

# Fidelity Without Translation

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CHIEF JUSTICE MARSHALL once admonished us that “We must never forget it is a *constitution* we are expounding.”<sup>1</sup> So true, but just what are we supposed to remember? Evidently, that we are dealing with a document designed for the ages, which in turn needs an exposition that lasts at least as long. Fine. But that wholesome bromide only stresses the importance of getting things right. It does not supply a right answer to questions that could last an age.

This obvious fixation with durability could quickly lead us down one of two paths. The first path leads us to believe that governments can endure only if they maintain fidelity to their original design, and resist temptation in old age to compromise the redoubtable principles of youth. Our natural law tradition has long stressed the immutable nature of first principles, which includes some that no one wishes to change today: the liberty of all per-

sons from the chains of slavery; the importance of free and independent thought and debate, and perhaps even the importance of private property and free trade. Walter Berns once said (I paraphrase) that “the trick is to keep the times in tune with the Constitution, not the Constitution in tune with the times.” In a word, no evolution please.

The second path veers off in the opposite direction: it claims that the first path inevitably leads us to a rigid constitution whose resilience and utility necessarily depreciates over time. The world moves forward; new technologies are introduced; our values and attitudes shift with mass immigration and the temper of the time. Any constitution that hews blindly to its original conceptions, that slavishly follows all of its original commands, will be a derelict lost upon the sea: out of touch with its times, and a tribute to its own irrelevance. Our Constitution illustrates that general truth. In-

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1 *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

terpretation therefore must avoid this peril just as it must avoid the peril of ossification. Now evolution is what we have to seek, not what we seek to avoid. So now we have our dilemma. Sound constitutional interpretation must be consistent in its statement of principle; yet it must also adapt to the needs and exigencies of the time. How to travel down both paths simultaneously?

Fidelity is offered as the tool that beats the dilemma. That fidelity to the Constitution lies not in respect for its narrowly drawn commands, but in an alert sensitivity to the values that these commands express. We are more faithful to the original intention and design if we alter it carefully to meet the exigencies of new times. Championed most ardently by Lawrence Lessig, our new goal is to achieve fidelity in translation, the title of his notable and influential essay on the subject.<sup>2</sup> But translation trope fails. We do not need any special help in translating from English to English, as we might in translating from French to English; we do not need to update early or middle English. Something is always lost in translation, and the greatest fidelity to an original document comes without translation, rather than through it. Indeed for all the emphasis on the importance of translation, Lessig never translates. We never are told that this clause of the Constitution has this rendering today. What we get instead are countless reasons for the necessity of translation, but no translations. It is as though we are told of the manifold ways to translate from French to En-

glish but see no English rendition of a Moliere play or a Camus novel.

To cast doubt on the translation metaphor does not strand us in a world bereft of interpretation. In dealing with a constitutional provision, we have to understand what its words mean, and how they apply to the myriad of government actions that the Constitution is said either to forbid or authorize. In so doing we should recognize that even as the semantic meaning of given terms remains constant and unchanged, the class of objects to which they apply could change, and could conceivably expand to matters that were beyond all human imagination in 1787. Yet the measure of flexibility present in ordinary language should caution us to avoid the temptation to take for ourselves that extra dollop of freedom from the supposed power to translate. We don't need rarefied theories of linguistic interpretation that celebrate the confluence of context, structure and changed circumstances. What we need are careful readings of text that capture the balance, sense and logic of the original doctrine. We have to reach for detail, not abstraction.

In order to contrast the fidelity with, from fidelity without, translation, it is best to examine some concrete examples. Mine are not chosen at random. I shall try to add some new twists to two topics that have occupied me before: The reading of the commerce power in Article I,<sup>3</sup> and of the takings clause in the Fifth Amendment.<sup>4</sup> Professor Lessig has advocated translation of the commerce clause. Professor

2 Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) [hereinafter Lessig, *Fidelity in Translation*]; followed by Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) [hereinafter Lessig, *Understanding Changed Readings*]; and Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125 [hereinafter Lessig, *Translating Federalism*]; Lawrence Lessig, *Fidelity as Constraint*, 65 FORDHAM L. REV. 1365 (1997).

