partisan world of divisive political ideologies.

Alas that this is not so. It's not so, because the Constitution, after all, is a text—a piece of writing and as polysemous as any other text. But, for that very reason, the hermeneutic attitude of many jurists becomes discernible once one examines their attitudes to the prospect that too many interpretations might be made of that text, in the same way one proposes multiple interpretations of *Hamlet, Faust* or *Madame Bovary*. In *Interpreting Law and Literature. A Hermeneutic Reader*, the editors Sanford Levinson and Stephen Mailloux cite William Rehnquist, who became Chief Justice on the Supreme Court from 1986 to 2005, describing his role as only upholding the understanding and values "'that may be derived from the language and intent of the framers' of the Constitution" (Levinson/Mailloux 1988: 4). The Framers, inter alia Benjamin Franklin and Thomas Jefferson, helped draft the text at the Constitutional Convention in 1787—they're also known as the Founding Fathers. What, for Rehnquist, arrests the proliferation of contending interpretations is respect for the Framers' language and intent. But what access to their intentions does the language—and the writing—of the Constitution give us, or Justice Rehnquist? Levinson and Mailloux also cite Robert Bork, a judge proposed by President Reagan for a position on the Supreme Court, as declaring that "'[i]t is necessary to establish the proposition that the framers' intentions […] are the sole

legitimate premise from which constitutional analysis may proceed"' (ibid.: 5). But what strong or weak theory of intentionality is presupposed here? We surely need that theory, if it's the case, no less, that "the framers' intentions are the sole legitimate premise from which constitutional analysis may proceed." Lastly, the editors cite the 75th Attorney General, Edwin Meese, appealing for "'a Jurisprudence of Original Intention' to guarantee that constitutional meaning '[is] not to be changed by ordinary interpretation"' (ibid.: 6). Goodness knows, one would like to know what that Jurisprudence of Original Intention can really be, and also like to know what Meese means by "ordinary interpretation."

These are not just the positions, perspectives and debates of the last century, however. Consider the current website of the Federalist Society, an organization that advocates for conservative legal attitudes. The FAQ says: "The Society's main purpose is to sponsor fair, serious, and open debate about the need to enhance individual freedom and the role of the courts in saying what the law is rather than what they wish it to be" (fedsoc.org: n.p.). Note how the first issue, to enhance individual freedom, is related, via "and," to what seems a different issue, namely the role of the courts in saying what the law is rather than what they wish it to be. For the Federalist Society, the two issues are related. Freedom seems secured by respect for the law, or the Constitution, *as it is*. Judicial activism, which willfully alters the law, or the Constitution, is apparently a matter of restricting personal freedoms. But many, on the left at least, view the activism of specifically Conservative Supreme Court justices to have restricted personal freedoms the most —not least, those of people who can no longer freely choose whether to get an abortion or not.

Evidently, one would wish the Federalist Society to specify *what the law is*. What is it? Some answers can be gleaned from

the "What People Are Saying" section. Personalities and publications are cited in order to substantiate the notion that the law is determined by the Framers' and the Founding Fathers' original intentions. Disapproved of are situations where the law becomes what one wishes it to be, since that legal wish-making departs too far from those original intentions. The *Boston Globe* is quoted as declaring that "The Federalist Society has missed no opportunity to assert that the Constitution had been stretched away beyond the Founding Fathers' intentions" (fedsoc.org: n.p.). Ronald Reagan is cited as saying of the Federalist Society that "You are returning the values and concepts of law as our founders understood them to scholarly dialogue" (fedsoc.org: n.p.). It would be cruel to castigate Reagan's ghost for not having clarified the difference between advocating for the return of *values* and advocating for the return of *concepts of law*. Cited also is Cass Sunstein, a prominent legal scholar, as saying that "They are not a uniform bunch. There is a libertarian strand, who want to reduce regulation; and a judicial constraint strand that wants the federal courts to back off; and an originalist strand, that the constitution should mean what it was when it was ratified, which has radical and preposterous implications" (fedsoc.org: n.p.).

It's that last strand that concerns me in the present essay. For it does indeed seem preposterous to imagine that one can read the Constitution—a written text—and somehow access the original meaning and original intentions of the authors who wrote it. For some, it's so preposterous that the question becomes rather blunt: how can we let persons who actually believe that to legislate on any kind of legal issue at all? Let's be less blunt, however, and a little more academic in tone, and pose two questions: firstly, what does it mean to legislate in the name of the Constitution's foundational authority and in terms of strict adherence to the Framers' intentions? Secondly, what

interpretive latitude are legal scholars and Supreme Court justices prepared to grant themselves as regards those original intentions?

In what follows, I shall try to answer such questions in accordance with the three rubrics proposed by this volume of the *Yearbook for Translational Hermeneutics*: hermeneutics, specialized discourse, and translation. Consider hermeneutics. The questions at issue are hermeneutic questions since they evidently involve matters of interpretation—and interpretive latitude, moreover. Part of the problem in view of such interpretive latitude, however, concerns whether the uttermost sign of respecting the Constitution is simply the refusing of any interpretive latitude at all: one treats the Constitution as if it cannot and ought not change, and that effectively amounts to a display of 'respect' that plunges all present and future interpretations of the Constitution back into the past when that text was written. At issue is accordingly whether one regards the law as fixed as it was in 1788, when it was ratified, or one holds that the law, nevertheless, can be and perhaps necessarily is inconsistent with what certain men said and wrote at that time. At issue, therefore, is to what degree that inconsistency licenses freer interpretations, or whether one acts to ensure that such inconsistency never becomes so utterly inconsistent that there is a radical departure from that foundational text. In other words, or rather in the words of the Federalist Society, what matters is that what the law is remains intact, and that contemporary rulings remain consistent with that determinable 'essence' of the law. Surely, in one vital sense, the Federalist Society is right: the law must be seen to be consistent, and rulings must reinforce that consistency lest the law be compromised at its very heart. Rulings must find the law of the Constitution to still be right, and they must not make the law of their own arbitrary volition.

The great fear, therefore, concerns the possibility of such arbitrariness. Whether that fear is unfounded I will discuss further along. But if fear there is, then it's notable that the first person to introduce the term 'hermeneutics' to American legal scholars, a German immigrant named Francis Lieber, expressed that fear well enough. The editors of *Interpreting Law and Literature. A Hermeneutic Reader* cite from Lieber's 1839 book *Legal and Political Hermeneutics or Principles of Interpretation in Law and Politics with Remarks on Precedents and Authority*. Lieber's concern is with what he calls "construction," namely a form of textual interpretation that is too hermeneutically free: "'[C]onstruction endeavors to arrive at conclusions beyond the absolute sense of the text, and […] it is dangerous on this account'" (Levinson/Mailloux 1988: ix). For Lieber, as for the Federalist Society, I think, there seemingly must be an "absolute sense" of the Constitution and that absolute sense must be secured somehow. Lieber, for his part, seeks hermeneutic safeguards: "'we must strive the more anxiously to find out safe rules, to guide us on the dangerous path'" (ibid.: ix).

But in view of this dangerous path, one might claim that there's no need to anxiously impose or otherwise invent rules to govern legal interpretation. For if one wonders what endangers that absolute sense, one might argue that those dangers can hardly be registered as dangers at all in the contexts of legal interpretation and, indeed, of legal education. This brings me to the second rubric, namely specialization. Consider my own specialization: I'm trained in literary theory and criticism, and I participate in scholarly debates concerning structuralism, poststructuralism, and Derridean deconstruction. Thus I would be inclined to view the notion of an "absolute sense of the text" —of any text—from those viewpoints, and consider it wellnigh impossible to establish that absolute sense. The polysemy, the disseminative play or energies of texts cannot be controlled

by any closure of interpretive or textual context. Nor can the notion of 'sense' be unproblematically invoked without any further enquiry into the ways and arts of making linguistic meaning. Moreover, from that point of view (my own), the question of intention, whether it be that of the Framers or any other authors who *enframe* their authority within the somewhat unstable confines of texts really cannot be treated so simplistically. From that point of view, then, one would be daring to ask Justice Rehnquist questions that would almost automatically occur to students of literature—automatically because their disciplinary training encourages them to do so. If it's about upholding the understanding and values "that may be derived from the language and intent of the framers," would he accept that his role is akin to an interpreter of Shakespeare, whereby the task is to uphold the understanding and values that may be derived from the language and intent of the author of *Hamlet*? If the Federalist Society can cite the *Boston Globe* saying that "The Federalist Society has missed no opportunity to assert that the Constitution had been stretched away beyond the Founding Fathers' intentions," what if one expressed the same disapproval concerning interpretations of *Hamlet* that have been stretched away beyond Shakespeare's intentions?

