Understanding Federalism's Text

Lawrence Lessig*

I am grateful for the careful and serious attention that Professors Clark, Maggs, and Merritt have given to my article *Translating Federalism: United States v Lopez* ("*Translating Federalism*").[1] There is much in their criticisms that I agree with and much, in the end, that I will acknowledge. But I want to begin with a point that they all let pass too quickly—a point that is central to the argument that I am making, though a point that I obviously have not made central enough. This is the idea of "utterability"—of what can be said, by whom and when. A theory of interpretive fidelity, I argue, must leave room for utterability; textualism, I claim, does not.

I sketch the idea of utterability in the first part of this short essay; in the second, I link it to the comments from this Symposium.

I. Utterability

Consider the following text: "Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it."[2]

Most will recognize these to be the words of Thomas Jefferson. Most will recognize them from the Declaration of Independence. They are for us sacred—part of a sacred text, the stuff of the utterly utterable, still uttered today. They are the foundation of the Yale School of American sovereignty,[3] and the ordinary stuff of a constitutional law class anywhere. They are words that define who we are.

But consider the story of a young graduate of the University of Chicago Law School, George Anastaplo. In the early 1950s, seeking admission to the Illinois bar, Anastaplo was interviewed by the Illinois Supreme Court's Committee on Character and Fitness. He was asked to state the principles underlying the Constitution of the United States. Anastaplo listed separation of powers, and the fundamental principle that "government is constituted so as to secure certain inalienable rights."[4] He was asked to state more, and so he went on to say, "[a]nd, of course, whenever the particular government in power becomes destructive of these ends, it is the right of the people to alter or to abolish it and thereupon to establish a new government."[5]

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* Jack N. and Lillian R. Berkman Professor for Entrepreneurial Legal Studies, Harvard Law School. Thanks to Nerlyn Gonzales for extraordinary research and editorial assistance

1 Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 SUP. CT. REV. 125.

2 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

3 *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

4 In re Anastaplo, 366 U.S. 82, 99 (1961) (Black, J., dissenting).

5 *Id.*

With these few words, the life of this young graduate changed. Anastaplo of course was just thinking of the words of the Declaration, but the committee that considered Anastaplo's answer didn't have Jefferson in mind. They asked him to expand on his answer. He pointed them to the Founders.[6] They asked him about revolution—did he believe that revolution could be justified? He did; revolution could be justified.[7] Did he believe revolution by force could be justified? "Yes," he responded, as George Washington had done.[8] Did he believe that spying against an unjust government could be justified? "I think spies have been used in quite honorable causes," Anastaplo responded.[9] And then the following exchange occurred:

Q: Are you aware of the fact that the Department of Justice has a list of what are described as subversive organizations?

A: Yes.

Q: Have you ever seen that list?

A: Yes.

Q: Are you a member of any organization that is listed on the Attorney General's list . . . ?[10]

At this point one imagines (because the transcripts do not reveal) that there was a pause as this twenty-five-year-old kid contemplated the trap he was in.[11] Anastaplo faced two of the most respected members of the Chicago bar, one who would become a leader in Adlai Stevenson's campaign for president; he also faced a question that he easily could have answered—for no, Anastaplo was not, nor had he ever been, a subversive. But he was about to become one. Given the values of the American Republic and the ideals of the Bar, the question in Anastaplo's mind was irrelevant. So rather than answer, in a wonderfully Socratic fashion (Socratic now in two senses of that word), he asked a question. Said Anastaplo to the Commissioner: "Do you believe that is a legitimate question?"[12]

The commissioner did think the question legitimate, and he insisted on an answer. When none was forthcoming, the commissioner asked a subsequent question, no less insistently and no less (in Anastaplo's mind) irrelevant: "Are you a Communist?"[13]

Anastaplo, no communist, refused to answer. He was denied admission to the bar. Eleven years later, the Supreme Court of the United States—that liberal Warren Court so out of touch with the values of American society—upheld Anastaplo's exclusion. He was never admitted to the Illinois bar; for a time, he drove a cab to support his family. Though graduating at the top of

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6 *See id.* at 100 n.3 (mentioning Washington).

7 *See id.*

8 *See id.*

9 *See id.*

10 *Id.*

11 *See id.*

12 *Id.*

13 *See id.*

his class from the University of Chicago, he could find no employment there. Eventually he became (and still is) a professor at Loyola School of Law.[14]

This story is not just a story about McCarthyism, though of course McCarthyism is within the story. Nor is it only a story about the tragedy of a certain kind of idealism, though of course that idealism is its reality. For this story is also a story about "text," and in turn a story about "textualism." For here is a text—as sacred a text as one could find from within our tradition—that, at this time at least, had been rendered unutterable. *Normal* people couldn't say this sort of thing, its Jeffersonian pedigree notwithstanding. The context had *rendered* its meaning different. People and institutions, constrained by the need to be or appear normal had no choice but to recognize this change—a change in the social costs of saying certain things, given who was saying them and when. A change, that is, in the "utterable."

"Utterability" tracks this change in what can be said. It focuses the shift in the social costs of different texts. Contexts change, and such change renders the saying of the same thing different. Behavior then responds to this difference, or change—the behavior, that is, of those who must utter such vulnerable texts. For those who can, they might try to utter different texts. Or if they can, they might simply stand silent.

The reasons for such changes are many. They are not just reasons of weakness. *In re Anastaplo* was about weakness, but *In re Anastaplo* is not the only example.[15] Texts can be rendered unutterable because uttering them within a particular context would be "inappropriate," where what is appropriate is determined by a conception of an institutional role.[16] Texts can be rendered unutterable because uttering them has become indecent, where what is indecent is determined by the prevailing sentiments of the commu-

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14 *See* M.A. Stapleton, *Prof Who Took Costly Stance 45 Years Ago Sees Rewarding Dividend in Its Consequences,* CHI. DAILY L. BULL., Aug. 18, 1995, at 3.

