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TRANSLATING THE CONSTITUTION

Jack M. Balkin*

FIDELITY AND CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION. By *Lawrence Lessig*. Oxford and New York: Oxford University Press. 2019. Pp. 459. \$29.95.

INTRODUCTION

Fidelity and Constraint: How the Supreme Court Has Read the American Constitution is a dazzling book—crammed full of interesting ideas and a wealth of remarkable reinterpretations of the constitutional canon, and written in an engaging and accessible style. As its subtitle implies, the book is a rational reconstruction of the U.S. Supreme Court’s practices of interpretation from the Founding to the present. In this process of rational reconstruction of the Court’s work, Lawrence Lessig¹ treats doctrinal developments with charity—some would say excessive charity. Lessig tries to explain, for example, why the post-Reconstruction Court thought that it had to read the Reconstruction Amendments narrowly at the expense of African Americans, why the *Lochner*-era Court felt it had to protect freedom of contract, and why the same Court felt compelled to strike down Franklin Roosevelt’s New Deal programs (pp. 92–94, 130–31, 301, 324–25, 332–34). Lessig explains that the justices did so because they wanted to be faithful to the Constitution’s meaning, to their professional role as judges, or to both.

The book makes a descriptive claim that eventually becomes a normative claim. The descriptive claim is that the U.S. Supreme Court has responded to changing circumstances by translating original meaning into new doctrines that may have no basis in the Constitution’s text. The justices try to preserve the meaning of the Constitution’s text in its original context by producing equivalent meanings in a changed social context. This process of translation is fidelity to meaning (pp. 5, 49–64).

A recurring problem with these translations, Lessig argues, is that they may turn out to conflict with the Court’s fidelity to its role as a court of law. Then the justices must sacrifice fidelity to meaning through translation in order to maintain fidelity to role. As a result, the Supreme Court’s practice has been shaped by the sometimes competing and sometimes complementary duties of fidelity to meaning and fidelity to role (pp. 18, 43).

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Lessig then moves from is to ought. He argues that, in our constitutional tradition, this is an acceptable and appropriate way for the Supreme Court to behave, even if we might quibble about some particular decisions (p. 18).

To elaborate this thesis, Lessig goes from the Founding to the present, offering polished, interesting, and often controversial readings of canonical cases in the Supreme Court's history. His general approach is largely non-accusatory: to understand all is to pardon all. The Court's work may look blameworthy from our present-day perspective, but if you understand the Court's twin duties of fidelity to meaning and fidelity to role, you will understand that in most cases, the justices did the best they could under the circumstances. Often, the best they could do was very unjust by our present-day lights.

The theory of *Fidelity and Constraint* arose in the context of debates over originalism in the 1990s, but it is not, strictly speaking, a book about originalist theory. Lessig nowhere defends originalism or explains why originalism is the proper or best method of interpretation. He simply starts from the assumption that the justices of the Supreme Court have wanted to be faithful to original meaning and have translated past to present in order to be faithful. In this sense, his argument echoes that of Will Baude and Stephen Sachs, who argue that originalism simply is the law of the American Constitution,² although Lessig does not adopt their theory of original-law originalism.

Lessig developed most of the key ideas for *Fidelity and Constraint* in a series of pathbreaking articles over twenty years ago.³ Although the historical studies in the book are quite interesting and provocative, little of the central theory in the book has changed from his initial formulations. His concepts of one-step and two-step originalism were worked out in the mid-1990s. As a result, Lessig has relatively little to say about the copious literature on originalist theory that began at the turn of the twenty-first century, a few years after his important articles on fidelity in translation were written.

This Review focuses on three major questions raised by *Fidelity and Constraint*. Part I asks how Lessig's theory of translation, which asserts fidelity to original meaning, meshes with contemporary versions of originalism. Part II examines Lessig's use of the concept of social meaning to explain and justify many of the Supreme Court's most famous liberal decisions, in-

2. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019); William Baude, *Essay, Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 n.16 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 849–52 (2015).

3. Lawrence Lessig, *Commentary, Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

cluding *Brown v. Board of Education*,⁴ the sex equality cases, the reproductive rights cases, and the gay rights cases. It shows how Lessig follows in the footsteps of the American Legal Process tradition. Part III asks whether a purely internalist theory of constitutional change like Lessig's is adequate to explain the growth and development of the American Constitution. It argues that Lessig's account could be made stronger by integrating it with a broader focus on history and institutions: in particular, by focusing both on the role of political parties, social movements, and state-building in constitutional change and on the long-term construction of judicial review by the political branches.

I. TRANSLATION AND ORIGINALIST THEORY

A. *What Is Translation?*

A central idea in the book is translation. By translation, Lessig means achieving a rough equivalence of meaning-in-context between two different time periods: "Translation itself is a two-step process. In the first step, the translator understands the text in its original context. In the second step, the translator then carries that first step meaning into the present or target context. This is two-step originalism" (pp. 63–64).

This formulation does not require that we preserve the original semantic meaning or the original communicative content of the text. Rather, it demands that we preserve the underlying purpose, function, or design behind the text in the new context. Lessig's theory of translation is best understood as the attempt to preserve the Framers' original purposes, or "the Framers' design," described at a fairly abstract level, over time (pp. 66–67, 80, 92).

Lessig's account of original meaning is orthogonal to most of the current versions of original meaning. It does not attempt to be faithful to what contemporary originalists call the original public meaning (or the original communicative content) of the text, the original methods used to interpret the Constitution, or the original legal meaning of the text.⁵ Some translations will deliberately depart from the text and add new features that are not part of the written text in order to preserve the text's original purpose, function, or design. This is how Lessig understands the Old Court's readings during the struggle over the New Deal and the Rehnquist Court's federalism revolution.⁶

At the same time, Lessig rejects what contemporary originalists call "original understanding" and "original intention" versions of originalism:

4. 347 U.S. 483 (1954).

5. *E.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009) (describing original methods originalism); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456–57, 534–36 (2013) (describing original meaning originalism and offering a survey of different approaches to originalism).

6. *See* pp. 85–94, 177–82.

“Fidelity to meaning asks the Court to read the Constitution in light of the current interpretive context so as to preserve its original meaning. That is different from saying the Court should read the Constitution as the Framers would have. That’s the question of the one-step originalist” (p. 212). Instead, “[t]he aim of the two-step originalist is to take what the Framers would have done in their context and to find an equivalent in this context, so as to preserve meaning across contexts” (p. 212). And when preservation is not possible, the goal is “to realize as much of that equivalence as possible” (p. 212). This means, for example, that courts might decide to create new limitations on federal power that are not mentioned in the text in order to preserve spheres of state regulatory authority.

Translation is also necessary in cases of “*Erie*-effects.” These are situations in which the Framers’ purpose or design rests on a conceptual foundation or deep assumption (not merely a change in technology) that is undermined later on (pp. 231–32). When this happens, courts have to decide how best to compensate for the change in ways that will simultaneously further the original purposes of the Constitution while remaining faithful to their role as courts (pp. 251–52). In both of these situations, neither the original public meaning of the text nor the original understanding of the text is sacrosanct. Both may be displaced in order to achieve the best equivalent meaning in the new context.

B. *What Kind of Originalism?*

This discussion shows that there is an important difference between Lesig’s conception of translation and those versions of the New Originalism, like my own theory of living originalism, that have a “thin” theory of original meaning.⁷ The theory of living originalism argues that where the text uses a standard or principle, we may—and should—take changes in social context into account in applying the standard or principle.⁸ This does not change or disregard the text; it applies the text. The theory of living originalism asserts that this practice is required by fidelity to the text itself, because the text uses standards and principles rather than rules, and this reflects a choice by the constitutional designers.⁹

Along similar lines, Randy Barnett and Evan Bernick argue that when we engage in constitutional construction, we may not depart from the original communicative meaning of the text.¹⁰ We should create constructions

7. JACK M. BALKIN, *LIVING ORIGINALISM* 77 (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*]; Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 646 (2013) (distinguishing between thick and thin versions of original meaning).