But perhaps a feature of specialization—in this case the education of law students into the legal discipline—is that such students learn *not* to pose interpretive questions in the way I have done. Is part of the process of specialization, beginning at Harvard or Stanford Law School, a training in how to not pose questions concerning legal interpretation in ways that otherwise might license reference to Gadamer's *Truth and Method*, Barthes's essay "The Death of the Author," or Derrida's *Of Grammatology*? Would that earn students a failing grade if they did cite such persons and their texts?

What remains, however, is Lieber's anxiety, and perhaps also the anxieties of conservative jurists and scholars—those who feel that there must be rules governing the interpretation of legal texts and that such rules might be grievously lacking. But perhaps there's no need for angst, since—if you take my point concerning specialization—the rules of the game will probably have been well-learned by the time one graduates from law school. One will have already learned, I think, how not to embrace the interpretive liberties of Derrida, learned how not to even think he would be a relevant reference, and learned, more generally, how not to make any problematic parallels between what is debated in the contexts of literary studies and that of legal studies. I'm aware of the existence of Critical Legal Studies, where it's quite normal to invoke Derrida's "Force of Law" text, for instance, in the same breath as one refers to Plato's *Laws* or Hegel's *Elements of the Philosophy of Right*, but I still doubt that the curriculum of Harvard or Columbia Law School is heavy with the representative figures of Continental philosophy or poststructuralist literary theory. So when graduates of such schools then ascend to the ultimate perch of the Supreme Court, it seems implausible that they refer to Gadamer, Barthes or Derrida when it becomes necessary to consider the status of the *text* of the Constitution, to establish their working definitions of 'sense,' 'meaning' or 'language,' and to specify their theories of intentionality.

Nonetheless, that dangerous path perhaps still lies ahead, and the Federalist Society still needs to advocate for originalist and strong intentionalist positions on the interpretation of legal texts, especially the Constitution. The anxieties remain, but much depends on how the specialized discipline of legal studies expresses them. It does so not always in Lieber's terms, namely the terms of hermeneutics, and it does not generally express them in terms of literary theory or in terms of, for in-

stance, Derridean deconstruction. (But 'generally' doesn't mean 'never,' which is why one finds Derrida more strangely present than one might expect.) In any case, the anxiety centrally concerns the apparent lack of rules governing legal interpretive practice. It concerns the latitude for interpretation one is, or isn't prepared to grant. Now, faced with this quandary, one option involves borrowing those rules *from somewhere else*, and then considering them to be enforceable within the domain of legal interpretation. This brings me to the third rubric, namely translation. For if there is one constituency of readers and interpreters who seem bound by a certain rule, it's the constituency of translators. Readers can read as they please. Interpreters seem not to be bound by any particular rules, or at least whatever those rules are, they perhaps lack binding force. But there does seem to be a rule obeyed by translators that actually does have that force, and that's the edict they're so commonly compelled to obey, namely the edict of fidelity.

Translation Studies scholars, including many readers of the present *Yearbook*, I should imagine, would probably want me to now enter considerable caveats in respect of the translation model I have just ventured to describe—the 'equivalence' model as it is sometimes called, or as Lawrence Venuti characterizes it in his 2019 book *Contra Instrumentalism. A Translation Polemic,* the 'instrumentalist' model, one which "conceives of translation as the reproduction or transfer of an invariant that is contained in or caused by the source text, an invariant form, meaning, or effect" (Venuti 2019: 1). Those caveats, if one now entered them, would query the idea that translators are bound by a 'rule' and indeed by a rule prescribing the 'fidelity' that apparently secures verbatim equivalence. If one agrees with Venuti's polemic, moreover, one would "STOP using moralistic terms like 'faithful' and 'unfaithful' to describe translations" (ibid.: ix). But I will not enter these caveats in my own

essay, nor adhere to Venuti's urgent recommendation to STOP referring to "fidelity" and "infidelity," quite simply because my purpose in this essay is firstly to show why certain legal scholars feel it necessary to invoke fidelity as they adopt the equivalence model, and secondly to explain why the adoption of that model helps us better understand what is at stake in the specialized discipline of American Legal Studies, especially in view of its primary document, the Constitution.

Some legal scholars, as we shall now go on to see, recommend that interpreters of the law, especially the Constitution, display the same fidelity translators are assumed to display (I stress 'assumed') when they undertake their interpretive work. They recommend that such interpretations be as faithful to the letter and spirit of the law as translators are supposed to be (I stress 'supposed' to be) in view of the letter and spirit of the original texts they translate. The Constitution, that is, is the text to which one ought be faithful, and the best fidelity is shown when one respects its originality—its original meaning, and the original intentions of the Framers. Fidelity provides the rule here, one that reliably restricts the latitude for what is otherwise feared to be arbitrary or freewheeling interpretation. The corollary is that certain legal scholars wish to make the parallel between legal interpretation and the practice of translation. The parallel is inexact, but that doesn't matter. What does matter is the possibility of equating the translator's obedience to fidelity and that of legal interpreters. If translators should respect the original text, so should legal interpreters as well. If translators should respect the intentions of original authors, so should legal interpreters. If translators stray from the path of strict translation and onto the dangerous path of adaptation then it will be cried 'traduttore traditore,' and that cry would be equally loud if legal translators did something similar. Neither translators nor legal interpreters should transform original texts into

what they wish they could be. No: translators must respect the text *as it is*, as must legal interpreters: both should be bound by the deontological edict of fidelity, and limit their interpretive license in accordance with that same edict. Ideally, that license would be so limited as to elicit the very ideal of translation, namely verbatim replication. One would surely wish the Constitution to afford itself to such ideal 'translations' so that it never changes, nor loses any of its authority in translation at all.

2 In Search of Original Understanding

I turn now to two essays that illustrate matters, both, I stress, much-quoted and considered to be important for contemporary American legal scholarship. The first is Paul Brest's "The Misconceived Quest for the Original Understanding," published in *Boston University Law Review* in 1980. (Brest, incidentally, is cited on the Federalist Society's "What People Are Saying" webpage in his capacity as Dean of Stanford Law School.) Brest usefully clarifies the terms: those who quest for original understanding subscribe to originalism: "By 'originalism' I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution" (Brest 1980: 204). Yet problems emerge when originalism implies outright adherence to the original intentions of those who drafted that text (and later we shall complicate matters vis-à-vis the Framers and the so-called Adopters): "Adherence to the text and original understanding arguably constrains the discretion of decisionmakers and assures that the Constitution will be interpreted consistently over time" (ibid.). "Arguably" understates the case, of course, and a good deal still depends on what, besides the strict originalist position, might otherwise assure the Constitution's *consistent* interpretation over time. "The most extreme forms of originalism are 'strict textualism' (or lit-

eralism) and 'strict intentionalism," writes Brest (ibid.). Strict textualists construe words and phrases narrowly and precisely. For strict intentionalists, *per* an illustrative legal case, '"the whole aim of construction, as applied to a provision of the Constitution, is […] to ascertain and give effect to the intent of its framers and the people who adopted it"' (ibid.). There is "moderate originalism" (ibid.: 205), however, where the Constitution remains authoritative, but "many of its provisions are treated as inherently open-textured" (ibid.). Note "open-textured"—much, perhaps too much, depends on what that means. Literary critics might moreover ask what to understand by inherently. The unwelcome and captious questions of literary critics can perhaps be warded off by the serene wisdom of a Supreme Court Justice. Brest cites Thurgood Marshall:

> [A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. […] [I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application. (Marshall as cited in Brest 1980: 206).