3 See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996).

4 Richard A. Epstein, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). See also Richard A. Epstein, *Toward the Revitalization of the Contracts Clause*, 51 U. CHI. L. REV. 703 (1984); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1.

William Treanor has translated the takings clause.<sup>5</sup> My reactions to these two translations are quite different. Lessig's reworking of the commerce clause mischievously converts simple and direct prose into post-modern poetry. The untranslated version of the clause gives a far better sense of its meaning, even, indeed especially, today. Professor Treanor is guilty of the opposite sin. He engages in unnecessary translation, for the untranslated takings clause does a far better job of accommodating his structural concerns than his revised rendition.

## COMMERCE

The commerce clause provides: "Congress shall have the power ... [3] To regulate commerce with foreign nations, and among the several States and with the Indian Tribes." The clause appears as one of a list of enumerated powers of Congress. How should it be interpreted? To answer that question it is useful to juxtapose the rival readings of the clause. I defend the received wisdom on the subject before the Constitutional revolution of 1937. It assumed that the powers conferred on Congress were neither nugatory nor exhaustive, but somewhere in between. It read the term commerce to cover the shipment of goods and people among the states, or to and from foreign nations and the Indian tribes. It excluded from that definition the power of Congress to regulate the internal or local affairs of the states, just as it would exclude the power of Congress to regulate the internal or local affairs of foreign nations or the Indian tribes. It recognized the historical context that militated against reading federal power to reach manufacture, agriculture and even local commerce. After all, the modern broad rendition,

if read back in time, would have allowed Congress to regulate or even abolish slavery in the South before the Civil War; strange that the Northern abolitionists missed that opportunity.

To treat Congress's power under the commerce clause as limited is not to dismiss it as unimportant. Trade was as vital to early Americans as it is to us. The tea in Boston Harbor came from (or was it bound to?) foreign ports. Hamilton in *Federalist* 11 paired the commerce power with the Navy, thereby showing the intimate connection between the two. Alas, he did so not to defend free trade, but to raise tariffs to stifle state competition and thereby set the stage for the tariff battles that divided North and South in the Antebellum period. Even so, trade with Indian tribes and in a domestic common market was one of the great achievements of the American union.<sup>6</sup> Reading commerce (with foreign nations, among the states and with the Indian tribes) to mean, commerce with those groups, fits with ordinary use, and fits within our broader constitutional structure. So why the need for translation?

Lessig has a different view of the subject:

As commerce today seems plainly to reach practically every activity of social life, it would seem to follow that Congress has the power to reach, through regulation, practically every activity of social life. Put another way: If America were to adopt a constitution today that had this grant of authority within it, it would be perfectly reasonable to read this grant to give Congress the power to regulate the full range of economic (and hence social) life in America.<sup>7</sup>

Note the differences in approach. We no longer are asked to translate a clause from one

5 William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785-790 (1995).

6 On which, see Edmund W. Kitch, *Regulation and the American Common Market*, in *REGULATION, FEDERALISM, AND INTERSTATE COMMERCE* (A. Dan Tarlock ed., 1981).

7 Lessig, *Translating Federalism*, *supra* note 2, at 130.

social context to another. Rather, we focus on a single word, “commerce,” which is read without reference to any of the words that precede or follow it. We are then told that commerce reaches every area of social and economic life, but we are not told why this is false for the founding period. So it looks as though the commerce clause has this translation: “Congress shall have the power to regulate every area of social and economic life.” But it is never explained why that Orwellian grant of power, if made explicitly, should attract the support of anyone who supported the system of limited and enumerated powers in the early Constitution. It takes more than a translation of a full clause (not just a word) to reach that result. In order to translate we have to repudiate the attitude of cautious necessity that the Founders brought to the creation of the national government under the constitution.

