

FOUNDING-ERA TRANSLATIONS OF THE U.S. CONSTITUTION

*Christina Mulligan, Michael Douma, Hans Lind, & Brian
Quinn**

I. INTRODUCTION

After the United States Constitution was drafted in 1787, the document was translated into German and Dutch for the German- and Dutch-speaking populations of Pennsylvania and New York.¹ Although copies of both the German- and Dutch-

* Christina Mulligan is an Assistant Professor of Law at Brooklyn Law School. Michael Douma is the Director of the Institute for the Study of Markets and Ethics at Georgetown University. Hans Lind is a Giamatti Fellow at Yale University. Brian Quinn holds an M.A. in Comparative Literature from the University of Chicago and a B.A. in English from Harvard University. Where uncited, Dutch interpretations were completed by Michael Douma and German interpretations were completed by Hans Lind. The authors wish to thank Jack Balkin, William Baude, Randy Barnett, Randy Beck, Jud Campbell, Nathan Chapman, Dan Coenen, Kent Dolfay, Richard Epstein Bill Glod, Christopher Green, Jill Hasday, Jeanne Hoffman, Martin Kagel, Kurt Lash, Robert Leider, Michael McConnell, Tim Meyer, Joe Miller, Thomas E. Mulligan, George Pike, Richard Re, Bo Rutledge, Stephen E. Sachs, Frederick Schauer, Larry Solan, Larry Solum, Christian Turner, Kirk Wetter, the faculty workshop participants at the University of Georgia, the fellows of the Information Society Project at Yale Law School, and the participants in the Sixth Annual Hugh & Hazel Darling Foundation Originalism Works-in-Progress Conference. Special thanks to Michael Widener, Rare Book Librarian & Lecturer in Legal Research at the Lillian Goldman Law Library at Yale Law School, for his invaluable research help, without which this project could not have been completed.

1. The primary translations this Article will refer to are: VERFAHREN DER VEREINIGTEN CONVENTION GEHALTEN ZU PHILADELPHIA, IN DEM JAHR 1787, UND DEM ZWÖLFTEN JAHR DER AMERICANISCHEN UNABHÄNGIGKEIT. AUF VERORDNUNG DER GENERAL ASSEMBLY VON PENNSYLVANIEN AUS DEM ENGLISCHEN ÜBERSETZT (Michael Billmeyer ed., presumed 1787) [hereinafter "U.S. CONST. (German)"], <http://modern-constitutions.de/US-00-1787-09-17-de-c.html>; and CHARLES R. WEBSTER, DE CONSTITUTIE, EENPARIGLYK GEACCORDEERD BY DE ALGEMEENE CONVENTIE, GEHOUDEN IN DE STAD VON PHILADELPHIA, IN'T JAAR 1787: EN GESUBMITTEERD AAN HET VOLK DER VEREENIGDE STAATEN VAN NOORD-AMERIKA, VERTAALD DOOR LAMBERTUS DE RONDE, GEDRUCKT BY ORDER VAN DE FEDERAL COMMITTEE, IN DE

language Constitutions have been preserved² and are reprinted in a German collection of constitutions edited by Horst Dippel,³ they have largely escaped analysis until now.⁴ This Article examines the text of the translations and explains how they can clarify the meaning of the Constitution's original text.

By presenting and analyzing translations of the Constitution, this Article makes several modest but significant contributions to the field of constitutional interpretation. Principally, the translations provide evidence of the Constitution's original public meaning—the meaning of the text as understood by its contemporary translators and as reflected in their interpretive choices. This evidence may be of particular value when studying clauses in the Constitution that have not typically been the subject of discussion and commentary. The translations also provide examples of situations where there were multiple “original public meanings”—where members of the public developed different interpretations of the same text. More generally, this Article proposes that translations constitute a uniquely advantageous source of constitutional commentary by virtue of their ability to comprehensively and contextually analyze the Constitution's text. Unlike other sources, such as published pamphlets, the ratifiers'

STAD VAN ALBANY (1788) [hereinafter “U.S. CONST. (Dutch)”], <http://modern-constitutions.de/US-00-1787-09-17-nl-c.html>. Both documents are reprinted in *1 CONSTITUTIONS OF THE WORLD FROM THE LATE 18TH CENTURY TO THE MIDDLE OF THE 19TH CENTURY* (Horst Dippel ed., 2006) [hereinafter “1 DIPPEL”].

2. An original copy of the German-language U.S. Constitution can be found at the Lilly Library at Indiana University, Bloomington, and an original copy of the Dutch-language U.S. Constitution is on file in the Historical and Special Collections of the Harvard Law Library. See U.S. CONST. (German), http://www.modern-constitutions.de/nbu.php?page_id=02a1b5a86ff139471c0b1c57123ac196&show_doc=US-00-1787-09-17-dc&viewmode=thumbview (last visited Oct. 14, 2015) (stating that the Lilly Library, Indiana University has made copies of the German translation of the U.S. Constitution available); U.S. CONST. (Dutch), http://www.modern-constitutions.de/nbu.php?page_id=02a1b5a86ff139471c0b1c57123ac196&show_doc=US-00-1787-09-17-nl&viewmode=thumbview (last visited Oct. 14, 2015) (stating that the Historical and Special Collections of the Harvard Law Library has made copies of the Dutch translation of the U.S. Constitution available).

3. 1 DIPPEL, *supra* note 1 (comprising the U.S. Constitution in English, German, and Dutch, as well as each proposed amendment in English and German through 1810).

4. The German translation is so obscure that the Library of Congress website appears to be unaware of its existence, incorrectly surmising that the Dutch translation was the earliest publication of the Constitution in a non-English language. See *Widespread Interest in the Founding Documents*, LIBR. OF CONGRESS., <http://www.loc.gov/exhibits/creating-the-united-states/constitution-legacy.html> (last visited Oct. 14, 2015) (“Displayed here is a 1788 copy of the Constitution in Dutch, perhaps the earliest example of its publication in a language other than English.”).

speeches, or contemporary dictionaries, the translated constitutions exhaustively restate every term and phrase in the Constitution and represent those terms and phrases in context.

Part II will introduce the translations by situating them in historical context. Part III will turn to the value of using translations to interpret the Constitution in the present day. The text of the translations will be analyzed in Part IV. Accompanying this paper is also an appendix, which includes a table of the English, Dutch, and German texts, together with extensive annotations and notes on the peculiarities of these translations.⁵ Our aim is for these comments to be a helpful tool when using the translations to explore the meaning of the Constitution.

II. HISTORICAL CONTEXT OF THE FEDERAL CONSTITUTION IN TRANSLATION

On September 17, 1787, the Philadelphia Constitutional Convention adjourned after completing the drafting of the Federal Constitution. By the next morning, 500 copies had been printed in English, to be distributed to Congress, state governors, and state legislators.⁶

Shortly after the convention adjourned, Pennsylvania's congressional delegation requested a meeting with the Pennsylvania General Assembly, the state's legislative body.⁷ Benjamin Franklin hoped that by quickly ratifying the Constitution, Pennsylvania could secure the location of the new nation's capital.⁸ On Monday, September 24, 1787, and Tuesday, September 25, 1787, the Pennsylvania assembly ordered the printing of 3,000 copies of the Constitution in English and 1,500 copies of the Constitution in German "to be distributed throughout th[e] state for the inhabitants thereof."⁹ At the time,

5. See *infra* app.

6. PAULINE MAHER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 27 (2010).

7. *Id.* at 59.

8. *Id.*

9. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 62–64 (Merrill Jensen ed., 1976) [hereinafter DHRC II]. On September 24, Assemblyman William Findlay moved that 3,000 copies be printed in English and 500 printed in German. *Id.* at 62. Later in the day it appears Findlay moved for 1,000 copies to be printed in English and 500 copies in German, and the motion "was agreed to." *Id.* at 63. The following day, "[Assemblyman] Robert Whitehall[,] thinking the number, ordered [the previous day] to be published of the plan of the federal government, [was] too small[] . . . moved to add two

around one-third of the population of Pennsylvania primarily spoke German,¹⁰ and the relative number of constitutions printed in each language reflected this proportion. Assemblymen William Will of Philadelphia, Adam Hubley of Lancaster County, and Philip Kreemer of Berks County were appointed to a committee to “engage a proper person to translate the plan [Constitution] into the German language.”¹¹ The assembly’s German language printing was undertaken by Michael Billmeyer.¹² However, the translator’s name does not appear on the Billmeyer copies¹³ and does not appear to be known.

The Dutch translation was produced separately at the bequest of a pro-Constitution faction. In the late 1700s, the Dutch language was still spoken widely in New York, specifically in the rural areas around New York City “west of the Hudson, in New Jersey, around Kingston, and along the upper reaches of the Hudson and the Mohawk.”¹⁴ The Dutch translation was printed in 1788 to gather support for New York’s ratification, “by Order van de [of the] Federal Committee,”¹⁵ a group which explicitly advocated ratification of the Federal Constitution in New York.¹⁶ The printer of the Dutch translation, Charles Webster, owner of

thousand more to that motion.” *Id.* Assemblyman Hugh Brackenridge disagreed, arguing that, “the number of fifteen hundred, ordered yesterday, would be enough to convey the information generally through the state.” *Id.* It was eventually ordered that “two thousand copies in English and one thousand in German be printed in addition.” *Id.* at 64. Adding the totals from September 24 and September 25, it would appear that 3,000 copies were printed in English and 1,500 were printed in German. Describing these events, Pauline Maier wrote, “On Tuesday, September 25, the assembly ordered two thousand copies of the Constitution printed in English and another thousand in German for distribution throughout the state.” MAIER, *supra* note 6, at 60. Maier did not mention the September 24 order.

10. According to the 1790 census, 160,000 of Pennsylvania’s 434,373 inhabitants were German, and this tongue “was the standard language in the area where the German population was concentrated.” Juan F. Perca, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 310 (1992) (citing 2 ALBERT B. FAUST, *THE GERMAN ELEMENT IN THE UNITED STATES* 14 (1909) and HEINZ KLOSS, *THE AMERICAN BILINGUAL TRADITION* 140 (1977)). See also FRANK R. DIFFENDERFFER, *THE GERMAN IMMIGRATION INTO PENNSYLVANIA* (1977) (explaining that most authorities agree that German speakers in Pennsylvania constituted about one-third of the total population of Pennsylvania between 1730–1790).

11. DHRC II, *supra* note 9, at 57, 63.

12. *Id.* at 64.

13. See U.S. CONST. (German), *supra* note 1.

14. NICOLINE VAN DER SIJS, *COOKIES, COLESLAW, AND STOOPS: THE INFLUENCE OF DUTCH ON THE NORTH AMERICAN LANGUAGES* 34 (2009).

15. I DIPPEL, *supra* note 1, at 80.

16. MAIER, *supra* note 6, at 328.

the *Albany Gazette* and *Albany Journal*, is notable for having printed pamphlets by both the Anti-Federal and Federal Committees.¹⁷

The Dutch translator was Lambertus De Ronde,¹⁸ a Dutch-American minister of the Reformed Church in America (formally known as the Reformed Protestant Dutch Church).¹⁹ De Ronde was born in Holland in 1720, and lived in the village of Zuilichem in Gelderland for some period until 1746, before going to Suriname.²⁰ He visited New York in 1750. Upon De Ronde's arrival, he was approached by leaders of New York's Dutch Reformed Church "who anticipated their congregation soon would need another minister."²¹ His preaching was praised as "so pleasing"²² that he was hired by the Collegiate Church "with the understanding that he was to join the Coetus."²³

The Coetus was the larger of two warring factions within the Reformed Church; the other was known as the Conferentie. Adrian C. Lieby describes the Conferentie as a group that "often appeared to be moved by a violent hatred for all things American."²⁴ Although "[t]he [C]onferentie sometimes represented its battle as one to preserve the authority of Amsterdam and the ways of the fathers in the American Dutch church," Lieby claims that "its real objective was to oppose the great religious revival that had swept the colonies in the thirty years before the Revolution, . . . that has come to be called the

17. *Id.* at 333–34. On April 10, 1788, Webster printed a circular by the Anti-Federal Committee raising over thirty objections to the Constitution—about ten days later he published the Federal Committee's detailed rebuttal. *Id.*

18. 1 DIPPEN, *supra* note 1, at 80.

19. See EDWARD TANJORE CORWIN, A MANUAL OF THE REFORMED CHURCH IN AMERICA (FORMERLY REFORMED PROTESTANT DUTCH CHURCH) 1628–1902, at 417 (4th ed. 1902).

20. *Id.*

21. See Joyce D. Goodfriend, *The Cultural Metamorphosis of Domine Lambertus de Ronde*, HUDSON RIVER VALLEY REV., Spring 2009, at 63.

22. CORWIN, *supra* note 19, at 417.

23. *Id.* The Ecclesiastical Records of State of New York state that De Ronde was hired "under condition of becoming a coetus." 6 ECCLESIASTICAL RECORDS OF THE STATE OF NEW YORK 3495 (Edward Tanjore Corwin et al. eds., 1905) [hereinafter ECCLESIASTICAL RECORDS].

24. ADRIAN C. LEIBY, THE REVOLUTIONARY WAR IN THE HACKENSACK VALLEY: THE JERSEY DUTCH AND NEUTRAL GROUND, 1775–1783, at 20 (2d. ed. 1992). During the Revolutionary War, most Conferentie supporters in the Hackensack Valley became British loyalists. *Id.*

‘Great Awakening.’”²⁵ In the 1750s and 1760s, the Coetus faction had adopted the liberal language of “rights” while emphasizing personal religious revival. To the Conferentie, such talk seemed to suggest that man could play a role in choosing his own salvation. But any suggestion that God’s grace was resistible, or that man’s free-will played a role in his own salvation, was heretical to the Orthodox Calvinists, whose position on this matter was defined at the Synod of Dordt from 1618–19. The Conferentie were traditionalists who held strongly to Dordt, and because Dordt determined the doctrines of the Dutch Reformed Church in the Netherlands, the Conferentie maintained ties with Amsterdam in order to counter what it envisioned were Arminian (free-will) tendencies in the American church.²⁶

Despite the expectations of De Ronde’s appointment, he never attended another Coetus meeting and, in 1755, became a dedicated member of the rival Conferentie.²⁷ Although De Ronde had been a member of a committee that procured a preacher, Archibald Laidlie, to preach in English, De Ronde “afterward turned against him, and was the leading spirit of the ‘Dutch party’” which opposed English preaching.²⁸

25. *Id.*

26. See John W. Beardslee III, *The American Revolution*, in JAMES W. VAN HOEVEN, *PIETY AND PATRIOTISM* 17–34 (1976).

27. CORWIN, *supra* note 19, at 417.

28. *Id.* at 418. Laidlie “organize[d] special meetings where women by themselves, and men and youths by themselves expound[ed] the Scriptures by turns, repeat[ed] prayer from memory, discuss[ed] questions of conscience, etc.” Letter from Rev. Lambertus De Ronde to Rev. John Kalkoen, (Sept. 9, 1765), in *ECCLESIASTICAL RECORDS*, *supra* note 23, at 4006. In a letter, De Ronde described the tension:

[E]ver since the hour when a call was first extended to Rev. Laidlie, there has been no [peace] in our congregation; that the Dutch party is much dissatisfied with the English party, on account of the election of certain members of the Consistory. These were chosen for the satisfaction of the (young) Americans, because they had voted for an English-speaking minister. The Dutch party took this very ill . . . This quarrel has not abated at all since the arrival of Rev. Laidlie. His Rev. was not willing to preach from Passion-texts, or holiday-sermons, as he ought to have done; nor is he willing to be subordinate . . . Furthermore, he recommends that book of Marshall (on Sanctification), and gives utterance to incautious expressions, peculiar opinions, both in and out of the pulpit. All these things make matters worse, and cause many to fear that he will yet become an Independent; especially because he has many adherents.”