15 The shift can go the other way as well—from the unutterable to the utterable. A favorite example comes from a Justice experienced in uttering the unutterable, one whose unutterables have a way of becoming quite utterable. In a section of an opinion that begins, "The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom[,]" Justice Antonin Scalia wrote the following only a decade ago:

> An independent counsel is selected, and the scope of his or her authority prescribed, by a panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration, or even to the particular individual who has been selected for this special treatment? . . . The independent counsel thus selected proceeds to assemble a staff. . . . In the nature of things [these are] lawyers who are willing to lay aside their current careers for an indeterminate amount of time, to take on a job that has no prospect of permanence and little prospect for promotion. One thing is certain, however: it involves investigation and perhaps prosecuting a particular individual. Can one imagine a less equitable manner of fulfilling the executive responsibility to investigate and prosecute? . . . Does this not invite what Justice Jackson described as "picking the man and then searching the law books . . . to pin some offense on him?"

Morrison v. Olson, 487 U.S. 654, 727, 729-30 (1988) (Scalia, J., dissenting). In just ten years, this unutterable—that the independent counsel is unconstitutional—has of course become quite fashionable.

16 A court, ready to release a judgment, upon discovering the case has been rendered moot, should not then utter the judgment.

nity.[17] Or text can be rendered unutterable because uttering them would be silly, where what is silly is determined by what we all know is true.[18] These shifts change the cost of saying what before was plainly sayable. The change may not be as extreme as the change that Anastaplo faced. But at the margin, the change will be felt, and institutions will respond.

My aim in *Translating Federalism* was to use this shift in the utterable to understand shifts in attitudes towards federalism, and in the end, to justify the shifts in doctrine that track these shifts in attitude. It was to describe a history of federalism that was a function, in part, of these interpretive constraints. That history, I argued, cycled between two modes of interpretation—one textualist, and the other "translation."[19] The challenge was to understand this cycling as responsive to the shifts in the utterable, yet as consistent with a practice that we might call faithful.[20]

In part, this cycling could be explained by an interpretive constraint that I called the "Frankfurter constraint."[21] I will explain that constraint more in a minute, but at its core is this notion of the utterable. The "Frankfurter constraint" refers, that is, to the ability of a court (an American court) to sustain a particular interpretation or reading of a constitutional text across different social and political contexts.

But though I argued that there were two modes of interpretation (textualist and translation), I spoke as if translation were the dominant mode, and I applied the "Frankfurter constraint" only to translations.[22] As I described it, in the ordinary case, courts struggled to find a reading of the original text that, in context, would preserve the text's original meaning—they struggled, that is, to translate, and translation was subject to this "Frankfurter constraint." The picture was of courts striving for fidelity, but forced at times to yield to a constraint that sacrificed fidelity.

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17 In 1872, for example, one could say:

> [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.

Bradwell v. State, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). Such a statement is certainly not utterable today.

18 In 1967, the most liberal Justice on the Supreme Court could say that "[homosexuals] are the products of . . . 'glandular dysfunction' . . . [that he] is one, who by some freak, is the product of an arrested development." Boutilier v. INS, 387 U.S. 118, 127 (1967) (Douglas, J., dissenting) (quoting, in part, Harold Henderson, *Psychopathic Constitution and Criminal Behaviour*, *in* MENTAL ABNORMALITY AND CRIME 105, 114 (L. Radzinowicz & J.W.C. Turner eds., 1944)). No one would say this today. *But see* Carl Rowan, *Beware of Politicians Quoting the Bible*, CHI. SUN-TIMES, June 20, 1998, at 20.

19 *See* Lessig, *supra* note 1, at 127-28.

20 The aim is to understand the history consistent with a principle of interpretive charity. This means finding a reading that makes the interpretive history the best it can be. The focus is not on a particular judge's or court's subjective state of mind. The question is only whether we can read their words and behavior in a way such that they make sense in context.

21 *See* Lessig, *supra* note 1, at 174.

22 *See id.* at 175-76.

Some saw this picture as both too heroic and too narrow.[23] Too heroic in its image of courts constantly struggling towards fidelity—struggling to find a translation that, in context, preserves meaning. Virtue or struggle, these critics rightly insist, is the exception, not the rule. Most of the time the Supreme Court simply does "what the text says," regardless of the relationship between what the text says and what the text originally meant. Rarely the Court might do more. Occasionally it might struggle to embrace a more complete conception of fidelity. But that is the exception, not the rule. The rule is a more ordinary truth—of a practice untroubled by original meaning and quite satisfied with simply doing what comes naturally.

The picture is too narrow in its understanding of fidelity. As Professor Clark convincingly argues, when the Court yields in the face of something like a "Frankfurter constraint," it may be yielding *fidelity to meaning* while preserving *fidelity to institutional role*.[24] The Court gives up one practice (translation), which aims at preserving a particular aspect of the Constitution's original meaning, because it holds onto another aspect of the Constitution's original meaning—namely, an aspect defining its institutional role. Its "retreat," then, is not necessarily a retreat from fidelity, but an advance (given the emerging contestation that yields what I then described as the "Frankfurter constraint") to a different kind of fidelity.

Both points are fair, and both strike me as right. But the answer to both, I suggest, is a more general understanding of constraint. The answer is to expand the domain in which utterability operates. In *Translating Federalism*, utterability was a limitation on the practice of translation. My aim in this essay is to extend its application to the domain of textualism, to suggest how utterability might limit readings of the text as well. As I argue in the section that follows, both textualism and translation are subject to constraints of utterability, and the cycling between the two can be explained by this more general notion of constraint.

II. Constraints of Utterability and Modes of Reading

Distinguish between two modes of interpretation: an ordinary and an extraordinary. In the ordinary mode, the interpreter is less focused on deep questions of fidelity. Instead, the interpreter is simply applying the text as the text seems "naturally" to read. This is what before I called a "textualist" mode; its defining feature is its untroubled nature. Courts simply read the text as they find it, without bothering over whether "how they find it" is the same as "what it originally meant."

Most of the time this textualism is sufficient. Most of the time there is a happy coincidence between what the text "says" and what people want it to

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23 *See* Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435 (1997); Abner S. Greene, *Discounting Accountability*, 65 FORDHAM L. REV. 1489 (1997); Sanford Levinson, *Translation: Who Needs It?*, 65 FORDHAM L. REV. 1457 (1997).

24 *See* Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1167-71 (1998).

say.[25] I mean *coincidence* because of course the text "on its own" doesn't carry an original meaning. Meaning is a function of both text and context, and contexts change. My claim that there is a connection between what the text says and what people want it to say is *not* a claim that there is a connection between what the text says and what it originally meant. More often than we notice, what the text "says" has little relation to what it originally meant. But most of the time this gap does not trouble us. Most of the time we simply go on as if there were no gap.