So what interpretive device can carry that burden? To cut to the chase, Lessig’s key player is the doctrine of changed circumstances, the reworking of the horse-and-buggy economy into the age of instant telecommunications and supersonic flight which brings separate places closer together. Lessig is quite attached to these arguments and elsewhere ticks off the commonly known but easily forgotten facts. “Between the end of the Civil War and the 1929 collapse, the total value of manufactured products increased 20 times; the railroad track mileage went from under 40,000 miles nationwide to over 260,000; the urban population increased from 16.1 to 49.1 percent. Between 1860 and 1919, the value added by American manufacturers had increased by thirty-three fold.”<sup>8</sup>

So what does one make of these facts? Most obviously, that this remarkable period of sustained economic growth took place under the original view of the commerce clause that is

denounced as unfit for its own time. The major lesson to take away from this achievement is to leave well enough alone, and not to tinker with translations that could place it in peril. By not tinkering, moreover, we can capture many of the elements of this dynamic setting without translating the word commerce into something else. Remember, just because new items fall within a familiar term does not mean that its scope has changed. It only means that the world has brought forth new devices that fall into some familiar baskets.

Take the rise of the railroad. I suppose that there is someone out there who would think that railroad transportation across state lines did not fall into “commerce among the several states” because the first track was laid only after the Constitution was ratified. Lessig quotes a wonderful passage of Chief Justice Waite in *Pensacola Tel. Co. v. Western Union Tel. Co.* that resists just this fatuous reading.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steam boat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth.<sup>9</sup>

Is there any doubt what Waite would say about the airplane? We have no need for translation because the clause was well drafted in the first place: since it does not list any means of commerce it contains its own generative power. The most literal reading of the phrase commerce among the several states embraces not only railroads and telephones, but automobiles, airplanes, helicopters, internet ser-

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8 Lessig, *Understanding Changed Readings*, *supra* note 2, at 454-455.

9 96 U.S. 1, 9 (1876), quoted in Lessig, *Translating Federalism*, *supra* note 2, at 141-142.

VICES and satellite telephones – so long as it involves foreign commerce, commerce among the several states, commerce with the Indian Tribes. Who would dare translate the commerce clause to read, in part: “Congress has power to regulate commerce with foreign nations by sailing-vessel but not steamboat or airplane, and among the states by sailing-vessel or stage coach, but not steamboat or railroad, and with the Indian tribes but only by ....” More simply the clause does not read “Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, but only when carried on by techniques and machines in practices in common use in 1787.” Read against this rendition, Chief Justice Marshall’s admonition starts to make sense.

The simple point is that the words “commerce among the states” have built into the literal grant of Congressional power the capacity for change. We can have it all, both continuity and change. We do not have to fiddle with definitions because commerce has expanded. More interstate commerce, and more foreign trade, gives more to regulate under a constant definition. Similarly less trade (even in percentage terms) with the Indian tribes gives Congress less to regulate, again under a constant definition. One term, commerce, applies to all three types of trade: its meaning does expand or contract, or expand at different rates, because of variations in the patterns of trade. Manufacturing may expand, but it does not become commerce because it has become larger or more profitable. The greater level of integration of economic activities across state lines calls for no new Congressional power. Lessig’s statistics about volume of manufacture and trade do not require us to trade in old definitions for new ones.

Changed circumstances is a non-starter for another reason, which goes back to the doctrine’s common law roots. Circumstances always change, and easy invocation of the

doctrine would quickly spell the end to security of exchange. To keep contracts from being riddled with excuses, a successful appeal to changed circumstances requires at the very least that there be some *sudden* change of fortune. A theater could burn down; an earthquake or flood could block manufacture or transportation; the Suez Canal could be closed due to hostilities. Impossibility, frustration, mistake and the rest operate at best as a narrow exception to the usual principle that promises should be kept.