Would it be supercilious to criticize Marshall, a staunch liberal on the Court, for not clarifying what he means by the letter and the spirit of the text, and for not having clarified how the spirit is to be chiefly (chiefly?) collected (collected?) from its words? But what Marshall fears is where what he complaisantly calls the "plain meaning" of a Constitutional proviso plainly expresses something so ridiculous that one either believes the Framers were mad or they couldn't have intended to mean their own meaning. As if, one supposes, an article of the Constitution said "We the people believe in the existence of alien beings and propose to call them Martians." This would be

laughable, if it weren't for Marshall's revealing hyperbole: faced with the prospect of such absurdity, *but of which he gives no example*, he resorts to the extraordinary notion that all mankind would rise up in protest at that Constitutional monstrosity.

What interpretive absurdities is Marshall actually envisaging such that humanity entire would unite in condign condemnation? What, to use the contemporary parlance, was 'triggering' Marshall here? His querulous hyperbole appreciably departs from the sober 'specialized discourse' of legal jurisprudence, and signals a profound disturbance thereby. But, for Brest at least, the possibility of moderate intentionalism saves jurisprudence from its most extreme anxieties. Yet Brest recalls that the Constitution only passed into law because certain constituents were prepared to adopt that text as law. These were the Adopters. What about their intentions? Possibly, from a hermeneutic perspective, we already have too many intentions to account for. For Brest, however, the interpretive reflex remains the same: anyone who wishes to apply the law correctly must venture towards the horizon of the historical past, and begin there: "She must immerse herself in their society to understand the text as they understood it" (Brest 1980: 208). Brest specifies the corresponding tasks:

> The interpreter's task as historian can be divided into three stages or categories. First, she must immerse herself in the world of the adopters to try to understand constitutional concepts and values from their perspective. Second, at least the intentionalist must ascertain the adopters' interpretive intent and the intended scope of the provision in question. Third, she must often 'translate' the adopters' concepts and intentions into our times and apply them to situations that the adopters did not foresee. (Brest 1980: 218).

The interpreter's first and perhaps primary task is to function like a historian. But one still worries about the unmarked difference between trying to understand constitutional *concepts* and trying to understand *values*. What's a concept for legal theory?

To be one, it should presumably retain its conceptual validity whatever the interpretive vicissitudes it's subject to, otherwise it's not really a concept. It's one thing to ask translators to "translate" concepts, since concepts presumably have an invariant meaning (if they don't, they're not concepts). But to translate or otherwise understand *values* is a rather different thing, in my view. Yet the deepest problem is this: if the interpreter "must often 'translate' the adopters' concepts and intentions into our times and apply them to situations that the adopters did not foresee," well, how often is "often"? How frequently would conservative Supreme Court justices or the Federalist Society countenance that 'oftenness' before it becomes so often as to be a permanent circumstance of any legal interpretation? Evidently, one must arrest the prospect of 'translation' that ventures towards the interpretive horizons of the present to such a degree that what the Adopters or Framers couldn't foresee requires the Constitution to be made up entirely for new and future generations. (If that seems exaggerated, we'll see mention of that fantastic prospect or project a little later.)

If translators risk becoming too free in their activities, then let translators be reined in by the dictate of fidelity. Let all interpreters of the law and of the Constitution be likewise reined in. I turn now to my second essay, Lawrence Lessig's "Understanding Changed Readings: Fidelity and Theory," published in *Stanford Law Review* in 1995. Lessig accepts that "Readings of the Constitution change. This is the brute fact of constitutional history and constitutional interpretation. At one time, the Constitution is read to say one thing. At another, the same text is read to say something else" (Lessig 1995: 396). As he observes therefore, no theory of Constitutional interpretation that ignores the fact of such changes can be an adequate 'theory.' But central to Lessig's theory is fidelity. The question,

in this regard, is whether admitting that change might involve different *readings* of the Constitution amounts to a kind of interpretive betrayal. "Are these changed readings always changes of infidelity?" Lessig asks. He answers:

> Everyone, whether originalist or not, agrees that they are not. We all have the intuition that some changes are consistent with ideals of fidelity, even if some also are not. What we lack is not the sense that change is justifiable, but rather any clear sense of just when, or why. (Lessig 1995: 396)

Faced with that lacking clarity, at least it seems that there are *ideals* of fidelity, and those would provide something more rigorous than mere intuition—the rigor of an ethical principle, perhaps. But what are those *some* changes that are either intuitively felt to be or, on ethical principle, can be *adjudged* to be inconsistent? Lessig claims that "many (perhaps most) changed readings are consistent with an account of interpretive fidelity" (Lessig 1995: 396). Note that "many" is reinforced by that parenthetical "perhaps most": one would possibly like *many* to become *most* and then to become *all*. At this point, some might therefore decide to inspect the presumably *few* cases that don't exemplify the ideals of interpretive fidelity. But that's risky. So it's easier to advocate for fidelity and ground that advocacy on the already-established reliability that many, *perhaps most* changed readings are faithful. It's like fighting a battle that has already been *mostly* won. Lessig pitches his essay as "a rejection of the view that changed readings mean that 'meanings are fluid,' and fidelity is bunk" (ibid.). But are there really so many legal scholars who actually consider that meanings are so fluid and who express the notion that fidelity is bunk? The fight seems to be against a strawman—perhaps someone who has illicitly read too much literary theory, and too much Derrida, and who apparently embraces the notion that textual meaning is indeed fluid. (Or someone who has

read some translation theory, Lawrence Venuti perhaps, and considers the notion of translatory fidelity to be bunk—neither workable in practice, nor particularly desirable in theory either.)

What is interpretive fidelity for Lessig? "The interpreter of fidelity," he writes,

> tries to preserve meaning across contexts by selecting a reading of a legal text that, in context, has the same meaning as an earlier or original reading. If the meanings of these readings across contexts is preserved, or the same, then fidelity has been secured. (Lessig 1995: 403)

We already sense why Lessig will work his way towards the activity of translation (but not towards translation theory—there are no references to that domain of specialized enquiry in Lessig's text), since possibly *translation* describes the effort to preserve meaning across contexts, and indeed to render the *same* meaning of a text despite the traversal of different (linguistic) contexts. So the matter concerns how to justify these changed interpretations and readings (if not translations), and clearly the language of such justification must be the language of "fidelity" itself. Lessig proposes two kinds of justified changed readings:

> The first class we can call justifications of transformation; the second, justifications of translation. Justifications of transformation rest ultimately upon the actions of democrats changing a normative text's meaning; justifications of preservation rest ultimately upon the actions of juricrats, preserving a normative text's meaning in light of changing interpretive contexts. Justifications of transformation seek fidelity to what the people (or their representatives) have just said; justifications of translation seek fidelity to what the people have said before. (Lessig 1995: 442)

Translators, I think, would partially recognize this profiling of their task. Translators cannot escape the past—the original text comes first in time, the translation second in time. Such deference to the past is perhaps the nature and basis of their so-called fidelity. But if such fidelity concerns deferring to, and

then accurately replicating "what the people have said before," then we're asking translators to be ventriloquists—or else throwing translators, *nolens volens*, into the embrace of historians, since they too are confronted with the dilemma of making the past—the people of the past—speak again and in their own same language.