Id. Laidlie’s all-female group “was perceived as a dangerous innovation by his orthodox colleague, Lambertus De Ronde.” Joyce D. Goodfriend, *Incorporating Women into the History of the Colonial Dutch Reformed Church: Problems and Proposals*, in *PATTERNS & PORTRAITS: WOMEN IN THE HISTORY OF THE REFORMED CHURCH OF AMERICA* 30 (Renee S. House & John W. Coakley eds., 1999).

But church politics eventually spurred De Ronde to learn English. In 1765, De Ronde reflected, “I had to learn a language, against which I had an antipathy for twelve or thirteen years.”²⁹ By the 1760s, he frequently preached in English, at one point having to defend his practice of English preaching to the Amsterdam Classis.³⁰

Although De Ronde learned to preach in English, he was criticized for being “not in the least qualified” to do so.³¹ Historian Joyce D. Goodfriend observes, “[h]ow widely De Ronde read in English remains a matter of conjecture, but he clearly read well enough to be conscious of contemporary English literary conventions. Yet . . . it is not surprising that he exhibited concern about his comprehension of English.”³² De Ronde described his English-language book *A System: Containing the Principles of Christian Religion, Suitable to the Heidelberg Catechism* as “a bold Undertaking, by a person so little versed in the English Language. . . . [I]t would be Presumption to pretend to write it [in English] with Ease and Elegance.”³³ In another English-language book, *The True Spiritual Religion*, he wrote that “flowers of rethorick, fine style, fancy, wit, and such other ornaments” were “more than my skill in the English language, could produce.”³⁴

The reception of De Ronde’s work suggests that he sometimes traded conscientiousness for speed. After printing his book *A System: Containing the Principles of the Christian Religion, Suitable to the Heidelberg Catechism*, De Ronde was “admonished for leaving out an essential piece of doctrine” by the Amsterdam Classis.³⁵ De Ronde explained that “his eagerness to see the work in print precluded sending the manuscript to Amsterdam for approval” and that he would add an appendix to the work containing the missing material.³⁶

While De Ronde was capable, he was not always held in high praise, and he remained partial to the Dutch language and customs. *The Manual of the Reformed Church in America*

29. Goodfriend, *supra* note 21, at 64.

30. *See id.* at 65–66.

31. *Id.* at 65.

32. *Id.* at 67.

33. *Id.*

34. *Id.* at 68.

35. *Id.* at 65.

36. *Id.*

describes unattributed impressions of De Ronde: “He did not possess as high a standard of character and usefulness as his colleague, Ritzema, yet in many points, he was respectable.”³⁷ However, given how much internal disagreement plagued the Reformed Church, it is not surprising that anyone would get mixed reviews. Goodfriend summarized De Ronde’s complicated professional and personal relationship with Dutch and American culture.

De Ronde . . . cherished a vision of becoming a bicultural intermediary between the church’s parties, equally honored by traditional Dutch artisans and worldly Anglicized merchants. Thwarted in his design, he . . . cast himself as the vindicator of the Dutch partisans in their struggle against the innovations of the Anglicized Dutch.³⁸

Goodfriend ultimately laments others’ “failure to acknowledge De Ronde for what might be considered his heroic efforts to bridge Dutch and English cultures.”³⁹

De Ronde reportedly stayed in New York City until 1785, at which point he moved north to Schaghticoke, where he lived until his death in 1795.⁴⁰ However, a note by Rev. Thomas de Witt of the Collegiate Dutch Reformed Church of New York indicates that De Ronde “retired to the country when the British took over [New York City] in 1776, and did not return to [his] charge at the close of the war, but remained in retirement in [his] old age.”⁴¹ Goodfriend similarly explains that De Ronde and his contemporary, Ritzema, were “forcibly retired by a Consistory under the control of Anglicizers.”⁴²

According to William Elliot Griffis, popularizer of claims of Dutch influence on early America, and author of the 1909 book *The Story of New Netherland: The Dutch in America*, De Ronde’s translation of the Constitution into Dutch “had a tremendous influence among older men of the State, backing Alexander Hamilton, and securing New York for the Union and

37. CORWIN, *supra* note 19, at 417.

38. Goodfriend, *supra* note 21, at 70.

39. *Id.* at 63.

40. See 5 APPLETON’S CYCLOPAEDIA OF AMERICAN BIOGRAPHY 316 (James Grant Wilson & John Fiske eds., New York, D. Appleton & Co. 1888).

41. See 1 COLLECTIONS OF THE NEW YORK HISTORICAL SOCIETY 391 (1841).

42. Goodfriend, *supra* note 21, at 69.

Constitution.”⁴³ Nicoline van der Sijs claims, “[T]hanks to [De Ronde’s] translation, the Constitution received such strong support from the older male population that the state of New York came to accept it.”⁴⁴ But neither author provides primary sources to reinforce these claims, and the extent of the Dutch translation’s influence is presently unknown.

The exact date of printing is not recorded on the 1788 Dutch translation of the Constitution, but it was presumably printed before voting for convention delegates began on April 29.⁴⁵ Eligibility to vote for convention delegates was not limited by property requirements, and so any free white male over 21 could vote.⁴⁶ According to Pauline Maier, property-less voters tended to vote Federalist.⁴⁷

When the votes to elect ratifiers were counted, the Federalists had won nineteen seats, compared with the Anti-Federalists’ overwhelming forty-six.⁴⁸ The Federalists had taken New York (Manhattan), Kings (Brooklyn), Richmond (Staten Island), and Westchester Counties; the Anti-Federalists had won the rest.⁴⁹

In light of the Federalists’ poor showing at the delegates’ election, it is possible that Griffis’s and Van der Sijs’s views of the positive impact of the Dutch translation has been expressed too strongly. Few Federalist candidates were elected to the state ratifying convention, and the change of heart among the elected Anti-Federalist delegates is best explained by events following the delegates’ election. New York’s ratifying convention began on June 17, 1788.⁵⁰ By that time, eight states had already ratified the Constitution. New York’s Federalist delegates hoped that if a ninth state ratified before the New York convention ended and the new Constitution went into effect in the ratifying states, then New York would be more likely to decide to stay with the union.⁵¹ As hoped, New Hampshire ratified the Constitution on June 21,

43. WILLIAM ELLIOT GRIFFIS, *THE STORY OF NEW NETHERLAND: THE DUTCH IN AMERICA* 250 (1909).

44. SIJS, *supra* note 14, at 35.

45. *See generally* MAIER, *supra* note 6, at 327.

46. *Id.* at 327, 341.

47. *Id.* at 341.

48. *Id.*

49. *Id.*

50. *Id.* at 348.

51. *See id.* at 342.

and Virginia ratified the Constitution on June 26, 1788.⁵² News of these two events reached the New York convention while it was still in session and tipped the balance in favor of ratification, despite the strong Anti-Federalist presence.⁵³

Notably, a copy of the German translation of the Constitution is “bound up in the same volume” as the Dutch translation in the State Library of New York.⁵⁴ It was printed under the same authority and is of the same date and imprint as De Ronde’s translation.⁵⁵ This German translation was identical to the Billmeyer print, and the translator’s name is again omitted.⁵⁶

III. THE INTERPRETIVE VALUE OF TRANSLATIONS

A. TRANSLATION AS ANALYSIS

Part of the reason we consult the works of prominent late eighteenth-century commentators to understand the Constitution is “because they reflect the considered analyses of intelligent observers far closer to the relevant events [of the Founding] than we are today.”⁵⁷ De Ronde and the German translator were similarly-situated, intelligent members of the late eighteenth-century American polity, but one might question whether their

52. DHRC II, *supra* note 9, at 23.

53. See generally MAIER, *supra* note 6, at 376.

54. CORWIN, *supra* note 19, at 418–19. See generally John P. Kaminski, *New York: The Reluctant Pillar*, in *THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION* (Stephen L. Schechter ed., 1985). See also Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 832–33 (2007).

55. CORWIN, *supra* note 19, at 418–19.

56. I DIPPEL, *supra* note 1, at 64 n.1 (noting that the Billmeyer print is identical to the 1788 Charles Webster print).

57. See John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1356 (1998). In other words, “these works are simply good constitutional commentary by members who were or nearly were members of the political community within which the Constitution was adopted.” Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1178 (2003). To the extent that the original understanding of the ratifiers is considered significant, the translations are additionally relevant to those questions, as there is a good chance that some ratifiers in Pennsylvania and New York had seen the translations. Notably, the chairman of the Pennsylvania ratifying convention, Frederick Augustus Muhlenberg, was the son of a German Lutheran pastor and had studied in Germany for many years. See Oswald Seidensticker, *Frederick Augustus Conrad Muhlenberg, Speaker of the House of Representatives, in the First Congress, 1789*, 2 PENN. MAG. OF HIST. & BIOGRAPHY 184, 184–85, 202 (1889).

translations represent “considered analyses” such as those printed in a pamphlet or articulated in a speech. For their translations to possess the exegetical value associated with contemporary commentary and debate, their work would need likewise to have an analytical component, or more precisely, for their thought process to include an analytic step.

On this point, there is virtually unanimous consensus among textual scholars and linguists who compose the field of translation studies: no substantive epistemological difference exists between a commentary and a translation. Translation entails, and always has entailed, a process of analysis. Although this claim is intuitive, establishing it is not trivial. The competing possibility—that translation is some rote process, where word *A* in the source language becomes word *A'* in the target—comes readily to mind.

But on the contrary, analysis and commentary is a necessary part of translation. Indeed, certain scholars describe translation as “reported speech.”⁵⁸ Even the earliest canonical mention of translation in the Western tradition—Cicero’s account of adapting Greek drama into his native Latin—describes the translator digesting the source language and expressing it, as he saw fit, in the target language.⁵⁹ Consider an example of translation from Roman Jakobson, the most prominent member of the Russian formalist school of linguistics. In Jakobson’s example, a writer is trying to translate the English sentence “She has brothers” (not, it will be noted, a grammatically complex concept in English) into another language, such as Arabic, that recognizes not only a singular and a plural, but also a *dual* form.⁶⁰ Does the writer here use the plural form, knowing that this denotes at least three brothers, or the dual, which limits the total to two? Or perhaps it may be more desirable to write around the problem, translating the sentence less than literally (“She has more than one brother”), or else express the idea in Arabic with great precision but little grace (“She has two or more than two brothers”)? Whichever option the writer chooses, the translation of even this simple sentence necessarily becomes an interpretive act, with a variety of possible consequences. In one case, the

58. Roman Jakobson, *On Linguistic Aspects of Translation*, in *THE TRANSLATION STUDIES READER* 114 (Lawrence Venuti ed., 2000).

59. See Cicero, *De Oratore*, in *WESTERN TRANSLATION THEORY FROM HERODOTUS TO NIETZSCHE* (Douglas Robinson ed., 2002).

60. Jakobson, *supra* note 58, at 114.

translator may make an error—such as by using the plural form when the dual would have been correct. In another, there may not be a fact of the matter about how many brothers the woman has, and the translator may choose to create a more precise meaning an author did not intend. In yet another case, the translator may know from another source how many brothers the woman has, and correctly add this fact in the translation, supplementing a reader’s substantive understanding of a situation.

In many other cases, the analytic act will not be so obvious. In the vast majority of cases, in fact, it is trivial. As Jakobson puts it, “Languages differ essentially in what they *must* convey and not in what they *may* convey.”⁶¹ Arabic *must* convey a distinction between two and more than two, while English *may* do so. However, many expressions in English and Arabic are exactly alike in what they *must* convey. The translation of any number of common concepts (numbers, conjunctions such as “and” and “or,” many adjectives, etc.) may be essentially verbatim. Crucially, though, this does not mean that a translation is a simple word-to-word or phrase-to-phrase match. To determine that concepts are equivalent in two languages and can be verbatim-translated is, itself, a cognitive or analytic step. To recognize areas where analysis is required means recognizing the ones where they are not; we drive through green lights not because we fail to notice them, but because we have seen they are not red.

Taking these considerations to a more abstract level, the interpretative nature of translation follows from the realization that languages are neither isomorphic nor congruent to one another. As Ferdinand de Saussure pointed out, languages differ not only in the vocabulary they use to denote a certain concept (the “signifier”), but also in their conceptual way of slicing the world, leading to an inevitable incongruence that necessarily affects any act of translation. And as we have seen in the case of the “brothers” in Arabic, some languages might not only presuppose a different division of the world into mental concepts, but also are richer in vocabulary than others. Consequently, the translator’s task does not always consist of choosing the correlating signifier in a different language, but often consists of choosing a more or less close approximation. If the target language is more limited, compromises in conveying the original

61. *Id.* at 116.

meaning will be inevitable. If the target language is richer, the necessity of interpretative choices also arises: ambivalences in the source are not conveyable in this case, but instead need to be decided by the translator. A translator's choice for a certain, even non-corresponding or only partially corresponding correlate in the former case is as meaningful as a translator's choice to clear up an ambivalence of the source text in the latter. Both can be understood as a commentary on the source text. And even in cases of congruency of two languages (an unlikely case, since even in etymologically-related languages, shifts of meaning over time will lead to incongruence), the fact that a single word usually has a number of meanings that need to be distinguished still requires an act of interpretation when selecting the adequate semantic correlate. Additionally, in light of Wittgenstein, modern linguistics has moved away from the idea that a word has one or a number of fixed meanings, and instead defines the meaning of a word solely by its context of use, necessarily rendering any translation an interpretation of a source-text.

Synthesizing three centuries of European philosophy, from Schleiermacher and Hegel to Heidegger, George Steiner advanced a theory of translation that described it as the "hermeneutic motion"—the very name of which describes translation as a process of analysis (hermeneutics) that precedes bringing a text into another language (the motion).⁶² Indeed, even in one of the most rigorous and precise of all hermeneutic traditions—Talmudic scholarship—it is assumed that "every translation is always a commentary."⁶³ De Ronde's and the unknown German's translations constitute, therefore, commentaries or "considered analyses"—an additional source to access the original public meaning of the Constitution as translated in the late 1780s.⁶⁴

62. See George Steiner, *The Hermeneutic Motion*, in *THE TRANSLATION STUDIES READER* 156 (Lawrence Venuti ed., 2000). Similarly, Lawrence Lessig has noted that "[t]he translator's task is always to determine how to change one text into another text, while preserving the original text's meaning. And by thinking of the problem faced by the originalist as a problem of translation, translation may teach something about what a practice of interpretive fidelity might be." Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165, 1173 (1993).

