

2016

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## Recommended Citation

Levinson, Sanford, "What One Can Learn from Foreign-Language Translations of the U.S. Constitution" (2016). *Constitutional Commentary*. 25.

<http://scholarship.law.umn.edu/concomm/25>

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# WHAT ONE CAN LEARN FROM FOREIGN- LANGUAGE TRANSLATIONS OF THE U.S. CONSTITUTION

*Sanford Levinson\**

## I. INTRODUCTION

There is much that could be said about the fascinating discovery by Professor Mulligan and her colleagues of the Dutch and German translations of the English text of the United States Constitution<sup>1</sup> drafted in Philadelphia in 1787. But, of course, that draft consisted only of proposals; what was key was the transmission shortly afterward to the citizenry at large for what the first *Federalist* aptly described as their “reflection and choice”<sup>2</sup> about the new system proposed to replace what its critics called the “imbecility”<sup>3</sup> of the polity established by the Articles of Confederation. There are at least three different perspectives from which one can mount one’s own analysis of the non-English language texts that are the subject of this essay.<sup>4</sup>

First, one might simply look at their work—and, particularly, the extremely interesting Appendix containing the actual translations—from what might be termed a “micro-

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1. Christina Mulligan, Michael Douma, Hans Lind & Brian Quinn, *Founding Era Translations of the Federal Constitution*, 31 CONST. COMMENT. 1 (2015).

2. FEDERALIST NO. 1 (Alexander Hamilton). See also SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING *THE FEDERALIST* IN THE 21ST CENTURY (2015).

3. See, e.g., FEDERALIST NO. 15 (Alexander Hamilton).

4. Although I initially typed “foreign language,” it is, I think, essential to realize that there is a very powerful, and perhaps untenable, assumption built into the description of Dutch and German as “foreign language.” As noted in the text, there were many “good Americans” circa 1787 for whom English was not their primary language, contrary to Publius’s assertions in *Federalist* 2. That English has turned out to be the dominant language within the United States was perhaps predictable, but it surely was not legally required.

perspective.” We could concentrate on the subtle differences in meaning that might be generated by the shift from English to Dutch or German (and then back again into English by virtue of translating from the Dutch or German). I well remember my own experiment in this direction many years ago, when I asked a law student at the University of Texas, who had been a professional translator prior to his coming to law school, to translate one of the commonly available French versions of the U.S. Constitution without, of course, referring to the English version.<sup>5</sup>

A second possibility is to address some of the theoretical issues posed by the notion of “translation” itself, particularly with regard to the basis by which we assess the merits of any given translation. Even those who are, unlike me, multilingual, must nonetheless rely on translations much of the time in a world whose multicultural reality becomes ever more important. Almost by definition, we are at the tender mercies of the translator, the accuracy of whose work we really cannot truly judge. A final perspective is provided by what might be termed the “social history” aspect of their project, which emphasizes the social and political reality, and presumed importance, of the existence of German- and Dutch-speaking minorities in Pennsylvania and New York at the time of the Constitution’s proposal and ratification. The United States was already a “multi-cultural” or “multi-national” country, which raises interesting questions with regard to at least some of the theoretical underpinnings of the new nation taking form following the secession from the British Empire. The reality of such multiculturalism—especially when revealed in the presence of languages other than English—has often generated either denial or, when that is, as a practical matter, impossible, then normative opposition. We will see at least the first reflected in one of the most interesting essays of *The Federalist* and the latter in the thought, interestingly enough, of one of our most cosmopolitan “founders,” Benjamin Franklin. I will discuss these three perspectives in turn.

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5. I am embarrassed to say that although I recall that it was very illuminating at the time to see what difference it might make if, in some hypothetical future, historians trying to reconstruct the U.S. Constitution had only a French-language text from which to work, I do not remember the specifics and was unable to find the translation in my files. C’est la vie!