The facts Lessig marshals do nothing to advance his changed circumstances claim. Note they all compare the world of 1865 with the world 60 or 70 years later. There is continuous growth, not sudden shifts. Just how many miles of track must be laid for Congress to regulate manufacture? 50,000 or 250,000, or perhaps 300,000? Does Congress lose its power when track is ripped out? Nothing of the sort happens. The growth in rail transportation leads to the rise of the Interstate Commerce Commission in 1887; its decline leads to its demise a century later. Congressional power does not change; only its willingness to exercise those powers does.

Modern constitutional theorists usually bristle at the thought that common law doctrines can speak to the lofty issues of constitutional interpretation. So take a more generous view of changed circumstances, and focus on the end points while ignoring the phase transitions. What then does the admitted tale of greater national integration tell us? Only that we should keep to the original design. Make no mistake about it, the early system was designed to let Congress regulate trade across state borders. But the primitive transportation and technology of 1787 imposed *de facto* limitations on the scope of that trade. All too often citizens in one state were dependent on supplies that come from just one or just a few other states. Local regulation of production in those states could choke off the goods needed

elsewhere before they ever entered the stream of commerce among the states. The decision *not* to extend national power to these local activities which affect commerce, to use the received wisdom, was in a sense a calculated gamble: business activities inside one state could decisively affect the welfare in another, and Congress could do nothing about it.

That interactive risk is happily diminished today even if the interdependence among the states has increased with the pace of commerce. So long as Congress keep clear arteries of interstate commerce, goods can flow from every direction. There is far less chance that a local interruption in production in South Carolina will have dramatic consequences on people in Massachusetts. So long as no state can erect local blockades, the good citizens of Massachusetts can rely on an extensive transportation network to receive substitute goods and services from around the globe. Today the risk of local blockade is smaller than before, so why extend the federal power to regulate a diminishing threat?

All this does not mean that courts are without some role to play. The advocates of changed circumstances should think well of cases like *Hammer v. Dagenhart*<sup>10</sup> which, alert to the dangers of national power, correctly limit the ability of Congress to use its *admitted* power over interstate commerce to regulate local activities by indirection, in that case by prohibiting firms that make some goods with child labor from shipping any goods across state lines.<sup>11</sup> That decision is needed to prevent the erosion of state power under changed circumstances, and should be applauded by anyone who is anxious to insure that the federal monopoly over interstate transactions does not impose, so to speak, a hammerlock on

state autonomy. But strictly speaking, the problem of changed circumstances need not be invoked to rebut this incursion on state control, for the same tactic should have been rebuffed in 1787 as well.

Alternatively, the devotees of changed circumstances might also approve the rise of the dormant commerce clause, which limited the power of the states to interrupt free trade among the states even when the federal government was silent. In a sense this problem is the inverse of the *Hammer* question because now it is states, and not the federal government, that seek to impose the blockage. The case for this doctrine is weaker, however, for Congress can lift the blockades by use of its admitted control over commerce among the states. And if not distracted by the mass of other business that has come its way since 1937, it might have been inclined to do so. But again, beware of chalking matters up to changed circumstances. These state/federal conflicts arose in their modern form as early as *Gibbons v. Ogden*;<sup>12</sup> any required translation is therefore quite instantaneous.

When matters are rightly understood, it is only wishful thinking that holds that changed circumstances requires us to expand federal power. *NLRB v. Jones & Laughlin Steel Co.*<sup>13</sup> upset the earlier rule that left labor relations inside the plant to state regulation. *Wickard v. Filburn*<sup>14</sup> found that feeding grain to one's own cattle affected interstate commerce. Both labor unions and agricultural policy were burning issues before the 1937 revolution. Leaving both to state regulation reduces the risk of misguided policies with nationwide effects so long as goods and services can move freely across state lines. So we could have done quite well by maintaining the status quo.