63. Jacob Neusner, *Translation and Paraphrase: The Differences and Why They Matter*, 27 *HEBREW STUD.* 26, 35 (1986).

64. Besides these texts' exegetical value as commentary lies a further issue for the political theorist to chew on. If the government that was created at the state ratifying conventions was the government as the public understood it, then the Dutch and German

B. A CONTEXTUAL AND COMPREHENSIVE SOURCE

The German and Dutch translations of the Constitution are not merely *a* source to aid constitutional interpretation; they are also a new kind of source, one that possesses the unique quality of being both *contextual* and *comprehensive*. The translations are contextual because each translated term is understood in relation to the rest of the clause and document in which it appears, rather than in isolation. They are comprehensive because they restate each and every term and phrase in the Constitution, rather than just those of interest.⁶⁵

In contrast, consider the other types of textual sources that one might look to in order to discover the Constitution's meaning to the Founding-era public. Vasan Kesavan and Michael Stokes Paulsen enumerate:

- (1) the public (and sometimes private) writings of the Federalists and Anti-Federalists; (2) the public debates of the state ratifying conventions; (3) the early congressional, executive, and judicial interpretations of the Constitution; (4) the works of early commentators on the Constitution; and . . . (5) the secret drafting history of the Constitution.⁶⁶

Consulting commentary such as these for perspectives on the constitutional text's meaning is a part of the constitutional interpreter's toolkit.⁶⁷ But these sources all present one notable limitation: rarely, if ever, does any single analysis purport to exhaustively treat an entire text—the entirety of the Constitution—in a consistent level of detail.⁶⁸ As a result, the

translations could be understood as not just commentaries but as direct delineations of the contours of government, along with the English-language text. Alternatively, if one understands the creation of the federal government as an act of the states' ceding sovereignty, the German translation would play a particularly significant role. Because the German translation was authorized by the government of Pennsylvania for the purpose of helping the people of Pennsylvania decide whether to become part of the new United States, then the powers Pennsylvania ceded are specified in both the English- and German-language documents it published.

65. See DAVID BELLOS, *IS THAT A FISH IN YOUR EAR?: TRANSLATION AND THE MEANING OF EVERYTHING* 107 (2011) (stating that “unlike ordinary readers, [translators] are not allowed to skip.”).

66. Kesavan & Paulsen, *supra* note 57, at 1125–26.

67. See PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1195–99 (1987).

68. Moreover, many constitutional clauses were not debated widely in the public. Kesavan & Paulsen, *supra* note 57, at 1164 (remarking that “many issues and clauses simply were not discussed at the state ratifying conventions”).

work of any one commentator, while explicating the meaning of a certain section of text, does not always situate it comparatively with respect to all other relevant parts of the text. In short, commentaries on the Constitution's text are contextual—they analyze the text *in context*—but are rarely if ever truly comprehensive.⁶⁹

By contrast, the one common source that provides a potentially comprehensive reference for all possible terms—a contemporary dictionary—applies to the language in general, but not to the specific constitutional context.⁷⁰ Further work must be done to determine which of several dictionary definitions, if any, is an appropriate explanation of a term as used in the Constitution or whether a term had acquired some specialized or technical meaning.⁷¹

The translated constitutions thus boast a unique advantage that is not shared by other sources: they exhaustively restate every term and phrase in the Constitution and represent those terms and phrases in context. Unlike published pamphlets, the ratifiers' speeches, or contemporary dictionaries, these translations are *both* contextual and comprehensive. As such, the translated constitutions may be not only valuable but uniquely valuable to at least certain investigations into original public meaning.⁷²

69. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (“By viewing the document’s clauses in splendid isolation from each other—by reducing a single text to a jumble of disconnected clauses—readers may miss the significance of larger patterns of meaning at work.”).

70. See Kesavan & Paulsen, *supra* note 57, at 1202.

71. See Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 373 (2014). Maggs describes several of the challenges of using a dictionary to resolve the meaning of a term in the Constitution in the excerpt below:

First, the definition might come from the wrong kind of dictionary. A definition from an English language dictionary may be inapplicable to a constitutional term that has a specialized legal meaning, and, vice versa, a definition from a legal dictionary may be inapplicable to a constitutional term used in a non-specialized way. Second, even if the proper kind of dictionary is consulted, if the dictionary contains multiple definitions for the same word, some of these meanings ascribed to the word may not apply to the word as it is used in the particular context of the Constitution. Third, dictionary definitions do not always capture the correct meaning of words that form a part of a phrase or compound, such as “Vice President” or “declare war.”

Id.

72. The translations may be particularly helpful for producing intratextualist interpretations of the Constitution. Intratextual interpretation involves “the interpreter tr[ying] to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”

As sources, they are hardly perfect. For instance, as the appendix reveals, the translations occasionally contain clear mistakes—in addition to potentially other more subtle errors—that obscure the translator’s actual understanding.⁷³ Moreover, discovering a slippage of meaning in the translation of the English to the Dutch or German versions is just half the battle; a researcher would need to analyze the public meaning of the Dutch or German terms of interest as well, requiring specialized knowledge and research. One would also need to posit the degree to which a difference in meaning was a choice made based on the translator’s understanding of the English text, or a choice based on other values such as style or brevity at the expense of precision.

Despite these challenges, the existence of multiple language translations of the Constitution has the potential to clarify rather than muddy the document’s meaning. In a related context, Lawrence Solan has argued that the European Union’s practice of referencing multiple, equally-authentic translations of European legislation actually can increase confidence in the texts’ meanings.⁷⁴

Sometimes a particular translation has captured [a point], but at other times, reading the various translations suggests a common theme, expressed in different words by each translator . . . [t]he ability to compare different versions and then to triangulate . . . brings out nuances that can help the investigator to gain additional insight into the thoughts of the original drafter.⁷⁵

The same potential to “triangulate” is present here.

See Amar, *supra* note 69, at 748.

73. *See* Maggs, *supra* note 71, at 379 (observing that “. . . mistakes happen. Creating a dictionary is difficult work that requires detailed knowledge about a great many things. The lexicographer has very limited time to spend on any individual word, and it is easy to make a mistake, especially with difficult words”).

74. *See* Lawrence M. Solan, *The Interpretation of Multilingual Statutes by the European Court of Justice*, 34 *BROOK. J. INT’L L.* 277, 294–300 (2009). Others have argued the intuitive position that “adding language versions to a single body of law can only be a source of confusion.” Lawrence M. Solan, *Multilingualism and Morality in Statutory Interpretation*, 1 *LANGUAGE & L./LINGUAGEM E DIREITO* 5, 7 (2014); Janny Leung, *Statutory Interpretation in Multilingual Jurisdictions: Typology and Trends*, 33 *J. MULTILINGUAL & MULTICULTURAL DEV.* 481 (2012).

75. Solan, *The Interpretation of Multilingual Statutes*, *supra* note 74, at 292–93.

IV. THE TRANSLATIONS

The early German and Dutch translations of the Constitution speak to numerous constitutional debates, several of which are discussed at length below because of their particular significance. Other clauses are briefly annotated in the appendix accompanying this Article.⁷⁶

The cost of this broad treatment is a lack of depth. Any full exegesis of the translations would require delving deeply into the original public meaning of not just the English language, but the Dutch and German language as well. Whole articles and books have been written about single words in the original Federal Constitution. We do not pretend to be able to speak authoritatively about the entire translated document in a single Article. Nonetheless, we provide brief explorations of key phrases and terms as illustrations of how the translations were rendered and as guideposts for further analysis.

The authors are also keenly aware that the act of describing the Dutch and German texts in English introduces further opportunity to misunderstand what the translators believed they were writing. We have worked to minimize this problem by relying on scholars who regularly work with late eighteenth-century German and Dutch texts. Nonetheless, as noted above, every translation is also a commentary. It is a given that different readers may reasonably disagree on the meaning of the Dutch and German texts—as they do already when analyzing the Constitution in English.

Before considering specific clauses, several notes may be made about the translations as a whole. De Ronde's Dutch translation is notable for how closely it tracks the English-language Constitution. As Dippel describes, "This Dutch translation has a special flavor due to the fact that [De Ronde], a Dutch-American, followed the original phrasing very closely, readily adopting English terms when no Dutch equivalent seemed to be at hand, which sometimes renders the translation difficult to understand for a Dutchman."⁷⁷ On the one hand, De Ronde is concerned with producing a translation for a particular Dutch-American audience, not a Dutch-speaking audience in the Netherlands. He could then assume of his audience some

76. See *infra* app.

77. I DIPPEL, *supra* note 1, at 84 n.1.

familiarity with English words and American phrases. By adhering closely to the literal meaning of the Constitution and keeping the cognate translation wherever possible (instead of say, using a synonymous non-cognate of the English word), De Ronde was also preparing his audience for a future in which they would need to understand American legal terms in their American context. By using cognates, even when these words were uncommon in Dutch, De Ronde found an easy path to providing a translation that did not have to struggle between choosing the most precise and most common Dutch equivalent of the English text.⁷⁸

The German translation of the Constitution used here is a Michael Billmeyer print.⁷⁹ According to Dippel, it is not identical to “the first two German translations” which appeared in the *Gemeinnützige Philadelphische Correspondenz* on September 25, 1787, or to a translation in *Neue Unpartheyische Lancäster Zeitung*, printed on September 26, 1787.⁸⁰ However, the Billmeyer text was commissioned by the Pennsylvania General Assembly, was distributed among the German-speaking population of Pennsylvania, and is identical to three contemporary editions of the translation by Matthias Börtgis in 1787, Charles Webster in 1788, and Melchior Steiner in 1788.⁸¹

Although not much is known about the German translator, a number of things can be deduced about his person from this translations. As did De Ronde, he followed the original phrasing of the Constitution very closely, sometimes even adopting English terms when a German equivalent would have been at hand. He likely did not, or did not always, use a dictionary, since some of his translations are not the obvious choice, and the words he chose are often not the ones contemporary dictionaries list.⁸² There is

78. Cognates that appear in De Ronde’s translation include “privilegie” for “privilege” (art. I, § 9, cl. 2); “bill van attainder” for “bill of attainder” and “ex post facto wet” for “ex post facto law” (art. I, § 9, cl. 3); “publijke” for “public” and “judgen” for “judges” (art. II, § 2, cl. 2); “trial” for “trial” (art. III, § 2, cl. 2); and “corruptie van bloed” for “corruption of blood” (art. III, § 3, cl. 2). U.S. CONST. (Dutch), *supra* note 1.

79. U.S. CONST. (German), *supra* note 1; 1 DIPPPEL, *supra* note 1, at 64 n.1.

80. 1 DIPPPEL, *supra* note 1, at 64 n.1.

81. *Id.*

82. If the German translator used a dictionary, it was likely outdated at the time of translation since some of the words he chose were antiquated. The translator’s choices were compared to: THE ENGLISH CELLARIUS; OR A DICTIONARY ENGLISH AND GERMAN CONTAINING THE ENGLISH WORDS IN THEIR ALPHABETICAL ORDER AND DERIVATION (1768); JOHN BARTHOLOMEW ROGLER, A DICTIONARY ENGLISH,

some evidence that allows one to conclude that he was a German native speaker: his word use is elevated, and especially when it comes to more technical terms he seems not to have consulted a dictionary, since it is mostly in these cases when his chosen words are far from what the dictionaries of the time would have listed. Some of his vocabulary however seems to be dated, again especially when it comes to technical terms of law and commerce. In one curious instance, he even uses a word that was only common in a very few regions in Germany.⁸³ There is much more than a basic knowledge of grammar present,⁸⁴ although the translator often chooses to ignore it when it comes into conflict with his verbatim, paraphrasing style.⁸⁵ Yet despite the translator's command of German grammar, he makes some errors that would be surprising for a native speaker. For example, he sometimes translates "for" as "vor," even though the correct translation

GERMAN AND FRENCH CONTAINING NOT ONLY THE ENGLISH WORDS IN THEIR ALPHABETICAL ORDER, TOGETHER WITH THEIR SEVERAL SIGNIFICATIONS; BUT ALSO THEIR PROPER ACCENT, PHRASES, FIGURATIVE SPEECH, IDIOMS, AND PROVERBS, BY MR. CHRISTIAN LUDWIG NOW CAREFULLY REVISITED, CORRECTED, AND THROUGHOUT AUGMENTED WITH MORE THAN 12,000 WORDS, TAKEN OUT OF SAMUEL JOHNSON'S ENGLISH DICTIONARY AND OTHERS (3d ed., Leipzig, 1763); VOLLSTÄNDIGES WÖRTERBUCH DER ENGLISCHEN SPRACHE FÜR DIE DEUTSCHEN NACH DEM NEUESTEN UND BESTEN HÜLFSMITTELN MIT RICHTIG BEZEICHNETER AUSSPRACHE EINES JEDEN WORTES BEARBEITET VON JOHANNES EBERS . . . (Leipzig, Johann Gottlob Immanuel Breitkopf, Sohn und Compagnie 1794); A COMPLETE ENGLISH-GERMAN, GERMAN-ENGLISH DICTIONARY THE FIRST VOLUME CONTAINING THE ENGLISH-GERMAN PART, HEREIN NOT ONLY THE WORDS TO BE MET WITH IN OTHER DICTIONARIES, MAY BE FOUND, BUT ALL EXPRESSIONS OF NATURAL HISTORY, HUSBANDRY, MARINE, MERCHANDISE; THE LAW AND ITS COURTS THE VULGAR TONGUE AND PROVINCIALISMS ARE INSERTED BY JOHN CHRISTIAN FLICK (Hamburg, 1803); A NEW ENGLISH-GERMAN AND GERMAN-ENGLISH DICTIONARY CONTAINING ALL THOSE WORDS IN GENERAL USE, DESIGNATING THE VARIOUS PARTS OF SPEECH IN BOTH LANGUAGE WITH THE GENDERS AND PLURALS OF THE GERMAN NOUNS. COMPETED FROM THE DICTIONARIES OF LLOYD, NÖHDEN, FLÜGEL, AND SPORSCHIL IN TWO VOLUMES (Philadelphia, George W. Mentz & Son 1835). The latter is a more recent dictionary, but since there was a custom to integrate earlier dictionaries of other authors into one's own dictionary, these later, more extensive, eclectic dictionaries are an important source for earlier use.

83. The translator uses the word "zween," which is the male variant of "two," which is only common in some regions of Germany. It could however also be a typo ("zween" instead of "zweien"), but the grammatical case and the gender match better in the case of "zween."

84. The translator's command of German is on display when using the correct genitive case; the correct position of the verb and auxiliary verb is also frequently chosen—something non-native speakers often have difficulty with.

