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Fixed Constitutional Meaning and Other
Implausible Originalisms

Frederick M. Gedicks

A thesis submitted to the faculty of
Brigham Young University
in partial fulfillment of the requirements for the degree of
Master of Arts

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ABSTRACT

Fixed Constitutional Meaning and Other Implausible Originalisms

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Public-meaning originalists contend that judges properly interpret the Constitution only when they discover and apply its “original public meaning”—how the public understood the Constitution at the time it was adopted. Public-meaning originalism is premised on the “fixation thesis”—the meaning of any constitutional text is fixed when it is adopted. Concerns of the present, therefore, cannot affect constitutional meaning. Public meaning originalists acknowledge that the search for the fixed original meaning is not always successful, but it is always ontologically “there” to be found, even if epistemologically we sometimes fail to find it.

The fixation thesis underwrites the powerful rhetoric of fidelity originalists deploy against nonoriginalists. Originalists insist that judges who interpret the Constitution using nonoriginalist approaches are “making up” constitutional meaning. But if original public meaning does not exist in the past as a fact which present interpreters can objectively retrieve, public-meaning originalists are equally guilty of “making it up.” The public-meaning enterprise thus rises or falls with its ontological claim that original public meaning is a fact in the past which anyone from the present can recover and apply without altering its objective character.

Most public-meaning originalists have ignored the philosophical hermeneutic thesis that any investigation of the past is also shaped by the perspective of the interpreter in the present; the meaning of any text is mutually constituted by past and present. In this view, meaning does not exist in the past as a fact, but is created by the very interpretive effort to find it.

Only two public-meaning originalists have defended the fixation thesis against this critique. Keith Whittington rejected it outright in his early work, while Lawrence Solum recently argued its compatibility with fixation. Both arguments fail. “Fixed constitutional meaning” and the other purported objectivities in which public-meaning originalists wrap their theory are no less touched by interpretive subjectivity than the theories new originalists attack. Like all human inquiries into proper action in particular situations, constitutional interpretation is necessarily affected by particularities of the judge, the issue before her, and their relation to constitutional history and contemporary constitutional imperatives. None of this is subject to adjudication by a priori rule or objective method, as public-meaning originalists imagine.

No one is “faithfully” interpreting the Constitution in the way public-meaning originalists imagine. Everyone is doing the same interpretive thing, trying to connect the exigencies of the present with a document more than two centuries in force. The fixation thesis is false.

Keywords: Aristotle, constitutional interpretation, fixation thesis, Hans-Georg Gadamer, Martin Heidegger, hermeneutics, new originalism, ontology of meaning, originalism, public meaning

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INTRODUCTION: MAKING IT UP

Originalists contend that judges properly interpret the Constitution only when they discover and apply its original meaning.¹ Originalists initially looked for this meaning in the intentions of the framers,² but later abandoned intent for “original public meaning”—how the general public understood the Constitution at the time it was adopted.³ This “public-meaning” or “new” originalism is now the most widely held originalist theory of constitutional interpretation,⁴ so dominant that even nonoriginalists are pulled in its direction.⁵ We are all new originalists now.

A crucial premise of public-meaning originalism is the transparently named “fixation thesis,” which provides that the meaning of any constitutional text is fixed when it is drafted and

¹ *E.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 5-6 (1990); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 5 (2004) [hereinafter BARNETT, *THE LOST CONSTITUTION*]; KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 35 (1999) [hereinafter WHITTINGTON, *INTERPRETATION*]; Lawrence B. Solum, *Semantic Originalism* 173 (Illinois Pub. L. & Legal Theory Res. Papers Series, Working Paper No. 07-24, 2008) [hereinafter Solum, *Semantic Originalism*], available at <https://papers.ssrn.com/abstract=1120244>.

² *E.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 17, 22 (1972); Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *NW. U.L. REV.* 226 (1988); Edwin Meese III, *Speech to the American Bar Association* (July 9, 1985), available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf>.

³ *E.g.*, BARNETT, *THE LOST CONSTITUTION*, *supra* note 1, at 5; ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 17 (1997); WHITTINGTON, *INTERPRETATION*, *supra* note 1, at 35; Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611 (1999) [hereinafter Barnett, *Originalism for Nonoriginalists*]; John O. McGinnis & Michael B. Rappaport, *Originalism Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *NW. U.L. REV.* 751, 756, 762 (2009). *See also* *District of Colum. v. Heller*, 554 U.S. 570, 576-619 (2008) (5-4 dec.) (majority opinion by Scalia, J.) (exhaustively documenting the “normal and ordinary” meaning of the text of the 2nd Amendment when adopted in 1791 and applied to the states by the 14th Amendment in 1868).

Although initially a framers-understanding originalist, *see supra* note 2 and accompanying text, Judge Bork later converted to public-meaning originalism, *see* BORK, *supra* note 1, at 144.

⁴ McGinnis & Rappaport, *supra* note 3, at 761; Solum, *Semantic Originalism*, *supra* note 1, 4; Keith E. Whittington, *Critical Originalism: A Critical Introduction*, 82 *FORD. L. REV.* 375, 380 (2013) [hereinafter Whittington, *Critical Introduction*]. *See also* William Baude, *Is Originalism Our Law?*, 115 *COLUM. L. REV.* 2349 (2015) (arguing that some versions of originalism satisfy a Hartian rule of recognition as positive law of the United States).

⁵ *E.g.*, *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States, Hearing Before the Committee on the Judiciary, United States Senate*, 111th Cong. 62 (2010) (statement of Kagan) (“Sometimes [the framers] laid down very specific rules. Sometimes they laid down broad principles. Either way, we apply what they tried to do. In that way, we are all originalists.”).

ratified.⁶ According to the fixation thesis, the original public meaning of the Constitution cannot change. It follows that the present and its concerns cannot affect constitutional meaning. Public-meaning originalists see this as a feature, not a bug: constitutions are put into writing precisely to constrain government and its agents;⁷ written constitutions accomplish this by “locking-in” or “fixing” invariable rules of law to bind the government.⁸ Judges do not *make* the meaning of a written constitution, they *discover* it.⁹ All originalists accept the fixation thesis,¹⁰ which Justice Scalia called the “great divide” between originalism and other interpretive theories.¹¹

Public-meaning originalists acknowledge that epistemic obstacles sometimes prevent discovery of original meaning.¹² Nevertheless, none of them questions the *existence* of original public meaning, regardless of its epistemological recoverability. For public-meaning originalists, “What is the original public meaning of the Constitution?” is an empirical question whose answer

⁶ Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) [hereinafter Solum, *The Fixation Thesis*].

⁷ BARNETTE, THE LOST CONSTITUTION, *supra* note 1, at 103.

⁸ BARNETT, THE LOST CONSTITUTION, *supra* note 1, at 105 (If a constitution is “reduced to writing and executed, where it speaks it establishes or ‘locks in’ a rule of law from that moment forward.”); SCALIA, *supra* note 3, at 40 (“One would suppose that the rule that a text does not change would apply a fortiori to a constitution. [I]ts whole purpose is to prevent change, to embed certain rights in such a manner that future generations cannot readily take them away.”); WHITTINGTON, INTERPRETATION, *supra* note 1, at 54, 56 (“[O]nly a fixed text can provide judicial instruction and therefore be judicially enforceable against legislative encroachment The constitutional constraint on the people’s agents can emerge from the text as intended . . . only if the text has the fixed meaning it is uniquely capable of carrying.”).

⁹ *E.g.*, WHITTINGTON, INTERPRETATION, *supra* note 1, at 5-11 *passim*.

¹⁰ SCALIA, *supra* note 3, at 6; Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011) [hereinafter Barnett, *Interpretation & Construction*]; *see* Solum, *The Fixation Thesis*, *supra* note 6, at 4, 30; Whittington, *Critical Introduction*, *supra* note 4, at 378.

¹¹ SCALIA, *supra* note 3, at 38.

¹² *E.g.*, SCALIA, *supra* note 3, at 40; Barnett, *Gravitational Force*, *supra* note 12, at 416; Michael Ramsey, *Frederick Mark Gedicks: Lawrence Solum and the Thesis of Immaculate Recovery*, THE ORIGINALIST BLOG (Oct. 31, 2017), <http://originalismblog.typepad.com/the-originalism-blog/2017/10/frederick-mark-gedicks-lawrence-solum-and-the-thesis-of-immaculate-recovery-michael-ramsey.html>; Solum, *Fixation Thesis*, *supra* note 6, at 12; Whittington, *Critical Introduction*, *supra* note 4, at 403.

is an objective fact in the world.¹³ Public-meaning originalism, therefore, rests on an *ontological* assumption, that meaning exists in the past as a fact. Ontology is the study of being or existence, of everything that “is.”¹⁴ The fixation thesis presupposes that original public meaning “is” in the past in some way that leaves it unaffected by contemporary efforts to recover and apply it. In this view, the original public meaning of the Constitution is always “there” to be found,¹⁵ even if we sometimes fail to find it and, indeed, even if we fail to look for it at all.

The fixation thesis underwrites the powerful rhetoric of fidelity that public-meaning originalists deploy against nonoriginalists. Public-meaning originalists insist that only when judges apply the original public meaning of the Constitution do they uphold its commitments to popular sovereignty, limited government, and rule-of-law.¹⁶ Judges who decide on some other (nonoriginalist) basis are simply “making up” constitutional meanings to suit their preferences.¹⁷ Of course, if constitutional meaning does not exist in the past as a fact which can be objectively retrieved, then public-meaning originalists are “making it up,” too. The public-meaning enterprise

¹³ Lawrence B. Solum, *A Reader’s Guide to Semantic Originalism and a Reply to Professor Griffin*, 41 (Illinois Pub. L. Res. Papers Series, Working Paper No. 08-12, 2008) [hereinafter Solum, *Reader’s Guide*], <https://papers.ssrn.com/abstract=1130665>.

¹⁴ ANTHONY KENNY, *A NEW HISTORY OF WESTERN PHILOSOPHY* 160 (2010); e.g., Aristotle, *Metaphysics* (W.D. Ross trans.), in *THE BASIC WORKS OF ARISTOTLE* 779 vi.1 1026a15-16 & -30-33 (Richard McKeon ed. 1941) [hereinafter *WORKS OF ARISTOTLE*] (“[T]he first science deals with . . . being *qua* being—both what it is and the attributes which belong to it *qua* being.”). All citations to Aristotle are to the page number in *WORKS OF ARISTOTLE*, *supra*, followed by the Roman numeral of the book, the Arabic number of the chapter, and, if applicable, the Bekker line number(s).

¹⁵ Cf. Barnett, *Gravitational Force*, *supra* note 12, at 416 (“[W]hen conflicting interpretive claims arise about meaning, there is (à la Gertrude Stein) a *there* there to potentially to resolve the conflict.”). Stein actually suggested there *isn’t* a “there” there. See GERTRUDE STEIN, *EVERYBODY’S AUTOBIOGRAPHY* 298 (1937) (referring to Oakland, California).

¹⁶ BARNETT, *LOST CONSTITUTION*, *supra* note 1, 103-04, 107; WHITTINGTON, *INTERPRETATION*, *supra* note 1, at 56; Solum, *Semantic Originalism*, *supra* note 1, at 4.

