

AS TIME GOES BY: HERMENEUTICS AND ORIGINALISM

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I. INTRODUCTION

This short Article calls for a second look at the relevance of Hans-Georg Gadamer's philosophical hermeneutics to current controversies in interpretive theory and legal/constitutional theory. A generation ago hermeneutics spoke to issues in these fields dealing with positivism and intentionalism in interpretation. At that time, hermeneutics helped explain the inadequacies of interpretation based on plain meaning and/or the intent of the author or framers of texts. However, these discussions of and citations to Gadamer and other hermeneutists, once common, have all but vanished from contemporary literature.

Why has hermeneutics faded from these discussions? This has happened partly because the issues it once spoke to now appear to have been dealt with and passed over and partly because of criticisms of Gadamer's account of philosophical hermeneutics. For these reasons, it is not clear what hermeneutics has left to say in today's debates. In interpretive theory, for example, Jacques Derrida has questioned the possibility and efficacy of the "good will to power" assumed in the hermeneutic approach,¹ and Jürgen Habermas has charged that "Gadamer's prejudice for the rights of prejudices certified by tradition denies the power of reflection."²

Likewise, in constitutional theory, "We are all originalists, now!"³ That is to say, we all agree that the constitution ought to be interpreted according to its original public meaning. Unfortunately, we disagree as much as we did before our "agreement" on how to determine this meaning, and hermeneutics seems unable to help us choose among the varieties of originalism that compete for our allegiance. To command our attention once again, hermeneutics must speak to and help us resolve these current concerns. Can it? Yes, by getting back to some fundamental hermeneutic paradigms.

"Hermeneutics," Gadamer tells us, "is the art of agreement."⁴ It seeks agreement through understanding the relationships between different time horizons, between text and interpreter, and among interpreters. "Hermeneutic philosophers," David Couzens Hoy tells us, "usually engage in constructing

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¹ See Jacques Derrida, *Three Questions to Hans-Georg Gadamer*, in *DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER* 52-54 (Diane P. Michelfelder & Richard E. Palmer eds., 1989).

² Jürgen Habermas, *A Review of Gadamer's Truth and Method*, in *UNDERSTANDING AND SOCIAL INQUIRY* 335, 358 (Fred R. Dallmayr & Thomas A. McCarthy eds., 1977).

³ See *infra* note 33.

⁴ Hans-Georg Gadamer, *Reply to My Critics*, in *THE HERMENEUTIC TRADITION: FROM AST TO RICOEUR* 273, 273 (Gayle L. Ormiston & Alan D. Schrift eds., 1990).

theories that will be sufficiently general to account for all kinds of interpretation”⁵ Two important issues arise from these basic claims and aims. One is “whether [the various historical and humanistic] disciplines share a common conception of understanding and interpretation,”⁶ which Gadamer and Hoy assume, or at least hope. The second is whether hermeneutics is a descriptive or a normative practice—that is, whether it aims to describe what necessarily or always happens in interpretation or rather what should happen.

This Article explores these questions in two contexts as they have evolved over the past generation or so. First is the context of general interpretive theory construction to which Hoy refers above (which we may call “general hermeneutics”), and second is the context of the framers’ intent/originalism debate in American constitutional theory (which we may call “constitutional hermeneutics”). Both fields have seen a decreasing interest in Gadamerian philosophical hermeneutics over this time span for reasons largely relating to Derrida’s and Habermas’s critiques, mentioned above.

My aim in this second look at hermeneutics is to mutually illuminate and evaluate the claims and nature of these two fields by examining some debates and developments in each. The route to the renewed relevance of hermeneutics in these fields, I argue here, lies in what Gadamer calls “the recovery of the fundamental hermeneutic problem.”⁷ This back-to-basics move means doubling down⁸ on three hermeneutic paradigms—the process of application,⁹ Aristotle’s notion of practical wisdom,¹⁰ and legal hermeneutics¹¹—which constitute what might be called the Aristotelian face of philosophical hermeneutics, at the expense of hermeneutics’ universal, linguistic, and ontological aspects, which may be called the Heideggerian face of hermeneutics. In doing this, we pull back from Gadamer’s well-known assertion, “Fundamentally I am *not proposing a method*; I am describing *what is the case*.”¹² This statement encapsulates the ontological or descriptive aspect of hermeneutics, while the three fundamental paradigms treated here emphasize the normative and practical aspect. Is this hermeneutic heresy? No, it is rather application and evolution while maintaining fidelity to the fundamental claims and the perennial problems that have always characterized the development of hermeneutic theory.