3 Why Translation?

"Why 'translation'?" Lessig asks. A literary translator's practice," he writes,

> is to construct a second text in a second (or 'target') language to mirror the meaning of a first text in the first (or 'source') language—again, to construct the text, '*Je vous remercie*,' in the context of a room of French speakers to mirror the meaning of, '*Ich danke Ihnen,*' in a room of Germans. (Lessig 1995: 406).

To be noted, firstly, is the unexplained specification that the translator here is a *literary* translator. Secondly, that the metaphor concerns a "mirror." Thirdly, that the example involves the simple translation of "I thank you" into French and German. Literary translators would presumably wish things to always be so simple, and wish for equal simplicity in view of "context" as well. Lessig continues:

> This is the practice of the translator in law as well. She constructs a *reading* in the second context to preserve the meaning of a *reading* within the first, where, again, the context within which both readings are made includes a legal text and a context background to that text. If we conceive of these different interpretive contexts as just different languages, then we can link the practice of the legal interpreter to the practice of the translator: Both seek a text in a second interpretive context that preserves the meaning of another text in an original interpretive context. (Lessig 1995: 406–407)

But much depends on how one configures those two interpretive contexts—or what Gadamer might call 'horizons'—espe-

cially if the contexts at issue also involve the audience or readership to whom that text was originally intended, and the audience or readership for which the translation is destined. Skopos theory would perhaps intervene here. Or Schleiermacher, given his claim that translators must decide whether to usher texts (their contexts, and their readership, as well) back towards the horizon of their original past, or to escort texts from that past towards the interpretive and contextual horizons of the present. Certainly, it's difficult to "conceive of these different interpretive contexts as just different languages" without entering a long, perhaps endless list of caveats and qualifications.

At stake for Lessig is the preservation of meaning. That's the translator's task, and what should be the legal interpreter's task as well. What ensures that both tasks are understood to involve preservation at all is the assumption that translators always act in the vicinity of their law—the law of fidelity—and the same law should also apply to legal interpreters. Lessig introduces two instructive nuances in respect of his appeal to translatory practice, however. Firstly, what Lessig calls "fact translation" (1995: 406) involves reacting to changes in an interpretive context when new facts come to light: "Facts come in many forms, and no simple line divides the facts of a particular case from facts affecting broad classes of cases. For our purposes, however, the difference is not important. Whether conceived broadly or narrowly, all 'facts' are background to the particular text read, and a change in any could in principle constitute a change in the context of the text read" (ibid.). When, during deliberations upon a particular legal case, new facts—perhaps new evidence—emerge, the deliberations perforce adjust to those new facts, and that adjustment can be called a 'translation' where the translator has to note how the contextual 'background' has changed, and demonstrate the interpre-

tive flexibility to re-translate the text in the light of a now altered context. Lessig writes:

> Whenever the interpreter points to a change in the background to justify a changed reading in the foreground, I will say that she relies on an argument of translation. […] Whenever she relies upon the most narrow class of such background changes—what we would ordinarily call 'the facts'—I will call it an argument of fact translation. (Lessig 1995: 406)

If a new fact changes the context, or "background," then when the interpreter points to that fact, and has to now justify the concomitant change in interpretation, then that amounts to arguing about the necessary changes in textual and contextual meaning from the viewpoint of "translation," since translation describes how textual meaning necessarily changes from one linguistic context to another. But while the novelty of that fact might prompt slight changes or considerable changes, Lessig's second kind of translation reacts to a very different kind of alteration, and this kind concerns changes in the almost epistemic circumstances of understanding itself. This is "structural translation" (Lessig 1995: 406). When the interpreter "points more broadly, to understandings underlying the dispute in a particular case, I will call it an argument of structural translation" (ibid.). A fact should be easily noticed—it should have the evident profile of a fact. But it's harder to remark upon the profile of underlying understandings since these are embedded in discourses that are taken for granted, and which therefore lack visible particularity *as* discourses. Lessig writes: "What is crucially difficult about this whole way of speaking is that it is a discourse about ghosts" (ibid.: 413). I explain it like this: such discourses are *doxic*—they express, almost anonymously, the *idées reçues* of a society, culture or nation. But when the doxa changes, then the common understanding apparently supplied by that same doxa undergoes profound, structural change.

What all doxas would like to do, is pass themselves off as orthodoxies, and then pass themselves off as a congeries of *facts*, rather than as merely received wisdom, since received wisdom, cultural consensus, or the *donnée,* can change. The doxa of the past that viewed homosexuality as an illness has now changed, and therefore legal legislation and juridical rulings on cases concerning homosexuality have changed as well. There are other examples, of course, particularly those concerning attitudes to race.

4 Change and Changeability

But how immune is the American Constitution from such changes? When there are deep, structural changes in the doxa, can the Constitution remain an authoritative statement of the law *as it is*, or do contemporary interpretations and 'translations' betray that authoritativeness in the name of a Constitution one *wishes it to be*, or indeed wishes it to *have been* from the start? The problem, Lessig observes, is that the Constitution isn't immune from change. Consider reading the Constitution as if reading a text. The problem concerns how "to read a text that has been *added to* over time, and to read a text that has been added to *over time*" (Lessig 1995: 443). Lessig adds:

> A reader, that is, must not only synthesize the various constitutional principles embodied in this multigenerational text, but she must also understand how to read that text across vastly different interpretive contexts. She must, that is, both synthesize and translate, often at the same time. (Lessig 1995: 443)

So how to do that in light of a text that has been added to over time? What kind of 'additions' are permissible, and what aren't? What is a text that is susceptible to being 'added to' in any case? Literary theorists lean forward expectantly. Firstly, imagine a text unamenable to such additions: the text of the Constitution,

for instance. It would have bindings and framings, frames provided by the Framers. A properly bound volume, therefore, one provided with a fixed number of pages, and which has accordingly stopped being written or added to. Literary theorists would now say that it was unwise to use the word 'text' in the previous sentences, since the better term is 'work.' A 'work' is that which is *finished*—the last page written, and the final full stop provided. A 'work' is *complete*. The corresponding *material* realization of that completion is a Book. The binding is stitched, the cover pages affixed, the protocols—title pages, authorial signatures, the assertion of copyright—'glued' to that material object. But—and this is, for instance, Barthes's argument in "From Work to Text" (1984/1986)—a *text* cannot be so fixed, and the material circumstances Lessig himself describes for such a text is precisely that of something *that has been added to over time*.

That's the problem: the Constitution might not confirmably be a 'work.' It might be, in the Barthesian sense, a "text." It can be added to. Lessig, remarkably, now activates an analogy. Consider a *chain novel*:

> The chain novel is the paradigm multigenerational text: Each chapter is added by a different author, each addition bringing something new to the old, each aiming to make the text the best it can be. As new chapters are added, something about the meaning of what went before can change. (Lessig 1995: 443)

Imagine the Federalist Society's alarm: if the task is to respect the Framers' intentions—they being the original authors of that 'novel,' theirs being the signatures on the frontispiece, then what to make of the prospect of the Constitution being constantly asked to accommodate new chapters added by different authors? Still, Lessig provides reassurance that such additions aim to "make the text the best it can be," but I'm unclear as to

the criterion one might supply to adjudge what would be good, better, or best in this respect. Lessig develops his analogy thus:

> Now imagine that each chapter's author speaks a different language. Or better, that each chapter is added by a different generation. Now not only must the author (or reader) engage in an act of synthesis, to construct all that has gone before. Now she must first recover what was said before, through an act of translation, before she can add to what was said before. She must, that is, first carry the old text into the new context (translate) and then synthesize the translated text with what is to be added. (Lessig 1995: 443)

Imagine that. The "or better" rhetorical move is rather strategic, since to imagine the Constitution teeming with different authorial languages is a very risky thought-experiment. It's a thought of Babel. It would be better if different generations speak a language that still resembles, at least partly, the language of their forebears. In any case, if the risk is that this chain novel, this Constitution, now throngs with linguistic diversity, then we need interpreters to undertake an act of translation to cope with this. This act recovers "what was said before," and only once that recovery has taken place can that translator "add to what was said before." So instead of the worrisome analogy with a chain novel, where each chapter is added by a different author, and each chapter's author speaks a different language, it's preferable that we only countenance the sort of "additions" translators make. For translators don't *add* to the texts they translate, if that is taken to mean contributing new chapters of their own. They don't add to original works something unauthorized by original authors, and translators acknowledge that by agreeing that their *first* task is to recover "what was said before." To do so is to show deference to that prior 'saying' (or rather, writing), and we call that deference 'fidelity.' Preserving was said before still remains the task of translators as they translate what was previously said into the present horizons where that saying is said again.