Sometimes, however, we don't. Sometimes this textualist mode is insufficient. Sometimes its application seems sufficiently inconsistent with interpretive fidelity, and sometimes this inconsistency matters. *Why* the gap matters at one time and not at another is a complicated question; its answer, I suggest, reveals a deep truth about interpretive fidelity. But put deep truth aside. The point is simply to note the change. Sometimes the textualist reading embarrasses. Sometimes its implications, in context, are unutterable. In these cases—where the plain text seems unutterable—utterability constrains the Court to find a different, and sometimes a more faithful, reading. It pushes the Court, that is, to an extraordinary mode of interpretation—the mode that before I called "translation."

In this account, utterability constrains interpretation in two ways. As I described in *Translating Federalism*, it constrains in the extraordinary mode of translation. But it also constrains in the ordinary mode as well. Ordinary readings, or plain readings, or readings of what the text "says" continue, as translation does, *subject to* a constraint of utterability. For just as a translation may, an ordinary or plain meaning may, in context, if for different reasons, become unutterable. Utterability explains a shift both from the extraordinary to the ordinary of interpretation, and from the ordinary mode to the extraordinary.

The advantage in this account is that it answers both the criticism about heroism and the criticism about narrowness. It allows that most of the time, fidelity talk stands at one side—that only in extraordinary moments does the Court engage the extraordinary mode, that in the balance, the Court's readings are quite ordinary, ordinarily following the "plain text."

But when institutional pressures demand it—when, for example, the infidelity of plain readings becomes clear—this account also suggests a way for the Court to do better. Better by shifting to an extraordinary mode to satisfy the sense that the plain reading leaves something out, or that the ordinary reading cannot be sustained.

Sometimes this shift from the ordinary to the extraordinary mode is a shift to a better fidelity—sometimes, but not always. For the pressures of utterability, as *In re Anastaplo* suggests, can be pressures against fidelity as well as pressures towards fidelity. And certainly our history offers plain examples of the Court yielding to these alternating pressures, regardless of its orientation.[26] But my aim is not to justify every reading that the Court has

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25 This textualism may also be sufficient because circumstances have not changed enough to draw this text into doubt.

26 *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (Japanese internment case).

given; my aim is not an account that explains everything.[27] My aim is only to explore one moving part in the account of why readings change. More particularly, it is to explore, following Clark's insight, shifts induced by utterability that are not necessarily shifts of infidelity.

The cycle that I have described then is a move from a textualist reading of the Constitution to something else, induced, I argue, by the growing unutterability of the textualist reading. This "something else" sometimes is a reading of translation—an effort to find a reading that, in context, preserves the original meaning—subject to the "Frankfurter constraint"—the requirement that a reading offer a rule that can be applied in context without "appearing political."[28] When the reading begins to appear political, the utterability of the translation weakens. And a response then is a retreat back to a textualist reading.

One way to understand this retreat to textualism is as a retreat from interpretive fidelity. For by hypothesis, these are cases where the Court believes that a translation best preserves original meaning, but where the institutional costs of sustaining such a translation have become too great. But as Clark argues, we might also understand this retreat as itself an instance of interpretive fidelity—not fidelity to a particular meaning, but fidelity to an institutional role. When an interpretation appears political, a deeper fidelity, Clark suggests, counsels avoiding that interpretation. The retreat from translation to textualism, then, can be understood as responsive to this other form of fidelity—not as giving in to infidelity, but as recognizing an alternative: fidelity to institutional role.

III. Applying the Model to the Story of Federalism

The history of federalism[29] follows just this pattern-cycling between translation and textualism in response to the different pressures of utterability. And although my aim here is not to repeat the account offered in *Translating Federalism*, I do want to explain enough to suggest how this expanded utterability constraint might matter, and to advert to some additional evidence that supports my reading.

For much of the late nineteenth century, judges read the power-granting clauses of the Constitution—the Commerce Clause, and, importantly, the Necessary and Proper Clause—just as Chief Justice Marshall had taught them to.[30] Marshall had prescribed a formula: Congress had power over objects either in, or affecting, interstate commerce.[31] For much of the late nine-

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27 *See* Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1838-39, 1847 (1997) (discussing the problems with theories of interpretation that are too ambitious in their scope).

28 *See* Lessig, *supra* note 1, at 174.

29 Here I am referring to only one half of the federalism balance—limits on federal power in the name of states' rights. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1502 (1994) (indicating that the other half of the federalism balance is limitation of state sovereignty where federal action is required).

30 *See* Forrest Revere Black, *The Commerce Clause and the New Deal*, 20 CORNELL L.Q. 169, 179 (1935).

31 *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

teenth century, because of an increasingly integrated national economy, the Court permitted an expansion of congressional reach; in each case the Court could see how the object being regulated was in, or affected, interstate commerce. This was reading in the ordinary sense—the Court followed the text, at least as tutored by Marshall, to the end of ever-increasing congressional power, apparently untroubled by the apparent consequence that all was being swept within Congress's legislative power.[32]

At some point, however, conscience got the better of them. At some point, an echo of a complaint raised by many began to overwhelm. With each step, the Court was permitting what seemed to be a faithful exercise of congressional power; but over time, these increments yielded a balance that was fundamentally different from the balance envisioned by the Framers. The utterability of the claim that simply following Marshall's model yielded a Constitution consistent with the Framers' vision faded. And thus, "the old Court" was born.[33] For after a number of misfires,[34] and for a shorter period than is often thought,[35] the Court shifted into what I have called an extraordinary mode of interpretation. The Court began to offer ways of reading the Constitution that were not consistent with its meaning in a modern context, but that were readings, the Court believed, consistent with the text as originally understood. It *translated* the original text into a modern, economically integrated context and restored limits on federal authority.

The Court achieved this translation through a familiar set of tools.[36] In each case, the Court "found" implied limits on federal power that it said best instantiated the Framers' design. In each case, it invoked an original understanding about balance to defeat an otherwise textually unlimited grant of federal authority. The Court ignored the original understanding of the Necessary and Proper Clause;[37] it imposed a purpose constraint on plain grants of federal power;[38] it invoked its understandings of original balances to defeat what it perceived to be imbalances between federal and state power; and it justified this activism in the name of the Founders' design.[39]

This was translation. It was grounded in a conception of interpretive fidelity, and it achieved this fidelity through readings of the Constitution that

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32 *See* Lessig, *supra* note 1, at 141-42.