⁵ David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 136, 136 (1985).

⁶ *Id.*

⁷ This is, of course, the title of a central section of Gadamer’s *Truth and Method*. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 306 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004) (1960).

⁸ “Doubling down” is a gambling term which has filtered into other, not unrelated fields, especially politics and journalism. One glossary defines “double down” in this way: “In blackjack, it is the player’s option to double their original bet in exchange for receiving only one more card. To do this the player turns over their first two cards and places an equal bet alongside the original bet.” CasinosCompared.co.uk, *Casino & Gambling Jargon*, <http://www.casinoscompared.co.uk/jargon.asp> (last visited Apr. 29, 2010).

⁹ See GADAMER, *supra* note 7, at 306-10.

¹⁰ See *id.* at 310-20.

¹¹ See *id.* at 320-35.

¹² *Id.* at 512 (emphasis in original).

II. CONSTITUTIONAL HERMENEUTICS

A. *Letters of Transit*

The differences between the positions and theories discussed in this Article are often subtle and abstract. As an expository device, then, I have taken as my title a famous song, *As Time Goes By*,¹³ which is most commonly associated with a famous movie, *Casablanca*.¹⁴ The song title is contained in the song's best-known lyric, "The fundamental things apply, as time goes by." In discussing hermeneutics and interpretation, I return to this lyric not because its meaning is clear, but because it is ambiguous. Of the multiple readings of this lyric, I examine three in this Article. This section on constitutional/legal hermeneutics focuses on one reading—that according to the theory of meaning and interpretation, there is always a settled, core meaning and applications which can vary from case to case.

This idea was well captured in American constitutional law by Justice Sutherland in 1926 when he wrote, "[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation."¹⁵ This separation between meaning and application, philosophical hermeneutics counter, cannot be maintained. As Hoy puts the point, "Understanding is always already interpretation, Gadamer maintains, and interpretation is always already application."¹⁶

From Sutherland's perspective, the meaning of the Constitution is also fixed largely by the intent of the constitutional framers and adopters: "The whole aim of construction, as applied to a provision of the Constitution, is . . . to ascertain and give effect to the intent, of its framers and the people who adopted it."¹⁷ This view of constitutional interpretation has come to be known as strict intentionalism¹⁸ or interpretivism.¹⁹

A generation ago this strict intentionalism or interpretivism competed with a view, not surprisingly, called noninterpretivism. Noninterpretivism is defined by Ely as "the contrary view that courts should . . . enforce norms that cannot

¹³ The song was written by Tin Pan Alley songwriter Herman Hupfeld and first appeared in the short-running 1931 Broadway show *Everyone's Welcome*. For more on the song and its history, see MARK STEYN, *A SONG FOR THE SEASON* 172-78 (2008).

¹⁴ *Casablanca* is a 1942 Oscar-winning Warner Brothers picture written by Julius Epstein, Philip Epstein, and Howard Koch and directed by Michael Curtiz.

¹⁵ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

¹⁶ Hoy, *supra* note 5, at 139. Gadamer himself says, "Thus we are forced to go one step beyond romantic hermeneutics, as it were, by regarding not only understanding and interpretation, but also application as comprising one unified process." GADAMER, *supra* note 7, at 307.

¹⁷ *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting).

¹⁸ See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

¹⁹ John Ely described interpretivism as the view that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution" JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980).

be discovered within the four corners of the document.”²⁰ Typically, this involves a moral, rather than a textual or historical, reading of the provisions of the constitution, which is to say an application of some theory of equality, liberty, or fairness to the abstract values embodied in the open-ended clauses of the document. Nonoriginalists also often employ the metaphor of the living constitution, in contrast to the dead hand of the framers that is part of originalism.

