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## Translating Federalism: A Textualist Reaction

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Symposium

Textualism and the Constitution

Textualism and Federalism

**TRANSLATING FEDERALISM: A TEXTUALIST REACTION**

Gregory E. Maggs\*

I. Introduction

Patterns of commerce in this country have changed remarkably since the states ratified the Constitution in 1789. Two centuries ago, many businesses were localized because distant transactions were impractical.<sup>1</sup> Over the past two centuries, however, technological advances have diminished the significance of geographic separation. As a result, enterprises in different states now often compete with one another and very few commercial activities have only local effects. Indeed, the level of integration in our economy today surely exceeds what anyone could have foreseen in the eighteenth century.<sup>2</sup>

The increasingly interstate character of commerce has altered the balance of power between the states and the federal government regarding regulation of the economy. Although Congress's power to regulate "Commerce . . . among the several States"<sup>3</sup> might have had limited importance when interstate commerce was less prevalent, the Clause has become increasingly significant as markets have become so closely connected. Now almost any substantial economic activity affects commerce in more than one state.<sup>4</sup>

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<sup>1</sup> See Larry Kramer, *What's a Constitution for Anyway?*, 46 Case W. Res. L. Rev. 885, 919 (1996).

<sup>2</sup> See Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power under the Commerce Clause?*, 44 U. Kan. L. Rev. 217, 229 (1996).

<sup>3</sup> U.S. Const. art. I, § 8.

<sup>4</sup> See Thomas Reed Powell, *The Child Labor Law, the Tenth Amendment, and the Commerce Clause*, 3 S.L.Q. 175, 201 (1918) (explaining how the power of Congress expands under the Commerce Clause as the market becomes more integrated); Robert H. Bork, *The Tempting of America* 56-57 (1990) (noting that Congress now may regulate the "most trivial and local activities" if all that matters is whether the activity has an effect on interstate commerce).

Professor Lawrence Lessig recently analyzed this development. In his rich and important article, *Translating Federalism: United States v Lopez*<sup>5</sup> (“*Translating Federalism*”), Lessig strives to explain how the Supreme Court has interpreted and should interpret the Commerce Clause to address the changing character of our national economy. In the process, he advances two ambitious and provocative claims.

Lessig first asserts that the Supreme Court has sought to control the expansion of federal power by “translating” the Commerce Clause instead of following the Clause’s textual meaning.<sup>6</sup> He explains that the Court has not allowed Congress to regulate all “Commerce . . . among the several States” \*1199 because that literal reading of the Commerce Clause would give Congress the ability to regulate almost everything, and the Framers never intended for Congress to have so much power.<sup>7</sup> Instead, according to Lessig, the Court has attempted to translate--or update--the Clause to maintain a balance of power between the federal and state governments as “envisioned in the framing generation.”<sup>8</sup> In this way, he says, the Court may preserve the original function of the Commerce Clause despite departing from the Clause’s literal meaning.<sup>9</sup> Lessig cites the Court’s recent decision in *United States v. Lopez*,<sup>10</sup> which struck down the Gun-Free School Zones Act of 1990<sup>11</sup> (“the Act”), as his principal example of how the Supreme Court translates the Commerce Clause.<sup>12</sup>

Second, Lessig proclaims that, as a normative matter, the Supreme Court should engage actively in this type of translation.<sup>13</sup> In his view, the Court shows greater fidelity to the Constitution by reading it in ways that preserve the document’s original function than the Court exhibits by strictly following the document’s text.<sup>14</sup> Lessig explains that translation serves to “reestablish something ratifiers of the Constitution chose, eroded by

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<sup>5</sup> Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 Sup. Ct. Rev. 125.

<sup>6</sup> See *id.* at 130.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

<sup>10</sup> 514 U.S. 549 (1995).

<sup>11</sup> Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844-45 (1990) (codified as amended at 18 U.S.C. § 922(q)(2)(A) (1994)).

<sup>12</sup> See Lessig, *supra* note 5, at 194-214.

<sup>13</sup> See *id.* at 130-31.