## II. ON THE MICROANALYSIS OF LANGUAGE

Although this project may have interesting implications for “originalists,” explored in the accompanying essay by my friend Jack Balkin, it also is of obvious relevance to those who describe themselves as “textualists.” For example, does it matter—or, perhaps more to the point, exactly how and why does it matter—if instead of the words “to keep and bear arms” in the Second Amendment, we instead read only the words “to carry arms”?<sup>6</sup> This, of course, is not the only potentially interesting example found in a careful perusal of the Appendix. Consider the German translation of the “territories clause” of Article IV as ostensibly giving Congress “the power to sell the land or other property of the United States and for this to make the necessary rules/orders and establishments”?<sup>7</sup> “[F]or this” seems to limit congressional power of rule-making to a small subset of cases in which the land is being sold either to private purchasers or, perhaps, to a foreign country. To be sure, this raises a host of questions: Is it really conceivable that Congress is without power, say, to pass laws organizing new territories that are acquired by war or treaty or even the territories that are carved out of existing states like Virginia or New York? Still, those who profess to be serious textualists, like Justice Scalia or Harvard Law Professor John Manning, often argue that they (or we more generally) are bound by the dictionary meanings of language and that we ought not to infer broader “purposes” that in effect license judges and other interpreters simply to do whatever they desire.<sup>8</sup>

These, of course, are not the only examples of interesting problems that are generated by carefully reading the alternatives presented by retranslating the German and Dutch back into English. One might have a different conception of the Vice President—whose office I have elsewhere analogized to the duck-billed platypus because of the difficulty in assigning it to a single species<sup>9</sup>—if we accept, with regard to the limitation that

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6. Mulligan, *supra* note 1, at app., p. 56 (German translation).

7. *Id.* at 50.

8. See, e.g., Scalia’s opinions in *King v. Burwell*, 135 S. Ct. 2480, 2496–507 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578–618 (2014). See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004).

9. See SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS*

“[N]o Person holding any office” can “during his Continuance in office” be at the same time a member of the House or Senate, the proviso that the person in question must be someone who “administers any office.”<sup>10</sup> What “office” does the Vice President “administer[]”? Is any official within the entire Executive Branch, for example, under a duty to accept orders from the Vice President? Contrast the Vice President not only with the President—the Commander-in-Chief, after all—but also with the Secretary of Transportation or even the Deputy Undersecretary of the Bureau of Land Management in the Department of the Interior. The sole duty of the Vice President, according to the Constitution, is to be President of the Senate. The fact that contemporary presidents may assign their vice-presidents certain duties to chair committees or the like, arguably does not translate into “administer[ing]” an office, unless we want to argue that anyone who, say, hires a secretary or scheduler comes within the Disqualification Clause. But is that a sensible reading of the phrase?

Similarly, consider what difference it might make, with regard to the kinds of “germaneness” or “single-subject” rules sometimes found in state constitutions and their structuring of the legislative process, if Article I, Section 7 defined “Amendments” as limited to “Improvements” or “Corrections.”<sup>11</sup> We have become used to the fact that the Senate, especially, often proposes decidedly non-germane amendments to bills that originate in the House. If we knew only of the German translation, perhaps we would realize that all of them are unconstitutional. Among other things, this would presumably save us from the modern phenomenon of “omnibus legislation,” joining together in ungainly fashion hundreds of pages relating to significantly different issues that a president is forced to sign or veto *in toto*. Finally, consider the implications of translating “proper” in the Necessary and Proper Clause as “what the situation demands,”<sup>12</sup> especially if we view that as a

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AND THE CRISIS OF GOVERNANCE 228 (2012).

10. Mulligan, *supra* note 1, at app., p. 14 (German translation).

11. *Id.* at app., p. 15 (German translation).

12. *Id.* at app., p. 26 (German translation). Though see as well the commentary to the Dutch translation, where the translation for “proper” (“bequaam” in 18th century Dutch spelling), means, in retranslation, “competent, able, or capable.” *Id.* Thus, “[f]or a law to be ‘noodig en bequaam,’ it would have to be necessary and capable of achieving the end it sought.” *Id.*

proper subject for judicial scrutiny. It is still not clear how that differs from “necessary,” unless, of course, one translates “necessary” as Marshall did in *McCulloch v. Maryland*, to mean “useful.”<sup>13</sup> In that case, it might make sense, as the authors suggest, to view the German text as on to something in “emphasiz[ing] that the power given is essentially restricted” by the requirement that the objective situation, presumably open to judicial review, “demands” the controversial measure.