8. BALKIN, *LIVING ORIGINALISM*, *supra* note 7, at 6–7 (distinguishing original meaning and original expected applications).

9. *Id.* at 6–7, 23–31 (arguing that constitutional designers deliberately choose language capable of adaptation to new circumstances).

10. Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *GEO. L.J.* 1, 3 (2018).

that are consistent with the original communicative meaning and that further the spirit, purpose, and function of the constitutional text.¹¹

By contrast, Lessig does not assert that interpreters must apply the same text in new contexts. Sometimes that will be enough, but at other times, as in the case of federalism doctrines, it will not be enough. Rather, the translator must take changes in social context into account in order to produce new doctrines that will generate, in our own day, the practical equivalent of the social meaning of the text-in-context at the time of adoption. That is why Lessig believes that the *Lochner*-era Court's work and some of the Rehnquist Court's federalism decisions *depart* from the text in order to achieve a deeper fidelity.¹² Translation allows courts to create doctrines that have no basis in the text, or that actually vary the text in the view of an ordinary reader, if doing so achieves a better translation of text-in-context. This approach is consistent with the idea that "literal" translation is not always the best translation. At one point in the book Lessig calls this practice "Fidelity by Ignoring the Text" (p. 79).

Almost no other public meaning originalist that I can think of is willing to alter or vary the constitutional text in this way. Public meaning originalists are textualists who regard the meaning of the constitutional text as fixed at the time of adoption.¹³ Even original intention and original understanding originalists generally don't regard the text as mutable in the way that Lessig does. Rather, they argue that we should interpret the text in light of intentions and understandings.¹⁴ Most of these originalists would argue that federalism decisions that do not seem to be grounded in the text actually follow from the original meaning of the text (for example, the Tenth Amendment, or the original meanings of "commerce" and "necessary and proper"), or that they follow from the structure of the Constitution itself in ways that are fully consistent with the text's original meaning.

This does not mean that Lessig is not an originalist. It means that he is a unique kind of originalist, as I shall now explain.

C. *Why Lessig Is Not a Textualist*

Although Lessig uses the metaphor of translation and some of the theoretical literature on translation, the practice he describes is closer to "creative paraphrase" than the translation of literary texts (p. 52). This is not simply a quibble about definitions but, as Lessig himself points out, an important dispute about the point and techniques of translation itself (pp. 52–53).

11. *Id.*

12. *See* pp. 255–56.

13. Solum, *supra* note 5, at 456–57 (noting that most contemporary originalist theories hold that the public meaning of the text is fixed at the time of adoption).

14. *E.g.*, Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 230–31 (1988); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465–66 (1986).

Most translators of texts, whether ancient or modern, usually spend a great deal of time on the words in the text. They go over the words lovingly, even obsessively.¹⁵ They focus on etymologies, similar turns of phrase in literature contemporary to the text, allusions to past texts in the authors' literary tradition, and so on.¹⁶

Lessig does not do this. There are very few arguments in the book that could be called "textual," and very little textual analysis. There is almost no discussion of etymologies or contemporaneous use. Compared to most originalist analyses of the constitutional text, Lessig's treatment is quite sparse. Instead, most of the book discusses changes in social and technological contexts. His practice is closer to his example of *The Cotton Patch Version of Luke and Acts*, which offers paraphrases of famous Gospel stories in order to help contemporary audiences understand what the Gospel authors were getting at (pp. 51–52).

The choice between close textual analysis and paraphrase matters because of what we are being faithful to. Most originalists these days are textualists. They think that what we have to be faithful to is a text produced by a popular sovereign at a particular time.¹⁷ Hence they engage in detailed study of the meanings and order of words, and they resort to Corpus Linguistics, old English legal precedents, comparisons to Founding-era state constitutions and interpretive practices, and so on.¹⁸

You will find little of that in this book. The reason is that despite his use of the term "translation," Lessig is not, at heart, a textualist at all. Put in terms of the modalities of constitutional argument, he is a purposivist and a structuralist. (Or, more correctly, he believes that the Supreme Court, whose work he is sympathetically reconstructing, has been purposivist and structuralist.) Lessig uses the metaphor of translation in order to show how, despite what appear to be variances from the constitutional text, the Supreme Court really has tried to be faithful to the Constitution's purposes and structures all along (p. 56). Lessig asserts that translation preserves "meaning," but what Lessig means by "meaning" is purpose and structure (articulated at a fairly high level of generality), not semantic or communicative content.

15. See, e.g., ROBERT ALTER, *THE ART OF BIBLE TRANSLATION* (2019) (focusing on word choice, syntax, and allusions between different parts of the text).

16. *Id.*

17. See, e.g., Solum, *supra* note 5, at 459, 467 (describing textualist focus of contemporary originalism).

18. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (advocating close readings of the constitutional text and comparisons of different parts of the text); John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371 (2019) (advocating investigation of original legal methods); James C Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 21, 21 (2016) (advocating "the use of corpus linguistics to determine original public meaning").

D. *One-Step and Two-Step Originalism*

Lessig's theory repeatedly draws a distinction between one-step and two-step originalism. The distinction, however, has an important ambiguity. A one-step originalist attempts to "read the Constitution as the Framers would have" (p. 212). Comparing his constitutional theory to mine, Lessig says that "[i]n Balkin's terms, the one-step is an 'original expected application' originalist" (p. 484 n.61).

It is easy to see from this account that *Griswold v. Connecticut*,¹⁹ *Lawrence v. Texas*,²⁰ and the 1970s sex equality decisions²¹ are two-step originalism. They translate the meaning of the constitutional text—in the social and political context in which it was created—into a new context (pp. 63–64, 378, 391, 403, 454).

At the same time, Lessig also thinks that the liberal/progressive position in the constitutional struggle over the New Deal was *one-step* originalism. After attempting a series of conservative translations designed to protect economic liberty and limited federal power, "[t]he Court returned to one-step originalism. It gave to Congress a breadth of power that would authorize it to regulate far beyond the limits that (at least the conservatives believed) the Framers had intended. Fidelity to the meaning of this original constitutional commitment had been surrendered" (p. 140).

Why does Lessig think that *United States v. Darby*²² and *Wickard v. Filburn*²³ are one-step originalism? It can't be because these cases correspond to original expected applications. They are nothing close to what the Framers would have expected. Lessig spends some time showing how Justice Jackson and his colleagues worried that they were giving up on the Framers' design when they decided *Wickard*.²⁴ Rather, I think that it is because Lessig treats the Commerce Clause as a rule rather than as a standard or principle. Applying the same rule in a changed factual context produces results that undermine both the Framers' expectations and design.

So it would be more accurate to say that one-step originalism means applying original expected applications where the Constitution is silent or uses a standard or a principle; and where the Constitution states a clear rule, one-step originalism means following that rule regardless of the consequences to the Constitution's purposes or design. Once again we can see that Lessig is really a purposivist and structuralist at heart.

19. 381 U.S. 479 (1965) (striking down law banning use of contraceptives by married couples).

20. 539 U.S. 558 (2003) (striking down law banning same-sex sodomy).

21. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (holding that sex classifications are subject to intermediate scrutiny).

22. 312 U.S. 100 (1941) (upholding Fair Labor Standards Act of 1938).

23. 317 U.S. 111 (1942) (holding that federal commerce power extended to regulation of homegrown wheat).

24. See pp. 168–71.

Even so, it is not at all clear why Lessig thinks that the Court's *Lochner*-era decisions protecting economic liberty, such as *Allgeyer v. Louisiana*,²⁵ *Lochner v. New York*,²⁶ and *Adkins v. Children's Hospital*,²⁷ are two-step translations. If the dissenters in the *Slaughter-House Cases*²⁸ were correct that the Privileges or Immunities Clause of the Fourteenth Amendment protected economic liberties, such as the right to choose one's method of earning a living,²⁹ these decisions might be one-step originalism, as some conservatives argue today.³⁰ Lessig can take this view only if he thinks that the *Slaughter-House Cases* were correctly decided as a matter of the Framers' design or the Framers' original expected applications. This, however, is disputable, as Lessig himself recognizes (pp. 299–300). In fact, he justifies Justice Miller's opinion in *Slaughter-House* not on the basis of fidelity to meaning or one-step originalism. He justifies it as a departure from fidelity to meaning in the service of fidelity to role (pp. 299–300).

