

More Fidelity, Less Translation

A LOYALIST'S RESPONSE TO PROFESSOR TREANOR

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IN MY RECENT ESSAY, *Fidelity Without Translation*,¹ I argued that the metaphor of translation suffers from two vices. In some cases it is a source of great mischief, as in the interpretation of the commerce clause. There is always great comfort in adopting the common posture of reformers: that they have merely updated older understandings and institutions, rather than introducing new departures that have to be justified, if at all, on their own terms. When the translation technique is used to extend the scope of the commerce power from sales in national and foreign markets to all forms of local manufacturing and agriculture – a change which took place in the New Deal – this reformer's tendency is evident. In my view, it is a fatal defect of translation to use its plastic approach to justify the Supreme Court's New Deal commerce clause jurisprudence. It is not enough for a theory of

translation to recognize that the commerce clause might impose some limits on the scope of the federal commerce power, as by asking whether the Gun-Free School Zones Act of 1990 was rightly struck down in *Lopez v. United States*.² Rather, a sound theory of interpretation must seek to locate the boundary between federal and state action where the text and structure of the Constitution require it. Any theory that treats *Wickard v. Filburn*³ and *Lopez v. United States* as close cases has to be wrong on both counts. On many occasions, I have asked lay audiences to decide whether *Wickard* or *Lopez* – not both, not neither – fall within the scope of the commerce clause. They look at me with blank and puzzled stares. It is possible to be a constitutional originalist or a defender of the Supreme Court's commerce clause jurisprudence. It is not possible to be both.

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1 Richard A. Epstein, *Fidelity Without Translation*, 1 GREEN BAG 2D 21 (1997).

2 514 U.S. 549 (1995).

3 317 U.S. 111 (1942).

The dangers of translation with the takings clause run in the opposite direction. Here translation does not in and of itself lead to the unfortunate mischief that marks our commerce clause jurisprudence. But it does gratuitously add an unnecessary layer to the already difficult task of constitutional interpretation. The dangers of this form of translation are well revealed by the set of interpretive challenges hurled at me in Professor Treanor's thoughtful reply, *Translation Without Fidelity*,⁴ which not only chides me for my substantive positions, but gently reproves me for refusing to accept my honorary position as an ur-translator of the takings clause.

Treanor's argument has two strands. The first is that the textual approach to takings never takes the doctrine beyond the seizures of land or other tangible property by the government. That construction is indefensibly narrow for reasons that were just as strong in 1791 as they are today. The takings clause stands right next to the fourth amendment's prohibition against "unreasonable searches and seizures." In that context government seizure does seem to refer to taking property into custody for its use as evidence in criminal trials – regulation won't quite do. But the word "taken" has a broader meaning than this, as is seen by examples that would have cried out for compensation in 1791, just as they do today.

The United States first blows up your store, and then carts away the rubble to a warehouse where it is deposited, free of charge, in your name. It then condemns the land for its own use as a post office. Does anyone think that the United States should only have to pay for the land that it has taken; or must it pay for the house it has destroyed (less the value, if any, attached to the remaining rubble?). I cannot see why the social sensibilities of 1791 would have turned their back on

this claim. Nor should the situation change if the source of one's loss is not only the loss of bricks and mortar, but the loss of a customer base which cannot be served once the store has been blown up. The loss of "good will" may well be intangible, but it surely counts as a form of private property. It hardly does credit to the takings clause, then or now, to assume that such intangibles could be destroyed without compensation just because the government has not used them for its own purposes.

Next assume that the United States does not occupy your land, but instead builds a large fence around it to prohibit the ingress and egress of you, your family and agents. The government has not taken your land, and may well have no intention to do so. It has left you with the right to exclude strangers from property you cannot enter yourself. Professor Treanor seems to consider this a form of land use regulation compensable today but not in 1791. Why not both?