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

34 *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895), is the first apparent limit on federal commerce power, but it is a mistake to read too much into the opinion. The case is an interpretation of the scope of criminal authority under the Sherman Act. As the Sherman Act has no "Necessary and Proper Clause," it is not properly read as a measure of Congress's legislative power generally. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT (1888-1986) at 23 (1990); Augustine L. Humes, *The Power of Congress Over Combinations Affecting Interstate Commerce,* 17 HARV. L. REV. 83, 99 (1903).

35 The period begins with *Hammer v. Dagenhart*, 247 U.S. 251 (1918), which held unconstitutional a federal law regulating the number of hours that children were permitted to work in factories, and extends for only twenty years thereafter.

36 *See* Lessig, *supra* note 1, at 152-53.

37 *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

38 *See Hammer,* 247 U.S. at 276 ("The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the states.").

39 *See* Lessig, *supra* note 1, at 153.

were certainly not plain readings of the constitutional text. Or at least they were not plain readings of the text as it originally was read.[40] This was interpretation in an extraordinary mode, and it excited both a political and a judicial response. Over time, it established a claim for reading the Constitution according to a framing design, whether or not this framing design was expressed anymore by the framing text.

In time, and in a well known way, this practice of translation became too costly.[41] For reasons that I will not rehearse again here, the practice became difficult to sustain. Not only were the issues within this struggle difficult, but they were also issues that were increasingly seen as political. In ways that are beyond the scope of this essay, the context was changing to render every act of "translation" political.[42] The practice became vulnerable to the "Frankfurter constraint"—any rule had to be capable of a consistent application that would not appear in context to be guided by extralegal considerations. Over time, and as President Roosevelt succeeded in politicizing the Court's readings, the utterability of the Court's translations diminished. The Court was forced to retreat back to a textualist account.

In *Translating Federalism*, I sketched some evidence that this was indeed the Court's self-understanding. But the evidence was indirect. Professor Barry Cushman's most recent work provides a much cleaner account.[43]

As part of a general and quite powerful reinterpretation of the changes of the New Deal, Cushman has uncovered surprisingly direct evidence of the shift that I am describing, in the evolution of the Court's opinion in *Wickard v. Filburn*.[44] The question in *Wickard* was whether Congress had the power to regulate "home-grown wheat," as a means of regulating interstate commerce.[45] Roscoe Filburn had grown more wheat than his Agricultural Adjustment Act allotment, so that he would have more wheat for his family's own use. When he was fined under the Act, he challenged Congress's power to reach his activity.

The opinion that eventually resulted in the case is quite extreme. The Court upheld Congress's power to regulate home-grown wheat. Though decidedly not "commerce," nor "interstate," the Court held nonetheless that this production, when aggregated with similar production by other wheat farmers, would affect interstate commerce. Congress therefore could reach this activity, principles of "dual federalism" notwithstanding.

Most consider *Wickard* extreme among the New Deal cases, matched perhaps by *United States v. Darby*,[46] decided the year before. But the Court understood the case was extreme. As Cushman describes, the Court initially voted to remand the case to the district court for further findings to establish that in fact there was a significant effect on interstate commerce. Justice

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40 At least not as read by Chief Justice Marshall. *See id.* at 129 n.11.

41 *See id.* at 154 (discussing the reasons why translation became too costly too sustain).

42 *See id.* at 176-80.

43 *See* CUSHMAN, *supra* note 33.

44 317 U.S. 111 (1942).

45 *See id.* at 113-14.

46 312 U.S. 100 (1941) (prohibiting shipment in interstate commerce of any goods produced in violation of the Fair Labor Standards Act of 1938).

Jackson, drafting two opinions to this effect, reasoned that unless a substantial effect were shown, then anything could be claimed to be within interstate commerce, or to affect interstate commerce.

But after more thought, the Court decided instead to hold the case for reargument. And after struggling with the case over the summer, Jackson came to the conclusion that no real test could be found to limit Congress's commerce power. Once the Court had admitted economic facts into its calculus of federal commerce power, Jackson concluded, legal tests had proven to be of "no real value." As Cushman explains:

> The history of failure to frame an adequate standard caused Jackson to despair of the enterprise. Like [Justices] Cardozo and Hughes, he recognized the complexity of interaction in an integrated economy; unlike them, he saw no hope of formulating any meaningful criterion for distinguishing "local" from "national" economic activity. "In such a state of affairs," he remarked, "the determination of the limit is not a matter of legal principle, but of personal opinion; not one of constitutional law, but one of economic policy."[47]

Cushman is describing the "Frankfurter constraint." Jackson clearly saw that the result in *Wickard* could not be understood as consistent with the Framers' design of a limited federalism. But he also saw that in this context, there was no way to institutionalize a practice of limiting Congress's exercise of its power. So he fell back on a rule that would not restrain Congress directly, but that relied instead on Congress to restrain itself. This rule followed from an understanding of the Court's capacity and of its interpretive role. In the sense suggested by Professor Clark, perhaps the rule followed from a deeper understanding of the Court's institutional role, given the meaning of the Court's restrictions within that interpretive context.

Note what follows, however, from this understanding of the New Deal shift. If what context can give, context can take away, then what context can take away, context can give. Tools that at one time were impossible can become possible later on. The inability to sustain the extraordinary mode of reading—translation—can at a different time disappear. The will to sustain less than plain readings of the constitutional text, in the name of fidelity to the Framers' design, can return. And when it returns, it can lift constraints that before forced retreat. A translation that was rendered unutterable can, in a different context, be rendered utterable.

This process, I suggest, is just what we are seeing today. In a revival that began in the mid-1970s, the Court has offered a set of readings of the scope of federal power that are not consistent with the Constitution's plain text, yet that are directed at finding ways to re-craft or restrict federal power in the name of a framing design. Translation, in the context of federalism, is back. It has returned through the practice of implying limits on federal power, in the name of this founding design, but it has done so differently. The limits that we now are seeing—limits that I have elsewhere called "making it up"[48]—are for the most part more sophisticated executions, much smarter in

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47 CUSHMAN, *supra* note 33, at 217 (citations omitted).