E. *The Publicity Problem*

Lessig's theory of translation has a publicity problem. The liberal principle of publicity demands that people understand the legal and political institutions that govern them, and, conversely, that people should not be under any misapprehensions about how these institutions are organized.³¹ If Americans believe that they live under a written constitution but the officials who interpret the Constitution know better, this creates a problem of legitimacy because there is a secret that cannot be revealed to the public.

Lessig's theory of translation argues that legal officials can and do add things to the Constitution that are not in the text, and that they can even ignore the text in some circumstances. But the public does not understand that judges legitimately have this power. Perhaps even more important, the judges themselves do not talk as if they have the power to ignore the text or add to it. They speak as if they are following the text, clarifying the text, applying the text, or implementing the text, not varying it or paraphrasing it. This is

25. 165 U.S. 578 (1897) (announcing doctrine of liberty of contract under the Due Process Clause).

26. 198 U.S. 45 (1905) (striking down maximum hour law for bakers).

27. 261 U.S. 525 (1923) (striking down minimum wage law for women).

28. 83 U.S. (16 Wall.) 36 (1873) (upholding public health regulation requiring New Orleans butchers to rent from central slaughterhouse).

29. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 109–11 (Field, J., dissenting); *id.* at 116 (Bradley, J., dissenting).

30. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 192–208 (2004) (criticizing majority in *Slaughter-House* for betraying the original meaning of the Fourteenth Amendment).

31. Jeremy Waldron, *Principles of Legislation*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 15, 22 (Richard W. Bauman & Tsvi Kahana eds., 2006) (“People should not be under any misapprehension about how their society is organized, and the legitimacy of our legal and political institutions should not depend on such misapprehensions.” (citing JOHN RAWLS, POLITICAL LIBERALISM 66–71 (1993))).

the basis of Will Baude's argument that fidelity to the original meaning of the constitutional text is a basic attribute of American constitutional law.³² Judges and justices never say that they may disregard the text's original meaning, although they may disagree about what the meaning is—for example, whether it includes original expected applications—and how to apply it.

Of course, Lessig is not the only constitutional theorist who faces a publicity problem. David Strauss argues that judges may disregard the constitutional text and that the real Constitution is a common law system of precedents in which the text is sometimes superfluous.³³ This creates a publicity problem because most Americans think that they live under a written constitution. That is why some Americans actually carry pocket copies of the Constitution and quote the text to each other.

Bruce Ackerman argues that the Constitution has been amended outside of Article V through a series of "constitutional moments" in which an aroused public deliberated over whether to change the Constitution.³⁴ A successful constitutional moment—for example, the New Deal revolution—produces framework statutes and judicial precedents that have the status of constitutional amendments and that cannot be altered or overturned without a new constitutional moment or a new set of amendments.³⁵

Ackerman's theory of constitutional moments also creates a publicity problem, especially for his primary example of the New Deal. The government officials and judges who produced these framework statutes and precedents during the New Deal did not describe them to the public as constitutional amendments.³⁶ Nor did the voters who went to the polls in national elections in the 1930s and early 1940s understand that they were deciding whether to amend the Constitution outside of Article V. During the struggle over the New Deal, Franklin Roosevelt never said that he was seeking to amend the Constitution outside of Article V; in fact, he said precisely the opposite to the public.³⁷ He told the public that he was trying to restore

32. See Baude, *supra* note 2, at 2371 (noting that the Supreme Court always attempts to be faithful to the text and to original meaning even if it does not always succeed in doing so).

33. See David A. Strauss, *The Supreme Court 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4 (2015) ("In most litigated cases, constitutional law resembles the common law much more closely than it resembles a text-based system.")

34. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

35. See Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 65, 67–69, 83, 86–88, 108–09, 124 (2009); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742, 1750–53, 1761 (2007).

36. *Darby* and *Wickard*, for example, speak in terms of the proper interpretation of the Commerce Clause; they say nothing about amending the Constitution. Nor do the Social Security Act, the Wagner Act, or the Fair Labor Standards Act.

37. See, e.g., Franklin Delano Roosevelt, "The Constitution of the United States Was a Layman's Document, Not a Lawyer's Contract," Address on Constitution Day, Washington, D.C. (Sept. 17, 1937), in 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (Samuel I. Rosenman ed., 1941) ("You will find no justification in any of the language of the Constitution for delay in the reforms which the mass of the American people now demand. . . . [N]early every attempt to meet those demands for social and economic better-

the correct interpretation of the Constitution because judges had put things in the Constitution that were not in the text and were not intended to be there.³⁸

My own theory of living originalism deals with the publicity problem by arguing that the constitutional text is binding until it is amended through Article V, but that the text is only an incomplete framework with many details that have to be filled in and many rules, standards, and principles that have to be implemented in practice.³⁹ Every generation must apply and implement these features of the text in their own time through a series of constitutional constructions. These later constructions, however, must always be consistent with the text and attempt to apply it in good faith.

This account is consistent with the liberal principle of publicity because it takes the text seriously and uses the text in ways that ordinary people can understand. People who read the text can understand that a principle like “equal protection of the laws”⁴⁰ needs to be cashed out and applied in concrete contexts; they can also understand that what people thought was equal protection of the laws in 1868 is not necessarily what people might think is equal protection today.

Some of Lessig’s translations are completely consistent with this approach: they are nothing more than the application of the rules, principles, and standards in the text in new contexts. There is no need to describe these interpretations as translations of the text, because they are actually just applications or implementations of the text in new circumstances. But with respect to other translations in the book, Lessig argues that judges actually ignore the text or add things to the text that are not there.⁴¹ These latter translations create a publicity problem.

II. “IT IS EMPHATICALLY THE PROVINCE AND DUTY OF THE JUDICIAL DEPARTMENT TO SAY WHAT THE SOCIAL MEANING IS.”

The most interesting and provocative ideas in *Fidelity and Constraint* revolve around Lessig’s master concept of social meaning. Many of his claims about translation build on his theory of social meaning. In particular,

ment has been jeopardized or actually forbidden by those who have sought to *read* into the Constitution language which the framers refused to *write* into the Constitution.”).

38. In fact, Roosevelt argued that the Supreme Court had disregarded the Constitution’s text: the justices were “reading into the Constitution words and implications which are not there, and which were never intended to be there.” Franklin Delano Roosevelt, A “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary, Washington, D.C. (Mar. 9, 1937), in 1937 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 37, at 122, 126. Far from arguing that he was amending the Constitution, Roosevelt called for a return to the Constitution: “[W]e must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself.” *Id.*

39. BALKIN, LIVING ORIGINALISM, *supra* note 7, at 10, 14.

40. U.S. CONST. amend. XIV, § 1.

41. See pp. 56, 80, 255–56.

Lessig argues that judges are authorized to translate the Constitution (for example, the Fourteenth Amendment) when the social meaning of existing practices becomes contested and the conflict over social meanings becomes foregrounded. This is how Lessig explains the Supreme Court's decisions in *Brown v. Board of Education*, the modern sex equality cases, the reproductive rights cases, and the gay rights cases. Lessig groups all of these decisions together as examples of translation "on the Left" (pp. 5, 357, 388, 394, 401, 406). By contrast, the decisions in *Lochner*-era cases such as *Lochner* itself, *Adkins*, and *Hammer v. Dagenhart*⁴² are examples of translations "on the Right" (pp. 5, 84, 131, 135, 194, 197, 205, 457).

Here's the basic argument. Take an older practice—segregation, sex discrimination, suppression of homosexuality, criminalization of reproductive rights. For many years this practice is not contested. "Normal" people (Lessig's term, not mine) think it's obvious that there is no discrimination or abridgement of a fundamental right going on, and they also think that other "normal" people agree with them (p. 357).