All of these points are presumably interesting to anyone who takes constitutional language with extreme seriousness, including placing the language in a purportedly rigid historical context. Those of us who are not sympathetic with the radical rejection of purposivism—or embrace of originalism—found in at least some iterations of textual argument as adopted in certain opinions by Justice Scalia<sup>14</sup> or Chief Justice Roberts,<sup>15</sup> though, can wonder if anything would truly be different had all English-language texts disappeared on November 1, 1787, and we had been forced to reconstruct the Philadelphians’ handiwork by translating the texts back from Dutch and German into English. The only plausible response, obviously, is that we’ll never know. This is counter-factual history of truly science-fiction proportion. Still, it would be interesting to know how those far more sympathetic than I to originalism would respond to these discoveries.

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13. *McCulloch v. Maryland*, 17 U.S. 316, 356 (1819).

14. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2505 (2015) (“The Court’s decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery”).

15. See, e.g., Chief Justice Roberts’ dissent in *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2677–92 (2015). Roberts, of course, had written the majority opinion in *Burwell*, so it is fair to say that Roberts either has a more nuanced (or incoherent) view of the power of textual commands than does Scalia. Though perhaps I should emphasize that I *am* a “hard-core textualist” with regard to what I have taken to calling “the Constitution of Settlement” that is, alas, almost never really taught within the legal academy precisely because no interesting issues of “interpretation” seem to be involved. On the difference between the “Constitution of Conversation” and “Constitution of Settlement,” See LEVINSON, *supra*, note 9, at 19. My own stock example is Presidential Inauguration Day, whose deferral until January 20 I think to be unfortunate and even at times dangerous, but is, nonetheless, impervious to clever lawyerly argument that a discredited incumbent is under the duty to make way for his successor prior to that time. See U.S. CONST. amend. XX.

## III. ON ASSESSING TRANSLATION

Part of what is both interesting and amusing about this project is precisely that we have the original English-language texts by our sides, and we can use our presumed skill in that language in assessing, or at least offering thoughtful commentary, on the German or Dutch (or any other language, presumably) versions. But this reality points to an important theoretical issue with regard to the enterprise of “translation” and, more to the point, to our ability to assess the accuracy or validity of any given proffered translation. Consider in this context the arguments made by Larry Lessig that we should view American constitutional law in general as a process of “translation” from “original understandings” to later understandings that pay due heed to changed circumstances.<sup>16</sup> The obvious problem is how we assess any given “translation.” How do we decide, for example, if the “New Deal Settlement” represents the best way, in the 20th century, of reading the Commerce Clause or, instead, represents what Balkin and I have described in a different context as “judges on a rampage” who willfully ignore the limits of the text in favor of their own political preferences?<sup>17</sup> As I put it some years ago, who actually “needs” translations, with what implications?<sup>18</sup> The answer is someone who has no access to an “original text,” either because it no longer exists or because the person seeking the translation simply is incompetent to read and understand the original.<sup>19</sup>

One can evaluate a given “translation,” at least as to “reliability” (as distinguished, say, from its stylistic appeal to contemporary readers) if and only if there both exists a copy of some authoritative *ur-text* to which we can refer *and* the person assessing a given translation has sufficient facility in decoding the meaning of the original text to be able to say that the later interpreter was or was not faithful to its “true meaning.” But if all of the English-language texts of the Constitution disappeared,

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16. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

17. Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 78–79 (2007).