Turning to *Casablanca* once again, recall that many of the characters in that movie sought letters of transit to get themselves out of Casablanca and ultimately to the United States. Let us employ this “letters of transit” phrase here to articulate the hermeneutic critique of the last generation’s interpretivism/noninterpretivism debate. This critique makes the point that both views overlook the important hermeneutic idea that eminent texts like the Constitution are themselves letters of transit bridging the temporal, historical distance between the time of adoption and the present day; for this reason, such texts have a history, tradition, and trail of precedent that condition their meaning and application.²¹ These positions neglect this hermeneutic point and assume either, in the case of originalism, that this distance can be objectively and completely bridged, or in the case of nonoriginalism, that it need not be bridged at all. Justice Brennan, for example, spoke of “contemporary ratification” of the Constitution in opposing the first wave of originalists.²²

To state the hermeneutic critique of originalism in terms of dueling metaphors, one might say that originalism, like romantic hermeneutics before it, sees textual interpretation as a matter of reproducing the thoughts of the framers, of getting inside their heads, seeking, as Gadamer states it, to “*understand a writer better than he understands himself*.”²³ Gadamer’s hermeneutic approach, in contrast, sees interpretation as a form of conversation, a back and forth of question and answer, on the model of the Platonic dialogues.²⁴ Gadamer’s approach recognizes, but attempts to bridge, the distances between writer/framer and interpreter.²⁵

Originalism seemingly fails as a theory of constitutional interpretation on several fronts. First, at least in its strict intentionalist form, it requires us to discover psychological information about the framers that may be unobtainable today, and then it asks us to combine this psychological information into a group intent that may well have never existed.²⁶ Second, even if this group intent can be divined, it may well produce case results that are today unaccept-

²⁰ *Id.*

²¹ As Hoy remarks, “Central to hermeneutical theory, but most susceptible to the charge of historical relativism, is the thesis that the interpretation of a work is invariably conditioned by the prior history of the effects of that work.” Hoy, *supra* note 5, at 147.

²² See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

²³ GADAMER, *supra* note 7, at 191 (emphasis in original).

²⁴ See *id.* at 362-69.

²⁵ Ronald Dworkin praises Gadamer, “whose account of interpretation as recognizing, while struggling against, the constraints of history strikes the right note.” RONALD DWORKIN, *LAW’S EMPIRE* 62 (1986).

²⁶ For an influential diagnosis and description of these difficulties with strict originalism, see Brest, *supra* note 18.

able.²⁷ Originalism is embarrassed by reprehensible decisions with originalist elements, such as the *Dred Scott* case,²⁸ while it implausibly proffers originalist justifications for universally accepted decisions, such as *Brown v. Board of Education*,²⁹ which have little evident originalist underpinning. Ironically, the *Brown* opinion itself presents a better hermeneutic parry of originalist objections to its result than does the secondary literature in the law reviews. Confronting evidence of discriminatory intent on the part of the framers, Chief Justice Warren says simply, “[W]e cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.”³⁰ Alexander Bickel adds the gloss that the Court’s language presents “an awareness on the part of these framers that it was *a constitution* they were writing, which led to a choice of language capable of growth.”³¹

Nonoriginalism failed simply because it was an oxymoron—constitutional theory is concerned with constitutional interpretation which nonoriginalism, by its very definition, is not.³² This resulted, as we shall see, not in the death of this view, but rather in a morphing of it into varieties of originalism!

B. *We Are All Originalists Now!*

Reports of the death of originalism (and nonoriginalism, for that matter) have turned out to be, despite the various shortcomings of these theories, quite premature. True, one hears few proponents of strict intentionalism nowadays, and many former nonoriginalists make at least a show of paying attention to the constitutional text. One important thing has changed, though. Many of the old disputes continue, but they do so under the umbrella of originalism. So, commentators can now say with little exaggeration that, “We are all originalists now!”³³ But along with this expansion of originalism has come a Balkaniza-

²⁷ As Justice Scalia notes, “I can be much more brief in describing what seems to me the second most serious objection to originalism: In its undiluted form, at least, it is medicine that seems too strong to swallow. Thus, almost every originalist would adulterate it with the doctrine of *stare decisis*” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

²⁸ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (upholding slavery in the territories and denying the citizenship of African-Americans).

²⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (declaring racial segregation in the public schools unconstitutional). For an article developing these points about both cases, see Robert A. Burt, *What Was Wrong with Dred Scott, What’s Right About Brown*, 42 WASH. & LEE L. REV. 1 (1985).

³⁰ *Brown*, 347 U.S. at 492-93.

³¹ Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 63 (1955).