Now imagine that the social meaning of the practice becomes contested, so that "normal" people realize that other "normal" people disagree about whether the practice is discrimination or the abridgment of a fundamental right. (That is, a conflict about social meanings that may not have existed or may have existed only in the background now becomes foregrounded.) When the social meaning of an older practice becomes contested in this way, justifications for the practice also become contested.⁴³ They can no longer be taken as presumptively acceptable. When this happens, Lessig argues, courts have a duty to exercise judicial review to protect liberty and equality. They must translate past to present.

This is how Lessig justifies *Brown v. Board of Education*. Before World War II, most "normal" (there's that word again) people thought that segregation was not discrimination (p. 357). After World War II, the social meaning of segregation changed. The social meaning had become contested and this change was foregrounded. Many people now believed that segregation was discrimination and other people understood that they felt this way.

Lessig continues: "If the segregation is discrimination, then it must go *unless* it can be justified. But if that justification is contested, then the segregation cannot be justified. The very act of affirming the contested justification would trigger fidelity to role" (p. 358). That is, Lessig argues that *refusing* to exercise judicial review and protect equality would violate the Court's institutional role. As Lessig explains:

Once a line is seen as violating equality, the Court must decide whether or not to accept the justification for that inequality. Yet if that justification itself is contested, then for the Court to accept it would be for the Court to take a side in that contest. Depending on the nature of that contest, to take a side could conflict fundamentally with the conception of the

42. 247 U.S. 251 (1918) (striking down federal regulation of child labor).

43. See p. 387.

Court as a court. Justices on their own could have one view or another. But if the Court engages in that contest, it threatens its own institutional independence. (pp. 358–59)

And here's how the argument works in sexual autonomy cases like *Griswold v. Connecticut*⁴⁴ or *Roe v. Wade*⁴⁵: When it becomes contested as a matter of social meaning whether a liberty is fundamental (such as contraception or abortion), the Court must step in to protect the liberty: "Once viewed as fundamental . . . the burden shifts to the state to justify its infringement. But that means that the contestability of any justification renders the justification insufficient" (p. 392).

This argument seems puzzling for three reasons.

First, when social meaning becomes contested, so that reasonable people disagree about what is going on, why isn't this precisely the moment when judges should defer to the political process?

Second, why is refusing to exercise judicial review "taking a side" in a dispute about whether a practice is justified? Why wouldn't judicial intervention involve the courts "taking a side"?

Third, social meaning is never completely univocal. Who is to say when social meaning has become sufficiently contested that judges should translate into new guarantees of liberty and equality? What if only some people think that a practice is oppressive or discriminatory, while many others continue to deny it?

Lessig is not unaware of these questions. They lead to Lessig's second claim. He argues that when social meaning becomes contested, we cannot rely on the political process to recognize and protect new rights because the political process is not well designed to make principled judgments about these issues. As he explains:

[R]egardless of whether one believes ordinary people in a properly constituted process could come to a similar result, it's fairly clear that an ordinary democratic process through elections would not. Again, that view does not depend upon believing that people are incapable of answering these questions. It depends instead upon a judgment about what such a process produces. Whatever it produces, it is not the reasoned judgment that the defense of civil rights depends upon. It is not the balance and reasoning that the consistent defense of fundamental ideals relies upon. (p. 449)

Instead, Lessig argues that judges are better equipped than ordinary citizens—or their elected representatives—to recognize that social meaning has become contested and to act on these changes in social meaning in a principled way (pp. 449–51). Compared to the democratic political process, Lessig argues, "courts [are] the better institution to track the evolution of social meanings" (p. 452).

44. 381 U.S. 479 (1965).

45. 410 U.S. 113 (1973) (striking down Texas abortion law).

But the argument is quickly getting even more puzzling. Who in the world thinks that Anthony Kennedy is an expert on social meaning? Wouldn't an anthropologist, or an advertising executive, be more competent? Why Anthony Kennedy and not Clifford Geertz or Don Draper?

And why does judicial activism become justified as soon as social meaning becomes *contested*? Why does the point at which a justice thinks that reasonable people now *disagree* about whether denial of same-sex marriage is discrimination or an abridgment of liberty become the point at which the Court should mandate same-sex marriage throughout the nation? (Why shouldn't the Court have to wait until it's clear that almost all "normal" people agree on the social meaning?)

Lessig's argument seems to be missing a crucial step. It can't be enough that a judge understands that reasonable people disagree about the social meaning of excluding same-sex couples from marriage. The judge must also think that the practice actually violates liberty or equality. For if the judge *doesn't* think that denying same-sex couples the right to marry is unjustified discrimination, then the fact that people disagree is an excellent reason to leave the question to politics. Failing to intervene shouldn't—at least in that judge's eyes—threaten the Court's institutional role. I am not sure whether Lessig would accept this friendly amendment, but if he doesn't believe this, his argument does not seem very persuasive.

But even if we tweak the argument in the way I have suggested, it still looks a bit strange. Why should *judges*, of all people, decide when social meaning is sufficiently contested and what the correct understanding of a social practice is? (pp. 447–52). To paraphrase John Marshall, Lessig seems to be saying that "it is emphatically the province and duty of the judicial department to say what the social meaning is."⁴⁶

And indeed, that's pretty much what he says: "My positive claim has been that in fact, our tradition has allowed the Supreme Court a jurisdiction to say what the social meaning is" (p. 447).

What?

But wait. Here's another way to look at it.

Suppose that we translate (I use the word advisedly) all of Lessig's arguments about social meaning into a much older language of American legal thought: the language of American Legal Process. Then the argument would look something like this:

Judges should not protect new rights and liberties where reasonable people agree that there is no problem of discrimination or abridgment of a fundamental right. But when judges become convinced that fundamental rights and liberties are at stake—even if not everyone agrees with them—they have a duty to protect these rights and liberties in a principled fashion. That is because the political process is often unable to recognize violations of liberty and equality and to protect them in an appropriate way according

46. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

to principles of constitutional law that will apply not only in this case, but in other cases as well. Only the courts, because of their particular institutional configuration, have the ability to articulate principled justifications and doctrines to protect liberty and equality.

Sound familiar? This is essentially the view of midcentury Legal Process scholars like Alexander Bickel, Henry Hart, Albert Sacks, and Herbert Wechsler.⁴⁷ It is also the view of Ronald Dworkin, who agreed with Legal Process scholars that the courts, in contrast to legislatures, are the “forum of principle.”⁴⁸ In addition, Legal Process theorists argued that judges had the ability to observe the widely shared principles and ethical commitments of the society in which they lived and restate these commitments and values in terms of legal principles that apply generally, and not merely to the benefit of a particular group in society. (This is the famous idea of “neutral principles” of constitutional law.)⁴⁹

Lessig is giving us the arguments of the Legal Process school dressed up in the language of social meaning. Indeed, when he comes to his discussion of fidelity to judicial role, he essentially restates familiar Legal Process ideas about administrability and avoiding the appearance of political judging.

This connection to the Legal Process tradition is not, in and of itself, a criticism of Lessig. Rather, it is a way of understanding what his book is really about. Strip away the fancy talk about social meanings and what you have is a contribution to a familiar tradition of constitutional theory, one that is largely internalist in its ambitions.

Lessig and the Legal Process scholars who preceded him had two things in common. First, they had absorbed the lessons of legal realism and they recognized that it was difficult to get consensus on questions of value.⁵⁰ Second, they wanted to offer an account internal to familiar legal practices of reasoning about doctrines and legal texts that would help judges decide what to do in the face of disputes about questions of value.⁵¹ The Legal Process scholars looked for modes of reasoning that judges could reasonably employ, that leveraged judges’ capacities as legal professionals, and that would allow judges to sidestep difficult and contested questions of value—or turn them into other kinds of questions that judges could answer in ways that the coun-

47. See Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394–98 (1996) (describing the basic views of the legal process school); Brad Snyder, *The Former Clerks Who Nearly Killed Judicial Restraint*, 89 NOTRE DAME L. REV. 2129, 2132–33 (2014) (listing Hart and Sacks, Bickel, Harry Wellington, and Wechsler as key exponents). The key texts are HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994), and Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

48. Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

49. Wechsler, *supra* note 47.

50. See Rubin, *supra* note 47, at 1394–96.

51. *Id.* at 1396–97.

try would find legitimate and appropriate to the judicial role.⁵² Hence these scholars' focus on neutral principles, institutional settlement, and the reasoned elaboration of the law.