85. Metaphrase is the word-for-word, line-for-line rendering of a text, as contrasted with paraphrase. See Lessig, *supra* note 62, at 1193–94 (citing WILLIAM FROST, DRYDEN AND THE ART OF TRANSLATION 1 (1955) (citations omitted)).

would be “für.”

Whether the translator was a lawyer or legal scholar is unclear. On the one hand, this seems doubtful since it is here where his German vocabulary occasionally fails.⁸⁶ On the other hand he is willing to paraphrase and extensively explain legal terminology that juridical laymen might fail to understand. For example, “naturalization” is paraphrased as “Ertheilung des Bürgerrechts” (“the granting of a citizen’s right”), although a German cognate, “Naturalisation” existed at the time.⁸⁷ “Letters of Marque and Reprisal” is also imperfectly paraphrased, as “sich zu verteidigen und Repräsentationen zu gebrauchen, zu ertheilen” (“authorizations to defend oneself and to use reprisals”).⁸⁸ “Bill of Attainder or ex post facto Law” is rewritten in the German translations: “No Law, that declares someone guilty without forensic conviction (court decision), or that will be made after the deed [has been] committed and that declares someone guilty, shall be made.”⁸⁹ The phrase “work Corruption of Blood” is explained as “soll sich über die Anverwandten erstrecken” (“shall extend to its relatives”).⁹⁰

What is contradictory in the German translation is that despite the translator’s general verbatim style, his habit of using cognates even in cases where this rather hinders understanding, and his close adherence to the structure of the original draft even when it comes to the sentence structure, he is also occasionally willing, without apparent cause, to depart from his closer translation, paraphrasing and choosing more ill-fitting words when closer ones (even cognates) were available. His attempt to keep the sentence structure of the original text and at the same time to obey the most basic rules of German grammar creates monstrous hybrids that, especially when it comes to longer passages, are hard to understand even for a German reader. In rare occasion, the translated sentence is distorted so severely that

86. In the late 1700s, constitutions were a relatively new idea in Germany, as they were mainly a product of the Enlightenment. Most of the German constitutions did not come into effect until the early nineteenth century, which might explain some of the translator’s verbal clumsiness when describing a democratic legislative process. There was also a persistent tradition of using Latin instead of German technical terms in the legal context.

87. U.S. CONST. (German), *supra* note 1, art. I, § 8, cl. 4.

88. *Id.* art. I, § 8, cl. 11.

89. *Id.* art. I, § 9, cl. 3.

90. *Id.* art. III, § 3, cl. 2.

the meaning can only be reconstructed by using the surrounding context. These observations, as well as the fact that the translator does not seem concerned about whether using a cognate is the best choice from a semantic perspective, might indicate laziness or a need for expediency as a cause to the translation's peculiarities; it must have been simpler to use cognates, translate line by line, sentence by sentence, half-sentence by half-sentence, and occasionally adjust the grammar to the German rules, than to change the sentence structure in a way to facilitate understanding. That time pressure or laziness affected the translation is further supported by his permitting the monstrous sentences he created to remain in the translation, as well as the fact that some of the more ill-fitting word-choices he made might be the result of failing to consult a dictionary. On the other hand, there seemed to be a willingness to explain some hard-to-understand legal terms extensively and adequately, and by this make these parts of the Constitution understandable for the general public. Both his consistency as well as his inconsistencies are noteworthy; they have to be taken in account when the translator's choices are used to interpret the original meaning of the English original.

A. THE COMMERCE CLAUSE

Commerce Clause, Art. I, § 8, cl. 3.

English	German	Dutch
To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes	Die Handtschaft mit auswärtigen Nationen, und unter den verschiedenen Staaten und mit den Indianer Stämmen, einzurichten	Om de koopmanschap te reguleeren met buitenlandsche nation, en onder de onderscheiden staaten, alsook met de Indiaansche volkeren

One of the most heated debates in constitutional interpretation concerns the scope of power granted to Congress under the Commerce Clause. In the past several decades, the Supreme Court has considered whether this clause grants Congress the power to mandate that every person acquire health insurance,⁹¹ to criminalize growing marijuana for one's own

91. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

private consumption,⁹² to criminalize certain acts of violence against women,⁹³ and to enact higher penalties for carrying a gun near a school.⁹⁴ In each of these cases, the question before the courts was whether Congress's law constituted a permissible regulation of commerce or whether Congress had acted beyond the scope of its limited powers.

Two of the more popular interpretations of the clause are represented by the work of Randy Barnett and Jack Balkin. Barnett views the original meaning of the clause as instantiating a notably limited power. In 2001, he canvassed a wide variety of Founding-era documents including contemporary dictionaries, records of the constitutional conventions, the Federalist Papers, and early judicial interpretations of the Commerce Clause.⁹⁵ He concluded that, although the term 'commerce' had a variety of meanings, in the context of the constitutional clause, commerce "means the trade or exchange of goods (including the means of transporting them)."⁹⁶ Barnett also concluded the verb "to regulate" meant "'to make regular'—that is, to specify how an activity may be transacted—when applied to domestic commerce, but also included the power to make 'prohibitory regulations' when applied to foreign trade."⁹⁷

Jack Balkin maintains that a broader understanding of 'commerce' is appropriate. He argues that "[t]o have commerce with someone meant to converse with them, mingle with them, associate with them or trade with them The contemporary meanings of *intercourse* and *commerce* are far narrower than their eighteenth-century meanings."⁹⁸ "If we want to capture the original meaning of 'commerce,' we must stop thinking primarily in terms of commodities. We must focus on the ideas of interaction, exchange, sociability, and the movement of persons that business (in its older sense of being busy or engaged in affairs) exemplifies."⁹⁹

92. See *Gonzales v. Raich*, 545 U.S. 1 (2005).

93. See *United States v. Morrison*, 529 U.S. 598 (2000).

94. See *United States v. Lopez*, 514 U.S. 549 (1995).

95. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 112–30, 132–35, 139–40 (2001).

96. *Id.* at 146; see also *id.* at 112–30 (describing the meaning of commerce in a variety of sources from the Founding-era and later periods).

97. *Id.* at 146.

98. JACK BALKIN, *LIVING ORIGINALISM* 149 (2011).

99. *Id.* at 151.

The German translation seems to reflect a midpoint between Barnett and Balkin's interpretations. When translating "Commerce" the translator had a number of choices: 'Commercium,'¹⁰⁰ 'Kaufmannschaft,' 'Handel,' 'Handlung,' and 'Handelschaft.' He chose the last, 'Handelschaft,' a term that at the time already had become outmoded.¹⁰¹ Both Kruenitz,¹⁰² an eighteenth-century encyclopedia edited between 1773 and 1858 and Adelung,¹⁰³ an eighteenth-century German critical dictionary edited between 1793 and 1810, define 'Handelschaft' as the business of exchanging goods with the purpose of profit.

The root word of 'Handelschaft' is 'Handel,' which in its general meaning was very close to the English 'handling.' However, when used in the context of commerce, 'Handel' was understood "to broadly comprise any activity which creates a noteworthy change in an object"¹⁰⁴ so long as the activity was directed to profit.¹⁰⁵ In its common use, however, the term was usually limited "to (ex-)change of property."¹⁰⁶ Used as a

100. "[D]as Commercium" or "das Kommerz" (the latter rather referring to covenants or contracts in general)—which denotes the traffic of goods in general, and therefore is often understood as synonymous to "Handel." However, 'Handel' appears to be used much less frequently. See GOETHE-WÖRTERBUCH, HG. V. DER BERLIN-BRANDENBURGISCHEN AKADEMIE DER WISSENSCHAFTEN (1978) (discussing "Kommerz" and "Commercium"); see also 1 JOHANN CHRISTOPH ADELUNG, GRAMMATISCH-KRITISCHES WÖRTERBUCH DER HOCHDEUTSCHEN MUNDART MIT BESTÄNDIGER VERGLEICHUNG DER ÜBRIGEN MUNDARTEN, BESONDERS ABER DER OBERDEUTSCHEN. ZWEYTE, VERMEHRTE UND VERBESSERTE AUSGABE at col. 1342 (2d ed. 1970) (1793–1801).

101. According to ADELUNG, *supra* note 100, 'Handelschaft' was an antiquated term in the late eighteenth century. Instead, 'Handel' or 'Handlung' would be used. 'Handelschaft' is also a peculiar choice because even contemporary English-German dictionaries list 'Handel' or 'Handlung' as the translation for 'commerce.' See *supra* note 82.

102. JOHANN GEORG KRUEINITZ: OECONOMISCHE ENCYCLOPÄDIE ODER ALLGEMEINES SYSTEM DER LAND-, HAUS- UND STAATS-WIRTSCHAFT: IN ALPHABETISCHER ORDNUNG 1-242 (Berlin, Pauli 1785).

103. 1 ADELUNG, *supra* note 100.

104. In the original commentary, "jede thätige äußere Veränderung, Nahrung und Zeitliches Vermögen zu erwerben." 2 ADELUNG, *supra* note 100, col. 946.

105. *Id.* A different dictionary makes a distinction between 'Handel' and 'Handlung.' 'Handel' refers to selling or buying goods by merchants and hucksters whereas 'Handlung' is the term for the full field of the merchants' trade, also comprising the trade of bills. See generally S.J.E. STOSCH, PREDIGER ZU LÜDERSDORF VERSUCH IN RICHTIGER BESTIMMUNG EINIGER GLEICHBEDEUTENDER WÖRTER DER DEUTSCHEN SPRACHE ZWEYTER THEIL. FRANKFURT AN DER ODER, VERLEGT ANTON GOTTFRIED BRAUNS WITWEN (Wien, Eblen 1772).

106. 2 ADELUNG, *supra* note 100, col. 946. Kruenitz understands 'Handel' in its more specific meaning as the "business of the merchant." See KRUEINITZ, *supra* note 102.

collectivum, when the exchange of goods is someone's business, 'Handel' and 'Handelschaft'—the term the German print uses—become synonymous.

From this evidence, we can draw the contours of the term's meaning. 'Handelschaft' denotes the full field of the merchants' trade, comprising exchanging goods for goods or bills, and possibly including the shipment and transportation of goods.¹⁰⁷ This meaning also opens up the possibility that 'commerce' comprises the larger scope of actions and interactions of persons involved in business.

The German translator could have made a different choice here: 'Kaufmannschaft,' the German cognate to the term the Dutch translation uses ('Koopmanschap'). This term would have had a more narrow meaning, particularly according to S.J.E. Stosch, an eighteenth-century clergyman who is known for his meditations on word use. Stosch limits 'Kaufmannschaft' solely to the exchange of goods for money, whereas 'Handelschaft' or 'Handlung' is said to be the adequate terms for the broader scope of a merchant's action. Stosch also suggests that "Handelschaft" presupposes a business of a certain size, territorial scope, and professionalism.¹⁰⁸ Nonetheless, often, the terms 'Handelschaft' and 'Kaufmannschaft' would be used synonymously.¹⁰⁹

It is notable that an even more broad term could have been used for 'commerce'—its German cognate "Commerz" or "Kommerz" (derived from the Latin "commercium" and in this form, "das commercium," also found in German language).¹¹⁰ During the time of the translation, however, 'Commerz' and 'Kommerz' were not much in use.¹¹¹ In an English-German

107. STOSCH, *supra* note 105.

108. *Id.*

109. I ADELUNG, *supra* note 100. Stosch's treatment of the matter is also a sign of the terms' synonymy, as his task was to correctly tell words apart that were commonly used interchangeably. STOSCH, *supra* note 105.

110. All three versions of the cognate had two meanings: a broad one, meaning any interaction between people, be it social or directed to profit; and a narrow one, referring to the exchange of goods. See I ADELUNG, *supra* note 100; GOETHE-WÖRTERBUCH, *supra* note 100.

111. 'Commerz' and 'Kommerz' were not much in use, and were even more rarely invoked when talking about interactions in general. This usage only later became more frequent, probably due to their frequent usage as a title to denote more noble and distinguished people, as in "Commerzien-rath" or "Commerz-rath." THE ENGLISH CELLARIUS, *supra* note 82, only lists "Handel", "Gewerbe" ("business") and "Bekantschaft" ("acquaintance") as a translation of "commerce," but not

dictionary from 1800, Ebers defines ‘commerce’ as “the concourse/interaction of one with another,”¹¹² expressing a view similar to Balkin’s. However, the German translator did not choose this locution in his translation of the Constitution.

De Ronde gestures at a more circumscribed understanding of ‘commerce’; his choice of ‘koopmanschap’ points towards the actions of ‘koopmanen’ (merchants). However, while the German translator had a variety of choices in how to translate ‘commerce,’ De Ronde had fewer options. Although ‘handelschap,’ the Dutch cognate of the German ‘Handelschaft’ exists, it does not appear to have ever been in wide use. The word “koopmanschap” appears in nine places in Sewel’s *Compleat Dictionary English and Dutch*, published in 1766, but “handelschap” is not found.¹¹³

The translations of ‘regulate,’ however, run in different directions. De Ronde chose a Dutch cognate of the English word. In Dutch, ‘regulate’ or ‘reguleeren’ means to subject to imposition of rules or control, or to supervise.¹¹⁴ However, the German translator chose the verb ‘einrichten,’ a somewhat ambiguous term, which could mean any of: to establish something previously nonexistent, to furnish something existing, or to establish oneself somewhere. For comparison, the translator could have used the word ‘regulieren,’ meaning to subject something to rules or to control, now commonly used in the European Union.

While the Dutch translation preserves a narrower notion of regulation as “making regular” or setting rules for, the German translation appears to allow the government to establish commerce where it might not have previously existed. It might be argued that the Commerce Clause ruling in the constitutional challenge to the Affordable Care Act, which concerned whether Congress had the power to force individuals to engage in commerce, might have had a different result if the German

“Commercium.” See also GOETHE-WÖRTERBUCH, *supra* note 100 (“Kommerz” & “Commercium”); 1 ADELUNG, *supra* note 100, col. 1342 (“Commercium”).

112. EBERS, *supra* note 82, at 23.

113. EGBERT BUYS, *A COMPLEAT DICTIONARY ENGLISH AND DUTCH TO WHICH IS ADDED A GRAMMAR, FOR BOTH LANGUAGES, ORIGINALLY COMPILED BY WILLIAM SEWEL; BUT NOW, NOT ONLY REVIEWED, AND MORE THAN THE HALF PART AUGMENTED, YET ACCORDING TO THE MODERN SPELLING, ENTIRELY IMPROVED BY EGBERT BUYS* (Amsterdam, Kornelis de Veer 1766).

114. Specifically, “reguleeren” means “[t]o make regular or orderly” as in “to regulate the course of a river,” and also “to subject to legal decisions and rules.” See *Reguleeren*, VAN DALE DICTIONARY, www.vandale.nl (last visited Oct. 13, 2015).

translation were the dispositive text.

B. THE PROGRESS CLAUSE

Progress Clause, Art. I, § 8, cl. 8.