³² For a pointed statement of this argument, see William Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 217 n. 27 (1983).

³³ Google the phrase and you will even get hundreds of hits. It is even used sarcastically—the ultimate proof that it has passed into general usage. See Kellyanne Conway & David McIntosh, *We’re All Originalists Now*, REAL CLEAR POLITICS, June 16, 2009, http://www.realclearpolitics.com/articles/2009/06/16/were_all_originalists_now_97012.html (mocking

tion (not to mention a Balkinization³⁴) of that constitutional theory. No longer is there a sharp line separating originalism and living constitutionalism. Some writers even combine the two theories into aspects of one theory.³⁵ Jack Balkin, for example, now holds that “the debate between originalism and living constitutionalism rests on a false dichotomy.”³⁶ This error, according to Balkin, is brought about by a conflation to two quite different things—“the *original meaning* of the constitutional text as opposed to its *original expected application*.”³⁷

A generation ago, originalists and nonoriginalists differed over whether or not one should give “binding authority to the text of the Constitution or the intentions of its adopters.”³⁸ In the current debate, originalists generally hold that “a judge committed to original understanding requires . . . that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise.”³⁹ They differ, however, over the content, derivation, and explication of that “major premise.” This explication involves an examination of the original meaning/original expected application distinction, which, although made recently by Balkin and others, dates back to early critics of originalism a generation ago. Paul Brest, for example, drew a similar distinction between strict and moderate originalism in 1980.⁴⁰ Brest’s strict originalism tracks Balkin’s expected application originalism, while his moderate originalism (which looks at the general purpose of a constitutional provision rather than its expected application) parallels Balkin’s original meaning originalism, something which is not clear from the name Balkin gives it.

Putting the matter more clearly still, Balkin describes his interpretive approach as “the method of text and principle.”⁴¹ But even this description leaves important questions (e.g., how to derive and apply a principle) unresolved. To pursue this matter further, we turn to a distinction discussed by Antonin Scalia and Ronald Dworkin that is much the same as the distinction between semantic originalism⁴² and expectation originalism.⁴³ Dworkin draws

the White House’s portrayal of Judge Sotomayor as a “nonideological and restrained judge” in a memo sent to Republican senators during her Supreme Court confirmation hearings).

³⁴ I owe both the phrase and the pun to James Fleming, who when commenting on both the fracturing of the enlarged originalist camp and the recent entry of longtime living constitution proponent Jack Balkin (whose blog is called Balkinization) into the originalist fold said, “[W]e are all originalists now. Indeed, we are witnessing the Balkanization of originalism (as well as the Balkinization of it).” James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10, 12 (2007).

³⁵ See, e.g., Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009).

³⁶ Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007).

³⁷ *Id.*

³⁸ Brest, *supra* note 18, at 204.

³⁹ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 162 (1990). As evidence of the congeniality of this definition to contemporary originalists, Fleming gives the quotation and asks readers to guess the author from a list of originalists of various stripes. See Fleming, *supra* note 34, at 12-13.

⁴⁰ See Brest, *supra* note 18, at 222-24.

⁴¹ Balkin, *supra* note 36, at 294.

⁴² As Dworkin defines it, semantic originalism “insists that the rights-granting clauses be read to say what those who made them intended to say.” Ronald Dworkin, *Comment to*

this distinction in response to Justice Scalia's statement that "[w]e look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."⁴⁴

The purpose of Dworkin's proffered distinction between semantic and expectation originalism is not to reject Scalia's statement of approach, but rather to get him to further clarify and specify it. How would the two differ in practice? The example Dworkin gives is the constitutionality of public school segregation under the Equal Protection Clause of the Fourteenth Amendment, also the focus of *Brown v. Board of Education*.⁴⁵ Expectation originalism would uphold the constitutionality of public school segregation because "the majority of the members of Congress who voted for that amendment did not expect or intend it to have that consequence: they themselves sustained racial segregation in the schools of the District of Columbia."⁴⁶ But their semantic intention, what they actually said ("equal protection of the laws"), leads to the contrary result.