48 *See* Lessig, *supra* note 1, at 213.

their design. Not universally smart, but smarter. The Court's success comes in cases where it can construct a rule that can be easily and predictably administered; its failures come in cases where it constructs a rule that cannot help but revive the political questions originally avoided. The enterprise has been successful where it has constructed useable tools, less successful when it has used tools that are vulnerable to the politics of an interpretive context.

How long this practice can be sustained is an open question. In part it turns on factors external to the Court; in part it turns on the Court's own craft. If the Court can find limited and sustainable rules for restricting federal power, then its will to restore a federalist balance may be quite stable. It cannot move too far or too quickly, and it cannot move in a way that makes its actions seem "mere politics." But its recent cases have not been that, and they have not excited the response that the last sustained round of translation (the Warren Court) excited. For now, the charge that the Court is just "making it up" is a charge only associated with translation on the political left—a convenient understanding for translators on the right, but not a necessary understanding of translation, or of our constitutional history.

IV. Responses

The three commentators each fairly and carefully engage my account and each accept it to some degree, though obviously not to the same degree. They all eventually resist some aspect of my point about utterability, but that is not to say that they all agree up to the same point. Each steps off this train at differing points along the way. Professor Maggs is the first off, and so I will consider his arguments first.

Maggs has both a positive and a normative criticism of my argument. The positive is that, contrary to my claim, the Supreme Court in *United States v. Lopez*[49] did not engage in "translation." Its reading, Maggs argues, was simple textualism. The normative claim is more fundamental. It is that the Court should avoid translation. It should, as Maggs puts it, "read the [Commerce] Clause according to the text's original meaning and should not attempt to translate it."[50]

The first point is not as fundamental as the second, and so let me consider the second first.

There's a confusion here that is basic to the argument. As the text I just quoted suggests, Maggs writes as if there is a distinction between "original meaning" and "translation." But in the sense that I offer the term, if a translation is a good translation, then it just *is* the "original meaning." If the original text is X and you offer the translation Y, then Y is a "good translation" of X if the meaning of Y is just the same as the meaning of X. The text may be different, its application in context may be different, but the meaning must be the same.

No doubt that with a normative text such as a constitution, translation may yield an application that is different from the application originally ex-

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49 514 U.S. 549 (1995).

50 Gregory E. Maggs, *Translating Federalism: A Textualist Reaction*, 66 GEO. WASH. L. REV. 1198, 1199 (1998).

pected or understood. My claim is not that translations preserve original applications, or understandings, or expectations. But applications, or understandings, or expectations do not exhaust the concept of meaning.[51] Meaning is a function of a text in context, and translation simply works to assure that context doesn't render the meaning different.

Maggs seems to concede this point—at places, if briefly. He acknowledges my claim that "translation" is within the class of interpretive techniques focused on "fidelity."[52] (In *Translating Federalism*, I called it a kind of "originalism."[53]) But he counsels nonetheless that we need not "update" to preserve original meaning, linking translation to "updating."[54]

But again, "update" is ambiguous. In one sense, one can "update" to displace original values or judgments no longer desired. The Constitution may have been ratified by "proud men" who wanted to resist the policing power of the state; we may have become more passive. An updater in this sense would find a way to displace the originally constitutionalized values of liberty in the name of the modern value of bovinity.[55]

But that is not the sense in which I would speak of "updating." I would confess guilt to a Justice Black-like charge—that I am arguing that we should keep the Constitution "in tune with the times."[56] But "in tune" in just the sense that a piano is kept "in tune," given the changing temperatures in a concert hall. The aim is to assure that the meaning in the current context is the meaning originally penned; that changes in context—again like changes in the tension of piano wires due to differing temperatures—do not render the original document meaningless. To keep the Constitution in tune with the times is to read it in a way that preserves original meaning, just as we might say that to tune a piano is to preserve the original relationship among the notes on a piano to assure that the music is the same. And just as the sanction to tune is not the sanction to add a few notes to a Mozart sonata, so too the sanction to translate is not the sanction to add a few values that the Framers failed to embrace.

Thus, Maggs is correct that "the Supreme Court . . . does not have to update constitutional provisions through translation to deal with problems caused by the passage of time" if by "problems" he means our coming to hold values different from the values of the Framers.[57] For of course, in such a context, "Congress and the states may amend [the Constitution] under the procedures stated in Article V."[58] But I am not describing a practice to re-

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51 *See* ANTONIN SCALIA ET AL., A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

52 *See* Maggs, *supra* note 50, at 1200-01.

53 *See* Lessig, *supra* note 1, at 127.

54 *See* Maggs, *supra* note 50, at 1203-04.

55 *Cf.* Minnesota v. Dickerson, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) ("I frankly doubt whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on the mere *suspicion* of being armed and dangerous, to [the] indignity of [a physical search].").

56 *See, e.g.*, Katz v. United States, 389 U.S. 347, 373 (1967) (Black, J., dissenting) (rejecting the Court's role of bringing the Constitution into "harmony with the times").

57 Maggs, *supra* note 50, at 1203.

58 *Id.* at 1204.

flect changes in constitutional value. I am not describing the case where we believe differently from how the Framers might have thought. I am describing updating not in the sense of *changing meaning*, but in the sense of preserving original meaning. Thus, I do not "address the alternative of amending the Constitution,"[59] because amending is not what translation is about.[60] Translation is about steeling the Constitution *against* amendments—not the amendments of Article V, but rather the amendments of context.

Maggs's first point is answered more simply. He argues that the Court in *Lopez* was simply applying textualist methods to the conclusion that Congress's commerce power did not reach so far as to permit the regulation of firearms near schools.[61] He bases his conclusion on a plain reading, in a sense, of the Court's opinion. The Court said that it was interpreting the Commerce Clause, it read the Clause not to reach as far as prior courts had, and based its reading on the text's meaning. So why not, Maggs asks, simply conclude that this textualism is the product of a textualist opinion?