English	German	Dutch
To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries	Die Aufnahme der Wissenschaften und nützlichen Künste dadurch zu befördern, daß er denen Autoren und Erfindern das ausschliessende Recht zu ihren respectiven Schriften und Entdeckungen für eine gewisse Zeit versichert	Om den voortgang van weetenschap en nuttige konsten te bevorderen door (voor bepaalde tyden) aan de autheurs, en uitvinders te verzeekeren het uit sluitend regt tot hare bysondere schriften en ontdekkingen

The Progress Clause grants Congress the power to create copyrights and patents. The text runs in parallel; Congress is granted the rights to “promote the Progress of Science . . . , by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings” and to “promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries.”¹¹⁵

The general consensus is that “science” referred to learning or knowledge.¹¹⁶ Although the phrase “useful Arts” is more

115. See Giles S. Rich, *The “Exclusive Right” Since Aristotle*, 14 FED. CIR. B.J. 217, 224 (2004) (“[The clause] is two subjects—patents and copyrights—rolled into one[;] ‘Science’ is to be promoted by copyright and ‘useful Arts’ by patents.”); Giles Sutherland Rich, *My Favorite Things*, 35 IDEA 1, 2 (1994) (stating that “[i]t was quite clearly intended by the authors of the Constitution that copyright, not patents, was intended to promote science, and the province of rights granted to inventors respecting their ‘Discoveries’ was to promote the ‘useful Arts’”); Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 11–12 (2002).

116. See *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting) (citing EDWARD WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 125–26 (2002)) (arguing the purpose of the Clause is to promote “the progress of ‘Science’—by which word the Framers meant learning or knowledge”); Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 819 (2010) (“Intellectual property historians have contended that, at the time of the [framing, ‘the Progress of Science’ meant learning or knowledge (referring to the goal of copyright)].”);

ambiguous, scholars generally agree that it referred to technology,¹¹⁷ although Edward C. Walterscheid interprets “useful Arts” to mean “helpful or valuable trades.”¹¹⁸ Nonetheless, the Supreme Court “has shied away from fully defining what constitutes ‘the Progress of Science’ or ‘useful Arts.’”¹¹⁹ The Progress Clause notably omits any mention of protecting the fine arts, such as sculpture, poetry, painting, and music, which are clearly copyrightable under current statutory law.

There is a paucity of Founding-era interpretive data on the Progress Clause. Although Thomas Jefferson wrote at some length about patents and copyrights, he was not present at the convention in Philadelphia when the Constitution was drafted.¹²⁰ There is no record from the Convention of any debate concerning the clause.¹²¹ Indeed, aside from a brief discussion of the clause in Federalist 43,¹²² there is very little evidence of how the founders

Rich, *My Favorite Things*, *supra* note 115, at 2.

117. See Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 115 (1993) (“The ‘useful Arts,’ what we would now call applied science or technology, were often distinguished from ‘fine arts,’ then as now denoting art that is more aesthetic than practical, such as poetry, painting, sculpture, and the like.”); Lee, *supra* note 116, at 819; Peter S. Menell, *Forty Years of Wondering in the Wilderness and No Closer to the Promised Land*, 63 STAN. L. REV. 1289, 1293 (2011) (stating that “[a]lthough the Framers did not expressly define the term ‘useful Arts,’ usage at the time indicates that it related to trades utilizing what we would today call ‘technology.’ Several [Founding-era sources] support the textual inference that “useful Arts” concerned craft, trade, and industrial activities” (internal citations omitted) and “[t]he phrase ‘useful Arts’ was understood in contradistinction to the eighteenth-century terms ‘polite,’ ‘liberal,’ and ‘fine’ arts—which related to aesthetic and philosophical pursuits.”); see also Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 18 GEO. WASH. L. REV. 50, 54 (1949).

118. Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 52 (1994).

119. Lee, *supra* note 117, at 819.

120. RICHARD B. BERNSTEIN, THOMAS JEFFERSON 71 (2005).

121. See Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, 2–3 (2002).

122. Madison wrote:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of the common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision on this point, by laws passed at the instance of Congress.

THE FEDERALIST NO. 43 (James Madison). Madison’s reference to copyright being a right at common law in Great Britain was likely a reference to *Millar v. Taylor*, (1769) 4 Burr.

and contemporary readers of the Progress Clause interpreted it.

The Dutch and German translations of the Progress Clause tend to comport with the dominant academic understanding of the phrase “science and useful Arts.” “Science” was rendered “Wissenschaften” (“sciences”) in German and “wetenschap,” meaning science, knowledge, or scholarship, in Dutch. “Useful Arts” in German became “nützliche Künste,” indicating the skills and techniques of industry and craft, and standing in contrast to “schöne Künste” (“the beautiful arts”), which included painting and poetry. The Dutch translation was similarly rendered “nuttige konsten” —the useful arts, which excluded the visual arts.

Other language in the Progress Clause has been the subject of judicial scrutiny. The Progress Clause’s phrase “for limited Times” was at the center of a constitutional challenge to the Copyright Term Extension Act (“CTEA”) in the 2003 decision *Eldred v. Ashcroft*.¹²³ Eldred challenged the CTEA for extending the copyright term by twenty years, arguing that this extension violated the constitutional requirement that copyrights be granted only “for limited Times.” The Supreme Court held that even though the CTEA extended the copyright term by twenty years, the period of copyright protection still comported with the Constitution’s requirements because the term was not infinite.¹²⁴

The Dutch and German translations suggest a meaning of “for limited Times” which may slightly differ from the Supreme Court’s interpretation. De Ronde translates the phrase to “voor bepaalde tyden”—“for some time” or “for certain times.” Similarly, the German is “für eine gewisse Zeit”—“for a period of time” or “for a sure/certain time.”¹²⁵ Both suggest that in addition to not being infinite, the term of a patent or copyright may have to be a specific, particular length of time, not necessarily alterable

2303 (K.B). The holding that there was a copyright at common law in England was reversed five years later in *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.). See Malla Pollack, *The Owned Public Domain*, 22 HASTINGS COMM./ENT. L.J. 265, 284 n.92 (2000).

123. 537 U.S. 186.

124. *Id.* at 208–09.

125. The German ‘gewiss’ presupposes, as the Latin ‘certus,’ that the time in some way is sure (or for the German, that the time is “known,” which is the literal translation of “gewiß”). ‘Gewiss,’ as a participle that can both serve as an adverb or an adjective, stems from ‘wissen,’ (“to know”). In this regard, Grimm can state that only mathematics is “gewiss” (“certain”) as a science. Krucenitz also uses ‘gewiss’ in the meaning of ‘steady,’ as in requiring an artist to have a steady hand (“eine gewisse hand”). See KRUCENITZ, *supra* note 102.

in the future, although one could argue that even an extended term was still for a *certain* time, and that the certain time had merely changed. In this vein, the term ‘gewisse’ is also colloquially used in the sense of “some time” as opposed to “an infinite time,” in which case an exactly determined or determinable duration is not presupposed.

C. THE NECESSARY & PROPER CLAUSE

Necessary & Proper Clause, Art. I, § 8, cl. 18.

English	German	Dutch
To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.	Alle Gesetze zu machen, die nöthig und erforderlich seyn werden, die vorhergehende und alle andere Gewalt, die kraft dieser Verfassung der Regierung der Vereinigten Staaten oder einem Department oder Beamten derselben ertheilet worden, in Ausübung zu bringen.	Om alle wetten te maken, die noodig en bequaam zullen zyn om ter uitvoer te brengen de voorgaande magten en alle andere machten, gevestigd by deese Constitutie in het government van de Vereenigde Staaten of in eenig department of officiant daarven.

The question of what laws are “necessary and proper” for Congress to make harkens all the way back to the ratification debates. Anti-Federalists “pejoratively dubbed the Necessary & Proper Clause ‘the Sweeping Clause,’ arguing that it granted dangerously broad and ill-defined powers” to the Federal Government.¹²⁶ In contrast, “Federalist supporters of the Constitution . . . insisted that the Necessary and Proper Clause was not an additional freestanding grant of power, but merely made explicit what was already implicit in the grant of each enumerated power.”¹²⁷

126. Gary Lawson et al., *Raiders of the Lost Clause: Excavating the Buried Foundations of the Necessary and Proper Clause*, in *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 1, 1–2 (Gary Lawson et al. eds., 2010).

127. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 155 (2004). The debates at the Philadelphia Convention

Although Mark Graber pessimistically claimed, “no one, including the framers, knows the point of the phrase ‘necessary and proper,’”¹²⁸ Robert Natelson argues that contemporary documents indicate that “necessary and proper” was a legal term of art frequently used in agency instruments when granting incidental powers to one’s fiduciaries.¹²⁹ Indeed, during the ratification debates, Federalists wrote as though “proper” indicated that laws must accord with the government’s fiduciary duty to the people.¹³⁰

The question of what laws were “necessary” quickly became salient after the Founding, when each branch of government considered whether Congress had the power to charter a bank. James Madison, Thomas Jefferson, and Edmond Randolph interpreted “necessary” in a narrow manner.¹³¹ In contrast,

provide little guidance to the Clause’s meaning. The Necessary and Proper Clause was added to the Constitution by the “Committee on Detail” and never debated prior to the Convention’s final adoption of the Constitution. *Id.*

128. Mark A. Graber, *Unnecessary and Unintelligible*, 12 CONST. COMMENTARY 167, 168 (1995).

129. Robert Natelson argues the clause “tracks the language found in many Founding- and pre-Founding—era private agency instruments, which used ‘necessary and proper’ or some equivalent to give fiduciary agents incidental powers beyond those explicitly derived in the instruments.” Lawson et al., *supra* note 126, at 6. See generally Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52 (Gary Lawson et al. eds., 2010). Corporate charters also frequently contained “[c]lauses similar to the Necessary and Proper Clause . . . to ensure that an organization with limited powers and purposes would not be frustrated in the essential conduct of its governmentally assigned activities but still would be confined to its assigned functions.” *Id.* at 7. See generally Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 144 (Gary Lawson et al. eds., 2010). Natelson concluded that, in agency instruments, a provision using the word ‘necessary’ “communicated the grant of incidental powers, but no more or less.” Natelson, *supra*, at 76. British administrative law also contemplated “‘incidental’” powers, as contrasted with “‘principal’” powers. See William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1750 (2013). Empowering the agent “to act in a ‘proper’ manner would signal that the agent was bound by fiduciary responsibilities.” Natelson, *supra*, at 80. In a governmental context, “the founders frequently used the term ‘proper’ to refer to the obligation of each government branch to respect its jurisdictional boundaries.” *Id.* at 89–90 (citing Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993)). The records of the Constitutional Convention generally support the interpretation that the founders understood “necessary and proper” by reference to its contemporaneous legal usage. Natelson, *supra*, at 93.

130. Natelson, *supra* note 129, at 108–09.

131. See BARNETT, *supra* note 127, at 158–66; Edmond Randolph, *Opinion of Edmond Randolph*, in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 89 (M. SL.

Alexander Hamilton took the view that “*necessary* often means no more than *needful, requisite, incidental, useful or conducive to*.”¹³²

When Chief Justice John Marshall ruled on the constitutionality of the Bank of the United States in 1819, he sided with Hamilton. To Marshall, “*necessary*” meant “*convenient*.”¹³³ Although Marshall weaved flexibility into the notion of necessity, he suggested that “*necessary*” laws must still remain incidental in character.¹³⁴ Marshall went on to suggest that the term ‘proper’ limited Congress to passing laws actually, rather than pre-textually, aimed at achieving the ends listed among the enumerated powers.¹³⁵

Clair Clarke & D.A. Hall eds., Gales & Seaton 1832) (*hereinafter* LEGISLATIVE AND DOCUMENTARY HISTORY). Madison stated, “[The clause’s] meaning must . . . be limited to means necessary to the end, and incident to the nature of specified powers.” *The Founders’ Constitution: James Madison, The Bank Bill, House of Representatives*, UNIV. OF CHICAGO, http://press-pubs.uchicago.edu/founders/print_documents/a1_8_1889.html (last visited Oct. 16, 2015). Jefferson similarly interpreted the Constitution to “allow[] only the means which are ‘necessary,’ not those which are merely convenient for effecting the enumerated powers . . . [T]he [C]onstitution restrained [Congress] to . . . those means, without which the grant of power would be nugatory.” Thomas Jefferson, *Opinion of Thomas Jefferson: Secretary of State, on the Same Subject (Feb. 15, 1791)*, in LEGISLATIVE AND DOCUMENTARY HISTORY 93.

132. Alexander Hamilton, *Opinion of Alexander Hamilton, on the Constitutionality of a National Bank*, in LEGISLATIVE AND DOCUMENTARY HISTORY 97 (1832).

133. Marshall wrote:

[I]n the common affairs of the world, or in approved authors, we find that [‘necessary’] frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.

McCulloch v. Maryland, 17 U.S. 316, 413–14 (1819).

134. Part of Marshall’s rationale for holding the bank constitutional was that the power to charter a bank was not “a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.” *McCulloch*, 17 U.S. at 411. This conclusion was consistent with Randolph’s claim that “[t]o be necessary is to be incidental.” Randolph, *supra* note 131, at 89. William Baude has recently argued that the Necessary and Proper Clause permits the government to exercise incidental powers but not, in the language of Madison, ‘great’ powers. See Baude, *supra* note 129, at 1749–55.

135. See BARNETT, *supra* note 127, at 184–89. Marshall wrote:

[S]ound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

The Dutch and German translations of “necessary” denote a stronger requirement than Marshall’s notion of convenience, just as the plain text of the English does. De Ronde used the word ‘noodig,’ meaning “needed” or “demanded.” The German translator chose ‘nöthig,’¹³⁶ also meaning “necessary.”

The translation of “proper” provides more insight into the minds of the translators. In the Dutch translation, “proper” became “bequaam,” spelled ‘bekwaam’ in modern Dutch, meaning competent, able, or capable.¹³⁷ For a law to be “noodig en bequaam,” it would have to be necessary and capable of achieving the end it sought. This suggests an interpretation of “necessary and proper” where laws passed under the Necessary and Proper Clause are constitutional when they are capable of solving the problems or addressing the situations the enumerated powers of Congress were designed for.

The German translation used “erforderlich” for proper, meaning required, requisite to have happen, or “what the situation demands.” The translated phrase as a whole, “nöthig und erforderlich,” is thus somewhat redundant—laws must be “necessary and required.” This is a surprising translation because in the German legal vocabulary there was a non-redundant analog to the Necessary and Proper Clause that could be found in contemporary texts: “notwendig und angemessen.” “Angemessen” would mean “proper” in the Aristotelian sense, ensuring not only the effectiveness of the means, but also that the means are limited by the goal. In other words, it would not be “angemessen” for one to crack a nut with a sledgehammer. The redundant form the translator uses is not necessarily wrong, and might be understood to have a rhetorical function instead: it emphasizes that the power given is essentially restricted.

Neither translation evinces an understanding of Natelson’s notion of agency or a sense that “necessary and proper” laws are

McCulloch, 17 U.S. at 421.