10 247 U.S. 251 (1918).

11 For discussion, see Richard A. Epstein, *BARGAINING WITH THE STATE* 146-150 (1993).

12 22 U.S. (9 Wheat.) 1 (1824).

13 301 U.S. 1 (1937).

14 317 U.S. 111 (1942).

## Holding the Line by Statute

Such naiveté, it will be said; everyone knows that the expansion of federal power was inevitable, and that older distinctions could not survive their conceptual decay. Not so, however. Here are two examples.

First, telecommunications should offer a feast to the devotees of changed circumstances, but it remains by Congressional command a pre-1937 commerce clause backwater. Even prior to 1937, Congress could have regulated the telecommunications network. As with the railroads,<sup>15</sup> the difficult task of disentangling local from national elements in a single network could result in Congress having power to regulate the whole ball of wax. But it need not be so. Subsection 2(b) of the Federal Communications Act provides that "nothing in this Chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to ... charges, classifications, practices, services or facilities, or regulations for or in connection with intrastate communications service."<sup>16</sup> That clause was interpreted, without translation, to mean exactly what it said in *Louisiana Public Service Commission v. FCC*.<sup>17</sup> Even today in our integrated economy the FCC and the state public service commissions could use different rates of depreciation on their aliquot part of the same piece of equipment. Section 2(b) remained intact after the Telecommunications Act of 1996, where it again kept the FCC from dominating ratemaking for local services.<sup>18</sup> The conceptual understandings do not change as we move from constitution to statute. If Congress can draw an intelligible line for the

courts, then so can the Constitution. And if courts can separate local from national phone service, they can hold that feeding grain to one's own cows is not commerce among the several states.

My second example of the limited scope of interstate commerce comes from the law of arbitration. The Federal Arbitration Act (FAA),<sup>19</sup> originally enacted in 1925, contains a broad provision which the Supreme Court has held makes "valid, irrevocable, and enforceable" promises to arbitrate "involving commerce."<sup>20</sup> Spurred on by union concerns over their bargaining prerogatives, the FAA also provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>21</sup> Contracts for arbitration are routinely attached to employment contracts for all types of workers in a myriad range of employment, from stockbrokers to shoeshine salesmen. The question that has come before the lower courts after *Gilmer* has been how widely to cast the net of the phrase "any other class of workers engaged in foreign or interstate commerce."

Ironically, this provision does give rise to a genuine question of changed circumstances. The 1925 reading of the commerce clause gave to the phrase "involving commerce" a reading that reached the instrumentalities of interstate commerce, but not retail trades and manufacturing. Because the original coverage was so defined, it was easy to read the tag end of the employee exemption in harmony with the basic coverage provision. The only workers

15 See Transportation Act of 1920, ch. 91, 41 Stat. 456, upheld in *Wisconsin Railroad Commission v. Chicago, Burlington, & Quincy Railroad*, 257 U.S. 563 (1922).

16 Federal Communications Act § 2(b), 47 U.S.C. § 152(b) (1994).

17 *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986).

18 *Iowa Utilities Board v. FCC*, \_\_\_ F.3d \_\_\_, 1997 WL 403401 (8th Cir. July 18, 1997).

19 9 U.S.C. § 2 (1994).

20 See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1994).

21 9 U.S.C. § 1 (1994).

whose contracts were shielded from arbitration were those who plied the narrow paths of interstate and foreign commerce before 1937. Since the FAA itself does not reach manufacturing and retail trades, the exemption is coordinated with the basic provision.

Come the undeniable transformation of 1937, and what should be done to the pre-1937 statute? The phrase “involving commerce” has now been recast to cover all productive activities. The only way to reach this conclusion is to assume that Congress meant for the FAA to grow in scope with the commerce power, even when Congress was quite mistaken (along with everyone else) about its prospects for growth. Justice Breyer reached just that result in *Allied-Bruce Terminix Companies, Inc. v. G. Michael Dobson* on the ground that the words “involving commerce,” like the words “affecting commerce” indicate Congress’s determination to exercise its full measure of power under the commerce clause.<sup>22</sup> But once again this view suppresses the significance of the 1937 revolution (not to mention the *Erie* revolution of a year later).