<sup>14</sup> See *id.*

changes that no one chose, to ensure that something of the original structure survives these unchosen changes.”<sup>15</sup>

Lessig’s article makes a substantial contribution to the ongoing debate about how courts should react to changed circumstances when deciding constitutional cases. Ultimately, however, I disagree with both of Lessig’s claims. The Supreme Court, in my view, did not translate the Commerce Clause in *Lopez*, but instead decided the case in a textualist manner.<sup>16</sup> In addition, for reasons that I will explain, the Court generally should read the Clause according to the text’s original meaning and should not attempt to translate it.<sup>17</sup>

## II. Lessig’s Contribution

Lessig’s theory warrants attention, even from textualists who disagree with his ultimate conclusions, because Lessig agrees with one of textualism’s central assumptions: the Supreme Court’s decisions must be judged by their **\*1200** faithfulness to the Constitution.<sup>18</sup> As described above, Lessig supports attempts to translate the Commerce Clause because he believes that the Court often can show greater fidelity to the Constitution through translation than it could by reading the Constitution’s text literally and ignoring historical developments.<sup>19</sup>

Not all scholars share Lessig’s premise about maintaining fidelity. For instance, in response to Lessig and others, Professor Michael J. Klarman recently has argued that the Constitution does not deserve our loyalty at all.<sup>20</sup> He reasons that we differ substantially from the Framers in ideology and material circumstances,<sup>21</sup> noting that political assumptions and economic conditions have changed a great deal since the 1780s.<sup>22</sup> For these reasons, Klarman contends that the Framers simply do not have “much of

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<sup>15</sup> Id. at 135. Professor Lessig has developed his theory of translation in a series of articles. See Lawrence Lessig, *Fidelity and Constraint*, 65 *Fordham L. Rev.* 1365 (1997); Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165 (1993); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *Stan. L. Rev.* 395 (1995).

<sup>16</sup> See *infra* Part III.

<sup>17</sup> See *infra* Part IV.

<sup>18</sup> See Lessig, *supra* note 5, at 131 (noting that “[f]idelity is the dominant modality of constitutional interpretation”).

<sup>19</sup> See *id.*

<sup>20</sup> See Michael J. Klarman, *Antifidelity*, 70 *S. Cal. L. Rev.* 381, 381 (1997).

<sup>21</sup> See *id.* at 383-85.

<sup>22</sup> See *id.* at 385-86.

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relevance to say about how we should govern ourselves today.”<sup>23</sup> Professor Cass Sunstein recently has expressed similar skepticism about fidelity to the Constitution.<sup>24</sup>

Klarman and others who disagree with Lessig’s insistence on fidelity have an interesting theory. Perhaps, after all these years, our Constitution does not warrant our loyalty for the various reasons that Klarman and others point out. Yet, for better or for worse, the Justices already have decided that the Constitution deserves fidelity; indeed, they swore to uphold and defend the document upon taking office. Consequently, in rendering their decisions, the Justices primarily care about how they should exhibit their allegiance to the Constitution, not whether the document should continue to govern us.<sup>25</sup> Lessig has something to say about this question; Klarman and other critics of fidelity do not.

Lessig’s effort to evaluate the Court’s work in terms of its faithfulness to the Constitution leads to the principal contribution of his article. He adds to the debate about textualism by observing that judges might strive to be faithful to the Constitution in more than just one way. Textualists should keep this important idea in mind.

In legal thinking, disagreements often arise not because people have different goals, but because they have different conceptions of the same goal. Consider, for example, the desire for equality in the law. One way to promote equality is to treat everyone the same. Another is to treat people differently based on their differing circumstances. Both methods promote equality; they simply advance alternative visions of what equality means. The same idea holds true for the goal of fidelity. As Lessig explains, the Supreme Court can be faithful to the Constitution in two ways. The Court \*1201 can follow the text strictly or it can attempt to translate the text so that the Constitution serves the functions that the Framers envisioned.<sup>26</sup> Although the two approaches may lead to different outcomes, textualist critics cannot fault the Court for unfaithfulness merely because the Justices

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<sup>23</sup> *Id.* at 387.

<sup>24</sup> See Cass Sunstein, *The Partial Constitution* 100 (1993) (arguing that “agreement on the document many generations ago is insufficient” to warrant loyalty to it in modern times).

<sup>25</sup> See Gregory E. Maggs, *Yet Still Partial to It*, 103 *Yale L.J.* 1627 (1994) (making a related argument in response to Sunstein).