¹⁷ See, e.g., Justice Clarence Thomas, “How to Read the Constitution,” Manhattan Institute Wriston Lecture (Oct. 16, 2008) (“[T]here are really only two ways to interpret the Constitution—try to discern as best we can what the framers intended or make it up.”), *excerpt reprinted in* “Commentary,” *WALL ST. J.*, Oct. 20, 2008, at A19. See also Baude, *supra* note 4, at 2351 (“Originalists rely on an intuition that the original meaning of a document is its real meaning and that anything else is making it up.”).

rises or falls with its claim that public meaning is a fact objectively resting in the past, which anyone from the present may recover and apply without altering its objective factual character. Unless this claim is true, public-meaning originalism hardly differs from other approaches to constitutional interpretation.¹⁸

With so much riding on the fixation thesis, it is surprising that most public-meaning originalists merely assume the ontology that underwrites it. They largely ignore the philosophical hermeneutic thesis that “original” textual meaning is shaped by the demands of the interpreter in the present, and not solely those of the text in the past; the meaning of any text, in other words, is constituted by past *and* present.¹⁹ Textual meaning does not lie around the past like a rock, waiting for someone to pick it up and carry it back to the present. Rather, it is precisely the interpretive effort in the present to articulate the meaning of a text from the past which *creates* textual meaning. To paraphrase Faulkner, the past is never just the past, but always also the present.²⁰

Two prominent public-meaning originalists have defended the fixation thesis and its ontological claim against this hermeneutic critique. Professor Whittington rejected it outright in his early work,²¹ while Professor Solum recently argued its compatibility with fixation.²² Both

¹⁸ For a discussion of these other approaches, see PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

¹⁹ See generally, HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall rev. trans. 2nd rev. ed. 2013) (1960) [hereinafter GADAMER, *TRUTH & METHOD*].

²⁰ Cf. WILLIAM FAULKNER, *REQUIEM FOR A NUN* act ii, sc. 3, at 92 (1951) (“The past is never dead. It’s not even past.”). Or, to paraphrase Stein correctly, see *supra* note 15, there is no “there” there, until we look for it.

²¹ WHITTINGTON, *INTERPRETATION*, *supra* note 1, at 74-76, 92-94, 102-08.

Keith Whittington is the William Nelson Cromwell Professor of Politics at Princeton University. His early work provided much of the theoretical foundation for public-meaning originalism. See WHITTINGTON, *INTERPRETATION*, *supra* note 1; KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999) [hereinafter WHITTINGTON, *CONSTRUCTION*].

²² Lawrence B. Solum, *Originalism, Hermeneutics, and the Fixation Thesis* [hereinafter Solum, *Hermeneutics and the Fixation Thesis*], in *THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY* 130 (Brian G. Slocum ed. 2017) [hereinafter *LEGAL INTERPRETATION*].

misunderstand the hermeneutic argument, though this, too, has gone largely unremarked in the critical originalist literature.²³

Public-meaning originalism rests on the twin assumptions that original public meaning is a fact existing in the past unaffected by our present knowledge of it, and that proper method can, in principle, recover and apply this meaning in the present without altering its objective factual character. I will argue that this account of constitutional interpretation contradicts the account of textual understanding offered by philosophical hermeneutics, and is additionally ontologically implausible. The original public meaning of the Constitution is an effect of both past *and* present: the tradition of prior understandings through which constitutional meaning is handed down to us, and the concerns which trigger the interpretive search for its current meaning.

I develop and defend this thesis in four parts. Part I provides a detailed examination of the fixation thesis and the ontological assumptions on which it rests. Part II discusses the hermeneutic challenge to fixation by Martin Heidegger's argument that human understanding is structured by one's prior relations with other persons and things in the world,²⁴ and Hans-Georg Gadamer's adaptation of this ontology to textual interpretation.²⁵ Part III considers the specific arguments of

Lawrence Solum is Carmack Waterhouse Professor of Law at Georgetown University Law Center. Solum's many working papers and published articles have illuminated the philosophical foundation of public-meaning originalism, particularly in philosophy of language. *E.g.*, Solum, *Semantic Originalism*, *supra* note 1.

²³ The only direct ontological criticism of public-meaning originalism is an incisive book chapter by Professor Mootz, the leading legal academic on philosophical hermeneutics and law. Francis J. Mootz III, *Getting over the Originalist Fixation*, in *LEGAL INTERPRETATION*, *supra* note 22, at 156 [hereinafter Mootz, *Originalist Fixation*] (criticizing Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 22). *See also* Francis J. Mootz, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 *B.U. L. REV.* 523 (1988). A few scholars have noted the ontological assumptions of public-meaning originalism without exploring them in depth. *E.g.*, Rik Peters, *Constitutional Interpretation: A View from a Distance*, 50 *HISTORY AND THEORY* 117 (2011).

²⁴ MARTIN HEIDEGGER, *BEING AND TIME* (John Macquarrie & Edward Robinson trans. 1962) [hereinafter HEIDEGGER, *BEING & TIME*].

²⁵ GADAMER, *TRUTH & METHOD*, *supra* note 19; HANS-GEORG GADAMER, *REASON IN THE AGE OF SCIENCE* (Frederick G. Lawrence trans. 1981) [hereinafter GADAMER, *AGE OF SCIENCE*]; HANS-GEORG GADAMER, *PHILOSOPHICAL HERMENEUTICS* (David E. Linge ed. & trans. 1976) [hereinafter GADAMER, *HERMENEUTICS*].

Professors Whittington and Solum, showing that they misunderstand Gadamer's arguments about interpretive horizons and application of interpretive meaning. Part IV criticizes examples that Whittington and Solum deploy against hermeneutic ontology; it also analyzes a classic American film, *It's a Wonderful Life*,²⁶ and a canonical Supreme Court decision, *Brown v. Board of Education*,²⁷ to illustrate the improbability of the fixation thesis, and the more intuitive account of textual understanding offered by philosophical hermeneutics. I conclude with some observations about the claims of new originalists to exclusive interpretive fidelity.

I. FIXED CONSTITUTIONAL MEANING

The fixation thesis provides that two sets of facts fix the meaning of any constitutional provision when adopted: facts about the *semantics* of the text, and facts about the *context* surrounding the text's adoption.²⁸

A. *Semantics*

The Constitution is written in clauses, which constitute the basic unit of analysis for public-meaning originalists.²⁹ Each word in a constitutional clause possesses an ordinary linguistic meaning established by conventional patterns of usage existing at the time the clause was adopted.³⁰ Rules of syntax and grammar in force at adoption, as evidenced by contemporaneous usage in newspapers, magazines, pamphlets, dictionaries, and legal and other public documents,

²⁶ *It's a Wonderful Life* (RKO Liberty 1946). Part IV-D is drawn from Frederick Mark Gedicks, *It's a Wonderful Originalism! Lawrence Solum and the Thesis of Immaculate Recovery*, 31 DPCE ONLINE 653 (Oct. 2017).

²⁷ 347 U.S. 483 (1954).

²⁸ E.g., Solum, *The Fixation Thesis*, *supra* note 6, at 28.

²⁹ Solum, *Semantic Originalism*, *supra* note 1, at 50-51.

³⁰ *Id.* at 60.

dictate how these words fit together as a predication or statement.³¹ Ordinary meaning, syntax, and grammar in use at the time of adoption together constitute and fix the original semantic meaning of a clause—that is, the meaning a literate person of the time would have understood solely from the words of the clause.

Public-meaning originalists maintain that once fixed in a written constitutional clause, semantic meaning exists in the past as a fact. This entails two claims. First, that semantic meaning is objective; it exists apart from and unaffected by whatever particular individuals might think about it. As Professor Barnett declares, “the English language contains words with generally accepted meanings that are ascertainable independent of any of our subjective opinions about their meaning.”³² References to the “factual” and “objective” character of original public meaning abound in the public-meaning literature.³³

Second, the factual existence of original public meaning entails the claim that the semantic meaning of the Constitution is objectively ascertainable. References to the “objective” or “factual” character of original public meaning imply a world whose contents are verifiable regardless of who undertakes the verification.³⁴ If the original public meaning of the Constitution is an objective

³¹ See BARNETT, LOST CONSTITUTION, *supra* note 1, at 93; Solum, *Semantic Originalism*, *supra* note 1, at 51.

³² BARNETT, LOST CONSTITUTION, *supra* note 1, at 105.

³³ *E.g.*, SCALIA, INTERPRETATION, *supra* note 3, at 17 (“We 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*.”); Barnett, *Gravitational Force*, *supra* note 12, at 415 (“New Originalism . . . seeks to establish an empirical fact about the objective meaning of the text at a particular point in time.”); Solum, *The Fixation Thesis*, *supra* note 6, at 28:

The public meaning of the text that was proposed in 1787 was necessarily determined in large part by the conventional semantic meanings of the words and phrases that make up the text and the regularities of usage that are sometimes summarized as rules of grammar and syntax. Conventional semantic meanings and syntax are determined by linguistic facts—that is, by regularities in usage.

³⁴ See NICOLA ABBAGNANO, DIZIONARIO DI FILOSOFIA 379 (2nd ed. 1971) (author’s translation):

[A “fact” is] an objective possibility of verification . . . , in the sense that anyone can verify it oneself given the same conditions. “It is a fact that *x*” means that *x* can be verified or ascertained by anyone in possession of the appropriate means, or can be consistently described or predicted.

fact, it follows that everyone who undertakes the methodologically proper search for this meaning will find the same thing, regardless of personal identity, commitments, or situation.³⁵ As Professor Solum has declared, “bare semantic content is recognized or discovered rather than created”³⁶ In principle, a conscientious interpreter is able to articulate the original semantic meaning of a constitutional clause without altering its objective factual character.³⁷

Professors Barnette and Solum have used the Domestic Violence Clause to illustrate the role semantics plays in fixing meaning.³⁸ This clause provides, “The United States . . . shall protect each of [the states] on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.”³⁹ Today “domestic violence” means physical or sexual abuse by one family member of another, with “domestic” pointing towards the home where family life is conventionally centered. When the Domestic Violence Clause was adopted along with the rest of the Constitution in the late 1780s, however, this usage was unknown—indeed, many actions now considered abusive were then numbered among the prerogatives of male heads of household.

The fixation thesis holds that the meaning of “domestic violence” was fixed in 1788 when the Domestic Violence Clause was adopted along with the rest of the Constitution. Thus, the clause

For summaries of the complex philosophical issues surrounding “objectivity” and “fact,” see ABBAGNANO, *supra*, at 379-81; Kevin Mulligan & Correia Fabrice, *Facts*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. Winter 2017), <https://plato.stanford.edu/archives/win2017/entries/facts/>.

³⁵ See WHITTINGTON, CONSTRUCTION, *supra* note 21, at 7 (“Ideally interpreters set aside their own interests in the case at hand in order to pursue an objectively demonstrable, correct outcome.”).

³⁶ Solum, *Reader’s Guide*, *supra* note 13, at 3.

³⁷ See, e.g., BARNETT, LOST CONSTITUTION, *supra* note 1, at 105; SCALIA, *supra* note 3, at 140; WHITTINGTON, INTERPRETATION, *supra* note 1, at 39, 52-53; Barnett, *Gravitational Force*, *supra* note 12, at 415.