136. “[N]öthig” stems from the noun “Not,” meaning “(strong) need” or “emergency.”

137. ‘Bekwaam’ outpaces ‘bequaam’ 38 to 2 in appearances in Sewel’s Dictionary, indicating perhaps De Ronde’s old-fashioned tendencies. See BUYS, *supra* note 113. His upbringing in Gelderland likely contributed to his non-standard spellings and regional vocabulary. The inventory of his estate indicates that De Ronde read almost exclusively 17th century Dutch religious texts. Rensselaer County Historical Society [New York] Rensselaer County Surrogate Court records, inventory of the estate of Lambert DeRonde. 16 February 1796.

merely laws incidental to laws clearly within the powers of Congress. This may be because the translators were unfamiliar with the phrase “necessary and proper” as a term of art. Nonetheless, the view that a proper law is one which is not pre-textually related to an enumerated power is somewhat evoked by the translations “erforderlich” and “bequaam,” particularly if one understands ‘bequaam’ as indicating that a law is only proper if it is capable of advancing the ends Congress is permitted to.

Justice Marshall contrasted the language of the Necessary and Proper Clause with the language prohibiting states from laying imposts of duties. That language states, “No State shall . . . lay any Imposts of Duties . . . except what may be absolutely necessary for executing its inspection laws.”¹³⁸ Because the phrase “absolutely necessary” appeared elsewhere in the Constitution, Marshall claimed the “necessity” required by the Necessary and Proper Clause “need not be absolute” and that the term “necessary” could be taken “in its ordinary grammatical sense” and “used in a sense more or less strict.”¹³⁹

The terms “necessary” and “absolutely necessary” retain their difference in degree in the German and Dutch translations. In German, “absolutely necessary” became “unumgänglich nöthig” (uncircumventably necessary). More literally, ‘unumgänglich’ means “unable to be walked around.” In Dutch, it became “absolut noodzakelyk” (absolutely necessary). De Ronde curiously chose a very close synonym for ‘noodig’ in this clause, ‘noodzakelyk’. The terms are very often used interchangeably, but to the extent that there are shades of difference in meaning, ‘noodig’ is something which is demanded or asked for, like a favor, but something that is ‘noodzakelyk’ is required, like military service.

138. U.S. CONST. art. I, § 10, cl. 2.

139. *McCulloch*, 17 U.S. at 388.

D. PRIVILEGES AND IMMUNITIES

Privileges & Immunities Clause, Art. IV, § 2, cl. 1.

English	German	Dutch
The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.	Die Bürger eines jeden Staats sollen zu allen Vorrechten und Freyheiten der Bürger in den verschiedenen Staaten berechtigt seyn.	De burgers van elk staat sullen regt hebben tot alle voorregten en vryheeden van burgers in de onderschydene staaten.

Writ of Habeas Corpus, Art. I, § 9, cl. 2

English	German	Dutch
The privilege of the Writ of Habeas Corpus shall not be suspended	Das Recht des Habeas Corpus Befehls soll nicht aufgehoben werden	De privilegie van het writ van habeas corpus, zal niet opgeschort worden

There are two frequently-encountered interpretations of the Privileges and Immunities Clause. The first is that the clause merely prevents discrimination between residents and nonresidents of a state — “the Clause guarantees that non-resident citizens will have merely the same privileges and immunities that are guaranteed to resident citizens.”¹⁴⁰ The second is that the Clause “guarantees a uniform set of substantive privileges and immunities to citizens of the United States no matter what rights a particular state constitution might contain.”¹⁴¹

140. Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor to Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809, 890 (1997).

141. *Id.* See also Chester James Anticau, *Paul’s Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 5 (1967). The substantive view is perhaps most famously associated with *Corfield v. Coryell*, No. 3,320, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), written by Justice Bushrod Washington while riding circuit. Justice Washington’s interpretation of the Privileges and Immunities Clause in *Corfield v. Coryell* “was long considered the authoritative interpretation of the Privileges and Immunities Clause.” David R. Upham, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1483 (2005). In *Corfield*, he claimed that the privileges and immunities of citizens of the

Supreme Court jurisprudence currently treats the Privileges and Immunities Clause as a non-discrimination clause, preventing the governments of a state from discriminating against citizens from other states.¹⁴² Under this interpretation, the phrase “Privileges and Immunities” does not consist of specific protections of substantive rights, but rather requires that any “Privileges and Immunities” granted or recognized by a state are granted or recognized equally in citizens of that state and of other states.

One textual question that persists amidst the debate about the meaning of the Privileges and Immunities Clause concerns the meaning of terms ‘privileges’ and ‘immunities.’ Robert Natelson

several states were “those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.” *Corfield*, 6 F. Cas. at 551–52. Among the privileges and immunities of citizens of the several states were: [p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety[] . . . [t]he right of a citizen of one state to pass through, or to reside in any other state[] . . . to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state

Id. Many scholars understand *Corfield* as standing for the proposition that “the privileges and immunities protected under Article IV are not those graciously accorded to its citizens by a state of sojourn, but the rights, privileges and immunities of citizens of the several or United States—the natural, fundamental rights of free men everywhere.” Chester James Anticau, *Paul’s Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 11 (1967). See, e.g., JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 259–60 (1978); Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 816–18 (1982); see also MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 123–24 (1986); LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-34, at 529 (2d ed. 1988). For a further discussion of these authors and others’ interpretation of the Privileges and Immunities Clause, see Upham, *supra*, at 1487, n.20. David Currie presents a different interpretation of *Corfield*—that the decision “concluded no more than that the clause allowed discrimination against an outsider if the right in question was not ‘fundamental.’” DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 239, n.12 (1985). Despite *Corfield*’s prominence, it was in fact one of several decisions that interpreted the Privileges and Immunities Clause in a variety of ways. See Upham, *supra*, at 1498–1510.

142. See Jon David Pheils, *Defining the Scope of the Article Four Privileges and Immunities Clause*, 54 U. CIN. L. REV. 883, 884–85 (1986). Note the history and interpretation of the Privileges and Immunities Clause of Article Four of the U.S. Constitution differs strongly from the Privileges or Immunities Clause of the Fourteenth Amendment.

argues these terms are far from inkblots¹⁴³ and arrives at the meaning of the terms ‘privileges’ and ‘immunities’ by looking at the terms’ historic usage. Privilege, as defined in a variety of legal dictionaries, tended to mean “(1) a benefit or advantage; (2) conferred by positive law; (3) on a person or place; (4) contrary to what the rule would be in absence of the privilege.”¹⁴⁴ Lay dictionaries reflected the same definition. Natelson concludes, “Nothing in these definitions identified privileges with natural rights or natural law. Nor did the definitions suggest that privileges were necessarily created, as some have asserted, by the English common law. On the contrary, the definitions suggest that privileges were departures from the usual course of common law.”¹⁴⁵ Similarly, an immunity constituted “an exemption, otherwise contrary to law, given to a person or place by special grant.”¹⁴⁶ Although “privileges and immunities” were considered grants from the government to particular, often small, classes of people under early English law, today several “privileges” and “immunities” could be seen as natural rights, such as the right to acquire and alienate land.¹⁴⁷

De Ronde’s translation of “privileges” to “voorregten”

143. Natelson argues “‘Privilege’ was a legal term of art with a clear definition, elucidated by a large body of Anglo-American case law and commentary. The same was true, in [some] degree, of ‘immunity.’” Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1122 (2009). Natelson went on to criticize Justice Washington’s view of Privileges and Immunities as failing to make sense on both its own terms and as a historical matter, and to note a variety of other interpretations of the clause: that the Clause protected a general right to travel, that the “privileges and immunities of citizenship” were the rights specifically enumerated in the Constitution, and that “privileges and immunities” were “the ancestral privileges of Englishmen—transferred to Americans through their colonial charters.” *Id.* at 1126. See also David F. Forte & Ronald Rotunda, *Privileges and Immunities Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 269 (Edwin Meese, III et al. eds., 2005) (“‘Privileges and immunities’ constituted a summary of ancient rights of Englishmen that the colonists fought to maintain during the struggle against the mother country.”); Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 809–15 (1982) (describing rights granted in colonial charters and claiming that these “privileges and immunities” amounted to British constitutional limitations). Natelson rejects these interpretations.

144. Natelson, *supra* note 143, at 1130–31.

145. *Id.* at 1132.

146. *Id.* at 1133. Natelson concludes that the terms ‘immunity’ and ‘privilege’ effectively referred to the same legal concept. *Id.* at 1133. “Because an immunity was a benefit, otherwise contrary to law, given to a person or place by special grant, it was a privilege. A privilege to act in a certain way necessarily implied an exemption from the normal consequences of so acting—hence, an immunity.” *Id.* at 1134.

147. *Id.* at 1138–39.

reflects the notion that privileges were benefits granted by the state, instead of rights. For “immunities,” De Ronde uses “vryheden” (freedoms), a word that reflects a notion of natural liberty rather than a special grant by the state. Sewel’s Dutch-English Dictionary from 1766 attests that “voorrecht” is a special privilege, and that freedom (vryheid) is a more general term.¹⁴⁸ Where the term ‘privilege’ is used in Article 1, Section 9, clause 2, describing the “privilege of habeas corpus,” De Ronde chooses the cognate “privilegie” to stand in for privilege.

The German translator also gives a meaning to “privileges and immunities” that is not quite in accord with existing theories, but which is notably aligned with the meaning evoked in De Ronde’s translation. For “privileges,” he uses “Vorrechte,” meaning a special benefit granted. But for “immunities,” he uses “Freyheiten” (freedoms). “The Privilege of the Writ of Habeas Corpus,” however, becomes the right of habeas corpus—“Das Recht des Habeas Corpus,” now equating “privilege” (“Vorrecht”) and the more modern “right” (“Recht”).

E. NATURAL BORN CITIZEN

Natural Born Citizen, Art. II, § 1, cl. 5.

English	German	Dutch
No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President	Niemand ausser ein geborner Bürger, oder der zu der Zeit, da diese Verfassung angenommen wird, ein Bürger der Vereinigten Statten ist, soll zu dem Amte eines Präsidenten wahlfähig seyn	Geen persoon dan een ingeebooren burger, of die een burger is van de Vereenigde Staaten op den tyd van de adoptie van deese Constitutie, zal verkiesbaar zyn tot het officie van President

Recent presidential elections have raised the question of what it means to be a “natural born Citizen” eligible to become President of the United States. The Republican presidential candidate in 2008, John McCain, was born to American parents in the Panama Canal Zone in 1936, while his father was on active

148. BUYS, *supra* note 113.

duty in the U.S. Navy.¹⁴⁹ Before McCain, a shadow was also cast on George Romney's attempt to win the Republican presidential nomination in 1968; Romney was born in Mexico to U.S. citizen parents.¹⁵⁰

There are competing interpretations of the phrase "natural born Citizen." Gabriel Chin argues that to be a natural born citizen, one must be a citizen "at the moment of birth," whether or not that citizenship is acquired under the citizenship clause of the Fourteenth Amendment or by Congressional statute.¹⁵¹ A competing view is that one is only a natural born citizen if one is born within the United States. Under this view, a child who is born to American citizens abroad is naturalized at birth by statute and is not a natural born citizen.¹⁵² Still another view holds that the citizenship clause of the Fourteenth Amendment is not the right place to look for the definition of "natural born Citizen," as the Fourteenth Amendment was passed after the Constitution was adopted, and that the notion of "natural born Citizen" can be extracted from the common law.¹⁵³

Larry Tribe and Ted Olson claim the "natural born Citizen" language contemplates the inclusion of children of American citizens, arguing that the clause was inspired by the British Nationality Act of 1730, which provided that children born abroad to "natural-born Subjects" of the British crown were "natural-born Subjects" themselves.¹⁵⁴ In Tribe and Olson's view, the Natural Born Citizen Clause tracks the existing understanding of natural born subjects in England, simply substituting the word "Citizen" for "Subject."¹⁵⁵ Larry Solum similarly looks to

149. See, e.g., Gabriel J. Chin, *Why Senator John McCain Cannot Be President*, 107 MICH. L. REV. FIRST IMPRESSIONS 1, 2 (2008), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1089&context=mlr_fi. Much of the debate about John McCain concerned a statutory question of whether the Canal Zone was within the "limits and jurisdiction" of the United States, which reaches issues beyond the argument about the text of this clause.

150. See, e.g., Peter J. Spiro, *McCain's Citizenship and Constitutional Method*, 107 MICH. L. REV. FIRST IMPRESSIONS 42, 43 (2008), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1086&context=mlr_fi.

151. Chin, *supra* note 149, at 2.

152. See Chin, *supra* note 149, at 5.

153. *Id.* at 16.

154. See British Nationality Act, 1730, 4 Geo. 2, c. 21; Laurence H. Tribe & Theodore B. Olson, Opinion Letter, *Presidents and Citizenship*, 2 J.L. 509, 510 (2012).

155. Tribe & Olson, *supra* note 154. See also *Hennessey v. Richardson Drug Co.*, 189 U.S. 25, 34-35 (1903).

Blackstone's discussion of "natural born subjects" as an indication of what people during the Founding might have looked to in order to understand the phrase "natural born Citizen."¹⁵⁶ However, Blackstone is "not completely clear or precise."¹⁵⁷ Blackstone states, "Natural-born subjects are such as are born within the dominions of the crown of England."¹⁵⁸ But he also qualifies the statement, noting "all children, born out of the king's ligeance, whose fathers were natural-born subjects, are now natural born subjects themselves, to all intents and purposes."¹⁵⁹

De Ronde translates "natural born Citizen" to "ingeebooren burger" (an inborn or innate citizen). As written, De Ronde's language is close to a word-for-word literal translation of the English text, but in Dutch the language becomes somewhat redundant. In Dutch, a 'burger' meant a person who was a citizen automatically or at birth,¹⁶⁰ as contrasted to a 'porter,' who was a naturalized citizen.¹⁶¹ The different terms arose from a physical understanding of Dutch cities. At the center of old Dutch cities was a fort (burg or burcht, the same root existing in the French adjective bourgeois); the "poort" was the gate into the city. One

156. Lawrence B. Solum, Commentary, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 23 (2008), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1846&context=facpub>.

157. *Id.* at 27.

158. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354 (Oxford, Clarendon 1765–1769), http://avalon.law.yale.edu/subject_menus/blackstone.asp.

159. Solum, *supra* note 156, at 27. Other evidence cuts both ways. The first naturalization act of 1790 provided that "children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens." *Id.* at 29. On the one hand, this statute could be read as simply codifying the original meaning of the citizenship clause. On the other hand, it could be seen as setting a discretionary rule beyond that which a common law notion of "natural born citizen" or "natural born subject" would include. *Id.* Given the ambiguous evidence, Solum gestures towards the "new originalist" notion that there can be a point where "interpretation runs out" and sources beyond the Constitution's text and the original public meaning of the document must be referenced. *See id.* at 30.