<sup>26</sup> See Lessig, *supra* note 5, at 127.

choose one approach over another. Arguments against translation must lie elsewhere.<sup>27</sup>

### III. Translation in Commerce Clause Cases

Although Lessig makes a valuable contribution with his discussion of how translation might maintain fidelity, I disagree with his principal claim that the Court recently has been attempting to translate the Commerce Clause. Lessig, as noted above, cites *United States v. Lopez*<sup>28</sup> as his foremost example, but his characterization of the case troubles me. As I read *Lopez*, the Court struck down a federal statute based on a textual reading of the Commerce Clause and did not employ translation to reach its conclusion.

*Lopez* came before the Supreme Court in 1994. In the case, the Justices had to decide whether Congress had the power to enact the Gun-Free School Zones Act of 1990.<sup>29</sup> The Act prohibited an individual “knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”<sup>30</sup> Although the Court had not struck down a federal statute under the Commerce Clause in more than half a century,<sup>31</sup> this case seemed different from the start.

During the oral argument, it appeared that the government was going to lose and that the Court was going to strike down the Act under a literal reading of the text of the Constitution. Justice Scalia acknowledged that the Court had not always been “too strict” in determining the reach of the Commerce Clause.<sup>32</sup> He candidly acknowledged that “if Congress says some commercial activity is interstate commerce, or affects interstate commerce, that’s okay. But here you have regulation of something that is not commercial activity in any sense of the word, but merely the possession of an item.”<sup>33</sup>

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<sup>27</sup> See *infra* Part IV.

<sup>28</sup> 514 U.S. 549 (1995)

<sup>29</sup> See *id.* at 551.

<sup>30</sup> Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844 (1990) (codified as amended at 18 U.S.C. § 922(q)(2)(A) (1994)).

<sup>31</sup> The Court last struck down a federal statute as exceeding the power of Congress under the Commerce Clause in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>32</sup> See Transcript of Oral Argument, 1994 WL 758950, at \*7 (U.S. 1994), *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260).

<sup>33</sup> *Id.* at \*8.

Solicitor General Drew Days faltered at this point in the argument. He could not explain in a manner convincing to the Justices how the statute involved either “commerce” or any activity “among the states.”<sup>34</sup> He also could not explain satisfactorily how Congress’s power under the Commerce Clause would be limited in any way if the Court interpreted the Clause as granting Congress the power to pass the Act. Solicitor General Days could identify few areas that the Commerce Clause would not permit Congress to \*1202 reach if the definition of commerce was so broad that it included possession of a firearm.<sup>35</sup>

After the oral argument, the Court’s decision to invalidate the Act came as little surprise. In the first paragraph of its opinion, the Court announced its conclusion that “[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress ‘[t]o regulate Commerce . . . among the several States . . .’”<sup>36</sup> In explaining its holding, the majority opinion cited Commerce Clause decisions as old as *Gibbons v. Ogden*<sup>37</sup> and as recent as *Preseault v. ICC*.<sup>38</sup> The majority then concluded that there was no precedent interpreting the Clause in a way that would encompass gun possession in school zones.<sup>39</sup> The Act, the Court reasoned, did not address commerce, the instrumentalities of commerce, or anything having a substantial effect on commerce.<sup>40</sup>

Unlike Lessig, I do not see any attempt by the Court to translate the Commerce Clause in order to preserve its function in modern times. I would characterize the Court’s decision as textual because, as the opinion’s initial paragraph indicates, the holding rests on the literal language of the Commerce Clause. The Constitution empowers Congress to regulate interstate commerce, but the Act did not regulate commerce. In the end, the Court concluded that something it would not have characterized as commerce in the eighteenth or nineteenth century likewise should not be viewed as commerce in the twentieth century. The Court did not update the Commerce Clause to reach its conclusion despite all of the changes that have produced our modern economy.

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<sup>34</sup> See *id.* at \*8-10.

<sup>35</sup> See *id.* at \*10-20.

<sup>36</sup> *United States v. Lopez*, 514 U.S. 549, 551 (1995) (quoting U.S. Const. art. I, § 8, cl. 3).

<sup>37</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>38</sup> 494 U.S. 1 (1990).

<sup>39</sup> See *Lopez*, 514 U.S. at 561-63.

<sup>40</sup> See *id.* at 561.