³⁸ E.g., Barnette, *Gravitational Force*, *supra* note 12, at 416; Solum, *Fixation Thesis*, *supra* note 6, at 16-17.

³⁹ U.S. CONST., art. IV, § 4 (1788).

cannot include contemporary understandings of “domestic violence” like physical or sexual abuse of children or spouse. Subsequent changes in usage—“linguistic drift”—cannot change the original semantic meaning of “domestic violence” courts apply to contemporary disputes, because that meaning was fixed upon the clause’s adoption.⁴⁰

B. *Context*

Original semantic meaning is rarely sufficient to resolve constitutional cases and controversies. Public-meaning originalists acknowledge the necessity of supplementing the bare semantics of the text with context—additional relevant information which specifies and stabilizes semantic meaning.⁴¹ Just as the original semantic meaning of the Constitution is time-bound, so is the context surrounding semantic meaning, consisting of those circumstances known or available to the public at the time the Constitution was adopted.⁴² This “publicly available context” consists of *textual context* and *historical context*.

1. Textual Context

Sentences are rarely uttered in isolation. Where a sentence appears in the larger conversation or document of which it is a part influences its meaning.⁴³ The same is true of constitutional clauses. *Where* a clause appears in the Constitution—for example, which clauses

⁴⁰ Solum, *The Fixation Thesis*, *supra* note 6, at 17.

⁴¹ See WHITTINGTON, INTERPRETATION, *supra* note 1, at 35, 60; Solum, *Semantic Originalism*, *supra* note 1, at 59. See also SCALIA, *supra* note 3, at 37 (“In textual interpretation, context is everything”); Solum, *The Fixation Thesis*, *supra* note 6, at 28 (“Additional [interpretive] work is done by . . . facts about the context of constitutional communication”).

⁴² Solum, *The Fixation Thesis*, *supra* note 6, at 28.

⁴³ E.g., BARNETT, LOST CONSTITUTION, *supra* note 1, at 105.

surround it, how a clause is grammatically marked off from others, the section and article in which a clause is placed—affects its meaning.⁴⁴

Again, the Domestic Violence Clause is illustrative. It forms part of a longer sentence containing several clauses:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.⁴⁵

Preceded immediately by the Invasion Clause, which obligates the United States to repel any forceful occupation of a state originating outside its borders, the Domestic Violence Clause seems to take up the analogous problem of violent rebellions against a state government occurring within its borders. The Domestic Violence Clause obligates the federal government to put down these internal revolts on state request, just as the Invasion Clause obligates federal defense against attacks originating outside a state's borders. The Invasion and Domestic Violence Clauses form part of Article IV, which generally clarifies rights and obligations among the states, their respective citizens, and the federal government as constituent parts of the newly formed Union,⁴⁶ including when the newly formed federal government may or must deploy its military resources to assist a state. Finally, the Constitution elsewhere expressly authorizes Congress to maintain a standing

⁴⁴ See WHITTINGTON, CONSTRUCTION, *supra* note 21, at 6 (referring to originalist interpretation from “the four corners of the [constitutional] document”); Solum, *Semantic Originalism*, *supra* note 3, at 54 (“Context” includes “the whole text of the Constitution . . .”). See also SCALIA, *supra* note 1, at 17 (Public-meaning originalists look for “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”).

⁴⁵ U.S. CONST., art. IV, § 4 (1788).

⁴⁶ See *id.*, § 1 (providing that public acts and records in one state shall be recognized in the others, and vesting in Congress power to specify required proof and collateral effects); *id.*, § 2, cl.1 (declaring privileges and immunities of citizenship to citizens traveling through or residing in states other than the one where they live); *id.*, § 2, cl.2 (providing obligation of extradition of escaped criminals); *id.*, § 2, cl.3 (denying states power to free slaves fleeing from other states, and providing obligation of return); *id.*, § 3 (providing for congressional admittance of new states, but protecting territorial integrity and existing extra-territorial claims of states in existence at ratification).

army and to federalize state militias,⁴⁷ and expressly names the President “commander-in-chief” of these forces.⁴⁸

The textual context of the Domestic Clause confirms that “domestic violence” means violent rebellions originating within a state against its legitimate authority.

2. Historical Context.

Public-meaning originalists claim that semantic meaning is a fact existing at a particular time, in a particular place, for particular reasons. Each clause of the Constitution was likewise adopted at a particular time and place for particular political imperatives and social considerations. New originalism relies on historical sources to retrieve the historical context surrounding adoption of the Constitution and its amendments, “to elucidate the understanding of the terms involved and to indicate the principles that were supposed to be embodied in them.”⁴⁹ For example, the Constitution was adopted after the widely recognized failure of the Articles of Confederation, notably the impotence of Congress in the face of state intransigence and protectionism which prevented formation of a true economic union of the states. The Articles existed only because of the Revolution, which itself was driven by the many colonial grievances against the British Parliament and monarchy, some of which were set forth in the Declaration of Independence. These particular problems generated particular constitutional provisions, such as the Commerce Clause, which foreclosed state tariffs and other acts of state economic protectionism by removing the power to regulate interstate commerce from the states and vesting it in Congress.

⁴⁷ U.S. CONST., art. I, § 8, cls.12-16 (1788).

⁴⁸ *Id.*, art. II, § 2, cl.1.

⁴⁹ WHITTINGTON, INTERPRETATION, *supra* note 1, at 35.

Once more, the Domestic Violence Clause illustrates how historical context contributes to constitutional meaning. When the U.S. was governed by the Articles (1781-88), the states were bedeviled by internal rebellions, euphemistically called “the people out of doors.”⁵⁰ These ranged from organized attacks on state governments such as Shays Rebellion, to loosely organized mobs of local citizens. At the Philadelphia Convention, Federalists insisted that the newly conceived federal government be vested with sufficient military power and constitutional authority to extinguish these rebellions and mob actions.⁵¹

A public-meaning originalist would conclude that the historical context surrounding adoption of the Domestic Violence Clause stabilizes and specifies its semantic meaning, excluding the possibility that the clause refers to child and spousal abuse in favor of the understanding that it imposes upon the federal government the obligation to deploy its military forces to put down, upon state request, rebellions originating within a state.⁵²

* * *

Public-meaning originalists claim that the meaning of any constitutional clause is fixed when the clause is adopted. The components of fixation are the semantic meaning of the clause, as specified by its textual and historical contexts. This fixed original meaning exists in the past as an objective fact. In principle, those who follow proper public-meaning methodology can recover this meaning without altering its objective, factual character.

⁵⁰ GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 319-28 (1998) [hereinafter WOOD, *AMERICAN REPUBLIC*].

⁵¹ GORDON WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC: 1789-1815*, at 111 (2009).

⁵² U.S. CONST., art. IV, § 4 (1788).

II. ONTOLOGICAL CHALLENGES

New originalism depends on the ontological claim that the original public meaning of the Constitution is a fact always “there” in the past to be found, regardless of whether or how we look for it. Gadamer challenged this claim in *Truth and Method*, easily the most consequential work on hermeneutics in the 20th century,⁵³ as even some new originalists acknowledge.⁵⁴ Drawing on Heidegger’s ontology in *Being and Time*,⁵⁵ Gadamer provides an extended argument against the possibility of methodologically “objective” interpretation in the “human sciences”—that is, in historical, legal, literary, theological, and similar “humanistic” texts.⁵⁶ Gadamer argues instead that textual meaning is mutually constituted by past and present,⁵⁷ directly contradicting the fixation thesis. If textual meaning is composed of influences and elements of the present as well

⁵³ See, e.g., JEAN GRONDIN, INTRODUCTION TO PHILOSOPHICAL HERMENEUTICS 2 (1994) [hereinafter GRONDIN, PHILOSOPHICAL HERMENEUTICS]; JOEL WEINSHEIMER, GADAMER’S HERMENEUTICS: A READING OF *TRUTH AND METHOD* ix (1985).

Important criticisms of *Truth and Method* in English include Emilio Betti, *Hermeneutics as the General Methodology of the Geisteswissenschaften* (1962) [hereinafter Betti, *Hermeneutics*], in JOSEPH BLEICHER, CONTEMPORARY HERMENEUTICS: HERMENEUTICS AS METHOD, PHILOSOPHY, AND CRITIQUE 51, 58, 73 (1980), and E.D. HIRSCH, VALIDITY IN INTERPRETATION app. II at 245-64 (1967). Betti, *Hermeneutics*, *supra*, draws its principal themes from EMILIO BETTI, *TEORIA GENERALE DELLA INTERPRETAZIONE* (2nd ed. 1992) (2 vols.) (1955) [hereinafter BETTI, *TEORIA GENERALE*].

⁵⁴ See, e.g., Solum, *Hermeneutics and Fixation Thesis*, *supra* note 22, at 145 (calling *Truth and Method* a “powerful and influential theory of hermeneutics”).

⁵⁵ See GADAMER, *TRUTH & METHOD*, *supra* note 19, at 255-64 (discussing HEIDEGGER, *BEING & TIME*, *supra* note 24).

⁵⁶ “Human sciences” is a common translation of the German *Geisteswissenschaften*, whose sense is somewhat broader than the English “humanities,” including as well law and most of what are now known as the “social sciences.” See, e.g., RICHARD E. PALMER, HERMENEUTICS: INTERPRETATION THEORY IN SCHLEIERMACHER, DILTHEY, HEIDEGGER, AND GADAMER 98 (1969). The term literally translates as “sciences of the spirit,” which refers to those areas of study in which humans interpret other humans and their work rather than natural objects or phenomena. See generally “*Geist*,” “*Geisteswissenschaften*” & “*Wissenschaft*,” in THE OXFORD-DUDEN GERMAN DICTIONARY 319, 811 (W. Scholze-Stubenrecht & J.B. Sykes eds. 1994) [hereinafter OXFORD GERMAN DICTIONARY].

⁵⁷ See, e.g., GADAMER, *TRUTH & METHOD*, *supra* note 19, at 301 (Understanding a work from the past “will always involve *more* than merely historically reconstructing the past ‘world’ to which the work belongs. Our understanding will always retain the consciousness that we too belong to that world, and correlatively, that the work too belongs to our world.”).

as the past, as Gadamer contends, it follows that the meaning of a “traditional” text from the past *does not exist* unless and until someone in the present interprets it and thereby contributes the necessary present component of meaning.

Unlike public-meaning originalism, the hermeneutics of Heidegger and Gadamer does not propose an interpretive method. Methods are epistemologically oriented; they provide justifications for knowledge claims.⁵⁸ *Truth and Method* describes how understanding happens, not how we justify it as knowledge.⁵⁹ Its claim that understanding is constituted by the present as well as the past directly challenges the ontology assumed by the fixation thesis, which conceptualizes constitutional meaning as an objective fact existing in the past independently of present influences and considerations.

A. *The Circularity of Human Understanding*

Writing a generation before Gadamer, Heidegger decisively rejected the conceptual separation of the human subject from its object of knowledge,⁶⁰ which underwrites so much of Western thought.⁶¹ In this conventional view, each of us is “inside” ourselves in our subjective minds, while “outside” is the objectively real world. This separation creates an epistemological gap; a centuries-old preoccupation is transcending this gap, how to build an epistemological bridge from the merely subjective in-here to the objectively real out-there.