Divining counterfactual intention is always tricky business, but I doubt that a 1925 Coolidge Congress would have marched to the

tune of this New Deal drummer. Chief Justice Marshall in *Dartmouth College* articulated a test that offers some help in wading through changed circumstances. He knew that many developments would not be “particularly in view of the framers of the Constitution,” but he thought that this did not preclude its extension, as the case of railways and airplanes so keenly points out. But he added: “It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception.”<sup>23</sup> Had the 1925 Congress foreseen this problem my guess is that it would have varied the language, or blocked (that next year) the nomination of Harlan Fiske Stone to the Supreme Court.

So keeping the basic coverage of the FAA inelastic spares us the thankless task of translating the exemption clause to the post-1937 universe. But once the FAA is (mistakenly) expanded, what fate befalls its exclusion? Perhaps it gets bigger as well, to keep it in line with the basic coverage provision. Just that conclusion has been argued by Professor Matthew Finkin on more than one occasion.<sup>24</sup> But most courts have not been per-

22 513 U.S. 265 (1995).

23 *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644-645 (1819). Lessig manages to trivialize this wonderful passage, using it to explicate the social context around the words “Meet me in Cambridge tomorrow,” without specifying Massachusetts or England. Lessig, *Fidelity in Translation*, *supra* note 2, at 1179-1180. But this is merely a case of ambiguous designation for which parol evidence has long been allowed even under the most stringent version of the rule. See *Raffles v. Wichelhaus*, 2 Hurl. & C. 906, 908, 159 Eng. Rep. 375, 376 (Ex. 1864): “the moment it appears that two ships called the Peerless were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose of showing that the defendant meant one Peerless and the plaintiff another.” No fancy theories are needed.

24 Matthew Finkin, ‘Workers Contracts’ Under the United States Arbitration Act, 17 BERKELEY J. EMPLOYMENT & LAB. L. 282 (1996); Matthew Finkin, *Employment Contracts under the FAA – Reconsidered*, 48 LAB. L.J. 329 (1997). See also Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENVER U. L. REV. 1017, 1030-1036 (1996). She uses the words “yellow dog contract” to attack the arbitral process. As an impassioned defender of the yellow dog contract, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1370-1375 (1983), I would use that epithet to achieve the opposite result, if I thought that my own views of the soundness of arbitration had anything to do with the issue of statutory construction – which it doesn’t.



sualed.<sup>25</sup> They treat the phrase “any other workers engaged in foreign or interstate commerce” as covering only workers involved in the instrumentalities of commerce. Come crunch time, the pre-1937 reading of the term is perfectly clear and perfectly stable. It resists translation when all about it has gone mad.

This selective return to virtue does have one drawback: it leads to the wrong statutory result by making arbitrable as a matter of federal law all employment contracts that cover post-1937 commerce. Under current law, the right answer is that the FAA keeps to its 1925 contours, so that employment arbitrations are governed by state law, save to the extent that they involve interstate commerce as that phrase was understood in 1925. By venturing into the waters of partial translation, both sides to the present dispute get the arguments confused. First they wrongly expand the coverage “involving commerce” to keep the FAA in play; then they give the 1925 exemption its 1925 meaning. The second step is right, but the first is wrong. The upshot is that the Court wrongly applied the FAA to these arbitration contracts. Today state law should govern, even if it continues to show the hostility to the executory enforcement of arbitration contracts that the FAA was intended to combat. The right answer is to make Congress redraft the 1925 statute for the post-1937 era.