The analogy with translation therefore allows Lessig to admit that the Constitution needs to be updated and therefore "added to" in a certain respect, but because translation is regulated by fidelity and translators understand their primary task to involve recovering and preserving the original meaning of source texts, then let it be translators who give the rules to those working in the domain of legal interpretation, and those thereby confronting how the Constitution, or the law, changes over time. Yet the different kinds of 'additions' still concern Lessig. He writes:

> Both synthesis and translation, then, yield different readings of what went before, but the reasons for these differences are quite distinct. Synthesis comes to understand differently what went before because what is added is added in part to change what happened before—to carry the story forward, to develop a character, to sharpen a plot, to save the day. Translation yields different readings of what went before only to make what went before understandable to the reader today. Its aim is not to change the past, but to recover it, *as if* (for we can always act as if) we can recover without changing. (Lessig 1995: 443)

Consider the activity of synthesis as an act of adding new material to that chain novel but where that addition does not alter the novelistic plot: on the contrary, it carries the plot forward, and even "saves the day." If a novelistic plot is allowed to develop, from chapter to chapter, then the Constitution should also be allowed to develop, but what must not change is the underlying shape or profile of that same text any more than the identifiable plot of a novel should change either. The novelistic plot always saves itself as a plot, and never descends into *Tristram Shandy*-esque digressions where it's no longer clear whether there is a meaningful sense of an ending, nor indeed a meaningful sense—an originalist sense—of the beginning either. And, as for translation, it remains the case that *recovery* is the primary task here: recovery of the sense of the beginning. But if that's a hopeless task, for translators as much as histori-

ans, one can at least pretend *as if* each constituency could recover that sense. Note the extraordinary parenthesis: "*as if* (for we can always act as if) we can recover without changing."

Well now. Is that all legal originalism amounts to? Act *as if* one believes that original meaning can be recovered. Act *as if* the Framers' intentions could be accessed. With apologies to Hans Vaihinger, you might call this the jurisprudence of *as if*. Do translators act in the same way? Do they act *as if* they actually can recover original meaning? Do translators act *as if* there is a doctrine of fidelity that they obey but nonetheless one they secretly consider to be practically unachievable? Perhaps the only way translators are found out for their feigned fidelities is when they're punished for the betrayals they, albeit covertly, always-already admitted to. It's Kafkaesque.

Lessig recognizes that the text of the Constitution can and does change. His criticism of other legal scholars, when they contemplate the circumstances of such changes, is that they narrow matters to "the notion that change *requires* amendment" (Lessig 1995: 400). But, in many circumstances, the changes are not so dramatic that the Constitution requires outright amendment, and because this is so, one has to describe those kinds of changes and also describe what hermeneutic, or translatory responses will ensue. "As I argue," he writes,

> we have long recognized cases where, in the face of changes in context, the proper act of fidelity is a changed reading of the constitutional text—constitutional change, that is, without constitutional amendment. As others have before, I will call this a justification of *translation*. (Lessig 1995: 400)

Lessig also puts it like this:

> That change occurs cannot be denied. How change happens is more complicated—sometimes quickly, sometimes slowly, sometimes by decree, sometimes by consensus. Think of uncontested discourses as the banks of a river within which contested discourses flow. As the banks shift (as the uncontested shifts), so too will the movement of

> the water change (so too will the contested discourses shift). These shifts can be dramatic—a canal, for example—or evolutionary—erosion. The question for structural translation is how these shifts will be accommodated within norms of interpretive fidelity. (Lessig 1995: 414)

Imagine that. The unspoken authority of uncontested discourses, or what I earlier called the doxa, form into distinctive riverbanks that smoothly channel the turbid flow of contested discourses. But contested discourses abrade the contours of those riverbanks, and we get (as I imagine it) mushy wateredges and polder-fields blurring the previously neat distinction between rivers and their riverbanks. Or else, the frictions of disputatious discourses force a new channel—a canal—into the previously mapped waterways of the doxa. But at no stage does this watery map of discourse burst the banks and riverbanks, canals and canalsides altogether because what remains in force are *norms* of interpretive and translatory fidelity. When the landscape or waterscape of legal discourse is seemingly at risk, those norms come to the rescue and re-establish the shape of normative discourse by ensuring that the influx of hitherto uncontested discourse, but now contested, is siphoned into new 'canals' of interpretation, new in shape to be sure, but still reconfigurable *as* canals. Not wanted, here, is a dyke-bursting flood of discursive novelty that no interpretive norm can master. No wonder Lessig activates—perhaps unconsciously—the maritime metaphor that often accompanies thoughts of *translatio*. Translators are frequently asked to be bridge-builders, to span riverbanks and seashores, and ensure that the turbulent waterways of multilingualism are safely navigated.

5 The Task of the Translator

Let me regain purchase on matters by again considering how originalism—strict or moderate—conceives of the task of

readers, interpreters and translators. Let me revert to Paul Brest's essay to do so. The task is apparently similar to that of the historian. Brest cites Quentin Skinner:

> The essential difficulty posed by the distance that separates the modern interpreter from the objects of her interpretation are succinctly stated by Quentin Skinner in addressing the analogous problem of facing historians of political theory: '[I]t will never be in fact that be possible to simply study what any given classic writer has *said* […] without bringing to bear some of one's own expectations about what he must have been saying.' (Skinner as cited in Brest 1980: 219)

But how are interpreters to *solve* that essential difficulty? And is the dilemma only analogous to the one suffered by historians of *political* theory? Notice how the dilemma is lessened for Skinner because the writers in question are already *classic* writers. What if one weren't sure of such classicity? These are the questions that would be raised if one hadn't cited Skinner but rather Foucault's *History of Madness* or Michel de Certeau's *The Writing of History*, I imagine. The problem, in any case, is how interpretation should relate to the voices of the past, and then carry those voices—conveyed by written texts, let's not forget—towards the present. It's a considerable problem, especially if one's legal doctrine purports to be heedful of the intentions of the Framers, Founding Fathers, and Adopters. Brest puts it like this:

> The intentionalist interpreter must next ascertain the adopters' interpretive intent and the intended breadth of their provisions. That is, she must determine what the adopters intended future interpreters to make of their substantive views. […] Perhaps they wanted to bind the future as closely as possible to their own notions. Perhaps they intended a particular provision to be interested with increasing breadth as time went on. Or—more likely than not—the adopters may have had no intentions at all concerning these matters. (Brest 1980: 220)

But *how* are interpreters to do this? How, hermeneutically, does one distinguish a substantive view from an insubstantial one?