⁵⁸ See KENNEY, *supra* note 14, at 624 (describing how scientific method confirms theories); e.g., GADAMER, HERMENEUTICS, *supra* note 25 at 199 (Neo-Kantian method “assumed without question that what can be known is really grasped by the sciences alone, and that the objectification of experience by science completely fulfills the meaning of knowledge.”).

⁵⁹ GADAMER, TRUTH & METHOD, *supra* note 19, at xxxiii.

⁶⁰ HEIDEGGER, BEING & TIME, *supra* note 24, at 128, 131.

⁶¹ See ROBERT SOLOMON, CONTINENTAL PHILOSOPHY SINCE 1750: THE RISE AND FALL OF THE SELF 153-67 *passim* (1988); e.g., RENÉ DESCARTES, DISCOURSE ON METHOD AND MEDITATIONS ON FIRST PHILOSOPHY 63-70 (Donald A. Cress trans. 3rd ed. 1993) (1637/1641).

Heidegger described the problem of subject/object separation with the metaphor of a box in which subjective consciousness is imprisoned from the objective world outside. If “[t]ranscendence . . . is taken to be the relationship that somehow or other maintains a passageway between the interior and exterior of the box by leaping over or pressing through the wall of the box,” then “the problem arises of how to explain the possibility of such a passage.”⁶² Most philosophers, he suggests, pursue a solution in some epistemology like causation, psychology, or physiology.⁶³

Heidegger himself denied the separation of subject and object, thereby eliminating the epistemological gap between them. He posited instead that human beings have a necessarily prior involvement with every person and thing they seek to understand.⁶⁴ We are not independently existing subjects who breach the “box” of consciousness to reach the equally independent world outside; we are rather always, at every moment, already in the world alongside other persons and things:

When [human being] directs itself towards something and grasps it, it does not somehow first get out of an inner sphere in which it has been proximally encapsulated, but its primary kind of Being is such that it is always “outside” alongside entities which it encounters and which belong to a world already discovered.⁶⁵

⁶² MARTIN HEIDEGGER, *THE METAPHYSICAL FOUNDATIONS OF LOGIC* 160-61 (Michael Heim trans. 1984) [hereinafter HEIDEGGER, *METAPHYSICAL FOUNDATIONS*].

⁶³ *Id.* at 161.

⁶⁴ See WILLIAM RICHARDSON, *HEIDEGGER: THROUGH PHENOMENOLOGY TO THOUGHT* 85 (3rd ed. 1974); SOLOMON, *supra* note 61, at 162.

⁶⁵ HEIDEGGER, *BEING & TIME*, *supra* note 24, at 88-89.

Heidegger abandoned the term “human being” for the German *Dasein*, in order to avoid the philosophical and cultural freight attached to the former. See *infra* note 67. I’ve retained “human being” for accessibility.

Human “being,” in this view, is not bare self-existence—“I think, therefore I am”⁶⁶—but a “being-there,”⁶⁷ a “being-in-the-world.”⁶⁸ Having this kind of being, Professor Leiter explains, “we exist practically absorbed in a world ‘already constituted,’ constituted precisely by the practical involvements we have with the things and people in it.”⁶⁹ The “there” of Heideggerian being, therefore, is less a location than an attitude, an openness towards the possibilities of existence afforded by the situations in which one finds herself.⁷⁰

Heidegger’s conception of human being generates special meanings for “understanding” and “interpretation.” “Understanding” is one’s projection of oneself into the possibilities of existence available to her in the particularities of her situation. To understand something is to realize it as a possible way to exist.⁷¹ Understanding thus entails self-development; one’s being is also a becoming.⁷² Rather than discovery of objective meaning, “interpretation” is development of the understanding of one’s possibilities. To “interpret” something is to bring “explicitly into sight” its possibilities for one’s existence.⁷³

⁶⁶ DESCARTES, *supra* note 61, at 19.

⁶⁷ HEIDEGGER, BEING & TIME, *supra* note 24, at 153-57 (emphasis added).

“Being-there” is the customary English translation of *Dasein*, a German noun upon whose verb form Heidegger plays for a fresh conception of the freighted term “human being.” See “*dasein*,” in OXFORD GERMAN DICTIONARY, *supra* note 56, at 191 (intransitive verb meaning “to be”).

⁶⁸ HEIDEGGER, BEING & TIME, *supra* note 24, at 80, 107, 141 (emphasis added).

⁶⁹ Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 Yale L.J. 253, 271 (1996).

⁷⁰ See THOMAS SHEEHAN, MAKING SENSE OF HEIDEGGER: A PARADIGM SHIFT 95 (2015).

⁷¹ HEIDEGGER, BEING & TIME, *supra* note 24, at 184.

⁷² *Id.* at 188.

⁷³ *Id.* at 189. For a succinct discussion of understanding and interpretation in *Being and Time*, see Leiter, *supra* note 69, at 271-76.

Human being-in-the-world precludes understanding and interpretation from yielding objective knowledge of the world. We cannot grasp the meaning and significance of things in the world independently of who we are and what we preliminarily know about them,⁷⁴ because we are, at every moment, already living in the world alongside them, bound up with them in pre-existing relationships.⁷⁵ Heidegger calls these preexisting relations the “fore” structure of understanding,⁷⁶ whose various components unavoidably shape our understanding of other people and things in the world.⁷⁷

Nevertheless, the fore-structure does not permit us to make of the world anything we wish. While my presuppositions of meaning shape my understanding of the world, the “facticity” of the world, to use another of Heidegger’s specialized terms, also shapes that understanding.⁷⁸ The “brute facts” of one’s situation open some possibilities of existence and close off others.⁷⁹ All of us are thrown into situations in the world with possibilities and limitations. The possibilities we choose define who we are, but who we are influences the possibilities we choose. One’s choices among possibilities give her life meaning, but this meaning determines the possibilities she finds

⁷⁴ HEIDEGGER, BEING & TIME, *supra* note 24, at 191-92. *See also id.* at 190-91 (“[W]hen something within-the-world is encountered as such, the thing in question already has an involvement which is disclosed in our understanding of the world, and this involvement is one which gets laid out by the interpretation” of the thing.).

⁷⁵ *Id.* at 191-92 (“An interpretation is never a presuppositionless apprehending of something presented to us. If . . . one likes to appeal to what ‘stands there,’ then one finds that what ‘stands there’ in the first instance is nothing other than the obvious undiscussed assumption of the person who does the interpreting.”).

⁷⁶ *Id.* at 192.

⁷⁷ *Id.* at 191.

⁷⁸ *Id.* at 82 (“The concept of ‘facticity’ implies that an entity ‘within-the-world’ has Being-in-the-world in such a way that it can understand itself as bound up in its ‘destiny’ with the being of those entities which it encounters within its own world.”).

⁷⁹ Heidegger uses “factual” to distinguish “factual”: we cannot become anything we wish, although precisely how our possibilities and limitations interact with our choices is never fixed in advance as “factual” might imply. *See* David Couzens Hoy, *Heidegger and the Hermeneutic Turn*, in THE CAMBRIDGE COMPANION TO HEIDEGGER 170, 179-80 (Charles Guignon ed. 1993) [hereinafter CAMBRIDGE HEIDEGGER].

attractive. For Heidegger, understanding and interpretation are necessarily circular: understanding is always self-understanding, interpretation always self-interpretation.

Heidegger's claim is not that individual subjectivity distorts the true appearance of objects independently existing in the world.⁸⁰ Rather, he claims that subjects and objects *have no existence* outside of their relationships with each other. It's not that there is no objectivity in the world (or subjectivity, for that matter), it's rather that there are no pure subjects or pure objects. What we call "subjectivity" and "objectivity" are combined in every person and thing in the world.⁸¹

B. *The Circularity of Textual Understanding*

1. The Problem of the Circle

Gadamer adapted Heidegger's ontology to textual interpretation in *Truth and Method*.⁸² His point of departure is the problem of the "hermeneutic circle," which acquired particular salience with the Reformation's emphasis on *sola scriptura*.⁸³ If Christians were to read and understand the Bible themselves, without the constraints of hierarchy and tradition, they would need interpretive guides that nevertheless would not supplant the direct sense of the text; the hermeneutic circle was one of them.⁸⁴ The reformers held that the meaning of any particular biblical text is constituted by its place in the history of salvation recounted in the Christian Bible. But the meaning of the Bible is itself constituted by each biblical text—the aphorisms, miracles,

⁸⁰ See GRONDIN, *PHILOSOPHICAL HERMENEUTICS*, *supra* note 53, at 95.

⁸¹ *Cf.* HEIDEGGER, *BEING & TIME*, *supra* note 24, at 125 (criticizing the Cartesian subject as existing "in such a way that it needs no other entity in order to be"). See also Harrison Hall, *Intentionality and World: Division I of Being and Time*, in *CAMBRIDGE HEIDEGGER* *supra* note 79, at 122, 135 (observing that for Heidegger human being is inseparable from the being of the world).

⁸² GADAMER, *TRUTH & METHOD*, *supra* note 19, at 278-317.

⁸³ See *id.* at 181-83.

⁸⁴ See GADAMER, *AGE OF SCIENCE*, *supra* note 25, at 95.

parables, poems, and stories contributing to the whole of salvation history.⁸⁵ In short, the meaning of the whole of the Bible is constituted by its individual parts, but the meaning of each such part is constituted by its place in the whole of the Bible.

This circular structure of understanding represents a problem for the human sciences: How can there be reliable interpretive knowledge? The meaning of a text depends on its place within a larger tradition, but the meaning of this tradition depends on the meaning of the texts which compose it, including the text whose meaning is at issue. This leaves no firm epistemological foundation on which to ground correct textual understanding. As Charles Taylor described the problem:

What we are trying to establish is a certain reading of a text or expression, and what we appeal to as our grounds for this reading can only be other readings. We are trying to establish a reading for the whole text, and for this we appeal to readings of its partial expressions; and yet because we are dealing with meaning, with making sense, where expressions only make sense or not in relation to others, the readings of partial expressions depend on those of others, and ultimately of the whole.⁸⁶

The hermeneutic circle was a source of 19th-century anxiety about the influence of subjectivity in the human sciences. The Romantics believed the texts of the human sciences were repositories of knowledge, but that subjective attributes of the interpreter too easily contaminated that knowledge.⁸⁷ They addressed this problem by imitating the natural and physical sciences, developing methodologies for the human sciences which, like the scientific method, sought to minimize or eliminate the subjective influence of the interpreter.⁸⁸ The Romantic approach was to

⁸⁵ HANS W. FREI, *THE ECLIPSE OF BIBLICAL NARRATIVE: A STUDY IN EIGHTEENTH AND NINETEENTH CENTURY HERMENEUTICS* 172-83 (1974).

⁸⁶ Charles Taylor, *Interpretation and the Sciences of Man*, 25 *REV. METAPHYSICS* 3, 6 (1971).

⁸⁷ See BLEICHER, *supra* note 53, at 102-03 (“The situatedness of the interpreter has proved an embarrassment to those theorists who so persistently strove towards approximating the ideal of objectivity, as they saw it realized in natural science.”).