18. See Sanford Levinson, *Translation: Who Needs It?*, 65 FORDHAM L. REV. 1457 (1997).

19. Jill Hasday has suggested that even someone competent in a foreign language might nonetheless be interested in a translation partly to see what another competent reader said and partly, perhaps, in the hope that the alternative translation will prove more felicitous with regard to how one hopes to interpret the text in question.

for example, we would simply have no way of knowing whether the German or Dutch versions were faithful to the original or not. It would be like debates on the internal physiology of the unicorn. There is simply no way of deciding whether unicorns are ruminants or not.

Similarly, and just as importantly, if I myself cannot read Dutch or German, as is most certainly the case, I have no basis for praising or criticizing any “retranslation” of the Constitution from one of those languages back into English. The phrase “it’s all Greek to me” presumably captures the sense of alienation when looking at an alphabet that one cannot decode, let alone the complex sentences built out of the strange looking phis, psis, and omegas. I am a big fan of the *Iliad*, which I believe should be read by every literate person. There are, needless to say, literally dozens of competing translations; the first, by George Chapman, provoked one of the most famous poems in the English language.<sup>20</sup> Nearer our own time, the reader can pick from well-reviewed versions by Robert Fagles, Richard Lattimore, Robert Fitzgerald, and Stephen Mitchell, to name only four among many others.<sup>21</sup> I have my own preferences, based in part of the accessibility of the English text to a modern reader and the sheer flow of the narrative. And some versions are more self-consciously “poetic” than others. One reviewer writes of a 1987 translation by Martin Hammond that “[i]f I couldn’t stand to read another line of poetry but wanted to refresh my memory of the story, Hammond’s version would be my choice.”<sup>22</sup> What I simply cannot do, though, is say that one of them is a more “faithful rendering” of Homer than another. How in the world would I know? The reason I rely on the translation is precisely that I am illiterate in the original Greek (or, if truth be known, in any other non-English language). One can, of course, look at

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20. See John Keats, *On First Looking into Chapman’s Homer*, POETRY FOUNDATION, <http://www.poetryfoundation.org/poem/173746>.

21. For comments about various translations, see Douglas Hofstadter, *What’s Gained in Translation*, N.Y. Times Book Rev. (Dec. 8, 1996), <https://www.nytimes.com/books/97/07/20/reviews/hofstadter-translation.html>. See also Daniel Mendelsohn, *Englishing the Iliad: Grading Four Rival Translations*, NEW YORKER (Oct. 31, 2011), <http://www.newyorker.com/books/page-turner/englishing-the-iliad-grading-four-rival-translations>.

22. Eric McMillan, *The continuing story of Akhilleus*, EDITOR ERIC’S GREATEST LITERATURE OF ALL TIME: THE WORKS (2013), <http://www.editoreric.com/greatlit/translations/Iliad.html>.

translations heuristically; no doubt readers fluent in Russian or French may still be interested in translations of Tolstoy or Proust, but, at the end of the day, they are in no serious sense “relying” on them in the same way that I must. And, of course, a common occurrence is that these fluent readers will spend most of their time registering complaints about the inept translations foisted upon them!

So the importance of the materials uncovered by Professor Mulligan and her colleagues, however interesting, is decidedly different from what it would be if, say, they had discovered the Greek or Latin text of a hitherto unknown (or lost in antiquity) Assyrian constitution, where there is simply no “original” against which to measure the purported translation. Moreover, it is probably worth adding, the almost certain commitments of contemporary readers to particular interpretations of the English-language constitution with which we are all familiar makes it particularly unlikely that we would be budged by whatever the Germans and Dutch translators (and then re-translators) had come up with. This is an “academic project” in both the positive and somewhat pejorative senses of that term, almost certainly unlikely to interest anyone not a practicing academic.

#### IV. AMERICA AS A MULTI-LINGUAL SOCIETY

But enough of linguistic theory. Frankly, what I find most truly important about these translations is their putting the lie to a central aspect of one version America’s founding myth. Begin with the Declaration of Independence and its assertion that there exists in British North America “one people” who can secede from the British Empire and come together collectively to exercise self-government as The United States of America. As a matter of fact, one might say that the Articles of Confederation themselves put the lie to that assertion insofar as the new government was so weak, with “sovereign” power specified to be retained, by and large, in the constituent states. The amendment rule set out in Article XIII, by requiring unanimity, also underscored the extent to which it was indeed a *confederation*, that is, a limited-purpose coming together of “sovereign” states for specific purposes. Think of NATO or NAFTA in today’s world (or, perhaps, depending on one’s degree of pessimism, the European Union).