160. Sewel's 1766 dictionary equates the status of "burger" to one who is free. For the English word "infranchise," he says, "(or to make a freeman) iemand burger maaaken." BUYS, *supra* note 113, at 386. A recent work exploring the history of idea of citizenship in the Netherlands is JOOST KLOEK & KARIN TILMANS, BURGER: EEN GESCHIEDENIS VAN HET BEGRIIP "BURGER" IN DE NEDERLANDEN VAN DE MIDDELEEUWEN TOT DE 21STE EEUW (2002).

161. *Cf.* Jakobson, *supra* note 58, at 116 (stating that "languages differ essentially in what they *must* convey and not in what they *may* convey."). Whereas English only has one term for citizens, Dutch splits the concept into two terms— one for citizens at birth and another for naturalized citizens.

thus belonged truly to the center of the city, or one was admitted from the outside. The choice of “ingeebooren” could indicate De Ronde’s belief that a citizen needed to be born in the United States, or the entire phrase could simply be understood as an imperfect attempt to literally translate the English text, as De Ronde does at many points in the Dutch copy.

The German translation gestures at the broader interpretation of the Natural Born Citizen Clause, using the phrase “ein geborner Bürger.” A Bürger belonged to a privileged group in urban society: he was neither noble nor clergy, but nevertheless had, unlike the rest of the population,¹⁶² certain freedoms and rights. Although ‘Bürger’ is thus not a perfect substitute for ‘citizen,’ it could nevertheless be commonly used in this way during the eighteenth century, especially when translating the Latin term ‘civis’ or the English ‘citizen.’ Since Germany was not a republic, a more adequate term was not at hand.¹⁶³

“Ein geborner Bürger” then roughly means “a born citizen,” dropping the term ‘natural’ entirely. Why did the translator omit the word ‘natural’? One possibility is that the translator believed the notion of “natural born” was completely captured by “geborner,” that he could not conceive of how someone who was “born a citizen” would not be a “natural born Citizen,” and that he understood such tautology in the original simply as a rhetorical cliché. . . .

Ersch-Gruber,¹⁶⁴ an early nineteenth century German Encyclopedia, includes the statement that “every Son of a Citizen is a born Citizen,”¹⁶⁵ which could easily be regarded as tautological. Naturalization or birth were the only two ways of

162. The so-called “vierter Stand” (fourth estate).

163. Adlung lists a number of different meanings of the term ‘Bürger.’ First, a Bürger is defined as an inhabitant of a city whose inhabitants were allowed to partake in the freedom the town itself had (the word is traced back to “Burg” (“castle”) which is understood to refer to any fortified place). Second, as the so-called “third estate,” in contrast to the nobles and clergyman. Third, as a translation for the Latin “civis,” in a republic or a comparable form of state. Finally—in a figurative meaning—anyone living in a town. 1 ADELUNG, *supra* note 100, at 1263(f).

164. ALLGEMEINE ENCYCLOPÄDIE DER WISSENSCHAFTEN UND KÜNSTE IN ALPHABETISCHER FOLGE VON GENANNTEN SCHRIFTSTELLERN BEARBEITET (J.S. Ersch & J.G. Gruber eds., Leipzig, 1821).

165. *Id.* at 39 (“Jeder Bürgersohn ist geborner Bürger, für Fremde aber ist die Bürgerannahme mit großen Schwierigkeiten verbunden”).

becoming a “Bürger,” *tertium non datur*, and due to the blood principle, a child born overseas would not need to be naturalized.¹⁶⁶ Notably, in German-language discussions of the Natural Born Citizen clause during the early nineteenth century, the “natural” is usually omitted.¹⁶⁷ “[N]aturally born” is simply understood to stand in contrast to the cases of adoption (and the special case of residence in part of Missouri at the time of the French cession).¹⁶⁸

F. THE RECESS APPOINTMENTS CLAUSE

Recess of the Senate, Art. II, § 2, cl. 3.

English	German	Dutch
The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.	Der Präsident soll Gewalt haben, alle erledigte Stellen, die sich während dem, da der Senat nicht sitzt, ereignen mögen, durch Ertheilung der Commissionen zu besetzen, welche am Ende der nächsten Sitzung desselben aufhören sollen.	De President zal magt hebben om alle vacante plaatsen die mogen voorvallen gedurende de afweezenthyd van de Senaat, op te vullen door commissies te vergunnen welke zullen ophouden met het eind van haar naast volgende sitting.

In January 2012, President Obama appointed Richard Cordray to head the newly-created Consumer Financial

166. Similar to the case in the Netherlands, the principle of naturalization sprung from a Roman legal custom already abolished during the middle ages where unfree inhabitants (serfs, etc.) were considered free “a year and a day” after they had arrived – leading to the saying “Stadtluft macht frei” (breathing city-air sets you free). However, unlike in Dutch, the German terminology does not differ between “Porter” and “Burger.” There were, however, differences in practice: only the “gesworene Buerger” (the sworn citizen) had equal rights, and since naturalization usually was bound to the question of property, in the majority of cases only the second generation (that was then also inborn) would have reached such status.

167. If, at the time in Germany, the phrase “naturally born” was ever used outside the context of the United States Constitution, then it was either in a theological context (distinguishing the natural birth from the rebirth by faith, or contrasting the naturally born humans from the God-made Adam) or in a medical context (obstetrics).

168. See AMERICA IM JAHRE 1831 at 304 (C. N. Röding ed., Hamburg, Hoffman 1832) (summarizing the U.S. Constitution). A similar omission can be found in another contemporary work. BENJAMIN FRANKLIN, DR. BENJAMIN FRANKLIN’S LEBEN 424 (Weimar, Verlage des Landesindustrie-Comptoirs 1818) (stating “[t]he American Certificate of Naturalization grants foreigners, who have been domestic there for seven years, all rights of inborn subjects.”).

Protection Bureau (“CFPB”), as well as three other individuals to the National Labor Relations Board (“NLRB”).¹⁶⁹ Cordray’s nomination had been blocked by a Senate filibuster since July 2011.¹⁷⁰ The President had acted during what the executive claimed was a “Recess of the Senate,” permitting him to bypass the requirement to receive the “Consent of the Senate.” At the time of the appointments, the Senate was meeting in *pro forma* sessions every three business days from December 20, 2011, through January 22, 2012, rather than officially ending the legislative session.¹⁷¹ Often the meetings lasted “minutes or even seconds . . . to meet the definition of holding a Congressional meeting.”¹⁷² Senate Democrats had used the same tactic in the past to prevent President Bush from making recess appointments.¹⁷³

The question of whether President Obama’s appointments qualified as occurring “during the Recess” made its way to the Supreme Court and was answered in June 2014. All nine justices held that the appointments were unconstitutional, however they disagreed on why. Writing for the majority, Justice Breyer held that the term “the Recess” includes both the intersession recess between Senate sessions and “an intra-session recess of substantial length.”¹⁷⁴ The majority understood the purpose of the clause as preventing governmental action from grinding to a halt during the Senate’s extended absence.¹⁷⁵ As the D.C. Circuit noted in the same case, “[a]t the time of the Constitution, intersession recesses were regularly six to nine . . . months . . . and senators did not have the luxury of catching the next flight to Washington.”¹⁷⁶ Although the President could hypothetically

169. Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 4, 2012, <http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html>.

170. *Id.*

171. *See* Noel Canning v. NLRB, 705 F.3d 490, 498 (D.C. Cir. 2013).

172. Cooper & Steinhauer, *supra* note 169.

173. *Id.*

174. NLRB v. Noel Canning, 134 S. Ct. 2550, 2561 (2014).

175. *Id.* at 2565–66 (“[The framers] might have expected that the Senate would meet for a single session lasting at most half a year.”). *Id.* at 2598 (Scalia, J., concurring) (“[T]he majority contends that the Clause’s supposed purpose of keeping the wheels of government turning demands that we interpret the Clause to maintain its relevance in light of [new circumstances].”).

176. *Noel Canning*, 705 F.3d at 503 (citing Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1498 (2005)).

exercise the recess appointments power during an intra-session break of the Senate, the Court deemed the three-day break at issue was too short to constitute a break that would activate the recess appointments power.¹⁷⁷ In contrast, Justice Scalia's concurrence maintained that the term "the Recess" could only refer to the single intersession recess that occurred between formal legislative sessions.¹⁷⁸ "[I]f 'the next Session' denotes a *formal* session, then "the Recess" must mean the break *between* formal sessions."¹⁷⁹

Although most of the German translation of the Constitution is literal, the Recess Clause is paraphrased. "[D]uring the recess of the Senate" became "da der Senat nicht sitzt"—"when the Senate is not sitting." In the same manner the German translator circumscribes "recess" in art. II, § 2, cl. 3. De Ronde translates the recess clause to "gedurende de afweezenthyd van de Senaat"—or "during the extended absence of the Senate." In other Dutch documents from the period, the word 'afweezenthyd' is used when an official or member of royalty is absent from a place for months or years, such as when one is on an extended trip abroad. In this sense, it is different from the modern Dutch 'afwezigheid' which refers more generally to one's absence, or to one being merely "not present," such as when one does not attend a business meeting. De Ronde's choice of 'afweezenthyd' indicates that he interpreted the original to mean that the absence was more than immediate or temporary, but extended.

The Dutch translation gestures at the underlying purpose of the Recess Appointments Clause—to give the President the power to get work done when the Senate was absent for an extended period of time and, by extension, could not approve a candidate. Because of the difficulty and slow pace of travel in the late eighteenth-century, senators would literally be unable to approve nominees when they left the Capitol to return to their home states. The Recess Clause would have allowed the President to temporarily fill vacancies during periods when the senators were absent for an extended period of time.

In contrast, the German translation brings less clarity to the *Noel Canning* question. The definite article—"the Recess"—is

177. *Noel Canning*, 134 S. Ct. at 2566.

178. *Id.* at 2592 (Scalia, J., concurring).

179. *Id.* at 2596 (Scalia, J., concurring).

absent from the German translation. And the eighteenth-century German distinction between ‘séance’ and ‘session’—the former meaning the individual meeting, the latter the longer period of time convened, including adjournments—does not provide much guidance because “to sit” is the root of both nouns.¹⁸⁰

Nonetheless, the German translator’s choices can contribute to the discussion. Although he uses “sitting” in the sense of “séance” in art. I, § 3, cl. 6, his understanding of the word ‘recess’ becomes more clear when paraphrasing it in art. I, § 3, cl. 2. In that clause, “recess” is understood as the interim period after the assembly has parted (“während der Zeit, da . . . auseinandergegangen ist”) until the next “coming-together” (the literal meaning of “Zusammenkunft”). However, only so much can be read into this phrasing, because the translator also uses “Zusammenkunft” in the case of adjournment.¹⁸¹

G. FELONY

Art. I, § 6, cl. 1.

English	German	Dutch
They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest	Sie sollen in allen Fällen, Hochverrath, Hauptverbrechen und Friedensbruch ausgenommen, von Arresttirung während dem	Zu ¹⁸² zullen in alle gevallen, uitgezondert van verraad, dood waerdige misdaad en verbrekinge van vrede, het voorregt hebben om niet gearresteerd te worden

180. “Session is the row of meetings until an Ajournement, therefore Session and Séance (Sitzung) are not to be confused.” 1 DE LA CROIX, VERFASSUNG DER VORNEHMSTEN EUROPÄISCHEN UND DER VEREINIGTEN AMERIKANISCHEN STAATEN 320 (1792). Adlung also understands “session” not as a single meeting, but as longer period (“Sitzungsperiode”), whereas the single meeting, in contrast, is called “séance.” See ADELUNG, *supra* note 100. Our translator seems to follow this distinction by translating “Sitzung” as “session.” An interpretative decision on what is meant by “Recess” is however avoided by using a verb instead of a noun, thereby creating an ambivalence, since “to sit” is the verb form both of “séance” and “session.”

181. U.S. CONST. (German), *supra* note 1, art. II, § 3.

182. “Zu” should be “ze” (“they”). There is no word ‘zu’ in Dutch.

Art. I, § 8, cl. 10.

English	German	Dutch
To define and punish Piracies and Felonies committed on the high Seas	Seeräuberey und Hauptverbrechen, die auf der offenen See begangen werden	Om te bepalen en te straffen zeerooverien en doodwaardige misdaaden gepleegt op de hooge zee

Art. IV, § 2, cl. 2.

English	German	Dutch
A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice	Wenn jemand in einem Staate des Hochverraths, eines Haupt- oder andern Verbrechens beschuldigt wird, und der Gerechtigkeit entfliehet	Een persoon in cenige staat beschuldigt van verraad, felony of andere misdaad, die van de justitie zoude vlieden

The term ‘felony’ has had a very broad and frequently changing meaning. Writing in 1823, Massachusetts lawyer and legislator Nathan Dane wrote in his treatise on American law, “[T]he word felony, in the process of many centuries, has derived so many meanings from so many parts of the common law, and so many statutes in England, and has got to be used in such a vast number of different senses, that it is impossible to know precisely in what sense we are to understand this word.”¹⁸³ Although felonies were traditionally punished by forfeiture of property or death under the common law in England,¹⁸⁴ in America at the time of Dane’s writing, there were “many felonies, not one punished

183. 6 NATHAN DANE, *DIGEST OF AMERICAN LAW* 715 (Boston, Cummings, Hilliard & Co. 1823).

184. See Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 *CLEV. ST. L. REV.* 461, 463–65 (2009).

with forfeiture of estate, and but a very few with death.”¹⁸⁵ Blackstone similarly explained, “Felony, in the general acceptance of our English law, comprises every species of crime, which occasioned at common law the forfeiture of lands or goods.”¹⁸⁶

For “felony,” the German translator chose the word “Hauptverbrechen.” In the present day, the term is no longer in use.¹⁸⁷ In the tradition of the early penal codes and its translations,¹⁸⁸ it meant “head crime”—one automatically punished by death, usually decapitation.¹⁸⁹ Like the English term ‘felony,’ ‘Hauptverbrechen’ had already experienced a considerable semantic shift in Germany by the late eighteenth century, and the translator could have intended the term to encompass a variety of meanings. Most likely, he intended a more modern meaning, since fundamental changes in the penal system had already severed the direct link between the gravity of the offense and the punishment.¹⁹⁰ The secondary meaning “Haupt-” always possessed outside the field of criminal law (“main”) had largely replaced the primary meaning (“capital”) even in the field of penal law.¹⁹¹ In contract law, “Haupt-Pflicht” (“capital duty”) was already understood to be the main duty of a party, and in the field of Ethics, “Haupttugend” (“capital virtue”) could stand in for “Kardinaltugend” (“cardinal virtue”).¹⁹² When Campe’s Dictionary defines “Hauptverbrechen” in 1808, there is no explicit reference made to the death-penalty. Instead the term is

185. 6 DANE, *supra* note 183, at 715.

186. 4 BLACKSTONE, *supra* note 158, at 94. *See also* BLACK’S LAW DICTIONARY (9th ed. 2009) (defining ‘felony,’ at common law, as “an offense for which conviction results in forfeiture of the defendant’s lands or goods (or both) to the Crown, regardless of whether any capital or other punishment is mandated.”).