⁸⁸ See BLEICHER, *supra* note 53, at 108-09; DONATELLA DI CESARE, *GADAMER: A PHILOSOPHICAL PORTRAIT* 90 (Niall Keane trans. 2013).

abandon one's subjectivity in the author's, so as to understand the meaning of the text even better than the author did.⁸⁹

But scientific method is not so easily transferred to the human sciences. "Objectivity" means something more in physics or geology than in literature or law, even after Kuhn.⁹⁰ Whatever the being of a rock might be, we can be sure it is not *human* being. By contrast, the human sciences entail precisely humanity's investigation of human existence, of humanity itself.⁹¹ Humans interpret the meaning of texts authored by other humans; these texts are encased in traditions which influence, and are influenced by, how human interpreters understand these very texts.

Suppose I'm a philosopher set to review a book about Plato. A review setting out only my own thoughts about Plato, without considering the book's approach and its place in the tradition of classical Greek philosophy, would not be a review of the book. At the same time, it would be absurd to write the review as if I had no personal views about Plato and no knowledge of the Platonic tradition. Nor can I neutralize how the tradition has informed my view of Plato, or how my own views might have reciprocally influenced the tradition. It is impossible for me to approach the book from "intellectual nowhere," without any preconceptions whatever.⁹²

⁸⁹ See BLEICHER, *supra* note 53, at 15; DI CESARE, *supra* note 88, at 71-72.

⁹⁰ THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

⁹¹ See *supra* note 56.

⁹² This hypothetical is drawn from DI CESARE, *supra* note 88, at 88, and Jean Grondin, *Gadamer's Basic Understanding of Understanding* [hereinafter Grondin, *Gadamer's Understanding*], in *THE CAMBRIDGE COMPANION TO GADAMER* 36, 40 (Robert J. Dostal ed. 2002) [hereinafter *CAMBRIDGE GADAMER*]. See also GADAMER, *TRUTH & METHOD*, *supra* note 19, at xxix (speculating about the effect of European history on the history of "North American Eskimo tribes" notwithstanding their development wholly independently of Europeans):

In fifty or a hundred years, anyone who reads the history of these tribes as it is written today will not only find it outdated (for in the meantime he will know more or interpret the sources more correctly); he will also be able to see that in the 1960s [when *Truth and Method* was published] people read the sources differently because they were moved by different questions, prejudices, and interests.

The problem of the hermeneutic circle is this: Every text is encased in a tradition which preconditions how readers understand both the text and themselves, at the same time that readers themselves contribute to this same tradition by interpreting the texts which form it, including the text they're interpreting. It seems, therefore, that textual interpretation cannot yield knowledge.

2. The Promise of the Circle

Just as Heidegger argued that the forestructure of understanding conditions how we interact with the world, so Gadamer maintains that comparable preconceptions about a text—he calls them “prejudices,” in the sense of prejudgment—shape how we understand it:

A person who is trying to understand a text is always projecting. He projects a meaning for the text as a whole as soon as some initial meaning emerges in the text. Again, the initial meaning emerges only because he is reading the text with particular expectations in regard to a certain meaning.”⁹³

We cannot free ourselves from traditions and the textual preconceptions they engender, to see these independently of our interpretations of them or their influence on us. Instead, we are always within traditions, which shape how we understand ourselves as well as the texts we interpret.⁹⁴

Gadamer dealt with this circularity by embracing it. The circle is not a “problem” for textual understanding, but the condition of its possibility.⁹⁵ Since interpretive neutrality is impossible, our preconceptions of a text's meaning are the only basis on which we can initially understand anything about it. The key is that we not be unknowingly trapped within them: one

⁹³ *Id.* at 279.

⁹⁴ *Id.* at 294.

⁹⁵ Hoy, *Heidegger*, *supra* note 79, at 185. *See also* HEIDEGGER, *BEING & TIME*, *supra* note 24, at 195:

If the basic conditions which make interpretation possible are to be fulfilled, this must rather be done by not failing to recognize beforehand the essential conditions under which it can be performed. What is decisive is not to get out of the circle, but to come into it in the right way.

who pretends to interpretive neutrality has disregarded her preconceptions, leaving her unable to imagine other possibilities.⁹⁶

Gadamer illustrates how our preconceptions enable us to access the past with the concept of the classical. “Classical” here refers not to antiquity, but more generically to the height of achievement, an exemplar of the perfect.⁹⁷ This sense of “classical” depends on both past and present; one cannot describe a past summit of literature or art as “classic” without the sense of a present in relative decline. The classical requires both an exemplary past and a present which no longer measures up; it is “preservation amid the ruins of time.”⁹⁸ When we encounter a “classic”—say, a Shakespearean play—we are predisposed to regard it as exceptional, and simultaneously to regard contemporary works in the genre as diminished by comparison. Our understanding of a classical work, therefore, “will always involve *more* than merely historically reconstructing the past ‘world’ to which the work belongs.”⁹⁹ There is always the sense that the world of the work and the world which calls it “classic” are connected, that “we too belong to that world, and correlatively that the work too belongs to our world.”¹⁰⁰

The idea of the classical illustrates how the circular structure of understanding constitutes meaning from both past and present. Our current prejudices are our only means of connecting with the classical past, as a height of achievement which necessarily includes a perception of current

⁹⁶ GADAMER, TRUTH & METHOD, *supra* note 19, at 369 (“A person who does not admit that he is dominated by prejudices will fail to see what manifests itself by their light.”). *See also* GADAMER, HERMENEUTICS, *supra* note 25, at 27 (Consciousness of the effect of history “seeks to be aware of its judgments and to control its own preunderstanding; and thus it does away with . . . naïve objectivism . . .”).

⁹⁷ GADAMER, TRUTH & METHOD, *supra* note 19, at 297, 299.

⁹⁸ *Id.* at 301.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

decline. To understand the past, therefore, is to participate in an “event of tradition, a process of transmission in which past and present are constantly mediated.”¹⁰¹

The hermeneutic circle captures the dialogical relation of the tradition from the past with the interpreter in the present. “Understanding” means to grasp the content expressed by the text, from the standpoint of one’s own place in the present.¹⁰² Unlike the Romantics, who sought identity with the author, hermeneutics recognizes the temporal distance between author and interpreter, between the familiarity of the tradition and the strangeness of the temporally distant text.¹⁰³ The “real meaning of a text” is determined by *both* the original situation of the author and her audience *and* the present situation of the interpreter.¹⁰⁴

3. Textual Interpretive Knowledge

Nineteenth-century historicists sought to escape the hermeneutic circle methodologically, by figuratively walling themselves off from the effects of history on them and their interpretations.¹⁰⁵ Gadamer calls this naïve: method enables historicists to imagine they are engaged in the objective excavation of facts, while the history they write is actually historically conditioned.¹⁰⁶ Public-meaning originalism resembles nothing so much as 19th-century historicism.¹⁰⁷

¹⁰¹ *Id.* at 302.

¹⁰² *Id.* at 306.

¹⁰³ *Id.* See also GADAMER, HERMENEUTICS, *supra* note 25, at 23-24 (“[T]he reading and writing of what is written is so distanced and detached from its author . . . that the grasping of the meaning of the text takes on something of the character of an independent productive act.”).

¹⁰⁴ GADAMER, TRUTH & METHOD, *supra* note 19, at 307.

¹⁰⁵ *Id.* at 293, 304.

¹⁰⁶ GADAMER, TRUTH & METHOD, *supra* note 19, at 310.

¹⁰⁷ Mootz, *Originalist Fixation*, *supra* note 23, at 159.

For example, consider whether *Brown v. Board of Education* is consistent with the original meaning of the Equal Protection Clause of the 14th Amendment.¹⁰⁸ *Brown* famously held that racial segregation in public education violated this clause, but did not address its original meaning.¹⁰⁹ The conventional view is that the 14th Amendment was not generally understood to require racially integrated public schools at the time it was adopted.¹¹⁰ The historicist would rely on some epistemological method (like public-meaning originalism) to provide an answer free of her own preferences, thoughts, and desires.

More than half a century after it was handed down, *Brown* has been canonized as constitutional scripture; any constitutional scholar who attacks the legitimacy of *Brown*'s desegregation holding risks academic oblivion. No one can escape the effect of this canonization on their understanding of the decision. Even so committed a public-meaning originalist as Judge Bork strayed to defend *Brown*.¹¹¹ The salient question is not whether Bork's argument is correct, but why he felt compelled to make it? Bork himself answers the question: no self-respecting law professor can do other than defend the result in *Brown*, whatever the cost to originalist theory.¹¹²

¹⁰⁸ 347 U.S. 483 (1954). The Amendment provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State* deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

U.S. CONST., amend. XIV, § 1 (1868) (emphasis added). The italicized language constitutes the Equal Protection Clause.

¹⁰⁹ 347 U.S. at 492 (“[W]e cannot turn back the clock to 1868 when the [14th] Amendment was adopted.”).

¹¹⁰ See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). See also *infra* Part IV-E.

¹¹¹ Compare BORK, *supra* note 1, at 75 (“[N]o one [in 1868] imagined the equal protection clause might affect school segregation.”) with *id.* at 81-82 (The framers of the 14th Amendment misunderstood that racial segregation is inconsistent with the principle of equality constitutionalized by the Equal Protection Clause.).

¹¹² *Id.* at 77 (The “end of state-mandated segregation was the greatest moral triumph constitutional law had ever produced,” the “high ground of constitutional theory” whose defense became a scholarly imperative.).

As Gadamer generalizes the point, “Understanding is, essentially, a historically effected event. [W]e are always already affected by history.”¹¹³

Consciousness of the effects of history is consciousness that the interpreter exists in an historical situation: she is standing *within* the situation, not in some space outside it.¹¹⁴ As a public-meaning originalist, Judge Bork could not have objectively, independently, dispassionately analyzed whether *Brown* is consistent with the original public meaning of the Equal Protection Clause, nor could he have objectively, independently, dispassionately analyzed whether *Brown* does or should have the moral authority it has, because he was always already entangled in the realities that no academic of any reputation can undermine *Brown*, and that public-meaning originalism is not a viable interpretive theory in the current academic environment if it cannot account for *Brown*.

History works its effects on us whether we realize it or not—and we generally don’t, without conscious effort. Our historical situation constitutes a horizon beyond which we cannot see,¹¹⁵ unless we place ourselves in the situation of another whose meaning has challenged us and caused us to question and suspend our prejudices.¹¹⁶ Gadamer describes this as being “pulled up short” by the text:

How do we discover that there is a difference between our own customary usage and that of the text? [G]enerally we do so in the experience of being pulled up short by the text. Either it does not yield any meaning at all or its meaning is not compatible with what we had expected.¹¹⁷

¹¹³ GADAMER, TRUTH & METHOD, *supra* note 19, at 310, 311.

¹¹⁴ *Id.* at 301.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 302.