Now dress up the hypothetical so that the government defends the prohibition on entry because the land is an historical landmark or delicate environmental habitat; are these restrictions on owner-entry not takings either? Clearly the better way to think about this problem is to concede that this exclusion is a taking, and then ask whether the state interest in landmark preservation or environmental protection justifies the state action. Here Professor Treanor and I have different views on the subject: he would sustain the government's restriction on an owner's right to build found in *Lucas v. South Carolina Coastal Counsel*,⁵ which I have roundly denounced. But this is in reality simply a variation of the previous hypothetical, in which the owner is allowed to enter the land, but not allowed to improve it. In order to address this issue we have to develop a

⁴ This issue, p. 177.

⁵ 505 U.S. 1003 (1992).

coherent theory of the police power, which is a ubiquitous component of any theory of interpretation. But that process itself in no way depends on translations based on changed social circumstances. Rather it recognizes that broad substantive commands, such as those contained in the takings clause, do not set out constitutional absolutes. Rather those commands create presumptions that certain forms of action are illegal. Those presumptions can in turn be overcome by showing some special justification for the action in question. The constitutional guarantee of freedom of speech does not nullify all laws designed to prevent fraud and mayhem. The takings clause does not prevent the state from imposing restrictions that are rationally calculated to prevent the occurrence of a common law nuisance. It may well be that with changed circumstances the frequency of state takings will increase, or the salience of certain justifications will increase, but that is hardly a form of linguistic transformation of the sort that Professor Treanor desires to implement. It is simply an observation that the same tests may place a greater crimp on an expanded set of government ambitions.

The second observation that Treanor makes in support of his broader reading turns on the political culture of the time of the framers. Madison in *Federalist* 10 clearly thought (wrongly, it turns out) that the extended republic affords great protection against the risk of faction. The sad truth of the matter is that faction can flourish in any political environment, and that a wise constitution has to be alert to the dangers not only of militant localism but also of arrogant centralism. All sovereigns, even in a system of dual sovereignty, possess some monopoly power; none therefore can be trusted not to abuse the power it has. Structural limitations (such as those overrun within modern commerce clause interpretation) are insufficient to meet the peril. Explicit protections of indi-

vidual rights are an indispensable part of the overall constitutional package.

How far should these then run? Treanor notes that the dangers of faction were great with both slaveowners and landowners, and that dispossession was the greatest risk that faced the owners of either. But surely it would be an odd way to draft a clause designed to guard against political favoritism and intrigue to confine it only to one kind of risk (dispossession) and two kinds of property. ("Nor shall the owners of slaves and land be dispossessed of their slaves and land respectively, for public use without just compensation.") The great thinkers of 1791 were well aware that risks of faction were endemic to all political institutions. As a matter of constitutional design it makes little sense to protect land and slaves from expropriation when the risks of faction and intrigue are far more pervasive. Surely it would be odd to construe private property so narrowly as to exclude, for example, water rights under the well developed riparian systems of the day. So too it would be odd to read the takings clause so narrowly as to prevent the government from seizing land, but allowing it to flood land with impunity.

Treanor's historical account presents us with an educated guess of the major political risks to private property at the time of the founding. From their *ex ante* perspective, the framers had no reason to draft a clause so narrowly as to preclude its application in analogous situations that present the same difficulties. *Ex post*, their original predictions could prove wrong: flooding could turn out to be a problem alongside dispossession. No matter. If the clause is correctly drafted, as the takings clause was, then the shifts in government actions only alter the theater of its application, not its substantive commands. The generality of the takings clause's terms makes it a suitable instrument to protect forms of property then unknown (e.g. the spectrum), or land against forms of confiscation then un-

imagined (e.g. modern zoning). The Lockean theory that animates the takings clause spoke of the need to protect “lives, liberties and estates” against arbitrary exercises of government power. Our founders were able to crystallize that theory by decreeing that private property (in all its forms) should not be taken

(by whatever guise) for public use without just compensation. Today we need fidelity to that original conception. We should not allow it to be frittered away by dubious translations that leave property owners of all classes, sorts and descriptions powerless against the machinations of majoritarian politics. *REB*