## TAKINGS

Let me turn more briefly to the takings puzzle. Again, it helps to start with the text: “nor shall private property be taken for public use, without just compensation.” The question one has to ask is when government – the target of this prohibition – has taken private prop-

erty. As we all know the takings clause has suffered a very different fate from the commerce clause: commerce gets construed broadly; the takings clause gets construed narrowly. But these opposite constructions are part of a single result-oriented plan, which is to expand the scope of legislative power at both state and federal levels. It is done by taking a very different view of the relationship between history and text.

On the history side, it is characteristic of most careful exegesis of the takings clause to go into great detail about the various forms of regulation of private property that were part of the legal landscape at and before the time of the Constitution. Treanor supplies us with one such history.<sup>26</sup> The takings clause is thus said to reach only those cases in which the government occupies land which was once held by its owner. Dispossession not regulation is the key to the takings clause. The clear implication is that the takings clause gives landowners no protection against the wide range of land use regulation that has grown up in this century.

Note that this method of historical interpretation is quite opposite that which is used for the equal protection clause. It would be easy to find thousands of regulations that distinguished between the position of men and women, and yet we are told that the internal logic of the equal protection clause covers distinctions based on sex as much as it covers those based on race (when it explicitly refers to neither). The great question is whether that same mode of argumentation should apply to the takings clause: should an appeal to its internal logic invalidate many of the laws in effect in 1787? Treanor, commendably, takes the position that it makes no sense in modern

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<sup>25</sup> See, e.g., *Tenney Engineering, Inc. v. United Elec. Radio & Machine Workers*, 207 F.2d 450 (3d Cir. 1953), joined more recently by *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) (Edwards, J.); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997) (Posner, J.).

<sup>26</sup> Treanor, *supra* note 5, at 785-791.

times to restrict the scope of the takings clause to cases of outright dispossession. He therefore favors the result of Justice Holmes in *Pennsylvania Coal v. Mahon*,<sup>27</sup> which makes it clear that regulations of land use that go “too far” should be subject to the takings clause.

The question is how do we get there. At one point the entire journey is quite mysterious. For openers, it should be noted that changes in technology and population density might be allowed to influence the interpretation of the takings clause just as they influence the interpretation of the commerce clause. After all, the more likely individuals are in collision course with each other, the greater the case for government intervention. If so, then one could insist that we have good reason to preserve the original narrow rendering of the clause. But this mode of translation suggests that Holmes in *Mahon* was wrong to cross the great divide and enter into the land of regulatory takings. Yet Treanor wants to defend the Holmesian journey, and to explain why changed social circumstances requires somewhat greater supervision of government activities, given the dangers of political abuse.

So we need, as it were, a different style of translation to reach the preferred result. Treanor supplies us with one, but it is gratuitous to his larger purpose. Consider two key elements that are involved in his translation scheme. One is the meaning of “property,” which the 1872 New Hampshire case of *Easton v. Boston, Concord & Montreal Railroad* construed as follows: “Property is the right of any person to possess, use, enjoy, and dispose of a thing.”<sup>28</sup> The second turns on the function of the takings clause; that purpose was to offset the defects in political process that could allow government to confiscate property without paying just compensation to its owner. Public

choice may be a twentieth century field, but the dangers of faction were well known to the founders. As Treanor notes, those dangers rise up with equal fury for regulation as well as for occupation. Hence knowing the nature of the original prohibition we should embrace recent decisions like *Lucas v. South Carolina Coastal Council*,<sup>29</sup> which jump the line of physical dispossession and extend the protection of the takings clause to regulations that prevent an owner from building on his own land. The process failures that are found in dispossession can be found in cases of regulation, so the job of the translator is to extend the takings clause beyond its original scope.