Lessig's resort to social meaning is his way of dealing with these age-old problems of judicial review. Instead of deciding whose values are really good or bad, really right or wrong, judges should look to social phenomena—in this case, social meanings—that are intersubjectively shared by many people in society. And because social meanings are intersubjectively shared, judges are in just as good a position as ordinary people to understand them. Better, in fact, because judges are isolated from everyday political contest, and so they can act in a principled fashion and won't be hampered by the need for political compromise and tempted by the desire to score political points.

Needless to say, if you weren't convinced by how Legal Process scholars like Hart, Bickel, and Wechsler solved these problems, you won't be convinced by Lessig's solution either. And conversely, if you are attracted to Legal Process solutions to these questions, you will find a lot to like in Lessig's approach, although you will wonder what the use of the term "social meaning" adds to the analysis. After all, you might think, if we are going to be internalist, let's be internalist and not confuse the issue by invoking social science. Of course, one might respond that Lessig's notion of "social meaning" isn't really meant as a claim about social science at all. It is a *judge's* view of social meaning, which need not correspond to what social scientists would or could measure.

This brings me to a second point about Lessig's use of social meaning. His concept of contested and uncontested social meanings (as well as his concept of foregrounded and backgrounded social meanings) is also not really meant as a social scientific account. Rather, it is the way that social meaning appears to judges and their elite audiences. The telltale sign is Lessig's use of the word "normal," to which I now turn.

A. *A Constitution for "Normal" People*

Lessig's arguments about translation seem to turn on a distinction between contested and uncontested social meanings (as well as backgrounded and foregrounded meanings). But that distinction creates a number of puzzles.

First, cultures are not monoliths; they are diverse. That means that social meaning is always contested. And that includes social meanings about whether there is discrimination and whether fundamental liberties have been abridged. If so, Lessig's argument about when translation is justified or required may prove too much.

Lessig is well aware of this fact. He solves the problem in two ways. The first is by distinguishing between what is foregrounded and what is backgrounded (p. 146). But the second, and more important, way of dealing with

52. *Id.*

the problem is by maintaining that social meaning is contested only when “normal” people think it is contested:

By “contested” I mean issues that normal people think normal people can disagree about. . . . I’m not saying that something is contested merely because people, on average or even frequently, contest it. I’m saying it’s contested because within a particular social context, people understand that normal people can disagree about it. The statement isn’t a prediction of how people would vote; it is instead a prediction about how deviation would be understood. (pp. 145–46)

This solution leads to still further difficulties. For one thing, it leads Lessig to very uncomfortable positions about who is “normal” for purposes of the theory.

Take *Plessy v. Ferguson*.⁵³ Lessig regards the decision as an act of moral cowardice and completely indefensible today (pp. 275, 335). Yet from the perspective of 1896, he argues that it was defensible because at that point in history it was taken for granted that blacks were inferior and that segregation was not discrimination (pp. 346–47). Yet it was quite obvious then—and Lessig himself points this out—that black people did not agree with this view (p. 346). And blacks constituted a very significant proportion of the American population. (In fact, they constituted half the population of the state of Louisiana in the 1890 census.)⁵⁴ And not just black people: some whites also thought that segregation was discrimination.

We can put the point more starkly. After the abolition of slavery, the social meaning of segregation was *never* uncontested in the United States, if you think that black people are “normal.” But Lessig argues that the social meaning of segregation was not contested in the late nineteenth century—and indeed, not until after World War II.⁵⁵ It follows that his view must be that black people were not considered “normal” at that point in history. (One gets to the same result through the distinction between foregrounded and backgrounded contestation of social meaning. Black people may have contested the meaning of segregation—a lot—but “normal” people did not notice that they were doing so.)

This raises a more basic question: Not considered normal *by whom*? Under Lessig’s theory of social meaning, *who* gets to say whether black people are normal or not? The answer appears to be that the elites from whom judges and justices are selected get to say who is normal.

As Lessig puts it, “The inferiority of the African race was a truth for the elite of the time, not opinion” (p. 346). The Court assumed that all reasonable people understood this. What? Did the justices not notice John Marshall Harlan waving his hand vigorously? Yes they did, Lessig responds, but “most people” thought his view was “crazy” (p. 346). In this passage, Lessig is

53. 163 U.S. 537 (1896) (upholding racial segregation in public facilities).

54. See U.S. CENSUS BUREAU, 1901 U.S. CENSUS REPORT 7 (1901), <https://www2.census.gov/prod2/statcomp/documents/1901-02.pdf> [<https://perma.cc/4SZ8-QJG5>].

55. See pp. 335–57.

equating the views of “most people” with most elites. This is not the only time he does this in the book.

The Court did not see the issue of discrimination as contested because the issue was not contested among educated white elites. (*Hey, says Harlan, waving vigorously, I'm right here!*) It follows from this point that the only people who are “normal” for purposes of the theory are those deemed to be normal (and reasonable) by elites (pp. 346–47). Not surprisingly, in these passages, as elsewhere in the book, Lessig moves seamlessly from talking about “most people” to talking about “elites.” For example, he says that “[n]ormal people saw the appropriateness of race-based segregation Justice Brown did not need to defend that claim. It was shared by everyone in 1896—including Homer Plessy! Or practically everyone, at least, and certainly almost everyone who mattered to the world of power” (p. 346).

This is one of the most important sleights of hand in the entire book. Whenever Lessig talks about the Court responding to what “most people” think, he is really talking about the justices responding to what elites think.

This sleight of hand, however, makes considerable sense sociologically if we are trying to describe why the justices behave in the way they do, which, after all, is a significant part of Lessig’s project. (The other part is the claim that these practices are actually legitimate.) Neal Devins and Lawrence Baum’s recent book, *The Company They Keep*, argues that Supreme Court justices perform before audiences of fellow elites.⁵⁶ They care mostly about elite opinion, not the opinion of the general public.⁵⁷ When justices think about “normal” people, or “reasonable” people, therefore, they think about the people whom they interact with on a daily basis and whose opinion they care most about.⁵⁸ Those people are well-educated elites and their families, who are also often well-educated elites.⁵⁹

If Devins and Baum are correct, it would follow that—in the Court’s eyes—what “normal” people think about what other “normal” people think turns out to be what elites think about what other “normal” people (i.e., elites) think.

As a descriptive matter, this would explain the results in *Brown*, *Griswold*, *Roe*, the sex equality cases, and the gay rights cases. The Court responded to changes in social meaning (among elites) in just the way that Lessig describes.

It is worth emphasizing, however, that although this explains the results in these cases as a descriptive matter, it does not justify them. Here Justice Scalia might object: “This proves my point: The Court is deciding these cases

56. NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 24–25, 40–46 (2019).

57. *Id.* at 46–53.

58. *See id.* at 24–25.

59. *Id.*; *see also* LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 43–49 (2006) (developing concept of “audiences” for judges).

according to elite opinion. Why should elites be permitted to overturn the views of ordinary Americans?"⁶⁰

Lessig does not really provide an answer to that question in this book. That is because he conflates "most people" with "normal people" and "normal people" with the audience for the justices—that is, elites. He does so because the Court itself does so. But again, that explains, rather than justifies, a program of constitutional interpretation.

Lessig attempts to deflect the question by returning to the argument from judicial role—which is also the argument from Legal Process.⁶¹ It does not matter whether judges are elites—they surely are. What matters is that they are better situated to decide questions of social meaning than the democratic process. This is essentially Hart and Sacks's principle of institutional settlement.⁶² As Lessig puts it,

The epistemological choice thus resolves not just upon whether one believes judges are from an elite or are politically biased. They certainly are both, and that fact is an important concern that must be addressed through proper diversity and humility. The choice resolves as well upon whether one believes that the alternative—the ordinary democratic process, at least as it is now—is capable of fairly evaluating the values at stake at all. (p. 451)

But the social meaning that judges are especially well situated to understand and act upon is elite social meaning. Why should *that* social meaning be the driver of constitutional interpretation and constitutional change?