¹¹⁷ *Id.* at 280. *See also id.* at 375 (“[W]e have experiences when we are shocked by things that do not accord with our expectations A question presses itself on us; we can no longer avoid it and persist in our accustomed opinion.”); GADAMER, HERMENEUTICS, *supra* note 25, at 92 (“[W]e are guided by preconceptions and anticipations in our talking

One who is challenged in this way becomes conscious of the preconceptions which had unconsciously determined her understanding, problematizing them and causing her to suspend their validity. This enables “the text, as another’s meaning,” to “be isolated and valued on its own” rather than appropriated to support one’s preconceptions.¹¹⁸ And this, in turn, opens up interpretive possibilities that were previously closed to the interpreter by her fore-conceptions.¹¹⁹

Understanding is the fusion of two “horizons,” that of the text and that of ourselves.¹²⁰ We fuse horizons by posing the alterity of the text from the past against our own present expectations of its meaning: “Every encounter with tradition that takes place within historical consciousness involves the experience of a tension between the text and the present.”¹²¹ The interpreter imaginatively projects herself into the past of the text.¹²² “It is always part of understanding that the view that has to be understood must assert itself against the power of those tendencies of meaning that dominate the interpreter.”¹²³ This does not mean objectifying the other horizon, as if one were an uninvolved Cartesian subject observing it from the outside; we are not horizontal tourists who visit the text like a theme park before returning to the safety of home. This would put

in such a way that these continually remain hidden[;] it takes a disruption in oneself of the intended meaning of what one is saying to become conscious of these prejudices as such.”).

¹¹⁸ GADAMER, *TRUTH & METHOD*, *supra* note 19, at 298.

¹¹⁹ *Id.* at 298; *see* GADAMER, *HERMENEUTICS*, *supra* note 25, at 27, 28.

¹²⁰ GADAMER, *TRUTH & METHOD*, *supra* note 19, at 305.

¹²¹ *Id.*

¹²² *Id.* at 316-17.

¹²³ *Id.* at 522-23.

nothing of the interpreter at risk;¹²⁴ it forecloses that the text “can be a claim *on us*.”¹²⁵ Nor is this fusion the interpreter’s Romantic loss of herself in the horizon of the past, which is another self-deception.¹²⁶ It is precisely *oneself* whom one must project *into* the past horizon; only then can the interpreter place in question her expectations of meaning.¹²⁷ It is because the text “makes a claim on us” that we are spurred to understand it.¹²⁸ With the interpreter’s own preconceptions and prejudices at risk within the horizon of the text, she is in a position to consider, in Gadamer’s words, if what the text is saying to us “could be right.”¹²⁹

* * *

The hermeneutic circle was a “vicious” circle for the Romantics, who sought to found interpretation in the human sciences on something resembling the methods of natural and physical science. To them the circle was epistemological quicksand that could never support reliable knowledge. Heidegger argued that, quicksand or not, the circle was unavoidable as a matter of ontology. The question is not how to avoid the circle, but how to deal with it.

¹²⁴ *Id.* at 314.

¹²⁵ *Id.* at 303 (emphasis added).

¹²⁶ *Id.* at 316, 458.

¹²⁷ *Id.* at 281:

[W]e cannot stick blindly to our own fore-meaning about the thing if we want to understand the meaning of another[;] we remain open to the meaning of the other person or text. But this openness always includes our situating the other meaning in relation to the whole of our meanings or ourselves in relation to it.

¹²⁸ *Id.* at 522-23.

¹²⁹ *Id.* at 303. *See also id.* at 458 (“[T]he other world we encounter is not only foreign but is also related to us. It has not only its own truth *in itself* but also its own truth *for us*.”); *id.* at 504 (“Understanding . . . does not consist in a technical virtuosity of ‘understanding’ everything written. Rather, it is a genuine experience . . . , an encounter with something that asserts itself as truth.”).

Gadamer applied Heidegger's ontological circle to textual interpretation. Since there is no "god's-eye view" of the world from which we can see it "as it really is,"¹³⁰ our foreconceptions, generated by our necessarily prior relationship to the texts we interpret, are where understanding must start. But this does not end in an interpretive solipsism that makes of a text whatever we wish; text and tradition also make their claims. Understanding is the fusion of these two horizons, interpreter and text, present and past. The hermeneutic circle is not a vicious obstacle to understanding, but its very condition.

III. FIXATION EPISTEMOLOGY AND HERMENEUTIC ONTOLOGY

The fixation thesis holds that the meaning of a traditional text like the Constitution is fixed by the semantic meaning of its words and clauses, and the context that existed when they were adopted as the Constitution. For public-meaning originalism, the factual existence of this fixed original meaning is assumed, leaving the focus on the epistemological problem: which method most reliably uncovers the semantic meaning and relevant contexts which fix constitutional meaning in the past?

Philosophical hermeneutics provides an answer to the ontological question that public-meaning originalists only assume: textual meaning does not exist in the past as a fact. Meaning is mutually constituted by past and present, by the contemporary influences of the interpreter and her life and times, and the tradition by which the text has been handed down from past to present. It follows that textual meaning is not a fixed object resting in the past; because it is partially constituted by the present, meaning necessarily varies with time. As the text moves forward

¹³⁰ HILLARY PUTNAM, REASON, TRUTH AND HISTORY 49-50 (1981) (criticizing metaphysical realism's "God's eye point of view"). See also Mootz, *Originalist Fixation*, *supra* note 23, at 161-62 ("Apprehending a text as a static and closed meaning from the past would require an interpreter from nowhere."). But see generally THOMAS NAGEL, THE VIEW FROM NOWHERE (1986) (constructing a limited theory of "objective" understanding).

through time, present concerns shift, combining with the past in different ways.¹³¹ Formerly present concerns become past, adding to the tradition that encases the text. New concerns in a new present will always interact with an expanding textual tradition.

To save the fixation thesis, Professors Whittington and Solum both attempt to refute the hermeneutic answer to the ontological question of textual meaning. Whittington argues that hermeneutics contradicts fixation, while Professor Solum argues they are consistent. Despite these logically opposite positions, Whittington and Solum misread Gadamer in the same way, epistemologically rather than ontologically. Both misunderstand Gadamer’s metaphor of fusing horizons as an illustration of the epistemological challenge of recovering the fixed original meaning of a traditional text like the Constitution, whereas Gadamer intends the metaphor to illustrate what textual understanding is. Likewise, they misunderstand application as a procedure divorced from interpretation and within one’s conscious control: one first uses originalist method to interpret the text, to discover its objective meaning, and only thereafter does one apply that meaning to solve a particular problem. Gadamer rejects the methodological exclusion of application from interpretation, conceptualizing these as a single unified event of understanding. One does not understand a text *before* its application, but *in* its application.

A. *Horizons*

1. Epistemological Horizons

Professor Whittington rejects outright that understanding has a circular structure. Gadamer’s account of understanding, he contends, relies on “incommensurable conventions” and

¹³¹ See GADAMER, HERMENEUTICS, *supra* note 25, at 57. See also Mootz, *Originalist Fixation*, *supra* note 23, at 161 (“[N]o text can have an essential and unvarying meaning because it is appropriated continually by historically situated readers.”).

“convention-bound” interpretation.¹³² He maintains that together these refute Gadamer’s argument that the structure of textual understanding circles between past and present, and demonstrate the inapplicability to textual interpretation of the metaphorical “fusion of horizons” Gadamer deploys to illustrate understanding.

Drawing on E.D. Hirsch’s criticism of the horizontal metaphor,¹³³ Whittington understands Gadamer to argue that a textual interpreter is trapped within her own interpretive horizon.¹³⁴ But if the interpreter cannot see beyond her horizon, Whittington reasons, she can only sort out disagreements *within* that horizon; interpretive questions rooted in other horizons would be invisible.¹³⁵ Because “interpretation depends upon the resources of an interpretive tradition, it cannot exceed that tradition.”¹³⁶

An interpreter trapped within her horizon, Whittington continues, cannot do what interpretation so often requires. Existing horizontal conventions are only provisional starting points which interpreters must leave behind to discover original meaning.¹³⁷ But if “text, interpretive conventions, and reader” enable one to see beyond one’s own horizon to that of the text, they must also enable recovery of the text’s original public meaning.¹³⁸ Whittington concludes that

¹³² WHITTINGTON, INTERPRETATION, *supra* note 1, at 102.

¹³³ E.D. HIRSCH, VALIDITY IN INTERPRETATION app. II at 252-54 (1967).

¹³⁴ WHITTINGTON, INTERPRETATION, *supra* note 1, at 103.

¹³⁵ See WHITTINGTON, INTERPRETATION, *supra* note 1, at 103 (citing HANS-GEORG GADAMER, TRUTH & METHOD 99, 148, 200-07, 296, 340-44, 374, 390-95 (Sheed & Ward trans. Garrett Barden & John Cumming ed. 1975) [hereinafter GADAMER, TRUTH & METHOD (1975)]; DAVID COUZENS HOY THE CRITICAL CIRCLE: LITERATURE, HISTORY, AND PHILOSOPHICAL HERMENEUTICS 50, 68-72 (1978)). Many of Whittington’s citations to *Truth and Method* seem unrelated to the proposition that an interpreter is epistemologically limited by her horizon.

¹³⁶ WHITTINGTON, INTERPRETATION, *supra* note 1, at 103.

¹³⁷ *Id.* at 103. See also *id.* at 103 (“Interpretation is an individual skill that cannot be reduced to following tradition.”).

¹³⁸ *Id.*

Gadamer's account is either wrong—it does not lead to textual understanding, because interpreters cannot supersede their horizontal limits—or it is irrelevant—the resources which enable interpreters to supersede horizontal limits also enable their recovery of original public meaning.¹³⁹

The problem, Whittington reasons, is Gadamer's dependence on Heidegger's conception of human existence as being-in-the-world. This "historicized nature of human understanding" drastically underweights the influence of the text in the interpretive process,¹⁴⁰ allowing the "reader's interpretive presuppositions" to overwhelm it. Because the interpreter is apparently trapped in her present horizon, walled off from the text, she is the sole source of textual meaning. What Gadamer calls fusing one's horizon with the text's, Whittington calls "submersion" of the text's horizon into the interpreter's: "the decontextualized text is brought into contact with the overwhelming context of the reader," and disappears.¹⁴¹

The "only way" to maintain the text as an independent contributor to its meaning, Whittington argues, is to recognize it as the repository of the author's "contextualized intentions."¹⁴² But again, if an interpreter recognizes the text as the representation of authorial intention, the fusion metaphor fails "in both directions": First, the text contributes nothing to the fusion of horizons without the author's intentions, but the need for fusion evaporates if the

¹³⁹ WHITTINGTON, INTERPRETATION, *supra* note 1, at 103-04. *See also* HIRSCH, *supra* note 133, at 254 (paragraph indent deleted):

How can fusion take place unless the things to be fused are made actual, which is to say, unless the original sense of the text has been understood? [H]ow can it be affirmed that the original sense of a text is beyond our reach and, at the same time, that valid interpretation is possible? . . . If the interpreter is really bound by his own historicity, he cannot break out of it into some halfway house where past and present are merged. [O]nce it is admitted that the interpreter can adopt a fused perspective different from his own contemporary one, then it is admitted in principle that he *can* break out of his own perspective.

¹⁴⁰ WHITTINGTON, INTERPRETATION, *supra* note 1, at 103.

¹⁴¹ *Id.* at 103-04.