The problem, as Maggs concedes, is that as a textualist opinion, *Lopez* is incomplete. As I argue, and as Maggs agrees,[62] the Court failed even to consider the application of the Necessary and Proper Clause (another bit of "text" in the Constitution) to the case at hand. This is no slight omission. It is like saying you have locked the house when all you have done is locked the front door. Any constitutional power analysis must always consider the full range of power-granting clauses. This the *Lopez* court did not do. But this, Maggs argues, "does not indicate that the Court was engaged in translation"; rather, "it merely shows that the Court did not perform as thorough a textual analysis as it might have."[63]

We should distinguish between two questions. The first asks what mode of interpretation—textualist or translation—best explains or justifies a particular outcome. Is the reading, in other words, best justified as a translation, or is it consistent with a textualist reading? The second question asks how that reading is then executed or explained. What, in other words, is its rhetoric? I completely concede that the rhetoric of *Lopez* is textualist. That indeed is (relative to *National League of Cities v. Usery*,[64] for example) one of its many virtues. But it is the first question—how to explain or justify the opinion—that I am addressing when I say that *Lopez* is a translation. And I say that because viewing the opinion as a translation avoids attributing to the Court a

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59 *Id.*

60 It turns out to be more complex than this. *See* Sanford Levinson, *Accounting for Constitutional Change*, 8 CONST. COMMENTARY 409 (1991) (discussing the difficulty inherent in the notion of a "living constitution").

61 *See* Maggs, *supra* note 50, at 1201-03.

62 *See id.* at 1203.

63 *Id.*

64 426 U.S. 833 (1976). In *National League*, the Court adopted a test that made federal power turn on the nature of the activity regulated. Where the federal government regulated within traditional domains of state function, *National League* invalidated such laws; where it regulated in an area not traditionally within a domain of state function, the regulation was permissible. *See id.* at 852. The problem with this test, however, comes in its execution. For the category of "traditional" is not easily drawn, and over time, the Court found the line more and more difficult to sustain.

1L's mistake. Or put another way, if *Lopez* is a textualist opinion, then it is a disqualifyingly poor textualist opinion. But if it is instead a translation, then, although I might have quibbles about its technique, it does not suffer from this fundamental error in execution. It may dissemble, it may mislead, but at least it doesn't blunder.

My disagreements with Professor Clark are less pronounced, if they are disagreements of substance at all. Indeed, Clark's work, both here and in the context of federal common law,[65] evinces the very same concern that I am addressing, and as I now see, his conception of fidelity in both cases is richer and more complete than my own.[66] The differences that may remain, however, can be isolated if we first draw two distinctions: (1) means from ends, and (2) conservative from non-conservative.

The first distinction draws a line between the purpose of an interpretation and the means used to effect it. It is the same distinction that I just drew in response to Maggs—between what a reading is, and what rhetoric it adopts. The second distinction further divides means and ends. A "conservative" end means an interpretation focused on fidelity. A "non-conservative" end is not aimed at preserving original meaning. (Maggs identifies Professor Michael J. Klarman as an exemplar of this approach.[67]) A "conservative" means, on the other hand, is a reading that tracks the text fairly closely, while a "non-conservative" means is one that is not constrained by the text. Putting the two dimensions together, we get a matrix like this:

	Conservative	Non-Conservative
Means	[1]	[2]
Ends	[4]	[3]

As Maggs explains, we are all within box [4]. All four of us are playing this game of interpretive fidelity, and interpretive fidelity is fundamentally a conservative project. Not *politically* conservative—I am not talking about Republicans and Democrats. I mean that its interpretive end is conservative or preservationist.

My disagreement with Clark is in the difference between boxes [1] and [2]. I argue that at times, the only way to reach box [4] is to adopt means from box [2]. Clark, to the contrary, insists that we stay within box [1]. His argument is not grounded in some point about ontology—his claim is not that the only way to get to box [4] is through box [1]. His argument instead is in part principle and in part strategy.

The principle part (and perhaps the principal part as well) is that non-conservative means are inconsistent with the judicial role—that the "making it up" that I promote is simply not permitted. Regardless that the end is fidelity, courts may not use non-conservative means to that end.[68]

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65 *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 114 U. PA. L. REV. 1245 (1996).

66 *See supra* note 25 and accompanying text.

67 *See* Maggs, *supra* note 50, at 1200 (citing Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997)). There have been many others in the past as well.

68 *See* Clark, *supra* note 25, at 1167-71.

Clark's strategic point is very different. It is that, whether permissible or not, box [2] readings will be self-defeating—that the readings themselves will run afoul of the "Frankfurter constraint," or, more generally, that they will suffer the constraint of utterability. They will, in other words, come to seem political, and therefore undercut the very enterprise of fidelity in which the Court is engaged. Clark argues that as a matter of prudence, courts should therefore resist box [2] moves.[69]

I agree that sometimes box [2] moves will be self-defeating. I agree, in other words, that sometimes utterability will constrain box [2] readings. But I don't believe that there is any reason that utterability must constrain; and indeed, no reason that it must constrain any more or less than it constrains box [1]. Any means, whether conservative or not, can appear political. Whether it will is an important question, but always a question nonetheless. Judgments of prudence must guide, but they guide as a *judgment*, not as a rule. Whether something "appears" political will not be determined by a simple formal relation.

I do not agree, however, with Clark's first point—that as a matter of principle, courts must adopt conservative means. I readily concede, as Clark argues, that translation as I describe it would "shift[ ] significant power to the federal judiciary at the expense of the political branches."[70] This is undoubtedly right. And if one adds to that argument one recently advanced by the philosopher Bernard Williams—that the Court engaging these issues of value across time disables the same by the political branches[71]—then one does have a strong argument for resisting just this sort of translation. And finally, I confess an increasing attraction to the argument that in the long run, it is better that political values be re-created rather than translated. I am the sort who believes that the best understanding of equality would yield something like *Roe v. Wade*[72] and the rejection of *Bowers v. Hardwick*;[73] but I also believe that it would be best for the political system to discover that on its own, without the help of courts, or at least without having to rely upon courts alone.

These concessions notwithstanding, our history is replete with examples of box [2] moves to a box [4] end, beginning, I suggest, with *Marbury v. Madison*[74] itself. As a positive matter, we cannot understand our interpretive past without fitting many cases into box [2], and some of those into box [2] for a box [4] end. As a normative matter, while I do not agree that we should, I would only insist that if we do restrict ourselves to box [1] means, we not also pretend that what we are doing (or what the Court is doing) is something called "fidelity to the original meaning of the Constitution." What the Court is doing then is just letting the text lead where the text might lead, which emphatically is not necessarily to the end of interpretive fidelity. It

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69 *See id.* at 1166-67.