The Constitution drafted in 1787 was something quite different. It also spoke in the name of “We the People” and, as its opponents correctly pointed out, established a “consolidated” system somewhat misleadingly described as “federal” that in fact created an almost astonishingly more powerful national government, with nary a mention in the text of anything about “sovereign states.” Indeed, Article V underscored the extent to which a minority of states would have no choice at all about accepting amendments that were accepted by three-quarters of the states. No longer, as under the Articles, would a single state (or even several states, so long as they were less than  $\frac{1}{4}+1$ ) be able to veto changes thought desirable by three quarters of their fellow members of the Union.

Why should one accept this new constitutional order? Publius devoted *The Federalist* to exactly that question. And *Federalist 2* (written, for what it is worth, by John Jay) provided a powerful answer:

It has often given me pleasure to observe that independent America was not composed of detached and distant territories, but that one connected, fertile, widespreading country was the portion of our western sons of liberty. Providence has in a particular manner blessed it with a variety of soils and productions, and watered it with innumerable streams for the delight and accommodation of its inhabitants. A succession of navigable waters forms a kind of chain round its borders, as if to bind it together; while the most noble rivers in the world, running at convenient distances, present them with highways for the easy communication of friendly aids and the mutual transportation and exchange of their various commodities.<sup>23</sup>

Perhaps one finds this bucolic image persuasive. Surely I am not the only person who has noted the dramatic difference in landscape if one is flying over the eastern United States rather than, say, travelling from Texas to Oregon. Such mountains as exist east of the Mississippi are almost friendly, beckoning to the traveler with their copious trees that extend to the very tops of the mountains. No one who has seen the Rockies, let alone the Alps, would confuse them with the Appalachians. And it is surely unjust to expect Publius to be aware of the post-Louisiana Purchase topography of the United States, when the distinctly

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23. FEDERALIST NO. 2 at 6 (John Jay) (Clinton Rossiter ed., 1961).

more forbidding Rocky Mountains will become part of the American landscape. But then we come to his next paragraph, about which we can and should be less generous:

With equal pleasure I have as often taken notice that Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, *speaking the same language*, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence (emphasis added).<sup>24</sup>

This entire sentence is preposterous, though I have emphasized only the clause of greatest relevance to the project that is our topic. After all, we are told very early on, by way of explaining the existence of these very interesting translations, that in late September 1787, “around 1/3 of the population of Pennsylvania primarily spoke German.”<sup>25</sup> Similarly, “in the late 1700s, the Dutch language was still spoken widely in New York, specifically in the rural areas around New York City. . . .”<sup>26</sup> Surely Publius was aware of this; if we drop the *nom de plume* and ask about the historical figure John Jay, it defies belief that this son of New York was unfamiliar with the presence of Dutch speakers. One might not be surprised if he were ignorant, for example, of the fact that Georgia was settled not only by Englishman, but also by “Welsh, Scots Highlanders, Germans, Italians, Piedmontese, and Swiss,”<sup>27</sup> at least some of whom, for all I know, might have continued to speak their native languages even while considering the merits of the newly proposed Constitution. But it would be astonishing if he were unaware of basic aspects of New York social reality and, to say the least, also more than somewhat surprising if he were ignorant of Benjamin Franklin’s decided unhappiness at the multitude of German speakers in Pennsylvania.<sup>28</sup>

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24. *Id.*

25. Mulligan, *supra* note 1, at 4.

26. *Id.*

27. INFOPLEASE, *Georgia*, <http://www.infoplease.com/encyclopedia/us/georgia-state-united-states-history.html> (last visited Oct. 13, 2015).