Dworkin next offers "two clarifying translations" of semantic originalism—actual practices of the day and abstract principle.⁴⁷ Justice Scalia accepts Dworkin's distinction between expectation and semantic originalism and agrees that they are both semantic originalists.⁴⁸ But he rejects Dworkin's "two clarifying translations" as a distortion of views like his. His own view, Scalia says, is based not on the practices of the day, but rather it is "rooted in the moral perceptions of the time."⁴⁹

The difference between the two viewpoints can be best explained in terms of an earlier distinction drawn by Dworkin in his discussion of constitutional interpretation—the distinction between concepts and conceptions.⁵⁰ This distinction differentiates between a theory like Scalia's, which holds that a constitutional provision embodies a particular conception or version of a moral concept,⁵¹ and a theory like Dworkin's, which holds that the clause embodies the best moral/political theory of equality we have today. This disagreement is

ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 119 (Amy Gutmann ed., 1997).

⁴³ Expectation originalism, on the other hand, "holds that these [rights-granting] clauses should be understood to have the consequences that those who made them expected them to have." *Id.*

⁴⁴ ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 42, at 17.

⁴⁵ Dworkin, *supra* note 42, at 119.

⁴⁶ *Id.*

⁴⁷ *See id.* at 120. So, for example, under the actual practices version of semantic originalism, the list of cruel and unusual punishments would have been fixed by practices followed in the United States in 1791 when the Eighth Amendment was ratified, but under the abstract principle version it could evolve over time.

⁴⁸ ANTONIN SCALIA, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 42, at 129, 144.

⁴⁹ *Id.* at 145.

⁵⁰ *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-36 (1978).

⁵¹ In discussing cruel and unusual punishment, Scalia holds the Eighth Amendment embodies the view of cruelty "rooted in the moral perceptions of the time." SCALIA, *supra* note 48, at 145.

the central issue of the current originalism debate, at least for our purposes here, and is an important issue I explore in the remainder of this Article.

III. DIALOGUES WITH THE DEAD

Before suggesting a way of hermeneutically adjudicating the disagreement between Scalia and Dworkin over their conflicting versions of semantic originalism, let us briefly examine two criticisms of Gadamer's philosophical hermeneutics that complicate the use of his dialogic approach for this purpose. For even if it is conceded that the dialogic or reciprocal approach to constitutional interpretation on offer from philosophical hermeneutics answers several difficulties raised by an originalist account of constitutional interpretation, hermeneutics, especially in its strict intentionalist interpretive form, nevertheless has serious problems of its own. One significant problem of the conversational hermeneutic model is that it is not and cannot be truly conversational when applied to old, eminent texts such as the Constitution. In a normal conversation there are two or more interlocutors present and each is able to hold up his own side in the verbal give-and-take of actual conversation. Interpretation of old, eminent texts on the hermeneutic model is, in contrast, a dialogue with the dead. There can be no true exchange of thoughts, no questioning from the other, no critical resistance because there is only one live speaker.⁵²

What does this mean? Let me answer with another cinematic illustration: In *Casablanca*, Victor Laszlo, the resistance leader, asks to speak to Signor Ugarte, the man who first stole the letters of transit by killing the German couriers who were carrying them and was himself then arrested by the Germans. In response to Laszlo's request, the German Major Strasser replies, "You would find the conversation a trifle one-sided. Signor Ugarte is dead."⁵³ The dialogic problem we confront in the remainder of this Article is how to prevent the hermeneutic interpretive conversation from becoming "a trifle one-sided." Without an adequate answer to this question, the conversational metaphor will not carry us very far. A theory, it seems, is only as good as its metaphors. The metaphors in the theory of interpretation apply mainly to explaining and working through the tensions of competing values: flexibility and constraint, and fidelity and criticism. In a successful actual conversation, the interlocutors work this out as they go between themselves. The interpreter of eminent texts must perform both roles, it seems, herself.

In this part of the Article, I look at the effect of the "trifle one-sided" conversation interpretive theory by looking at criticisms of Gadamer's hermeneutics raised by Derrida and Habermas.⁵⁴ They both flow from a second possible understanding of my title lyric, "The fundamental things apply, as time

⁵² As Paul Ricoeur notes, "[T]here are problems of interpretation because the relation writing-reading is not a particular case of the relation speaking-hearing in the dialogical situation." Paul Ricoeur, *Metaphor and the Main Problem of Hermeneutics*, 6 NEW LITERARY HIST. 95, 95 (1974).

⁵³ HOWARD KOCH, *CASABLANCA: SCRIPT AND LEGEND* 134-35 (1992).