¹⁴² *Id.* at 104.

intentions are available through the text; and second, without original meaning there is nothing in the horizon of the text to fuse with the interpreter's present horizon, but if the resources within the interpreter's present horizon enable fusion with the horizon of the text, she can just as easily discover the original meaning and forego the need for fusion.¹⁴³ "The idea of conceptual fusion self-destructs as soon as textual content is taken into consideration, requiring that we abandon the metaphor in favor of a more accurate description of textual interpretation."¹⁴⁴

In contrast to Whittington, Professor Solum's goal is to demonstrate the consistency of fusion with fixation.¹⁴⁵ Solum agrees that we can only understand a traditional text like the Constitution from "our own perspective in the here and now." Like Whittington, however, Solum understands horizons as epistemological limits.¹⁴⁶ Imprisoned within her own horizon, the interpreter is susceptible to mistaken assumptions—for example, that the current semantic meaning of a constitutional text is the same as its original semantic meaning.¹⁴⁷ The possibility of error increases when the current semantic meaning is reinforced by a contemporary context that was absent at adoption. For example, Solum suggests that

our understanding of what the word "cruel" means is necessarily influenced by contemporary practices of punishment, including long periods of incarceration, that did not exist at the time the Eighth Amendment was framed and ratified. We may not overcome our assumptions about the meaning of the words "cruel" or "unusual," and hence it is

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Solum has elsewhere relied on Gadamer's description of the hermeneutic circle, to respond to the claim that originalism is not viable if the Constitution is viewed as an organic, intra-textual whole rather than a collection of separate clauses. See Solum, *Semantic Originalism*, *supra* note 1, at 107 (quoting GADAMER, TRUTH & METHOD (1975), *supra* note 135, at 264).

¹⁴⁶ Solum, *Originalism and the Fixation Thesis*, *supra* note 22, at 147 (quoting GADAMER, TRUTH & METHOD, *supra* note 21, at 316 ("[A] hermeneutical situation is determined by the prejudices that we bring with us. They constitute, then, the horizon of a particular present, for they represent that beyond which it is impossible to see.")).

¹⁴⁷ Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 22, at 148.

always possible that we will mistake the late-eighteenth-century meaning of those words.¹⁴⁸

Casting the interpreter's horizon as an epistemological obstacle to discovery of the textual horizon enables Solum to distinguish the interpreter's *beliefs* about original public meaning from the independently existing *fact* of original public meaning: "[O]ur *understanding* of original meaning (as opposed to the original meaning itself) is always subject to change."¹⁴⁹ Our beliefs about original meaning are preconditioned by the traditions in which we are embedded, but neither our interpretive preconceptions nor the traditions that engender them constitute the original meaning.

The fusion of horizons, in Solum's view, is asymptotic. New information about the original semantic meaning and context illuminate more accurate ways of understanding traditional texts, understandings that more closely approach the fixed but sometimes elusive original meaning.¹⁵⁰ Indeed, the point of the fixation thesis is to force the engagement of our beliefs about original meaning with the fact of this meaning, so as to make our understanding as accurate as possible.¹⁵¹ The interpreter's horizon approaches the horizon of the text ever more closely, but it is only ever the interpreter's horizon that moves; as mandated by the fixation thesis, the textual horizon remains the same, anchored in place by the semantics and context existing at adoption. Accordingly, Solum concludes that "there is nothing in Gadamer's hermeneutics that undermines the fixation thesis—once that thesis is properly articulated and understood."¹⁵²

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* See also *id.* at 149 ("The fact that our knowledge of original meaning is imperfect does not entail that there is no original meaning.").

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

2. Phenomenological Horizons

Both Whittington and Solum misunderstand the nature of the “horizons” whose fusion produces textual meaning, by reading them as epistemological limits rather than phenomenological expansions. They presuppose the ordinary language understanding of “horizon,” as the visual limit beyond which a person standing at a fixed point cannot see.¹⁵³ Thus their premise that the interpreter is always imprisoned within the epistemological boundary of her own (present) horizon.

Gadamer did not intend the generic understanding of “horizon” assumed by Whittington and Solum, but the phenomenological one developed by Edmund Husserl. The principal exponent of the phenomenological movement in the early 20th century, Husserl’s signature concept was the “phenomenological reduction,” which—greatly simplified—sought to reduce philosophical analysis to the phenomena of mental consciousness, while setting aside or “bracketing” the question whether or how the objects of this consciousness relate to objects in the material world.¹⁵⁴

The concept of “horizon” plays a critical role in Husserl’s account of perception. When we directly observe an object in three-dimensional space, we can literally see only a part of it at any one time.¹⁵⁵ Yet, Husserl maintains, our mental perception is of the *entire* object, not just the part

¹⁵³ “Horizon,” in OED ONLINE (2018) (“The boundary or limit of any ‘circle’ or ‘sphere’ of view, thought, action, etc. . . .; that which bounds one’s mental vision or perception; limit or range of one’s knowledge, experience, or interest.”), available at <http://www.oed.com/view/Entry/88458?rskey=zuXlTr&result=1#eid>.

¹⁵⁴ EDMUND HUSSERL, IDEAS PERTAINING TO A PURE PHENOMENOLOGY AND TO A PHENOMENOLOGICAL PHILOSOPHY § 33 at 65-66, § 52 at 117-18 (F. Kersten trans. 1982) (1913). See generally KENNEY, *supra* note 14, at 817.

¹⁵⁵ HUSSERL, *supra* note 154, § 44 at 94-95.

we directly observe.¹⁵⁶ We always perceive *more* than is directly given to our senses.¹⁵⁷ For example, standing on the street we see the front side of a house, but not the back. We can move around to the back, but any movement that brings the back side into view will preclude us from directly observing the front. Yet our mental perception is of an entire house, not merely the front wall.

How can this be? Husserl argued that our experience of houses and the contexts in which they normally appear fills out what is missing from direct observation,¹⁵⁸ enabling us mentally to perceive the entire house despite only a part being directly visible. So in a residential neighborhood, we would be shocked to walk behind a house to discover the front exists as a mere façade, even though from the front of the house we could see neither the entire neighborhood nor the back of the house. But on a Hollywood backlot we'd be shocked to find a whole house behind (what we would assume from the context is) a mere façade, again without ever having actually seen more than the front of the façade. Our experience of houses and façades and the contexts in which they normally appear fills in our perception in both cases, even though we cannot ever

¹⁵⁶ See Henry Pietersma, *Intuition and Horizon in the Philosophy of Husserl*, 34 PHIL. & PHENOMEN. RES. 95, 99, 100 (1973):

In perceiving a material object the subject does not see the object all at once. Yet Husserl insists that a perceptual situation is a case of seeing the object itself . . . Since the perceptual object is an external object of a material sort . . . the subject is *also* aware that there is more to the object than what he actually perceives.

¹⁵⁷ David Vessey, *Gadamer and the Fusion of Horizons*, 17 INT'L J. PHIL STUDIES 531, 533 (2009).

Heidegger calls this the "as" structure of interpretation: we always interpret something *as* something else, within the web of relevant relations that constitute our world. See HEIDEGGER, BEING & TIME, *supra* note 24, at 189; HEIDEGGER, METAPHYSICAL FOUNDATIONS, *supra* note 62, at 127-28. A train whistle, for example, is always perceived as a train, not as a sound *simpliciter*. Indeed, it requires extraordinary mental effort to hear a train whistle and *not* perceive the train emitting it.

¹⁵⁸ HUSSERL, *supra* note 154, § 113 at 267 ("Every perception . . . has its background of perception."); EDMUND HUSSERL, CARTESIAN MEDITATIONS 144 (1973) (1934):

Perception has horizons made up of other possibilities of perception, as perceptions we could have, if we actively directed the course of perception otherwise: if, for example, we turned our eyes that way instead of this, or if we were to step forward or to one side, and so forth.

directly observe the entirety of either all at once. The sum of these experiences and contexts is the phenomenological horizon of the house or the façade.¹⁵⁹

For Husserl, therefore, the horizon of an object of perception is the opposite of a limit on what one can see. To the contrary, a horizon contains more than can be seen directly or is otherwise given to the senses. A phenomenological horizon *expands* the limits of sensory perception, rather than bounding them.

Gadamer expressly adopts Husserl's phenomenological horizon, adapting it from mental perception to textual interpretation.¹⁶⁰ Accordingly, he emphasizes that "horizon" does not signify a fixed epistemological limit to what one can understand of a text.¹⁶¹ One can see beyond even a perceptual horizon, simply by moving to higher ground. "Horizons change for a person who is

¹⁵⁹ Cf. Vessey, *supra* note 157, at 534 ("Those aspects of an object that are not directly accessible to our senses, but make it possible to see an object as an object, Husserl calls the object's 'horizon.'").

¹⁶⁰ E.g., GADAMER, TRUTH & METHOD, *supra* note 19, at 247 ("[T]he concept and phenomenon of the horizon is of crucial importance for Husserl's phenomenological research. With this concept, which we too shall have occasion to use, Husserl is obviously seeking to capture the way all limited intentionality of meaning merges into the fundamental continuity of the whole."); *id.* at 464 & n.83 ("Seen phenomenologically, the 'thing-in-itself' is, as Husserl has shown, nothing but the continuity with which the various perceptual perspectives on objects shade into one another.") (citing HUSSERL, *supra* note 154, § 41); see Walter Lammi, *Gadamer's Debt to Husserl*, 71 ANALECTA HUSSERLIANA: YEARBOOK OF PHENOMENOLOGICAL RESEARCH 167, 176 (A.T. Tymieniecka ed. 2001) (observing that Gadamer understands "horizon" in terms of Husserl's phenomenology). See also GADAMER, TRUTH & METHOD, *supra* note 19, at 245 ("[W]e need to make room in our discussion for Husserl's phenomenology.").

¹⁶¹ See GADAMER, TRUTH & METHOD, *supra* note 19, at 247 ("A horizon is not a rigid boundary but something that moves with one and invites one to advance further."); *id.* at 313:

Since Nietzsche and Husserl, the word ["horizon"] has been used in philosophy to characterize the way in which thought is tied to its finite determinacy, and the way one's range of vision is gradually expanded. A person who has no horizon does not see far enough and hence over-values what is nearest to him. On the other hand, "to have a horizon" means not being limited to what is nearby but being able to see beyond it.

See also Dermot Moran, *Gadamer and Husserl on Horizon, Intentionality, Intersubjectivity, and the Life-World*, in 2 GADAMER'S HERMENEUTICS AND THE ART OF CONVERSATION 73, 84 (A. Wierciński ed. 2011) ("Gadamer opposes the view that horizons are mutually exclusive or that world views are hermetically sealed and nonporous . . . Horizons are not just limits but are essentially open to other horizons; they are moving boundaries.")

moving.”¹⁶² Even without moving we usually know from experience what lies beyond.¹⁶³ As I’ve explained, a phenomenological horizon includes all possible experiences of an object, not just those we can see at one particular moment. Like a perceptual horizon, a phenomenological horizon is not limited by what one sees from one fixed viewpoint, but includes everything knowledge and experience tells her lies beyond.¹⁶⁴

Finally, we can enlarge our horizons figuratively. While our present horizon dictates conventional understandings of texts, we are always aware—or can be made aware—that other possible meanings exist.¹⁶⁵ The interpreter’s horizon is not fixed, but can expand to include the horizons of others.