Surely the entire debate concerns the implications of each of those two "perhapses." *Perhaps*? And what to make of that interpolated "more likely than not"? Moreover, when Brest says that "To be a coherent theory of interpretation, intentionalism must distinguish between the adopters' *views* about an issue and their *intentions* concerning its constitutional resolution" (Brest 1980: 220), I wonder how that distinction is to be made. Back to translation: "The interpreter's final task is to translate the adopters' intentions into the present in order to apply them to the question at issue" (ibid.). But much depends, as hermeneutic scholars would observe, on how one actually frames "the question at issue." It's why a key component of Gadamer's hermeneutics concerns the 'questionability' (*Fragwürdigkeit*) of the question. Depending on how you frame the question, and consider that question *worthy* of being posed, then many of the corresponding answers have already been supplied in advance of any verdict. In view of that final interpretive or translatory task, the dilemma becomes acute. For if the initial task was to work towards the past and recover the meaning of that past text, or to pretend as if one can, then at least that task is relatively well-profiled by the doctrine of fidelity (and it helps if one only has to deal with Skinner's classic texts). But, in view of now escorting, in an act of translation, that text from the past to the present, what kind of Constitutional "updating" is permissible here? Brest says:

> However difficult the earlier stages of her work, the interpreter was only trying to understand the past. The act of translation required here is different in kind, for it involves the counterfactual and imaginary act of projecting the adopters' concepts and attitudes into a future they probably could not have envisioned. When the interpreter engages in this sort of projection, she is in a fantasy world more of her own than of the adopters' making. (Brest 1980: 221)

I alluded to this scenario above. Despite the earlier difficulties, at least interpreters were "only" trying to understand the past.

What they were "only" trying to do was recover and preserve the meanings resident in a text—the Constitution—of the past. And the norm of fidelity presumably informed such interpreter-translators what they were "only" supposed to do *vis-à-vis* that text. But when the task is to escort the meaning of the past towards the unsettled interpretive horizons of the present (and future), then somehow we enter into a realm of outright *fantasy*.

What's fascinating in both Brest's essay and Lessig's is how they profile what they seem to fear. Indeed, in Brest's text, despite what surely could have been a deployment of Gadamerian hermeneutics in the service of lessening the anxieties, and promoting a judicious balance between interpretive freedom and interpretive constraint, this isn't the case. Brest writes:

> There is a hermeneutic tradition, of which Hans-Georg Gadamer is the leading modern proponent, which holds that we can never understand the past in its own terms, free from our prejudices or preconceptions. We are hopelessly imprisoned in our own world-views; we can shed some preconceptions only to adopt others, with no reason to believe that they are the conceptions of a different society that we are trying to understand. One need not embrace this essentially solipsistic view of historical knowledge to appreciate the indeterminate and contingent nature of the historical understanding that an originalist historian seeks to achieve. (Brest 1980: 222)

That few scholars would accept this as an adequate characterization of Gadamer's hermeneutics is beside the point. What is the point (the *hopeless* point), is the idea that Gadamer's position amounts to solipsism. What is deeply at issue, I think, is how *radically* contingent, how *radically* indeterminate historical meaning really can be. Apparently, for Brest, what profiles that disturbing radicality is hermeneutic solipsism: each interpreter is locked into a jail-cell, the iron bars of which are made of his or her own interpretive prejudices. Thus imprisoned, the interpreter cannot seemingly enter into any dialogue (the scenario so important to Gadamer, however) with other interpreters. If

so, then interpretive consensus isn't possible, and hence meaning becomes sheerly indeterminate and utterly contingent.

But need we really go that far? If what is feared is untrammeled interpretive liberty that must be constrained by Lessig's "fidelity theory," have such liberties ever been taken with the Constitution of the United States? If the fear concerns what Lieber calls the "dangerous path" opened up by hermeneutics, a path that needs closing off by the imposition of interpretive rules, can't we ask whether Legal Studies already has enough rules to cope? If so, then is it really necessary to spend so much worrying about the supposed lack of rules, and so necessary to spend at least part of the time in asking translators to proffer the rules of *their* trade to help out?

These are the sorts of questions Stanley Fish asked in his 1984 *Stanford Law Review* essay "Fish v. Fiss." It's worth rereading. Owen Fiss published an essay, in the same journal, titled "Objectivity and Interpretation," in 1982. For Fiss, as Fish paraphrases him, at issue is the difference between the positivist view that "meaning is a property of—is embedded in—texts and can therefore be read without interpretive effort or intervention by a judge or a literary critic" (Fish 1984: 1325), and the subjectivist position where "texts have either many meanings or no meanings, and the reader or judge is free to impose—create, legislate, make up, invent—whatever meanings he or she pleases" (ibid.). Evidently, it's the latter view to be feared even if Fiss admits that the positivist view is rather naïve. "On the one view," Fish writes,

> the text places constraints on its own interpretation, on the other, the reader interprets independently of constraints. Fiss proposes to recognize the contribution of both text and reader to the determination of meaning by placing between the two a set of 'disciplining rules' derived from the specific institutional setting of the interpretive activity. (Fish 1984: 1325)

My own essay has asked whether those disciplining rules are ultimately subsumed under the rubric of 'fidelity,' and whether the corresponding discipline one might therefore wish to exact is the discipline of translation, where the danger of *readers* interpreting independently of constraints is avoided once one replaces 'reader' by 'translator,' since translators apparently don't enjoy that same independence.

The concern, in respect of legal texts, is that readers might enjoy so much interpretive independence that there is no hermeneutic discipline at all. Needed, therefore, are rules which, as Fish puts it, "tell you what to do and prevent you from simply doing whatever you like" (Fish 1984: 1326). But what would those rules look like? Fish writes,

> If the rules are to function as Fiss would have them to function—to 'constrain the interpreter'—they themselves must be available or 'readable' independently of interpretation; that is, they must directly declare their own significance to any observer, no matter what his perspective. Otherwise they would 'constrain' individual interpreters differently, and you would be right back to the original dilemma of a variously interpretable text and an interpretively free reader. (Fish 1984: 1326)

We would also, I suggest, be right back to the problem that concerns Brest, namely hermeneutic solipsism, where one interpreter might obey his or her own interpretive rules, but such rules cannot legislate for any other interpreter. Rules surely must be generally applicable in order to be rules at all. So where would one find those rules? Do texts always come with a glued-on *protocol* (the Greek etymology is pertinent here) where the interpretive rules are always-already announced? It's a question for all discourses and texts that purport to be 'specialized': what perhaps enables a discourse or text be specialized is if there are correspondingly specialized rules governing the interpretation of that discourse or text. But what are those rules? To be rules, they must exert a disciplinary and disciplining power, but they must also somehow not partake of the dis-

course or text over which they rule. So we need to *splice* the rules to the discourse over which they rule. But we also need to *cleave* rules away from the discourse to which they apply. One would have liked the Framers of the Constitution to have understood this as precisely the issue of *framing*. Outside the frame, there should have been space made for interpretive rules so that such rules dictate the interpretive latitude for the text—the text of the Constitution—that lies within that frame. But if there is no frame, there's no possibility of 'specializing' the Constitution such that recognizable interpretive rules verily hold sway. That might amount to deeming the Constitution a *chain novel*, or, at any rate, amount to deeming the Constitution a *text*. A 'text' perhaps describes a piece of writing that isn't provided with a hermeneutic protocol prescribing the interpretive rules by which it is to be read (or translated). If one wishes the Constitution to not be a 'text,' in this case, then one might resort to an option Fish notably describes, if only to reject it. One instead characterizes the Constitution as a 'document.' Fish refers to

> the distinction, assumed by many historians, between a *text* as something that requires interpretation and a *document* as something that wears its meaning on its face and therefore can be used to stabilize the meaning of a text. My argument, of course, is that there is no such thing as a document in that sense. (Fish 1984: 1326)

One would perhaps want the Constitution to be a document, rather than a text. That, I think, is what the Federalist Society, sundry Conservative Supreme Court judges, originalists and literalists, would want as well. It's what a strong theory of intentionalism would also desire: a piece of paper that wears the true "face" of the people who wrote it, one that only ever wears a visage that confirmably expresses their original intentions. But that's not the "face" any text can actually wear. So we plunge again into the morass of hermeneutics, historical enquiry,

translation, and the nervous business of providing interpretive rules for the Constitution since the Framers regrettably did not provide them. With Lessig, however, we can reach safer terrain. He says "All texts are read against a background of interpretive principles, or rules for reading, some of which we can call canons of construction" (Lessig 1985: 407). That's mostly true. But note "principles," "rules," and indeed a notion of "canon." Note the generalization—*all* texts. But Fish might ask where such rules are actually to be found, and I give in to the temptation to adduce Derrida as an example of someone who doesn't necessarily read texts against a background of interpretive principles, or rules for reading, and who hardly endorses canons of *construction*.