187. A cognate of ‘Hauptverbrechen,’ ‘Kapital-Verbrechen’ might still be found, especially as a layman’s term. Another term frequently used today is ‘Haupttat,’ also translating to “capital crime,” but which is presently used to distinguish the crime of the main perpetrator from that of the accessory.

188. The Latin “res capitalis” and “peccatum mortale” would usually translate as “Haupt[-]” or “Capital-Verbrechen.”

189. For example, the “Constitutio Criminalis Carolina” of 1532 was colloquially called “Halsgerichtsordnung” (“throat criminal code”) since the usual punishment in the Carolina was death.

190. A key change in Germany was to render punishment that was not only adequate to the crime committed, but also appropriate in light of a perpetrator’s individual level of guilt. *See generally* ERNST CHRISTIAN WESTPHAL, DAS CRIMINALRECHT (Leipzig, 1785).

191. *See* 2 JOACHIM HEINRICH CAMPE, WÖRTERBUCH DER DEUTSCHEN SPRACHE 572 (Braunschweig, Schulbuchhandlung 1808) (“Hauptverrath”).

192. 2 ADELUNG, *supra* note 100, at 1019 (“Haupttugend”).

defined as “a grand, grave crime (capital crime),”¹⁹³ although German legal scholars of the early nineteenth century would still have to debate what was meant when interpreting a law that uses the term.¹⁹⁴ When Johann Joachim Eschenburg used the term in 1783, he stated that the usual punishment for murder, as a capital crime, was banishment, a statement which would be contradictory if “Hauptverbrechen” required the death penalty.¹⁹⁵

Evidence that such semantic shift was taking place is particularly visible in a German translation of the proposed Seventh Amendment (which became codified as the Fifth Amendment) from the early 1800s. The phrase “capital, or otherwise infamous crime” is simply translated as “Haupt-Verbrechens,” illustrating that the term could serve as a translation for both “capital crimes” in the literal sense, and those crimes that are “as infamous” as such crimes.¹⁹⁶

In the Dutch translation, despite the allegedly amorphous meaning of ‘felony,’ De Ronde used a strikingly unambiguous term in translation. De Ronde translated “felony” to “doodwaardige misdaden”—literally, “crimes worthy of death” (except in art. IV, § 2, where he curiously says “felony,” without translation). De Ronde’s choice particularly suggests that despite the vague meaning of ‘felony’ before and after the Founding, some individuals might have still understood it as having a clear,

193. CAMPE, *supra* note 191 (“Hauptverbrechen”).

194. For example, in Bavaria in 1856, the question arose of whether “capital crimes” in the Bavarian Criminal Code of 1813 meant only those crimes that were punished with death. See BLÄTTER FÜR RECHTSANWENDUNG ZUNÄCHST IN BAYERN (Johann Adam Seuffert & Ernst August Seuffert eds., Erlangen, Palm & Enke 1856). At first glance, this debate might point against the modern use. However, the text presumes that people (already) used the term in the more modern sense of “severe crime”—this being the reason why there was need for the debate at all.

195. JOHANN JOACHIM ESCHENBURG, HANDBUCH DER KLASSISCHEN LITERATUR (Berlin, Nicolai 1783). Eschenburg’s subject is Greek antiquity, so it does not say much about the use of “Hauptverbrechen” in a more modern legal context. Nevertheless it is significant that the author can use the term in such context (meaning for a crime that was not generally punished with death) without being contradictory.

196. See GESEZE DER REPUBLIK PENNSYLVANIEN, IN ÜBERSEZTEN AUSZÜGEN, ENTHALTEND DIE BRAUCHBAREN OFFENTLICHEN GESEZE BIS ZU DEM JAHR 1805, EINSCHLIESSLICH: SO WIE AUCH DIE REGIERUNGS-VERFASSUNGEN DER VEREINIGTEN STAATEN UND VON PENNSYLVANIEN, HRG. UNDER AUTHORITY EINER GESEZES DER GENERAL-ASSEMBLY, PASSIRT IM APRIL, 1805, at xx–xxii (Reading, Gedruckt und Herausgegeben von Johann Ritter und Carl Kessler 1807), <http://modern-constitutions.de/US-00-1787-09-17-de-a-1789-1-c.html>. Two other nineteenth century translators of the U.S. Constitution into German completely omit the word “capital” in their translations. See I DIPPPEL, *supra* note 1, at 84 n.6.

narrow meaning—namely, a capital crime.

H. HIGH CRIMES & MISDEMEANORS

Art. II, § 4.

English	German	Dutch
The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.	Der Präsident, Vice-Präsident und alle bürgerliche Beamte der Vereinigten Staaten sollen ihres Amtes entsetzt werden, wenn sie wegen Hochverraths, Bestechung oder anderer hohen Verbrechen und Uebelthaten öffentlich angeklagt und davon überführt werden.	De President, Vice-President en alle burgelyke officianten van de Vereenigde Staaten zullen afgezet worden van haar officie, op een impeachment voor, en overtuigen van, verraad, bribery, of andere sware misdaaden en wangedragingen.

The phrase “high Crimes and Misdemeanors” is, at first glance, fairly opaque. A clue to its meaning comes from Blackstone, who distinguished “high treason” from “petit treason.” Petit treason included breaches of “private and domestic” allegiances.¹⁹⁷ High treason constituted crimes against society as a whole.¹⁹⁸ Following on this distinction, Raoul Berger explained that the English treated “high crimes and misdemeanors” as “a category of *political* crimes against the state.”¹⁹⁹ Berger’s analysis claimed “high Crimes and Misdemeanors” included misapplication of funds, abuse of official power, neglect of duty, encroachment upon parliamentary prerogatives, corruption, betrayal of trust, and giving pernicious advice to the Crown.²⁰⁰ Berger concludes, “[t]he phrase ‘high Crimes and Misdemeanors,’ . . . is not concerned with ‘high’ in the sense of ‘serious’ crimes as such, but with misconduct by officials in high places who are immune to ordinary forms of judicial or

197. 4 BLACKSTONE, *supra* note 158, at 75.

198. See Gary L. McDowell, “*High Crimes and Misdemeanors*”: *Recovering the Intentions of the Founders*, 67 GEO. WASH. L. REV. 626, 638 (1999) (citing 4 BLACKSTONE, *supra* note 158, at 75, 203).

199. RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 64 (1974).

200. *Id.* at 71–73.

political control.”²⁰¹ Michael Gerhardt similarly reads “high Crimes and Misdemeanors” as “not limited to indictable offenses, but rather includ[ing] great offenses against the federal government.”²⁰²

The German translator writes “hohen Verbrechen und Uebelthaten,” or “high Crimes and Misdeeds,” where ‘hohen’ most literally means high (as in altitude). The German text is much more ambivalent here than in the case of “Hauptverbrechen” and more complex than the English and Dutch prints. The choice of the German translator to use “hoch” (“high”) in this passage, together with his choice in art. III, § 3, cl. 1, to substitute “Treason” with “Hochverrath” (“high treason”), tracks Blackstone’s distinction between high and petit treason. But although “Hochverrat” (“high treason”) in contemporary German was understood to denote treason, directed against the state or its head,²⁰³ this understanding is muddled by the fact that ‘high’ and ‘capital’ were sometimes used as synonyms in the late eighteenth-century legal discourse.²⁰⁴ Not only could ‘high’ and ‘capital’ both refer to the seriousness of the crime, as already presumed in the case of “felony” (“Haupt-Verbrechen”), but “Haupt-” could, as in the case of treason, be used to denote offences against the state and its leader, with the consequence that the term ‘Hauptverrath’ and ‘Hochverrath’ become interchangeable in this semantic context.²⁰⁵ Campe’s Dictionary from 1808 accordingly lists both possibilities when explaining “Hochverbrechen” (“high crime”): the broader meaning of “a grave or exceptional crime,” and the more narrow meaning of “crime directed against the state or its head.”²⁰⁶

201. Thomas I. Emerson, *Impeachment: The Constitutional Problems*, 74 COLUM. L. REV. 131, 133 (1974) (reviewing BERGER, *supra* note 199).

202. MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 104-05 (2d ed. 2000). “[D]elegates to state ratification conventions often referred to impeachable offenses as ‘great’ offenses, and . . . frequently spoke of how impeachment should apply if the official ‘deviates from his duty’ or if he ‘dare to abuse the powers vested in him by the people.’” *Id.* (some internal quotation marks omitted).

203. See 1 ADELUNG, *supra* note 100 (defining ‘Hochverrath’ as a treason directed against the state or its head).

204. A legal example is again the case of treason, where “high treason” (Hoch-verrat) and “capital treason” (Haupt-Verrath) were understood to be synonymous. See *id.* (“Haupt-verrath”).

205. See 2 CAMPE, *supra* note 191, at 572 (“Haupt-verrath”).

206. 2 CAMPE, *supra* note 191, at 753 (“Hochverbrechen”). Campe also lists both possible meanings for ‘hochverrat’ (high treason). See *id.*

These usages in mind, it might be prudent not to read too much intent into the German translation of “high Crimes,” since there is a general tendency of the draft’s German translator to translate as literally as possible, and hereby to choose a cognate or even use an Anglicism, without giving much thought to the question of whether the cognate in the individual case would be the most appropriate German term to stand in for the original term. So, although the specific definition of “high treason” in the German system and its deliberate choice by the translator could accord with a translator’s intention to evoke Blackstone’s notion of high crime rather than petit crime (a distinction that even had found its way into Krueinitz’s *Encyclopedia*²⁰⁷ during the early 19th century), the possible synonymy of ‘high’ and ‘capital’ may render the German translator’s verbatim choice less significant. In the case of our translator and his tendency for verbatim translation, this could even be much more likely the case; his literal translation of “high” could simply be an example of where the German translator translated in a rote manner.

In Dutch, De Ronde says, “wangedragingen,” for “misdemeanors,” meaning “misconducts” or “misbehaviors.” However “high Crimes” emerges in De Ronde’s Dutch as “sware misdaden”—“serious crimes.” De Ronde’s translation likely says more about the public’s understanding of the phrase “high Crimes” than about whether Berger and Gerhardt correctly identified the phrase’s origins. De Ronde was not a lawyer and could easily have been unaware of Blackstone and other sources that distinguish between high and petit treason. The translation of “high Crimes” then presents a particularly stark example of how the intent of the authors of the Constitution might significantly deviate from the publicly-understood meaning of the phrase. Supposing that “high Crimes” was meant to evoke a crime against the state, De Ronde’s translation illustrates that some members of the Founding-era public may have understood the language to simply mean “serious crimes” as opposed to minor or unimportant crimes.

This observation is particularly notable in light of John McGinnis and Michael Rappaport’s proposition that the lay public would have recognized legal language in the Constitution

207. Krueinitz remarks that “the English” make a distinction between “high” and “petty treason.” See KRUEINITZ, *supra* note 102 (“Hochverrath”).

and refrained from coming to a judgment about its meaning. McGinnis and Rappaport argue that

It is a common, if not universal, reaction for a layperson to read a legal document, whether a contract, statute, or a constitution, and have the following reaction: “Well, it seems to mean *X* to me, but I am not a lawyer. To be sure of its meaning, I will need a lawyer to read it.” . . . This example suggests that the linguistic practice of the community would give priority to legal interpretive rules and to the lawyer’s understanding of legal documents, such as the Constitution.²⁰⁸

De Ronde’s translation suggests that at least some members of the educated, Founding-era public might not have always recognized each of the legal or specialized terms in the Constitution. As a result, they may have developed their own interpretations of the language and failed, as De Ronde did, to defer to a lawyer’s interpretation. Alternatively, one might imagine that De Ronde did not have the opportunity to corroborate his interpretation and was not actually subjectively certain of the Constitution’s meaning on this point. This view is possible given De Ronde’s preference for using cognates instead of locutions to express American legal concepts.²⁰⁹ On the other hand, it might also be implausible to suppose that De Ronde translated and published a text that he affirmatively believed might be incorrect.

V. CONCLUSION

This Article has analyzed two Founding-era translations of the United States Constitution and considered their usefulness as a means of interpreting the Constitution’s text. Our exegesis illustrates that the translations provide useful insight, but are also limited in significant ways.

Because translation presupposes interpretation, the particular choices of the translators can be understood as Founding-era commentaries on the Constitution. Commentary is not only present where the translators paraphrased or even chose to substitute a technical term with an extended explanation. Rather, the translator’s choice of words and sentence structure

208. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 126 (2013).

209. See *supra* note 78 and accompanying text.

itself inherently reflects analysis. The fact that languages are far from isomorphic, that in a large number of cases the translator had the option or need to choose from among many terms or phrases with varied meanings, sheds light on how a member of the Founding-era public would have understood the English-language text. Indeed, the examples we treated in this paper collectively illustrate a range of views that the Founding-era public might have had about the content of the Constitution.

Our discussion also highlighted a number of limitations present when using the Founding-era translations as an interpretive tool. The issues range from how authoritative a translator's understanding of a legal text can be, to how conscious the translator was of the nuanced meaning of his choices. While these issues are significant, the translations still can serve as a piece of the interpretive puzzle and add to our understanding of the Constitution as a whole. Despite any ambiguities and disagreements, the translations provide additional evidence of the Constitution's original public meaning and ought to stand alongside contemporary news articles, commentaries, convention notes, and dictionary definitions.

The limitations of using translations to interpret the original text are most clearly apparent in those cases where our translators disagree on the meaning of a passage. Whereas De Ronde's translation of "regulate" preserves the idea of regulation as "making regular," the German translation appears to allow the government greater latitude to establish commerce where it might not have previously existed. De Ronde's notion of "proper" laws concerns whether they achieve their ends, whereas the German translator's "proper" law is merely a required one. Although the German translations of "high Crimes" and "felony" track the dominant academic and contemporary understanding of the terms, De Ronde's translations deviate sharply from those interpretations. His translation of "high Crimes" evokes severity rather than a crime against the state; similarly, his translation of "felony" — "crime worthy of death" — is both highly specific and at odds with existing English and American law.

Such semantic dissociation between the two translations can be understood as either an example of differing interpretations, or as a contingent result of the translation process as a more or less conscious and controlled activity that inevitably leads to differences and even errors. The latter possibility might often be

the case with these translators' work. The fact that even within their own translations, certain terms are not applied in a consistent way calls into question the usefulness of understanding every word-choice as an interpretative argument. It is also worth recognizing that agreement between the translators does not necessarily indicate their interpretation reflected that of the rest of the Founding-era public. Agreement could spring from a consensus on the meaning of a respective passage, but could also simply be a case of coincidence. Concord in these cases does nevertheless have a significant heuristic value: there is a good chance that the translations agree with each other for a reason. Coupled with the translations' historic value, these insights render the Founding-era translations of the United States Constitution an invaluable source for constitutional scholars and lawyers today. For too long, they languished in obscurity—now they may be read, criticized, and reinterpreted.