B. *Translation in Polarized Times*

Suppose that we accept Lessig's theory of "contested" social meanings, and suppose that we also accept that courts can and should respond to changes in elite social meaning to protect liberty and equality. Even so, the argument faces yet another problem, one which Lessig himself is quite aware of, and which he addresses in the final pages of the book.

Lessig's theory works only if elites usually think alike on a wide range of issues (for example, as they did about race in 1890). His theory presupposes elite consensus as the normal or standard case, so that it becomes possible for elites to recognize that social meaning has become contested. If there was no general consensus among elites, it would make no sense to say that social meanings on a particular question had become contested and that this difference is now foregrounded.

60. See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality . . . is evil." (citation omitted)).

61. See, e.g., p. 350 ("My only point now is that a Court could rule as Justice Brown wrote in 1896 [in *Plessy*] and believe itself justified by fidelity to meaning *and* by fidelity to role.").

62. HART & SACKS, *supra* note 47, at 4.

Thus, Lessig's account relies—as have so many other twentieth-century theories of constitutional law—on an imagined consensus of an imagined public.⁶³

But today elite opinion is polarized on more and more subjects. While in the past well-educated elites tended to agree more than the rest of the public, the reverse is now the case: liberal and conservative elites disagree more than non-elites do.⁶⁴

Even worse, the country's politics is increasingly divided on issues of status and identity—issues that are primarily about questions of social meaning. Both sides complain loudly that the other side is discriminating against them and violating their fundamental rights: racial equality, sex equality, sexual-orientation equality, trans equality, speech rights, religious rights, gun rights, property rights, economic rights. If so, then Lessig's justification for judicial review will apply to too many things.

Because the two major political parties are facing off over identity and status, elites in both parties recognize that social meaning has become contested on almost all of the issues that they care about. According to Lessig's theory, that would seem to offer the Court the opportunity, if not the obligation, to exercise judicial review on all of these subjects. (Indeed, in cases where both sides can make liberty or equality arguments, the Court might have an obligation to exercise judicial review in both directions at once!)

This is not the first time this problem has arisen. Here are two examples from periods of high polarization in the nation's history, one old and one new.

The old example is *Dred Scott v. Sandford*.⁶⁵ The Jacksonian era is one of increasing elite polarization over slavery.⁶⁶ In 1820 the Missouri Compromise appears to be just that, a compromise between various regional and property interests.⁶⁷ By 1857, the compromise seems unbearable to the South, because it shuts Southern settlers out of large parts of valuable federal territory.⁶⁸ What once was a reasonable compromise now seems like discrimination to Southern elites. Fortunately for them, Jacksonian Democrats have a majority on the Supreme Court. Justice Catron, in a concurrence, explains that the Missouri Compromise violates "EQUALITY" (he uses all

63. Steven M. Griffin, *Legal Liberalism at Yale*, 14 CONST. COMMENT. 535, 551 (1997) (reviewing LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996)) (noting how much of twentieth-century constitutional theory implicitly relied on imagined notions of social consensus).

64. See DEVINS & BAUM, *supra* note 56, at 120–21, 130–40; Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661, 701–03, 712 (2013).

65. 60 U.S. (19 How.) 393 (1857) (striking down Missouri Compromise and holding that blacks could not be citizens).

66. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 126 (2006).

67. See *id.* at 123–25.

68. See *id.* at 126–27.

caps), which is one of the first uses of the term in the U.S. Reports.⁶⁹ The justices of the Supreme Court, attuned to the change in social meanings, strike down the Missouri Compromise under the Due Process Clause.⁷⁰

Lessig calls *Dred Scott* a “blunder” (p. 100). But why is it a blunder according to his theory? Social meaning had become deeply contested on this issue. It would have violated the Court’s fidelity to role to look the other way and defer to majority will (that is, the majority will of 1820). It would have been “taking sides” between North and South for the Court not to exercise judicial review.

Well, wouldn’t this have been contrary to fidelity to judicial role? Wouldn’t the Court look too political if it decided the constitutionality of the Missouri Compromise? Not at all. Mark Graber points out that political elites wanted the Court to resolve this issue and take it out of the hands of politicians.⁷¹ President Buchanan said as much.⁷² It’s true that a brand new political party, the Republicans, strongly disagreed with the result, but they were hardly the majority party in 1857.⁷³ To be sure, today we are quite sure that *Dred Scott* was a terrible failure of the judicial role, but in 1857 it was what political elites wanted from courts. Deciding these kinds of cases was the point of giving courts the power of judicial review. (The example of *Dred Scott*, by the way, shows the limits of “fidelity to role” arguments, if they are based on judges’ assessments of their role at the time they decide, as opposed to many years later on.)

The contemporary example of the problem is *Masterpiece Cakeshop*.⁷⁴ Consider the issues in the case in terms of social meaning. Jack Phillips argues that requiring him to serve same-sex couples violates his religious liberty.⁷⁵ The state of Colorado argues that it is applying a neutral law.⁷⁶ There is no discrimination. In fact, the social meaning of that law is that it is protecting equality for all.

69. *Dred Scott*, 60 U.S. at 528–29 (Catron, J., concurring) (“[T]he act of 1820, known as the Missouri compromise, violates the most leading feature of the Constitution—a feature on which the Union depends, and which secures to the respective States and their citizens and entire EQUALITY of rights, privileges, and immunities.”).

70. *Id.* at 450 (majority opinion).

71. GRABER, *supra* note 66, at 33–34 (“Prominent Jacksonians (and moderate Whigs) in all regions of the country during the late 1840s and early 1850s publicly declared that the federal judiciary was the institution responsible for determining the extent to which slavery could be regulated in the territories.”).

72. James Buchanan, Inaugural Address (Mar. 4, 1857), in 5 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 430, 431 (1897) (arguing that the issue of slavery in the territories was “a judicial question, which legitimately belongs to the Supreme Court of the United States”).

73. See GRABER, *supra* note 66, at 33 (“Members of the dominant Jacksonian coalition from all regions of the country praised the Court’s handiwork on the status of slavery in the territories as well as on black citizenship.”).

74. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

75. *Id.* at 1726.

76. *Id.*

Phillips responds that what the law means to him, and to other conservative Christians, is discrimination against Christians. It demeans them and treats them as uncouth bigots. For many years, the liberal meaning of public accommodations laws was uncontested. Public accommodations laws protected equality. Then the underlying facts changed. The gay rights movement persuaded many jurisdictions to add sexual orientation to the list of forbidden discriminations.⁷⁷ Religious conservatives felt disempowered and discriminated against. They suddenly realized that they were no longer a moral majority. They felt themselves to be a disparaged minority.

Conservative elites understood this. They agreed with the critique.⁷⁸ And with that, the social meaning of antidiscrimination laws had become contested, not only among the general public, but more importantly, among elites. The Supreme Court decided for Phillips on the narrow grounds that the decisionmakers may have been prejudiced against him.⁷⁹ But the larger question is whether the Free Exercise Clause should trump public accommodations laws that protect LGBTQ rights. If Lessig's theory is correct, the Court is certainly entitled to decide the question that way, even if Lessig himself would disagree.

Lessig is not blind to the problem. He sees that polarization threatens to make his theory irrelevant, because he understands that his theory is a "non-partisan" way of looking at the practice of judicial review:

[S]o deeply have we allowed partisan norms to infect the institution of the judiciary that we don't even recognize the essentially nonpartisan character of its past. Not that values have been irrelevant or that partisan values have not mattered. But the practice of constitutionalism stood above them, or beyond them, and the effort to keep alive commitments thought fundamental could therefore flourish.