70 *Id.* at 1170.

71 *See* Bernard Williams, *The Relations of Philosophy to the Professions and Public Life* (unpublished manuscript on file with author).

72 410 U.S. 113 (1973).

73 478 U.S. 186 (1986).

74 5 U.S. (1 Cranch) 137 (1803).

might well be a deeper fidelity, as Clark argues—a fidelity to institutional roles. That's fine, but let's at least confess that the set of values and constraints that the text-based Constitution yields in 1998 is different from the set of values and constraints the same text would have yielded in 1791, or 1868. And then let us then get on to justifying that difference in terms of institutional role.

But I do not believe that Clark really believes that we are bound to box [1]. He waivers back and forth between this extreme deference to text and a more active enterprise that looks to me much like translation. For example, of *Lopez* he says that perhaps the accommodation that changing contexts require is simply a narrower reading of the Necessary and Proper Clause[75]—that Marshall's expansive reading in 1819 could well be too expansive in 1998. A better reading now, he argues, would be more restrained.

A number of scholars have advanced the very same argument, though none with the candor that Clark evinces here.[76] Perhaps this move would work; my intuition is that it would not, but obviously my intuition is just that. In any case, the accommodation is something more than mere textualism; it is responsive to context—tuning the reading to the context.[77]

But the more fundamental example is Clark's endorsement of *Printz*.[78] And here I really do think we need a correction of candor. For look—*Printz* is plainly not a textualist opinion; Clark concedes as much, as does the Court. No text or clear evidence from the original context directed the Court to strike down the statute in question in *Printz*. Under ordinary procedures, this lack of text, or clear evidence from the original context, would have been decisive. As Justice Scalia explained in *Harmelin v. Michigan*,[79] if the Constitution does not "affirmatively" contain a restriction on Congress's power, then the matter is left to the legislature.

The Court in *Printz*, however, did not leave the statute standing. The Court did more than the ordinary reading would suggest. It felt compelled, or felt it had permission, to read beyond the text, standing on uncertain evidence from the original context, to embrace an understanding of the original meaning sufficient to give it authority to *construct* limitations on Congress's power that nowhere stand in the text, nor are clearly stated in the original context. This is the anticommandeering principle.[80] An increasing constraint of utterability has yielded a willingness in recent years to find ways to restrict more than what a strict reading of the text requires when it comes to con-

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75 *See* Clark, *supra* note 25, at 1174-78.

76 *See, e.g.*, Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 333 (1993).

77 Clark also argues that the Court should restrict the negative Commerce Clause. My sense is that that is already happening as signaled, for example, in *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir.) (upholding a state law prohibiting sale of spray paint despite challenge that it violated the Commerce Clause), *cert. denied*, 515 U.S. 1143 (1995).

78 Printz v. United States, 117 S. Ct. 2365 (1997).

79 501 U.S. 957, 976 n.6 (1991).

80 *See Printz*, 117 S. Ct. at 2376-79.

straining Congress's power—to find ways, that is, to imply limitations on what the text says in the name of interpretive fidelity.[81]

This is just translation, or better, in the context of federalism, translation all over again. Clark says it is an appeal to "text [read] in light of history and structure,"[82] but I do not understand that mantra to mean anything other than original meaning. *Printz* justifies its constructed (I would say "made up") constraints on Congress's power in the name of original meaning. That's fine; it is a form of activism, guided by a claim of interpretive fidelity. It is a beautiful example of translation, but still plainly, I insist, an example that uses box [2] means to a box [4] end.

Now many have criticized Justice Scalia's opinion in *Printz*.[83] They have criticized it as inconsistent with his opinions in other similar cases. But these criticisms come, I suggest, from a failure to distinguish—as I did when addressing Professor Maggs's point—justification from rhetoric. Professor Evan Caminker, for example, describes the opinion as "formalist" and then proceeds to trash the formalism that the opinion displays.[84] But although I agree that the rhetoric of *Printz* is formalist, I do not agree that its source or justification is formalism. Justice Scalia is not so narrow as to miss that there are substantive judgments guiding the outcome one way or the other; I cannot believe that he did not see that there was more than one way to go. Rather, in my reading of the opinion, he is yielding to a set of substantive judgments—namely, the judgments that he attributes to the Framers as expressed in their framing design. Yielding to that design, he uses the case to continue its campaign to reestablish federalist limits on Congress's power. If that use is justified, it is only justified as translation. And once we get over the nature of the justification (translation or textualist), then the question about formalism is just whether the rhetoric of the opinion will protect it against the constraints of utterability. Whether, in other words, the opinion will satisfy the "Frankfurter constraint."

Here, it seems to me that it will, for here formalism helps. Scalia's opinion is shot through with a sensitivity to the difficulty inherent in drawing lines that cannot be sustained. Justice Stevens argued in dissent that there was a difference between commandeering state legislatures and commandeering state executives, because there is a distinction between making and enforcing

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81 *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 97 (1996); New York v. United States, 505 U.S. 144, 161-66 (1992); Gregory v. Ashcroft, 501 U.S. 452, 457-61 (1991); *see also* Steven G. Calabresi, *The Crisis in Constitutional Theory*, 83 VA. L. REV. 247, 260 (1997) (book review).

82 *See* Clark, *supra* note 25, at 1195.

83 *See* Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1103-06 (1997); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 67-68 (1997); *The Supreme Court, 1996 Term—Leading Cases*, 111 HARV. L. REV. 207, 207 (1997); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 817 (1998); Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized as Part of the Constitution? Voices from the Courts*, 1998 BYU L. REV. 127, 129-30.

84 Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 200-05.

law.[85] Obviously there is. But Scalia was careful not to draw a line that would hang upon the Court being able to sustain the distinction. As he says, in his emphatically realist way, a clean line between "'making' law and merely 'enforcing' it, between 'policymaking' and mere 'implementation'"[86] cannot be sustained. And because the distinction cannot be sustained, he avoids a rule that makes anything turn upon it. He opts instead for a rule that in this context—a post-realist legal culture—can better sustain itself.