28. “Few of their children in the country learn English,” Franklin complained. “The signs in our streets have inscriptions in both languages . . . Unless the stream of their importation could be turned they will soon so outnumber us that all the advantages

The United States Constitution refrains from adopting an “official language,” but Franklin for one might have been much happier if we had emulated the French in adopting one. Why didn’t we? One possibility is that it was quite clear that English would dominate the economic and social marketplace and would inevitably win out in any competition. So why ruffle feathers by underscoring this reality and in effect officially marginalizing a fairly sizable number of one’s fellow citizens, whose votes one would need for the project of ratification, by labeling “un-American” their native language? Another possibility, of course, is that one might find this linguistic pluralism, like other aspects of our pluralism that Jay seems eager to ignore in *Federalist 2*, to be a positive advantage, a feature and not a bug, in contemporary parlance. In any event, it should be clear that the notion of a singular American “people” defined in terms other than the sheer contingency that they live within a geographically bounded territory, was then, and remains today, a subject of debate.<sup>29</sup>

No one familiar with the full panoply of the 85 essays that comprise *The Federalist* could possibly believe that Publius always speaks in a consistent voice. And this would no doubt be true even were Publius in fact a single person; it is no easy matter to maintain consistency even in a single essay (or judicial opinion), let alone over a wide array written at different times and, in the case of both *Federalist* essays and judicial opinions, responding to different concrete realities with regard to the audiences one hopes to reach.

So the question becomes why did Jay feel it incumbent to offer such a demonstrably wrong portrait of the “people” in whose name the Constitution was ordained? In many ways, the

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we have will not be able to preserve our language, and even our government will become precarious.” Quoted in Kenneth Davis, *The Founding Immigrants*, N.Y. TIMES, July 3, 2007, <http://www.nytimes.com/2007/07/03/opinion/03davis.html>. Or, as he put it in his “Observations Concerning the Increase of Mankind,” [http://www.archive.org/stream/increasemankind00franrich/increasemankind00franrich\\_djvu.txt](http://www.archive.org/stream/increasemankind00franrich/increasemankind00franrich_djvu.txt), “why should the Palatine Boors be suffered to swarm into our settlements, and by herding together establish their languages and manners to the exclusion of ours? Why should Pennsylvania, founded by the English, become a colony of Aliens, who will shortly be so numerous as to Germanize us instead of our Anglifying them, and will never adopt our language or customs, any more than they can acquire our complexion?”

29. See, e.g., BERNARD YACK, NATIONALISM AND THE MORAL PSYCHOLOGY OF COMMUNITY (2012).

answer may really be quite simple: Whatever may be the reality of 21st century American politics and culture, he clearly believed there was nothing to be gained by underscoring the extent to which we were, even then, distinctly multi-cultural and -national, with attendant challenges for a polity that claimed to consist of only “one people.” The political philosopher most often cited in *The Federalist* is not John Locke, but, rather, Montesquieu. To be sure, many of the citations have to do with his views on the importance of separation of powers, but it is also the case that the French philosopher was both a source and a foil for Publian ideas. After all, he is very well known as a philosopher of *republican* government—which, of course, the Constitution guarantees to each state in Article IV and, one presumes, is the motif of the overarching constitutional order itself. What are the preconditions for republican governance? According to Montesquieu, they are, basically, the *size* and the *homogeneity* of the polity. That is, a republic should be relatively small; part of the reason is that it should also be relatively homogeneous, consisting indeed of a singular people committed to self-government.