Principles and rules. What if there were none? Provocative is the question, and uneasy the proffered answers. Lessig's answer, as we know by now, relies on the appeal to fidelity: "By 'interpretive fidelity,'" he writes, "I mean any practice aimed at preserving something semiotic from the past, whether one calls that something meaning, or intent, or purpose" (Lessig 1995: 401). Evidently, some might want to discriminate the "semiotic" requirement in view of preserving meaning, intent and purpose (Performance Studies, for instance), but in any event, let's consider the issue of "meaning." Lessig says "I will also not attempt to define 'meaning'" (ibid.). He adds, "I will simply speak about tracking meaning, though I do not purport to say fully just what meaning is" (ibid.: 402). That's clearly prudent, of course, but still: "In my account, there are four moving parts to a practice of interpretive fidelity" (ibid.). Consider two of those parts:

> Think of the balance like this: Meaning is a function of the text read (the second moving part), and the context against which the text is read (the third). By 'text, I mean any artifact created at least in part to convey meaning; by 'context,' I mean just the collection of understandings within which such texts make sense. This essay is a text; the

> understandings that go with its placement in a law review are part of its context. Honking a horn is a text; the celebration of a local team's victory could be its context. In each case, text and context together permit a range of meaning; as either text or context changes, so may the product change as well. (Lessig 1995: 402)

Lessig is more Derridean than he realizes if honking a horn is also a "text." Derrida says nothing different: *il n'y a pas de hors-texte*. And, for Derrida, that also means that there is no outside of *context* either. Lessig writes:

> Text and context make meaning. How does meaning fit with fidelity? Fidelity is the aim to preserve meaning. How depends. In ordinary conversation, one selects a text to convey, in that context, the meaning one wants to convey. If one wants to convey the same meaning in two different contexts, then one may have to select two different texts. If in a room of Germans one wants to say, 'thank you,' one selects the text, '*Ich danke Ihnen*'; if one then moves to another room filled with French, one selects the text, '*Je vous remercie*.' In law, meanings get made through the application of legal texts in individual cases. The cases are the contexts; a statute, for example, is the text. (Lessig 1995: 402)

I wonder if it matters whether the translation involves the act of thanking. I hence wonder what Lessig might say about other performative speech acts, like "je vous pardonne" or "I sentence you to death." Interpretive fidelity, for Lessig in any case, becomes an issue when the ruling on a particular case must still reliably exemplify the general legality of the law in whose name and authority that ruling or sentence is pronounced. For, whatever the case, the law must still *apply*. But the problem is that sometimes the law is forced to adjust. Translation assists in describing situations where the law might have to bend in order to make that adjustment, but it doesn't break. And the reason why, is because the law is capable of 'translating' itself in order to flex to those situations without that translation losing the essential legality of the law itself. To the contrary: translation has the special ability to *preserve* that essential meaning—the

meaning of authority itself, the meaning of legal writ—even as translation *also* describes the circumstance where the law must adapt to the case at hand.

This is what some legal scholars, it seems to me, want scenarios of reading or interpretation to be: as flexible as translations, but also as *faithful* as translations are as well. Legal scholars and Supreme Court Justices might accept, as Lessig puts it, that "readings change" (Lessig 1995: 403). But they would also wish to endorse Lessig's rider: "If meaning is a function of text in context, then it should be clear that in at least some cases, a changed reading could be consistent with fidelity" (ibid.). Yet much depends on whether one regards Lessig's phrasing (it *should* be clear that in *at least some cases*, a changed reading *could be* consistent with fidelity) as admirably realistic or far too diffident. What some might wish—strict intentionalists, strict textualists, certain strands of the Federalist Society's membership—is the conversion of "in some cases" into "in all cases," and revising Lessig's "could be" into "must be consistent with fidelity." But Lessig has the integrity to raise the problems rather than simply ignore them. He writes:

> Central to the argument of this essay is a distinction between two aspects of an interpretive context—a distinction well known outside of law, though nonetheless not easily described. It is the distinction between aspects of an interpretive context that at any one time are contested, or up for grabs, or political, and aspects that are at the same time taken for granted, uncontested, given. These are imprecise words, and to some extent, full precision is impossible. But we can begin to understand what these imprecisions aim at in the following account. In any context, legal or not, within any discourse, whether cultural or scientific or social, some things are argued about; most things are not. Some things are up for grabs; others are taken for granted. (Lessig 1995: 410–411)

Notice, firstly, that the difficult-to-describe distinction is well-known "outside" of law. Evidently, the problem obtains once

that matter is drawn *within* the precincts of the law. Moreover, that problem is now described as a circumstance where something is "up for grabs." Clearly, we need rules to ensure that not everything in view of legal texts, and especially the Constitution, is up for grabs. Thus one has to establish parameters for how one goes about disputing meanings in a given interpretive context. Thus: "We argue about what law applies; we don't argue about what law is. We argue about how a text should be read; we don't argue about whether reading is possible" (Lessig 1995:411). But some do argue about what law is. Philosophers do. Some have proposed that the law is nothing other than a speciously benign name for mere force, or indeed violence—read Benjamin's "Critique of Violence" on that score, or Derrida's "Force of Law." Moreover, there are some who enquire into what makes reading possible and one name for that rather complex enquiry is 'grammatology' (or, to be provocative, 'Platonism'). Lessig nonetheless continues:

> We argue about whether I should wear a tie; not about whether I should wear a dress. Not that we couldn't argue about these matters —obviously, we could. Not even that we never argue about (at least some of) these matters—there are, after all, costume parties. And not that there is not a 'we' for whom these matters are up for grabs—deconstructionists dazzle with the problem of reading. But caveats notwithstanding, in each of these cases—and more generally, always —there is the normal against which exceptions get drawn. There is a space within which disagreement occurs, and a border that is not crossed. (Lessig 1995: 411)

Notice the sartorial and gendered example—wearing a tie like a man, wearing a dress like a woman. I'm not going to quibble, but I mildly ask why an essay about interpreting legal texts needs an example like this. And note how the up-for-grabs scenario is accompanied by reference to the dazzling deconstructionists. Yet, it's apparently enough to reach safety by means of that question-begging "caveats notwithstanding" to arrive at

the "normal" situation where exceptions are never so exceptional that they cannot be assessed in respect of that normality (or gendered dress-code). One admires that "more generally, always" for its audacity, therefore. For Lessig, there remains a safe space for disagreement and, indeed, there exists an uncrossable hermeneutic borderline. What Lessig wants is that the space for disagreement always affords the possibility of agreement, and to that extent he resembles Gadamer, I think. What Lessig is unwilling to countenance is outright dissensus where disputes cannot be arbitrated according to any agreed-upon set of rules. Not wanted here is Jean-François Lyotard, for instance, where, as he claims in *Le Différend* (1983/1988) (and to pastiche Lessig and Brest's phraseology) *in most cases* legal disputes can be arbitrated—this is the circumstance of the *litige*—but where in other cases, *fewer* perhaps, there can be no arbitration, and that's the situation of the *différend*. It shouldn't surprise us, if one reads the opening pages of his book moreover, that translation emerges: a *litige*, for Lyotard, describes a situation of translatability where the parties in dispute can meet on common ground, but a *différend* describes a situation of untranslatability—the parties remain foreign to each other, and nothing can resolve this.

We might, to retrieve Brest's characterization of Gadamer's position, call that a situation of mutual solipsism, but I think Lyotard describes that solipsism rather better than Gadamer given Gadamer's clarion advocacy for dialogue, and indeed for translation as well. For Gadamer, as for Lessig, one can disagree, but one must first agree upon the terms for that disagreement so that there is always-already common ground for that disagreement. Meet in the spirit of dialogue, therefore, rather than imprison oneself in solipsism where there's no conversation possible at all. Meet in the middle of translation

therefore, rather than speak in foreign languages unintelligible to other parties.