⁵⁴ I will be discussing only one main criticism from each theorist, the one I take to be most telling and most important, rather than all the criticisms they make of Gadamer, which, especially in Habermas' case, are extensive.

goes by.” This reading springs from Gadamer’s assertion that, “Fundamentally I am *not proposing a method*; I am describing *what is the case*.”⁵⁵ The reading concludes from the lyric and the assertion that hermeneutics just happens, that the fundamental things will always already apply without any particular skill or effort. Put this way, Gadamer’s assertion seems to be an exaggeration at best. Derrida’s main criticism here is any agreement that arises out of this hermeneutic dialogue with the dead is little more than the concealed will of the (living) interpreter. Habermas’ primary criticism is that, because of its focus on dialogic agreement, hermeneutics cannot achieve sufficient critical distance and attitude.

In Derrida’s 1981 “encounter”⁵⁶ with Gadamer, he posed three questions to the hermeneut. All three revolve around the notion of good will and its role in interpretation. In the first question Derrida asks, “What is the will if, as Kant says, nothing is absolutely good except the good will?”⁵⁷ In the second he asks, “What to do about good will—the condition for consensus even in disagreement—if one wants to integrate a psychoanalytic hermeneutics into a general hermeneutics?”⁵⁸ And in the third he says, “[O]ne needs to ask whether the precondition for *Verstehen*, far from being continuity of *rapport* . . . is not rather the interruption of *rapport*, a certain *rapport* of interruption, the suspending of all mediation?”⁵⁹ After these questions concerning good will, Derrida concludes, “I am not convinced that we ever really do have this experience that Professor Gadamer describes, of knowing in a dialogue that one has been perfectly understood or experiencing the success of confirmation.”⁶⁰

The sum of Derrida’s questions and conclusion is a denial that Gadamer actually describes “what is the case” in interpretation; instead, according to Derrida, Gadamer seems to describe only what might occur in some ideal, perhaps unattainable situation, one limited to the presence of the only absolutely good thing, the good will. This amounts to a denial of the ontological and universal claims (i.e., the Heideggerian face) of philosophical hermeneutics. Derrida presents psychoanalysis as a counterexample to Gadamer’s picture of hermeneutics as the art of agreement. In psychoanalysis, the analyst is presumably not seeking to come to understanding and agreement with the patient, but something quite the contrary—to get the patient to see the distortion in their own beliefs.

Likewise, Habermas doubts the universality of hermeneutic understanding while presenting a psychoanalytic counterexample. He charges, “Hermeneutic consciousness remains incomplete as long as it does not include a reflection

⁵⁵ GADAMER, *supra* note 7, at 512 (emphasis in original).

⁵⁶ The editors of the English translation of the proceedings refer to “the problematical phenomenon we have called ‘the Gadamer-Derrida encounter.’” *DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER*, *supra* note 1, at 10. The editors speak in this way because the interchange between Gadamer and Derrida can scarcely be called a debate, let alone a conversation, because of their failure to join issue.

⁵⁷ Derrida, *supra* note 1, at 52.

⁵⁸ *Id.* at 53.

⁵⁹ *Id.*

⁶⁰ *Id.* at 54.

upon the limits of hermeneutic understanding.”⁶¹ For Habermas, the prime limit on hermeneutic understanding is posed by what he calls “systematically distorted communications.”⁶² He points to Freud’s account of psychoanalysis as an example of this limit, noting that “Freud has drawn on the experience of systematically distorted communication in order to demarcate a sphere of specifically incomprehensible expressions.”⁶³

The use of psychoanalysis by Derrida and Habermas to demonstrate the limitations of Gadamer’s philosophical hermeneutics as a vehicle of insight and critique is perhaps most simply and effectively summarized by a 2007 Mankoff cartoon,⁶⁴ in which at the end of a therapy session a forlorn patient sits at the edge of the couch. The notepad-holding analyst leans forward to him and says, “Look, making you happy is out of the question, but I can give you a compelling narrative for your misery.”⁶⁵

IV. DOUBLING DOWN

The grand issue in legal and constitutional interpretation is always how to go forward and apply the law or constitution to the next case in a manner that demonstrates fidelity to text and tradition while, at the same time, paying sufficient attention to both larger values and the particular facts and circumstances of the case. Interpretation must be able to identify the underlying relevant principles and implement them at the proper level of generality and with the proper respect for tradition and precedent. Stated simply, interpretation is always a question of judgment. Judgment, in turn, is a matter of experience and virtue rather than method or rote application of rules. But how can judgment help us decide between the “two clarifying translations” about which Dworkin and Scalia disagree, and can it answer the charges of bad will and lack of critical dimension that Derrida and Habermas raise?