Of course one might quibble with the rule Scalia selects. One might well wonder, as Caminker does, whether Scalia has really avoided a series of hard interpretive questions.[87] And if Caminker is right, then this rule against commandeering will be subject to the increasing pressure of litigation; and if that pressure yields results that seem increasingly inconsistent, then it may well be that the Court will abandon the rule.

But now we are operating at the level of pragmatics, not nature. We are arguing about useable tools, not the essence of the opinion. Although I completely endorse the enterprise of selecting useable tools, I reject the argument that these tools were in a sense already there. *Printz* constructs these tools in the name of fidelity to a framing design. They are made, not found. And as with any constructed tool, there are two separate questions that we should ask. First, what is the sanction for this construction? (Here translation.) And second, are the tools that one constructed useful or efficient to their intended end?

Professor Merritt disagrees with my claim that the principle against commandeering is constructed.[88] Or at least she disagrees with the claim that it is wholly made up—unconnected to our constitutional past. In a series of powerful and historically rich articles, Merritt has established quite convincingly that the "roots" of the anticommandeering principle lie in the Republican Guarantee Clause.[89]

But I do not think we have a significant disagreement. Indeed, I find Merritt's approach to this question to be quite close to my own. I concede that we might find the roots of anticommandeering in the history of the Republican Guarantee Clause. But roots, by their nature, are hidden. It may well be that the original understanding of the Republican Guarantee Clause would have suggested to the ordinary reader just the sort of limitation that the anticommandeering principle imposes. But that the Clause *would have* suggested this to the Framers does not mean that it would suggest the same to us. Merritt has documented the tradition of the Republican Guarantee Clause, but its tradition is not its present meaning. If the anticommandeering

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85 *See Printz*, 117 S. Ct. at 2387-2401 (Stevens, J., dissenting).

86 *Id.* at 2380.

87 *See* Caminker, *supra* note 85, at 233-48.

88 *See* Deborah Jones Merritt, *The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems*, 66 GEO. WASH. L. REV. 1206, 1207 (1998).

89 *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994).

principle did not already resonate with this legal culture for independent reasons, I do not believe the Court could succeed in asserting the Republican Guarantee Clause against modern federal legislation. Changing contexts have rendered the clause and text empty, and an empty text cannot add credible support to an argument for resisting Congress's power.

The thrust of Merritt's beautifully powerful essay, however, is broader than this claim about the Republican Guarantee Clause. It is that we consider a more general principle behind the commerce power—a principle that others have also argued should limit the scope of Congress's power. This is the understanding of congressional power that extends power only where the states are unable to legislate independently.[90] As she puts it, "[t]he powers enumerated in Article I, Section 8 have a unifying theme: they all concern subjects that the states cannot regulate effectively by themselves."[91]

As a matter of first principles, I agree with Merritt's view of what the power clauses were meant to achieve. And in a first best world, I would also agree that a Court focused on fidelity should rightly restrict the scope of Congress's power to just those powers that meet her test. An ideal jurisprudence would find a way to narrow Congress's power to just this "theme." Plainly the Court has been "too timid"[92] to effect this limitation.

But the trouble again is in the execution. For the determination whether legislation is necessary at the federal level first requires a determination of what legislation is "proper." This of course is no simple matter. What is proper depends upon one's conception of legislative purpose; and if purposes differ, then propriety on one side would not translate into propriety on the other.

Even if we could agree on what legislation is proper, however, there would be a separate question about whether a particular piece of legislation falls within the proper scope of federal regulation. This again is a question of judgment, and this again would test the Court's ability to draw a consistent line.

Thus, neither question can avoid complex judgments, and for us, these complex judgments in both cases cannot help but lead the Court to conflicting decisions. Over time, these conflicting decisions cannot help but suggest that something other than legal judgment is on the line. The conflict, that is, cannot help but raise just the sort of troubles that the "Frankfurter constraint" describes. Once again, this would restrict the Court's ability to enforce its judgments about which powers are faithful to a founding design. As Merritt puts the very same point:

> If the Court announced that the register of congressional powers in Section 8 is outdated, that it was going to translate those powers to the twentieth . . . century, and that it would uphold congressional

90 Merritt cites Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 593 (1995), and Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997). *See* Merritt, *supra* note 88, at 1210 n.14. The point is also suggested by Forrest Revere Black, *The Commerce Clause and the New Deal*, 20 CORNELL L.Q. 169, 183 (1935).

91 Merritt, *supra* note 88, at 1210.

92 *Id.* at 1216.

> legislation whenever Congress reasonably concluded that the states could not reach the same result effectively, then the Court's actions would look too political.[93]

I say this while acknowledging that I believe Merritt is right about an ideal-limiting norm for Congress's power. That is, I agree that her limiting norm would produce a sensible balance of federal and state power, consistent with the Framers' design. But the design of a rule is about *designing* a rule—a rule that can function within a given institution, or a rule that has an institution that can enforce it. We cannot take these institutions for granted; their capacity is neither given, nor perpetual. What is enforceable at one time is not enforceable at another, and any understanding of interpretive fidelity must be able to account for such shifts.

The powerful point of Merritt's argument, however, concedes all this. She acknowledges, more completely than the other commentators, utterability's place. But in offering a better model, and acknowledging the Court's inability to execute that model, Merritt highlights the "costs" that this "disingenuous approach" yields.[94] Constraints on utterability mean the Court cannot ask meaningful questions about the basis of congressional power;[95] it cannot reject exercises of congressional power where there "really is no need for national regulation";[96] and perhaps most importantly, the Court cannot "articulate national values other than commerce"[97]—as if we really protect against domestic violence because it hurts national productivity, or as if we really ban discrimination because we want to support the sale of catsup.

These are powerful criticisms of where we are. They suggest good reasons why we should try to move from where we are to somewhere else—good reasons perhaps to imagine and to reconstruct a legal culture that might make possible the drawing of the distinctions that Merritt would advance. If it is a way of reasoning, or a way of speaking, that limits the Court's ability to sustain a constitutional balance, Merritt's questions push us to think about remaking our way of speaking. Or better, about remaking the conditions that limit our way of speaking. Or finally, about remaking the present constraints on utterability.

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93 *Id.* at 1213.

94 *See id.*

95 *See id.*

96 *Id.* at 1214.

97 *Id.*

PANEL IV

TEXTUALISM AND THE CIVIL WAR AMENDMENTS

Moderator
Stephen Saltzburg

Principal Paper

Commentaries