Lessig offers two counterarguments for why we should consider *Lopez* an exercise of translation. First, he contends that the Court was looking for a way to read the Commerce Clause that would preserve for the states some of the power that they enjoyed when the Constitution first took effect.<sup>41</sup> As evidence, he quotes the Court's statement: "[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."<sup>42</sup>

This argument is unpersuasive. Although the Court's statement reveals concern for the original function of the Commerce Clause, it does not show that the Court engaged in translation. As noted, the Court held that possession of a gun did not constitute commerce--the same conclusion that it would have reached two centuries ago. At best, the statement quoted by Lessig demonstrates that the Court refused to abandon its original understanding\*1203 of the text in part because such a departure would change the text's function.<sup>43</sup>

Second, Lessig argues that the Court engaged in translation because it failed to consider the Necessary and Proper Clause.<sup>44</sup> Although the Court did overlook this important provision,<sup>45</sup> and perhaps deserves criticism for the omission,<sup>46</sup> this fact does not indicate that the Court translated the Constitution. The omission merely shows that the Court did not perform as thorough a textual analysis as it might have--the Court should have considered all of the relevant portions of the Constitution, not just the Commerce Clause.

*Lopez*, to be sure, is only one case. Even if the Supreme Court did not translate the Commerce Clause in *Lopez*, it might have sought to translate

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<sup>41</sup> See Lessig, *supra* note 5, at 195.

<sup>42</sup> *Lopez*, 514 U.S. at 564.

<sup>43</sup> The statement also does not indicate that the Court would have departed from the text to preserve the function of the Commerce Clause. Indeed, the Court's emphasis on the text of the Clause at the beginning of the opinion makes that conclusion unlikely.

<sup>44</sup> See Lessig, *supra* note 5, at 197-201.

<sup>45</sup> Neither the majority nor the dissent mentioned the Necessary and Proper Clause. See *Lopez*, 514 U.S. at 549.

<sup>46</sup> In fairness to the Court, it should be noted that the Justices might have overlooked the Necessary and Proper Clause because of the way the government argued the case: the government only mentioned the Necessary and Proper Clause in one cursory footnote in its principal brief. See Brief for Petitioner, 1994 WL 242541, at \*13 n.4 (U.S. 1994), *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260).

the Clause in other decisions. Yet, if *Lopez* is the best example that Lessig can offer, translation does not appear to play a central role in Commerce Clause cases.<sup>47</sup>

#### IV. The Problems with Translation

Lessig, as noted, deserves credit for recognizing that the Supreme Court can be faithful to the Constitution in more than one way.<sup>48</sup> The Court may attempt to adhere to the Constitution either by following the text's literal meaning or by attempting to find a new meaning that preserves the text's original function. I disagree, however, with Lessig's belief that translation is better than textualism. In my view, translation has two substantial problems that textualism does not: it is unnecessary and it is overly difficult.

##### A. The Need for Translation

No one would deny that legal rules, even those in the Constitution, might become antiquated after two centuries. The Seventh Amendment, for example, still requires a jury trial in any civil case involving more than twenty dollars,<sup>49</sup> even though twenty dollars is not worth nearly as much now as it was in 1791 when the Amendment took effect. The Supreme Court, however, does not have to update constitutional provisions through translation in order to deal with problems caused by the passage of time. Instead, when **\*1204** developments warrant a change in the Constitution's text, Congress and the states may amend it under the procedures stated in Article V.<sup>50</sup>

Amendments have updated antiquated portions of the Constitution on a number of occasions. For example, after modern transportation allowed the President to travel more quickly to Washington, the Twentieth Amendment moved inauguration day to a date closer to the election.<sup>51</sup> Likewise, when the government needed more revenue than the original

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<sup>47</sup> See Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 *Fordham L. Rev.* 1435, 1436-54 (1997) (arguing that most of the Supreme Court's important cases have not involved translation).

<sup>48</sup> See *supra* Part II.

<sup>49</sup> See U.S. Const. amend. VII.

<sup>50</sup> See *id.* art. V (stating the amendment procedure).

<sup>51</sup> See *id.* amend. XX; John Nagle, *A Twentieth Amendment Parable*, 72 *N.Y.U. L. Rev.* 470, 483-89 (1997) (describing the history of the adoption of the Twentieth Amendment).

rules on taxation realistically could produce,<sup>52</sup> the Sixteenth Amendment empowered Congress to tax income.<sup>53</sup>

Lessig does not address the alternative of amending the Constitution in Translating Federalism.<sup>54</sup> He might respond, however, by arguing that the Article V amendment process cannot take translation's place because adopting an amendment is an onerous undertaking and thus seldom occurs.<sup>55</sup> This line of reasoning, however, is not very convincing for two reasons.