The answer lies in getting back to basics in hermeneutics or, as Gadamer puts it, “the recovery of the fundamental hermeneutic problem.”⁶⁶ More specifically, this means doubling down on the centrality of application, Aristotle, and law in hermeneutics.⁶⁷ These constitute the core or fundamental problem for Gadamer. It might be useful to consider why this is so. Why these three paradigms and not, say, literature, art, or history (or psychoanalysis, for that matter)?

Application, Aristotle, and law share several important features that underlie Gadamer’s account of philosophical hermeneutics, features which are not so prominent, if they are present at all, in other interpretive fields discussed by

⁶¹ Jürgen Habermas, *The Hermeneutic Claim to Universality*, in CONTEMPORARY HERME-NEUTICS: HERMENEUTICS AS METHOD, PHILOSOPHY AND CRITIQUE 181, 190 (Josef Bleicher ed., 1980).

⁶² “This hermeneutic consciousness proves inadequate in the case of systematically distorted communication: incomprehensibility is here the result of a defective organization of speech itself.” *Id.* at 191.

⁶³ *Id.*

⁶⁴ Robert Mankoff, *NEW YORKER*, Dec. 10, 2007, at 92.

⁶⁵ *Id.*

⁶⁶ See *supra* text accompanying note 7.

⁶⁷ See *supra* text accompanying notes 8-11.

Gadamer and other hermeneuts. Above all, they are practical. Because of this, they are action-guiding.⁶⁸ They are not merely verbal or theoretical. For this reason, they are present-oriented⁶⁹ and not merely historical in focus. They are holistic and concern the general and the particular, rules and ends, without giving absolute priority to any element. They are also holistic because they are self-interpretive; that is, they involve and effect not only the particular decision or act in the particular instant case or situation, but rather the larger self-understanding of the individual and social group.

Application is necessary simply because hermeneutic interpretation is unlike normal conversation. Gadamer recognizes this point⁷⁰ and answers the “dialogue with the dead” problem with these hermeneutic fundamentals. This is not to say that these fundamentals are foolproof, but rather that they are the models to follow if one wishes to interpret well.

While application requires judgment, judgment in turn requires practical wisdom and virtue. This is where Gadamer’s discussion turns from application to Aristotle, who explains the interrelation of practical wisdom, virtue, and character.⁷¹ Gadamer sums it up in this way: “[T]he basis of moral knowledge in man is orexis, striving, and its development into a fixed demeanor (hexis). The very name ‘ethics’ indicates that Aristotle bases *arête* on practice and ‘ethos’.”⁷² According to Aristotle, moral knowledge and virtue arises from practice and not theory. He says, “[M]oral virtue comes about as a result of habit”⁷³ Moral knowledge is not factual or theoretical knowledge (i.e., knowing that), but rather practical knowledge (knowing how)—it manifests itself in the doing.⁷⁴

We turn then to Scalia and Dworkin’s debate over a shared ethos as a moral conception or a moral concept. Both Aristotle and Gadamer come closer to Scalia and moral conception because that approach more closely approximates the shared virtue, habit, and practice they see as key to hermeneutic interpretation.⁷⁵ Moreover, Aristotle and Gadamer provide a plausible way to

⁶⁸ Discussing Aristotle and moral knowledge, Gadamer says, “[W]e are always already in the situation of having to act” GADAMER, *supra* note 7, at 315.

⁶⁹ In this way, but not in all ways, they are like Dworkin’s “law as integrity” which “begins in the present and pursues the past only so far as and in the way its contemporary focus dictates.” DWORKIN, *supra* note 25, at 227.

⁷⁰ “That is not to say, of course, that the hermeneutic situation in regard to texts is exactly the same as that between two people in conversation. Texts are ‘enduringly fixed expressions of life’ that are to be understood; and that means that one partner in the hermeneutical conversation, the text, speaks only through the other partner, the interpreter.” GADAMER, *supra* note 7, at 389 (citation omitted).