It is obvious that no defender of the Constitution could possibly accept the strictures on size; both Madison and Hamilton, in several of their Publian essays, explicitly defend what has come to be called the “extended republic.”<sup>30</sup> But Jay seems to be accepting the argument that even if extension is possible, it will be successful only if homogeneity remains. That, after all, is just what it means to be “one united people,” and he goes on to spell out, albeit misleadingly, all of the ways that we are united. To accept that a country extending, in 1787, from what is now Maine to the southern border of Georgia and then west to the eastern bank of the Mississippi was in fundamental respects *not* united around anything other than an abstract commitment to the Constitution, Jay may well have believed, would be to condemn the entire consolidationist enterprise. After all, as the anti-Federalist Agrippa wrote on December 3, 1787, “It is impossible for one code of laws to suit Georgia and Massachusetts. . . . The idea of an uncompounded republic, on an average one thousand miles in length, and eight hundred in

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30. See FEDERALIST NO. 9 (Alexander Hamilton); FEDERALIST NOS. 10, 14 (James Madison).

width, and containing six millions of white inhabitants, all reduced to the same standard of morals, or habits, and of laws, is itself an absurdity.”<sup>31</sup>

What would reduce the absurdity is to claim exactly what Publius/Jay did in *Federalist 2*. Perhaps one wants to argue that the differences in language are in fact relatively unimportant. Perhaps that is true, in comparison, say, to the differences in religious beliefs and commitments that Publius also freely ignores in his zeal to describe a homogeneous people (who will presumably be eager to support a consolidated national government). Thus, we discover that even the Dutch community in New York was divided into “two warring factions within the Reformed Church,” though it is unclear whether the wars over church doctrine translated into substantive political views on the merits of the new Constitution. The central point, though, is that the Publius of *Federalist 2* was basically in deathly fear of heterogeneity. It is hard to know which is worse, the prospect that he was actively lying, i.e., saying things that he knew to be untrue, or, instead, that his fears generated a massive case of denial.

However, as already suggested, what is fascinating about the various essays of Publius is that one can find alternative views of homogeneity and heterogeneity, so that the “extended republic” is not simply larger than the Italian city states or Geneva, but also *blessedly* more heterogeneous. Is this not the principal theme of what is probably the best known essay, *Federalist 10*, in which Publius/Madison expresses extremely deep fears about the political sociology of small states, including his own state of Virginia? That is, it turns out to be the case that *no* state, however small, is truly homogeneous. They are all divided by reference to a number of different factors, and these inevitable differences, “sown in the nature of man,” according to Publius, constitute the “latent causes of faction” that so concern him.<sup>32</sup> Factions, which he defines as the propensity to prefer one’s own interest over the common good, can be seen “everywhere,”

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31. Agrippa, quoted in JAMES MCCLELLAN, *LIBERTY, ORDER, AND JUSTICE: AN INTRODUCTION TO THE CONSTITUTIONAL PRINCIPLES OF AMERICAN GOVERNMENT*, (1989), [http://oll.libertyfund.org/titles/mcclellan-liberty-order-and-justice?q=It+is+impossible+for+one+code+of+laws+to+suit+Georgia+and+Massachusetts#McClellan\\_0088\\_1326](http://oll.libertyfund.org/titles/mcclellan-liberty-order-and-justice?q=It+is+impossible+for+one+code+of+laws+to+suit+Georgia+and+Massachusetts#McClellan_0088_1326).

32. FEDERALIST NO. 10 at 47 (James Madison) (Clinton Rossiter ed., 1961).

brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. . . . But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society.<sup>33</sup>

As is well known, Publius sees no way of eliminating faction without eliminating liberty itself. However, the consequences can be limited precisely by accepting the extended republic, which has the virtue of weakening the power of any given faction by creating a national political context within which a multiplicity of factions must contend with one another. Unlike the case in Virginia or any other state, no faction can genuinely hope to establish supremacy; all must seek out alliances and make compromises with groups they would prefer to crush if the situation allowed.