First, the difficulty of amending the Constitution should not be overstated. In the 209 years since the Constitution's ratification in 1789, we have had twenty-seven amendments. History thus shows that Congress and the States can change the Constitution when they really consider changes to be necessary.

Second, even if cumbersome, the amendment process still can suffice as a substitute for translation because the Constitution needs very little updating. Much of the Constitution has a timeless quality that no one sees a pressing need to change. Although the Framers should have thought more carefully when drafting some parts of the Constitution,<sup>56</sup> they generally chose rules that we all can live with today even when read literally. As a result, the difficulty of amending the Constitution does not matter a great deal because we seldom have reason to invoke the process.

Ironically, if employed regularly, the translation technique actually might hinder efforts to modernize the Constitution. Political branches of the government might see no need for a constitutional amendment that would protect a sphere of state power in the area of economic regulation if the Court strived to protect states' rights by translating the Commerce Clause. In the absence of translation, Congress and the states would be

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<sup>52</sup> See U.S. Const. art. I, § 9 (prohibiting unapportioned direct taxes); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) (striking down an income statute as an unapportioned direct tax).

<sup>53</sup> See U.S. Const. amend. XVI.

<sup>54</sup> Lessig mentions amendment of the Constitution only once, stating in passing that the Supreme Court must defend "commitment[s]" in the original Constitution "until changed by amendment." See Lessig, *supra* note 5, at 177-78.

<sup>55</sup> See Stephen M. Griffin, *The Problem of Constitutional Change*, 70 *Tul. L. Rev.* 2121, 2136 (1996); Klarman, *supra* note 20, at 387. Other writers have advanced variations of this argument in explaining why the Supreme Court has played such a substantial role in creating constitutional law.

<sup>56</sup> The twenty dollar limitation in the Seventh Amendment is an example.

forced to confront problems presented by the antiquation of the Constitution.

**\*1205 B. The Difficulty of Translation**

In addition to being unnecessary, the translation process that Lessig describes leaves many other problems unresolved. One concern is uncertainty. How is the Court to know when conditions have changed enough to make necessary the translation of a provision? If the Court decides to translate, what meaning should it adopt? How should the Court's observers evaluate translations?<sup>57</sup> I doubt that the Court ever will provide convincing answers to these questions.

Another problem, which Lessig himself observes, is that translations often might appear to be politically motivated.<sup>58</sup> When the Court starts to depart from the text, it sometimes seems as if the Court is abandoning its judicial role and is becoming a legislature.<sup>59</sup> For this reason, as Lessig observes, the Court often must use covert tools to accomplish translations that it desires.<sup>60</sup> The Court cannot simply state that it is updating the Constitution.

The textualist approach, combined with the possibility of amendments, does not raise these concerns to the same extent. Although words can be ambiguous and politics certainly can influence how the Supreme Court reads the Constitution—even when it purports to follow literally the text—the textualist approach still raises less controversy. The public knows that judges must apply written legal rules and generally feels comfortable evaluating the judiciary's work. Judges, accordingly, may cite candidly the Constitution's text as the basis for their decisions, as the Supreme Court did in the first paragraph of *Lopez*. For these reasons, textualism remains a better method of maintaining fidelity to the Constitution than does translation.

## V. Conclusion

Despite these difficulties with two of the central claims in *Translating Federalism: United States v Lopez*, Lessig has done an invaluable service in investigating alternative methods of showing fidelity to the Constitution

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<sup>57</sup> See generally Sanford Levinson, *Translation: Who Needs It?*, 65 *Fordham L. Rev.* 1457, 1468 (1997) (discussing problems with the practice of translation in the abstract).

<sup>58</sup> See Lessig, *supra* note 5, at 174-76.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* at 185.

when time has dated its provisions. He has argued convincingly that the Justices might reach different understandings of the Constitution, not through trickery,<sup>61</sup> but through different conceptions of what it means for them to uphold and defend the Constitution.

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<sup>61</sup> See Gregory E. Maggs, *Innovation in Constitutional Law: The Right to Education and the Tricks of the Trade*, 86 *Nw. U. L. Rev.* 1038 (1992) (criticizing underhanded methods of achieving desired results in constitutional law cases).