That practice will not survive a Court perceived by us all to be political. (p. 458)

Lessig is right. His theory is a rational reconstruction of the work of the Supreme Court in a depolarized politics. He is in good company: This is true of most constitutional theories of the twentieth century. If he had finished the book in the late 1990s, the problems that polarization presents for his theory would have been less apparent. But in 2019, it is hard not to notice them.

77. *State Public Accommodation Laws*, NAT'L CONF. ST. LEGISLATURES (Apr. 8, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [<https://perma.cc/SZ96-QRVP>]; see also Ashe McGovern et al., *Nondiscrimination Protections for LGBTQ Communities*, CTR. FOR AM. PROGRESS (Dec. 8, 2016, 7:00 AM), <https://www.americanprogress.org/issues/lgbt/reports/2016/12/08/294423/nondiscrimination-protections-for-lgbtq-communities/> [<https://perma.cc/QV8B-LEV4>].

78. See, e.g., David French, *Yes, American Religious Liberty Is in Peril*, WALL STREET J. (July 26, 2019, 10:54 AM), <https://www.wsj.com/articles/yes-american-religious-liberty-is-in-peril-11564152873> [<https://perma.cc/RBX7-GSP2>].

79. *Masterpiece Cakeshop*, 138 S. Ct. at 1729–31.

III. DOES LESSIG'S THEORY OF FIDELITY EXPLAIN CONSTITUTIONAL CHANGE?

Fidelity and Constraint is not only a theory of interpretation. It is also a theory of how and why constitutional change occurs. But it is not a book about political change, political movements, or social movements. It is written almost exclusively from the internal perspective of judges trying to decide difficult cases under changed conditions. Although the book argues that social meaning is a crucially important phenomenon, it does not understand the work of courts in terms of, or in conversation with, the institutions and practices that actually change social meaning—such as social movements or political parties. It also pays little to no attention to the effects of state-building, party structure, social movements, or institutional infrastructures on constitutional development. It is, in short, a thoroughly internalist account of constitutional change, which explains constitutional change solely in terms of how the justices understand and balance their twin obligations of fidelity to meaning and fidelity to role. *Fidelity and Constraint* focuses on how the Supreme Court (viewed as a single entity) perceives an ever-changing world outside it. The Court's perception and its response is the engine of constitutional change.

Lessig's concept of "fidelity to role" emphasizes that the Supreme Court must preserve its legitimacy, adopt only administrable legal doctrines, and generally be seen to be above politics. But the book does not say very much about what legitimacy is or about the social processes that would support or undo that legitimacy. Instead, fidelity to role appears to be an internal conception: justices might come to feel that they were not being faithful to their proper roles as judges; or they might feel that others viewed them with disapproval.

There are other ways of thinking about legitimacy, of course. One might consider the literature on how the Supreme Court gains, preserves, or loses support in public opinion.⁸⁰ One might consider the relationship between the judiciary and the other branches of government. It's possible that if the Court strays too far out of line from the desires of the political branches, Congress might respond and fashion a more pliable Court. It's also possible that the political branches might create the sort of Court that does mostly what the political branches want it to do. (Spoiler alert: they have!)⁸¹ But the

80. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637, 658–61 (1992); James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201 (2014); Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114 (1997).

81. JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* (2012) (describing the history of Congress's construction of a powerful federal judiciary); Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL.

book is innocent of any attention to contemporary political science about how judicial review is constructed by politics or responds to politics. It says nothing about the political science literatures that explain the political supports for judicial review or how political actors construct the Court's power and legitimacy. Instead, as noted above, *Fidelity and Constraint* emerges out of the Legal Process tradition and its vision of the judicial role. In this tradition, courts identify and resolve problems of legitimacy through sound judgment and legal craft. Lessig's intellectual forebears are important scholars like Alexander Bickel, Henry Hart, and Herbert Wechsler.⁸² They are not political scientists like Robert Dahl or Martin Shapiro.⁸³

A. *It's All in Your Head, Dude.*

Lessig argues that the justices behave as they do because they must balance fidelity to meaning against fidelity to role. Judicial role has two components, internal and external. The internal aspect concerns whether what courts do is administrable: "[H]ow will the rule or any particular doctrine of constitutional law play out over time? Will courts be able to apply it consistently or reliably? Or will their applications come to be seen as undetermined, or worse, political?" (p. 451). The external constraint concerns whether "this case or doctrine enable[s] courts to flourish or to remain relatively stable and capable within a proper conception of the judiciary" (p. 451). External constraints concern "how a court's practice is understood" (p. 163). Both internal and external constraints are constraints on the justices' understandings and behavior. They cause the justices to think and behave in certain ways and not others.

Throughout the book, Lessig places a great deal of weight on fidelity to role to explain why the justices develop new doctrines or retreat from them. The interaction of judges' obligations of fidelity to meaning and fidelity to role causes constitutional revolutions and significant changes in constitutional doctrine.

Put another way, Lessig's account of constitutional change is not only institutionally internalist. It is also psychologically internalist. What causes judges to change constitutional doctrine is the way that judges perceive existing law and forces in the world around them.

If we are trying to understand American constitutional development, however, it is not clear that this is the best way to understand how constitutional doctrine changes, especially in big-ticket items like constitutional revolutions. In these latter cases, the concept of fidelity to role does not seem to do very much explanatory work.

SCI. 425, 427–28, 446 (2005) (explaining how politicians construct judicial review to perform important tasks for them even if they disagree with individual decisions).

82. See *supra* text accompanying notes 46–50.

83. See, e.g., MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

B. *Winner's History*

Take the New Deal revolution as an example. Lessig argues that the pre-1937 Court created doctrines striking down economic and social legislation because they wished to preserve fidelity to meaning (p. 92). Eventually the Court found that these doctrines were not administrable and made the Court look too political (pp. 164–67). As a result, the Court retreated.

This account makes it sound as if the same people—called “the Court”—created doctrines through translation and then reversed course because they felt internal and external constraints. The members of “the Court” eventually realized that their doctrines were not administrable and appeared too political. So they changed their doctrines.

But that is not really what happened. Between 1937 and 1942, FDR got eight appointments to the Supreme Court.⁸⁴ The justices who created the previous jurisprudence were part of an older regime and reflected its values and presuppositions. The justices who replaced them were New Dealers who had very different ideas about the Constitution.

The best explanation of the New Deal revolution is not a sense of internal and external compulsion felt by the justices. It is the replacement of older justices by newer justices. The best explanation is not at the level of judicial psychology. It is at the level of institutional and political change. It is partisan entrenchment in the judiciary.⁸⁵

It would be one thing if Lessig showed that Justices Van Devanter, McReynolds, Sutherland, and Butler came to their senses and said to themselves, “Gee, what we are doing isn’t administrable and it makes us look far too political. I guess we’ll have to overturn our doctrines.” He does not show this. As far as we know, it didn’t happen. What did happen is that a president with very different views about the Constitution than these justices appointed new people with very different views of what the Constitution meant to replace them. The new justices then changed the doctrine dramatically.

Now if you asked the new justices *why* they changed the doctrine, they would tell you a story that sounds very much like Lessig’s account of fidelity to role: the Old Court’s doctrines made arbitrary distinctions. *They* were imposing their political views on the nation. But the problem was *them*. Not us. The new justices didn’t make these mistakes. The old justices did. And when FDR attacked the Old Court for being too political, these new justices were not feeling an external constraint. They would have nodded their heads in agreement: “He wasn’t criticizing *us* for being too political. We believe in judicial restraint. We’re all New Dealers here.”

84. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1747–48 (7th ed. 2018) (Table of Justices); *Supreme Court Nominations (Present-1789)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/B8YM-CV8W>].

85. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 490–91 (2006) (explaining the New Deal revolution in terms of partisan entrenchment).

If fidelity to role is an internal and external constraint felt by a particular judge or set of judges—and that is Lessig’s definition—then fidelity to role is not the best explanation of constitutional revolutions. We can’t really say that fidelity to judicial role *caused* the Court to retreat. The Court is not an “it.” It is a “they,” and the “they” is not constant over periods of constitutional revolutions. That is because many, if not most, constitutional revolutions in doctrine are produced by partisan entrenchment.⁸⁶ Older justices die or retire, and they are replaced by newer ones who reflect the victory of political parties and the influence of social movements. Lessig’s account of fidelity to role is winner’s history. It is what the winners say about where the losers went wrong.