The conclusion is correct, but the reasoning is not. Start with the broad definition of property found in *Eaton*. That definition does not arise out of some new nineteenth century consciousness; it is the standard definition of property from Roman times on down. It is a definition of property that has proved remarkably resilient over time, needing no translation (save from Latin to English) today. So if we protect private property, it is a perfectly sensible inference to assume that we protect all of its incidents, not only in combination but singly. It would be a very odd translation of the takings clause to say, “Nor shall private property be taken in its entirety for public use; but its incidents of use, enjoyment or disposition may be freely removed, compromised, or destroyed by government.” Better it is to read the clause to say, “nor shall private property be taken, in whole or in part, for public use without just compensation.” So the first step of interpretation does not depend on changed circumstances. It depends only on the intelligent use of background materials that were fully available and widely understood in 1791.

So too with the risk of political process.

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27 260 U.S. 393 (1922).

28 51 N.H. 504, 511 (1872).

29 505 U.S. 1003 (1992).

The great scandal in *Lucas* was that regulation took two beach front lots and reduced them in value from around \$1,000,000 to around zero (or indeed possibly less, because of the liabilities of ownership that remained). We can recognize the truism of public choice theory that concentrated groups often do all too well in legislative infighting. If so, Lucas was not on the winning team; the environmentalists won this round. But they could well lose the next when the political winds change. No matter; the particular constellation of political forces in any individual case does not drive the analysis. Our job is not to engage in the prediction of what political conditions are likely to result in uncompensated takings by one group or another. It is to make sure that those abuses are stopped whenever they occur. The constitutional text does not include an explicit reference to public choice theory. That theory therefore is relevant only to the extent that it gives us some reason to believe that property has been taken without just compensation, which the Constitution forbids. Here if we combine the standard definition of property with an evaluation of the consequences of regulation, we can't avoid the conclusion that private property has been taken to the tune of \$1,000,000. Public choice could explain why it happens: but once we know that it did happen, then the motive is legally irrelevant. Impose the compensation requirement, and magically the behavior of state government will change, as government officials know that the takings clause exacts its price for political intrigue.

Indeed, it becomes equally clear that the imposition of the clause, again without translation, cannot be limited in principle to those cases where government regulation deprives the owner of all economically viable use of the property. Here public choice theory tells us that legislative forces will regroup if told by courts that they cannot wholly eliminate land use unless they are prepared to pay compensa-

tion. The theory of public choice should now alert us to the risks of partial land use regulation, (e.g. zoning), which allow someone like Lucas to build but only with unnecessary cost and delay that could reduce the value of his \$1,000,000 landholdings to a negligible fraction of that amount. But the maxim, the more you regulate, the more you must pay, represents the more principled road that *Lucas* indefensibly did not take when it held that regulation is caught by the takings clause only when it leads to a complete economic wipeout. What logic of translation and political risk leads us to push the door ajar to regulatory takings, but refuse to cross the threshold? The basic logic of the takings clause requires that it reach partial regulations much as it reaches partial occupations. But Treanor will not go that far, without explaining why.

So there we have it. The conceptual tools for getting a sensible reading of the takings clause were all in place in 1791; the perils to which that clause is addressed were as endemic to the politics of an earlier age as they are to our own. Yet the takings clause as drafted was equal to its task when read in light of the standard definitions, usages and practices prevalent in its own time. To be sure, the clause contains other wrinkles dealing with the scope of the police power, but these too can be handled by a sensible reading of the clause that in no wise depends on the vagaries of modern translation. So in the end we should reach a view of the clause that has it apply to all cases of occupation and regulation. But that reading also requires us to examine what, if anything, the government has provided by way of benefit for the restrictions imposed, and what, if any, justifications it can offer for those restrictions that do leave landowners worse off than before. Filling in the gaps of that theory was the task that I defended in *Takings* in 1985. Treanor takes me gently to task, but his own faltering efforts at translation should propel him where he does

not want to go, to the same approach that I urged then. Surely there are unexamined twists in the road, but it helps in negotiating them to remember that we do not have to translate constitutional language. We do have to read it, carefully and responsibly. “We must never forget it is a *constitution* we are expounding.” 