Interestingly enough, Publius in *Federalist* 10 makes no mention at all of the degree to which factions can organize around language, though anyone familiar with politics today is fully cognizant of the extent in many countries around the world that linguistic issues are at least as important as some of the other “sources of faction” that are outlined. We have not escaped such tensions ourselves, of course; “English-only” movements have been a staple of American politics at least for most of the past half-century. As if corroborating the analysis set out in *Federalist* 10, devotees of linguistic exclusivity have been able to capture control of certain localities and even states, even as federal law has seemingly taken greater cognizance of the fact that English is only one of the languages spoken or understood by “genuine Americans.” Thus, a contemporary analogue of the translations of the Constitution into German and Dutch may be

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33. *Id.*

the preparation of voting materials in Spanish or Chinese, for example, in certain parts of the country. But the recognition that English is *not* our official language of government continues to raise the hackles of some observers. Louisiana Governor Bobby Jindal, one of the phalanx of those campaigning for the Republican nomination for the presidency, chose in his first television ad to emphasize not only that “[i]f folks want to immigrate to America, they should do so legally. They should adopt our values. They should learn English. . . .”<sup>34</sup>

A distinctly more distinguished scholar, Samuel P. Huntington, published in 2004 as his last book *Who Are We? The Challenges to America’s National Identity* that seemingly bought hook, line, and sinker the analysis offered in *Federalist 2*. Thus, wrote Huntington,

[t]he American people who achieved independence in the late eighteenth century were few and homogeneous: overwhelmingly white (thanks to the exclusion of blacks and Indians from citizenship), British, and Protestant, broadly sharing a common culture, and overwhelmingly committed to the political principles embodied in the Declaration of Independence, the Constitution, and other founding documents.<sup>35</sup>

Huntington despaired that this world was irredeemably lost. He was especially concerned by the increasing multilingualism generated primarily by the vast new numbers of Spanish-speaking immigrants, who he feared were far less likely to leave their initial language than were Asians, another increasing part of the American mosaic. After writing that “No society is immortal,” Huntington goes on to quote Rousseau: “‘If Sparta and Rome perished, what state can hope to endure forever?’”<sup>36</sup> Thus, Huntington suggested that we should not blithely assume that even the post-Civil War United States would maintain itself into the indefinite future. He explicitly rejected the wisdom of relying only on what might be termed “constitutional

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34. See James Hohmann, *Jindal in his super PAC’s first ad: Immigrants ‘should adopt our values... learn English’*, WASH. POST: POST POLITICS (June 29, 2015), <http://www.washingtonpost.com/news/post-politics/wp/2015/06/29/jindal-in-his-super-pacs-first-ad-immigrants-should-adopt-our-values-learn-english/> (which also contains a link to his video).

35. SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY* 11 (2004).

36. *Id.*

attachment,” describing this as “the classic Enlightenment-based, civic concept of a nation” in which “nationalism,” lacking any other commonalities, was predicated entirely on commitment to abstract propositions.<sup>37</sup> “History and psychology, however, suggest that this is unlikely to be enough to sustain a nation for long.”<sup>38</sup> Instead, he called for renewed emphasis on the “core culture” that he believed dominated in 1787.

One of the virtues of what I will call the “translation project,” though, is to call into question what constituted even in 1787, and even only among white males, the “core culture.” No one could take seriously the assertion that Americans at the time shared a single religion, but at least we might think that Publius had gotten it right about it “speaking the same language.” But now we know that was wrong as well. But so what? Perhaps his real mistake was not his altogether dubious reading of the American social order, but, rather, his belief, certainly shared with Franklin, that homogeneity really mattered. How might he have responded, for example, had Quebec accepted the invitation from American revolutionaries to join them as the “Fourteenth Colony” seeking independence from Great Britain in 1776.<sup>39</sup> Quebec was as French speaking then—it had been seized by the British only in 1763 as part of the Seven Year’s War—as it is now, and it would have been impossible to deny the multilinguicity of a United States that included Quebec. For better or, quite possibly, for worse, we did not have the opportunity in 1787 to come to terms with a robust form of heterogeneity that Quebec would have presented.

In any event, I trust it is clear that there is much reason to be grateful to Professor Mulligan and her associates. Professional linguists, theorists of interpretation, and American social historians all can benefit from their toiling in hitherto unknown and unexamined vineyards.

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37. *Id.* at 19.

38. *Id.*

39. See MARK R. ANDERSON, *THE BATTLE FOR THE FOURTEENTH COLONY: AMERICA’S WAR OF LIBERATION IN CANADA, 1774–1776* (2013).