That said, it’s important to recognize that there *are* some situations in which fidelity to role appears to be the best explanation for the Supreme Court changing its direction. (I say change its direction, not change its mind, because the Court is a group of persons that has no single mind.) These changes occur when a single justice flips, and the best explanation is that this particular justice became convinced that a doctrine was no longer administrable and that it led to arbitrary results.

For example, Justice Blackmun was the fifth vote in *National League of Cities v. Usery*.⁸⁷ Several years later, he changed his mind and voted to overturn *National League of Cities* in the *Garcia* decision.⁸⁸ The best explanation of this kind of change in doctrine is not partisan entrenchment but a single judge changing his or her mind, probably on grounds of fidelity to role. (Again, it is somewhat misleading to say that the Court changed its mind, because only one person changed his or her mind.)

If we turn to the example of the New Deal revolution itself, it is also plausible that Justice Owen Roberts’s votes in *Nebbia* (in 1934),⁸⁹ *West Coast Hotel* (in 1937),⁹⁰ and *Jones & Laughlin* (in 1937)⁹¹ can be ascribed to his individual notions of fidelity to role (as opposed to the views of the Court as a whole).⁹² He was a swing justice during this period and his votes made the difference in these cases. But the real change in doctrinal structure comes

86. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–83 (2001).

87. 426 U.S. 833 (1976) (holding that Congress could not constitutionally apply the federal Fair Labor Standards Act to traditional governmental functions), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

88. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities*).

89. *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding state price supports for milk).

90. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage law for women).

91. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act of 1935).

92. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 94–104 (1998) (offering a defense of Roberts’s course of decisionmaking based on internal legal reasoning).

with *Darby* (in 1941)⁹³ and *Wickard* (in 1942),⁹⁴ and these decisions are best explained by partisan entrenchment, not by fidelity to judicial role.⁹⁵

Here's another reason to think that partisan entrenchment is the best explanation for the New Deal revolution, and not fidelity to role. Suppose that Woodrow Wilson had gotten one more Supreme Court appointment and Warren Harding had gotten one less (Wilson got three in eight years, while Harding got four in less than four years).⁹⁶ Or suppose that Wilson appointed someone else other than the anti-Semitic, reactionary McReynolds,⁹⁷ and that another of Wilson's appointments, John H. Clarke, didn't leave after a few years to go campaign for the League of Nations (giving Harding one of his four appointments).⁹⁸ Then *Hammer v. Dagenhart*⁹⁹ comes out the other way, and so does *Adkins v. Children's Hospital*.¹⁰⁰ The transition to modern constitutional law goes much more smoothly. The Supreme Court's center is more in line with public opinion, and much less conservative. Because of Wilson's progressive appointments, the Court does not produce a series of controversial translations to preserve fidelity to meaning. Because there is no translation, there is no retreat between 1937 and 1942. Instead, in Lessig's terms, we would say that the Court just kept on keeping on, engaging in one-step originalism from the mid-1910s all the way to 1942—when it upheld the Fair Labor Standards Act. And that decision would have made perfect sense, because, in this alternative universe, the Court had already upheld Congress's power to regulate child labor in 1918 in *Hammer v. Dagenhart*.

The only difference between these two universes is the accident of who retires, dies, and gets appointed to the Supreme Court. Lessig is trying to explain why and how constitutional revolutions occur by using concepts internal to legal analysis and judicial understanding—fidelity to meaning and fidelity to role. Sometimes, this may be the best explanation. But usually it is not the best or most parsimonious explanation. Sometimes, institutions and political structures really do matter.

93. *United States v. Darby*, 312 U.S. 100 (1941).

94. *Wickard v. Filburn*, 317 U.S. 111 (1942).

95. CUSHMAN, *supra* note 92, at 224.

96. BREST ET AL., *supra* note 84, at 1745–47 (Table of Justices); *Supreme Court Nominations*, *supra* note 84.

97. LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at 179 (2009) (“Wilson mistakenly thought that McReynolds’s position on trusts was a proxy for progressive beliefs generally. McReynolds instead was a reactionary, whose votes would affect almost a quarter-century of constitutional doctrine.”).

98. *Id.* at 194 (describing Clarke’s exit from the Court as a “shocker,” which occurred “because he couldn’t stand McReynolds and wanted to work for U.S. entry into the League of Nations”).

99. 247 U.S. 251 (1918).

100. 261 U.S. 525 (1923).

CONCLUSION: EXPLAINING CONSTITUTIONAL CHANGE

A recurring problem of internalist accounts like Lessig's is that they have to explain a wide range of political and institutional features that generate constitutional change—for example, appointments strategies, social and political movements, state-building constructions, changes in political regimes and political party coalitions—in terms of the individual legal judgments and understandings of jurists. And that is what Lessig has done in this book. He has taken these larger social processes of constitutional change outside the courts and tried to explain their operations in terms of their effects in the minds of the justices, seen through the prism of the justices' conception of their judicial role.

Lessig is hardly oblivious to the outside world—he is very much concerned with how the world changes and especially how social meaning changes. As a prominent political activist, he is well aware that there are things called social and political movements, changes in party coalitions, state-building constructions, and appointments strategies. But his attempt to provide a purely internalist account of constitutional change prevents him from incorporating these features of constitutional change directly into his model. It requires him to explain change in terms of what is going on in the heads of the justices and their vision of professional values and good legal craft. This problem is not unique to Lessig. Any internalist account—for example, David Strauss's attempt to explain constitutional change as a process of common law development by judges—will face similar problems.¹⁰¹

One result of these problems is that, as a descriptive thesis, the argument becomes unfalsifiable. If the Court overturns *Roe v. Wade*,¹⁰² the reason will be fidelity to role. If the Court keeps *Roe*, the reason will be fidelity to role. Fidelity to role acts as the get-out-of-jail-free card to explain the Court's zigs and zags. The theory becomes unfalsifiable because the concept of fidelity to judicial role is taking on too much work. It tries to compress all of the different institutional and cultural features that actually produce constitutional and political change into a series of professional and prudential judgments in the heads of a slowly changing cast of nine characters.

With a little effort, however, we could easily integrate Lessig's theories with a wide range of externalist and institutional accounts. We could try to show, for example, how social and political movements affect social meaning, and especially elite opinion.¹⁰³ This addition would help explain *why* the justices respond to changes in social meaning—because social movements

101. See Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1146–49 (2012) (arguing that Strauss's common law theory conceals more plausible drivers of change in constitutional doctrine).

102. 410 U.S. 113 (1973).

103. Jack M. Balkin, *All Hail Ed Meese!*, BALKINIZATION (Apr. 3, 2019, 9:00 AM), <https://balkin.blogspot.com/2019/04/all-hail-ed-meese.html> [<https://perma.cc/9KX6-4H58>] (arguing that social movements change constitutional law by influencing the views of members of elite networks who, in turn, are the most important audience for federal judges).

affect educated elite opinion, and judges are strongly influenced by what elites think.¹⁰⁴

Similarly, we could explain changes in fidelity to meaning as well as the concept of fidelity to role in terms of partisan entrenchment. For example, Kevin McMahon has shown that Roosevelt deliberately chose judges and justices who were more likely to be racial liberals, which meant that after World War II, these justices were more sympathetic to viewing segregation as discrimination.¹⁰⁵ This example shows how partisan entrenchment affects how judges understand and act on changes in social meaning.

Likewise, partisan entrenchment and changes in party coalitions can help us understand why a later Court sees conflicts in fidelity to role that an earlier one did not. Replacing one set of justices with another is likely to produce a Court whose working majority has a different conception of judicial role than the previous working majority.

One could go through the book supplementing Lessig's arguments about fidelity to meaning and fidelity to role with these and other institutional and political explanations. The result would no longer be purely internalist. But it might be a more powerful account of the complicated processes of constitutional change.

104. *Id.*

105. KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* (2004).