So what to disagree about? Lessig says, "Disagreeing with someone about abortion makes you an opponent; disagreeing with someone about whether children should be tortured makes you an alien" (Lessig 1995: 411). Once *aliens* frame the parameters for hermeneutic debate, then we surely have the stable frame we have been looking for. Only aliens countenance child torture. But why produce an example concerning children in the first place? Is it because when one worries about a lack of interpretive or moral consensus one looks to children, since there is such a degree of consensus on how children should be treated that we almost have a universal moral consensus? Pedophilia is bad. Torturing children is bad. I emphatically agree. But I don't know if it helps frame the parameters for a dispute about abortion if one speaks of the unacceptable torture of children, all the more so since the nub of the abortion debate might concern not so much a child, but a fetus. Consider how that example concerning abortion and child torture reemerges in the following remarks:

> It is tempting to think that what distinguishes contested from uncontested discourses is something in the nature of the discourse itself – that, for example, value discourse is essentially contested, while fact discourse is not. In my view, no such line is possible. Values, no less than facts (indeed, I think far more than facts) are suitable for uncontested discourse, and they function, just as facts do, to constrain contested discourse. For example, discourse about whether one should torture children for sport is a fundamentally uncontested discourse of morality. (Lessig 1995: 411)

Compare the following:

> However known, however clear, however shown, however understood, there is a part of the background of understandings or beliefs or practices not directly challenged in a particular dispute; presuppositions taken for granted by both sides to a dispute, against which any

> dispute proceeds; a world of uncontested understandings that define what appears natural or necessary or true in any particular context. This uncontested is not simply the 'context' of a particular dispute, for some aspects of an interpretive context are plainly contested: Debates about abortion funding, for example, proceed within a context in which abortion itself is contested; both contests, however, proceed within a context in which equality is said to be a constitutional ideal, and in which the Constitution is taken as foundational. (Lessig 1995: 411–412)

What matters, of course, is that "fundamentally uncontested discourse of morality." If torturing children provides that discourse, or frame, and contesting that moral discourse or frame would be sheerly alien, then let it be so. But besides the matter of torturing children that turns a moral value into a matter of fact only aliens would contest, most of the problems the law confronts (whether in alliance with morality or not) lack that uncontestable frame and so the familiar fact-value dilemma obtains. Yet the example Lessig still wishes to proffer concerns abortion, an example that somehow—but I'm not quite sure how—is related to our consensus concerning not torturing children. It wouldn't be fair to criticize Lessig, in view of the abortion debate, not to have anticipated the recent Dobbs ruling which overturned Roe v. Wade, the case that was presumed to have secured the right to have an abortion. It wouldn't therefore be fair to inspect Lessig's assumption concerning how abortion debates (which don't just concern funding anyway) "proceed within a context in which equality is said to be a constitutional ideal, and in which the Constitution is taken as foundational," and to wonder whether it's so certain that such was the case in the Dobbs ruling. At least one Supreme Court Justice, I suspect, took not the Constitution to be foundational, but the Bible. The ruling did not, it seems to me, legislate in terms of the ideal of equality: overnight, some

became subject to legalized inequality simply because of the contingent fact that they had a womb.

6 Discipline and Punish

So how did it come to this? How did some Supreme Court Justices come to exemplify the best (i.e. the worst) examples of judicial activism, where they strayed away from the hermeneutic path of originalism and intentionalism and gave many Americans cause to worry that those Justices don't seem particularly bound to even their own presumably rigorous interpretive rules? My readers will doubtless find it unsatisfactory that I refrain from answering and instead reach my conclusion by examining the opposite scenario where the question is not so much whether judges and Justices are allowed to be so arbitrary but rather that they aren't allowed that arbitrariness at all. For I want to conclude via Stanley Fish's essay again. Owen Fiss feels the need for rules. Lieber senses a dangerous path if there are no rules. Brest worries about interpretive fantasylands. Lessig finds such rules by appealing to fidelity. But, for Fish, these anxieties concerning unregulated interpretation are needless. That, he argues, is simply because the specialized training one receives in law schools is more than adequate to ensure that interpretive rules are learned. To retrieve a point I myself made earlier, students at Harvard Law School are trained to *not* raise the interpretive problems that graduate students enrolled in literature degree programs, for their part, *are* trained to raise. Derrida and Lyotard figure on literary theory syllabi; they aren't figures, I suspect, who form part of the core curriculum of Harvard Law School.

Legal Studies, in short, is indeed a *Fachdisziplin*—it has its specialized discourses and its specialized modalities of interpretation. Thus, in view of the dreadful prospect that the Consti-

tution affords itself to such unbridled interpretation that the law itself is disabled, Fish says don't worry. Constitutional meaning can be debated, but the terms of that debate are quite rigorously fixed: all of the parties to that debate, Fish argues, at least agree on the importance of the Constitution, and only an alien (to invoke Lessig) would contest that importance. For Fish,

> readers and texts are never in a state of independence such that they would need to be 'disciplined' by some external rule. Since readers are already and always thinking within the norms, standards, criteria of evidence, purposes, and goals of a shared enterprise, the meanings available to them have been preselected by their professional training; they are thus never in the position of confronting a text that has not already been 'given' a meaning by the *interested* perceptions they have developed. More generally, whereas Fiss thinks that readers and texts are in need of constraints, I would say that they *are* structures of constraint. (Fish 1984: 1339)

It's the same point as above: professional training inculcates law students into a discipline. Those students thereby become proponents of the disciplinary rules they have acquired. Thus the fearful prospect of unregulated interpretation is appreciably lessened, if not curtailed outright. As Fish puts it, students educated in literature departments are trained to open up literary texts to multiple interpretive possibilities—it's routine to do so. But that isn't really what students at law schools are trained to do. So what were Lieber, Brest and Lessig actually worried about? Consider how few examples, if any, are given of the interpretive situation they fear, even if such a fear presumably motivated the effort to write the essays they wrote. Consider how analogies substitute for the provision of concrete examples and how those analogies work through such revealingly dramatic imagery. Consider, moreover, the assessment of Gadamerian hermeneutics as a species of solipsism and the reference, in Lessig, to the dazzling readings of deconstructionists.

Perhaps what prompted, or otherwise 'triggered' legal scholars in the latter decades of the 20th century was the vexing challenge of poststructuralism and deconstruction. Perhaps my enquiry is therefore lacking in contemporary relevance: the debates have moved on, Derrida is dead, and poststructuralism is no longer the intellectual paradigm in vogue.

But the interpretation of the Constitution shouldn't be subject to the whims of intellectual or hermeneutic fashion, and so it's not *passé* to ask the questions of poststructuralists and deconstructionists since it was exactly they who asked if any text can be immune to interpretive vagary. The answer, from the legal context, seems to be that the Constitution is and must be that immune text, for all that it can be moderately changed, updated, and even translated. Whether that means that the opposite scenario has to be countenanced, namely that the Constitution, like any text, is vulnerable to rule-free, arbitrary interpretation, depends on your willingness to actually provide examples of that sort of hermeneutic arbitrariness, or your tolerance for hyperbole. It does seem, though, that despite the anxieties concerning the lack of interpretive rules as they relate to the interpretation of the Constitution, despite the appeal to strictures of fidelity and the analogy with the practice of translation, perhaps, in the end, all of this was much ado about nothing. That's largely Fish's position. Except, of course, it's not much ado about nothing. And that's Kafka's lesson, and the reason I chose my title: questions concerning what the law is, about what it should and shouldn't be, are merely 'academic' until that day when suddenly, without warning and with an alarming sense of arbitrariness, the law comes looking for you.

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