⁷¹ “Virtue, then, is a state of character, concerned with choice, lying in a mean . . . that being determined by a rational principle, and that principle by which the man of practical wisdom would determine it.” ARISTOTLE, *THE NICOMACHEAN ETHICS* 39 (David Ross trans., Oxford Univ. Press 1998).

⁷² GADAMER, *supra* note 7, at 310-11.

⁷³ ARISTOTLE, *supra* note 70, at 28.

⁷⁴ “For we can only apply something that we already have; but we do not possess moral knowledge in such a way that we already have it and then apply it to specific situations.” GADAMER, *supra* note 7, at 315.

⁷⁵ There is an important exception for the notion of equity, discussed below. See *infra* note 79 and accompanying text.

try to bridge the temporal and other distances between framers and current interpreters.

Philia (variously translated as love or friendship—it is one of many Greek terms with no precise English equivalent) also plays an unexpected, but important role here in helping answer questions involving dialogues with the dead and good will. Three points Aristotle makes about friendship are of most relevance here. The first is that a man views “his friend is another self.”⁷⁶ The second is that he sees friendship as a kind of active and strong goodwill.⁷⁷ And the third is that “[c]oncord also seems to be a friendly relation.”⁷⁸ These points taken together and combined with the earlier description of virtue, character, and practical wisdom act as a reply to the criticisms of bad will and conservatism brought against Gadamer by Derrida and Habermas.

Let us turn, finally, to the exemplary status of legal hermeneutics for Gadamer. Legal hermeneutics differs from other sorts of interpretation, Gadamer says, because of its “dogmatic purpose.”⁷⁹ To put this less ponderously, we can say that it has a friendly relationship with the legal text and its framers, as opposed to the suspicious attitude taken in the psychoanalytic counterexample offered by Derrida and Habermas. There is no reason that different sciences or practices cannot have different purposes and, therefore, different attitudes in interpretation.

Legal hermeneutics for Aristotle and Gadamer is no uncritical slave to the text and original understanding of the law (although these will be the presumptive guides of the law). Equity, for example, stands as a corrective to law based upon justice. As Aristotle says, “[T]he equitable is just, but not the legally just but a corrective of legal justice.”⁸⁰ This model of legal interpretation is more situation-sensitive and, so, at once both more and less expansive than the text and principle originalism of Dworkin or Balkin. It is less expansive in the sense that it is normally constrained by history and context in ways principle is not, but it is also more expansive because in exceptional circumstances it can step outside the bounds of principle.

V. CONCLUSION

In this Article, I have argued for an emphasis on the Aristotelian face of philosophical hermeneutics in what is perhaps an excessively abstract way, which is a defect in a theory calling for a practical approach to interpretation. Let me make some minor amends for that by closing with an imagined dialogue between a constitutional framer (call her Ilsa) and a contemporary interpreter (call him Rick) inspired by a famous scene in *Casablanca*:⁸¹

⁷⁶ ARISTOTLE, *supra* note 70, at 228.

⁷⁷ *See id.* at 230-31.

⁷⁸ *Id.* at 231.

⁷⁹ *See* GADAMER, *supra* note 7, at 322.

⁸⁰ ARISTOTLE, *supra* note 70, at 133. Gadamer glosses the Aristotelian notion of equity in this way, “Aristotle shows that every law is in a necessary tension with concrete action, in that it is general and hence cannot contain practical reality in its full concreteness.” GADAMER, *supra* note 7, at 316.

⁸¹ *See* KOCH, *supra* note 53, at 218-19.

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Rick: You said I was to do the thinking for both of us . . . and it all adds up to one thing. . . .

Ilsa: You're saying this only to make me go.

Rick: I'm saying it because it's true. Inside of us we both know [it's true]

Ilsa: But what about us?

Rick: We'll always have [Philadelphia]. We lost it until you came to Casablanca. We got it back last night.

Ilsa: And I said I'd never leave you!

Rick: And you never will. But I've got a job to do, too. Where I'm going you can't follow. What I've got to do, you can't be any part of. Ilsa, I'm no good at being noble, but it doesn't take much to see that the [problems] of three [framers] don't amount to a hill of beans in this crazy world. Someday you'll understand that. . . . Here's looking at you, kid.