Whittington and Solum misunderstand the meaning of “horizon” in *Truth and Method*. When the horizons of interpreter and text are understood as analogues to Husserl’s phenomenologically expanded horizons, Whittington’s problem of horizontal imprisonment disappears; the text always makes claims on the reader’s perspective which can never overwhelm the text. Because the horizon is phenomenological not epistemological, there is always room for the text to make its own claims. As Professor Mootz explains, the “text stands as a provocation that cannot be wholly subordinated by the reader’s perspective.”¹⁶⁶ Likewise, there is no need to overcome or compensate for an interpreter’s horizon, as Solum assumes, because it is not an epistemological obstacle to textual understanding. The phenomenological understanding of

¹⁶² GADAMER, TRUTH & METHOD, *supra* note 19, at 315.

¹⁶³ Vessey, *supra* note 157, at 533.

¹⁶⁴ Cf. Moran, *supra* note 161, at 86 (“[N]ot just every perception but every ‘lived experience’ of whatever kind bears within a set of unique essential possibilities that go to make up what [Husserl] calls the ‘horizon’ of the experience.”).

¹⁶⁵ Vessey, *supra* note 157, at 536; *see supra* note 117 and accompanying text.

¹⁶⁶ Mootz, *Originalist Fixation*, *supra* note 23, at 161.

“horizon” collapses Solum’s distinction between one’s beliefs about original meaning and the fact of original meaning, and with it his conclusion that the fixation thesis coheres with philosophical hermeneutics.

B. *Interpretation/Application*

The conceptual heart of *Truth and Method* is a section entitled, “The Recovery of the Fundamental Hermeneutic Problem,” referring to both the problematic loss of application from hermeneutic understanding, and the philosophical problem created by its restoration to a central place in interpretation.¹⁶⁷

1. Application Restored

The biblical hermeneutics that emerged from the Reformation in the late 17th century recognized three elements or modes of textual comprehension: “Understanding,” or the grasp of obvious textual meaning; “interpretation” or exegesis, referring to the elucidation of textual meaning not immediately evident on the face of the text; and “application,” or the deployment of textual meaning to address problems of law, faith, and ethics.¹⁶⁸

The Romantics fused understanding and interpretation, arguing that interpretation is always necessary for understanding.¹⁶⁹ This left application an afterthought to the main interpretive event of articulating textual meaning in the abstract. Biblical hermeneutics, for example, came to understand application of Biblical texts to theological problems as separate from

¹⁶⁷ GADAMER, TRUTH & METHOD, *supra* note 19, at 318-50.

¹⁶⁸ *Id.* at 318. Gadamer emphasizes that these modes were not methods the interpreter deployed but “talents” she possessed, requiring a certain “finesse of mind.” *Id.*

¹⁶⁹ *Id.* See also *id.* at 185-86 (summarizing Schleiermacher’s argument that the normal consequence of textual understanding is misunderstanding, which interpretation must correct.).

exegesis of their meaning.¹⁷⁰ Application became a subsidiary procedure which had its place elsewhere and after understanding/interpretation.

By contrast, Gadamer melds application with the Romantic unity of textual understanding/interpretation, so as to combine understanding/interpretation/application into a single event of textual comprehension. Whereas the Romantics claimed that understanding is always interpretation, Gadamer argues that understanding is always interpretation *and* application:

[U]nderstanding always involves something like the application of the text to be understood in the present situation of the interpreter. Thus we are forced to go, as it were, one stage beyond romantic hermeneutics, by regarding not only understanding and interpretation, but also application as comprising *one unified process*. [W]e consider application to be *just as integral a part* of the hermeneutical process as are understanding and interpretation.¹⁷¹

Gadamer’s use of “application” is easily misunderstood. In the ordinary sense of application, a person takes a principle and deploys it to a particular situation involving someone or something else—*i.e.*, a situation the interpreter is figuratively standing “outside” of. For example, the Supreme Court in *Brown v. Board of Education* extracted a principle of racial equality from the Equal Protection Clause and applied it to invalidate the practice of government-mandated segregation in public education,¹⁷² But many of the Justices have remained notoriously bad at hiring African American law clerks,¹⁷³ even as they have expanded the application of *Brown* to a

¹⁷⁰ *E.g.*, *id.* at 318 (After Schleiermacher, the “edifying application of Scripture in Christian preaching . . . seemed very different from the historical and theological understanding of it.”).

¹⁷¹ *Id.* at 318-19 (emphasis added).

¹⁷² 347 U.S. 483 (1954).

¹⁷³ For example, in 33 years on the Court, Chief Justice Rehnquist did not hire a single African American clerk. Of the scores of law clerks hired by Justice Ginsburg since her appointment to the Court in 1993, only one has been African American. See Mark Joseph Stern, *The Supreme Court Is Terrible at Hiring Diverse Law Clerks, but Neil Gorsuch Is Surprisingly Good at It*, Slate (Apr. 16, 2018), <https://slate.com/news-and-politics/2018/04/the-supreme-court-is-terrible-at-hiring-diverse-law-clerks-but-neil-gorsuch-is-surprisingly-good-at-it.html>.

wide range of government discrimination. These Justices have not applied to themselves the principle of *Brown* they apply to others.

This is not what Gadamer means by “application.” A Gadamerian interpreter is always interpreting herself along with the text. No interpretation is free from the interests of the interpreter; this follows from the constitution of textual meaning by the present as well as the past. Every interpreter is standing *within* a situation; when she applies the text to that situation, therefore, she applies it to herself. “[T]o understand a text always means to apply it to ourselves”¹⁷⁴

As I’ve discussed,¹⁷⁵ the canonical status of *Brown* has placed its holding beyond questioning by the legal academic mainstream. As Judge Bork lamented, even the great Professor Wechsler was attacked for his suggestion that *Brown* lacked a neutral doctrinal justification.¹⁷⁶ Interpreting *Brown* to place public school desegregation outside the original public meaning of the Equal Protection Clause would have rendered it illegitimate by Bork’s own interpretive lights, saying as much about new-originalist theory and Bork himself as about *Brown*. When he interpreted *Brown*, Bork could not avoid also interpreting himself and public-meaning originalism, knowing that only one interpretation of *Brown* and the Equal Protection Clause could preserve the mainstream bona fides of both his reputation and his preferred interpretive methodology.

¹⁷⁴ *Id.* at 416; accord GADAMER, HERMENEUTICS, *supra* note 25, at 55 (“In the last analysis, *all* understanding is self-understanding.”).

¹⁷⁵ See *supra* notes 110-11 and accompanying text.

¹⁷⁶ BORK, *supra* note 1, at 78-79 (discussing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-35 (1959)).

For Gadamer, then, a text is not understandable without its applications *to its interpreter*, because the text's meaning *is* those applications.¹⁷⁷ Gadamer could hardly be clearer about this unity: "Understanding here is always application."¹⁷⁸

2. Application Is Interpretation

Having committed himself to the unity understanding/interpretation/application, Gadamer moves to the philosophical problem this unity creates: we can only "apply" something we already possess, but it seems to follow from understanding/interpretation/application that we do not possess textual meaning before the application that partially constitutes this unity. Gadamer turns to two sources to illustrate this problem and its solution: Aristotle's *Ethics* and its account of ethical or moral knowledge,¹⁷⁹ and legal interpretation and its identity with historical interpretation.¹⁸⁰

a. *Aristotelian Ethics*. Gadamer reads the *Ethics* to show that we are not subjects separated from moral knowledge as an object, as if it were a skill we could learn first and then apply. Rather, in ethical situations,

we are always already in the situation of having to act . . . , and hence we must already possess and be able to apply moral knowledge. That is why the concept of application is highly problematical. 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.¹⁸¹

¹⁷⁷ E.g., GADAMER, TRUTH & METHOD, *supra* note 19, at 321-22 ("The meaning of a law that emerges in its normative application is fundamentally no different form the meaning reached in understanding a text."); *id.* at 338 ("The work of interpretation is *to concretize* the law in each specific case—i.e., it is a work of application.").

¹⁷⁸ *Id.* at 320. *See also id.* at xxix ("[A]pplication is an element of understanding itself."); *id.* at 321-22 ("To distinguish between a normative function and a cognitive one is to separate what clearly belong together. [D]iscovering the meaning of a legal text and discovering how to apply it in a particular legal instance are not two separate actions, but one unitary process."); *id.* at 421 ("[U]nderstanding always includes an element of application . . .").

¹⁷⁹ *Id.* at 322-33 (discussing Aristotle, *Nicomachean Ethics* (W.E. Ross trans.) [hereinafter Aristotle, *Ethics*], in WORKS OF ARISTOTLE, *supra* note 14, at 935-1112 i-x 1094a1-1181b25).

¹⁸⁰ GADAMER, TRUTH & METHOD, *supra* note 19, at 334-39.

¹⁸¹ *Id.* at 327.

Gadamer will argue that grasping the meaning of a traditional text is like making ethical decisions; just as moral knowledge arises from the particularities of the agent and the situation calling her to act, so textual meaning is a function of both the interpreter in the present and the traditional text from the past. In neither case can universal rules govern the crucial event of moral decision or textual understanding.¹⁸²

The *Ethics* emphasizes the importance of the moral agent's particularity to ethical decision making. The quality of one's education is important to the acquisition of moral knowledge, because we judge well the things we know.¹⁸³ But so also is the content of one's character. How to act rightly in a situation depends on the actor's experience of prior situations and the character she developed by acting in these situations.¹⁸⁴ Education is less important for the abstract knowledge it imparts than for the character it develops. Who we are determines what we can understand of a situation calling for action, and what we understand of such a situation determines how we will act in it.¹⁸⁵ Whether education or experience, the capacity to judge what a situation requires of us depends on something we already have or know.¹⁸⁶

¹⁸² Gadamer reads the *Ethics* to have liberated moral decision making from Platonic metaphysics, by showing that the good exists only in human action rather than as a general abstraction. *Id.* at 322-23 (citing Aristotle, *Ethics*, *supra* note 179, at 937-38 i.4). The basis for moral knowledge is a conscious effort to *do* the right thing, not just to think it; this doing eventually orients one's habits and character to the good. *See* GADAMER, TRUTH & METHOD, *supra* note 19, at 323.

¹⁸³ Aristotle, *Ethics*, *supra* note 179, at 936 i.3 1094b28-1095a2, 937 i.4 1095b3.

¹⁸⁴ *Id.* at 952 ii.1 1103a16-17, 953 1103b14-17:

[M]oral virtue comes about as the result of habit. [B]y doing the acts that we do in our transactions with other men we become just or unjust, and by doing the acts that we do in the presence of danger, and being habituated to feel fear or confidence, we become brave or cowardly.

See also id. at 953 1103b27-31 (“[W]e must examine the nature of actions . . . for these determine also the nature of the states of character that are produced . . .”).

¹⁸⁵ Carl Page, *Hermeneutics and Practical Rationality*, 27 INT’L PHIL. Q. 81, 93 (1987).

¹⁸⁶ *See* Aristotle, *Ethics*, *supra* note 179, at 937-38 i.4 1095b6-8 (“For the fact is the starting point . . . and the man who has been well brought up has or can easily get starting points.”).

Because of the dependence of moral knowledge on individual character, one cannot acquire it by learning universal rules, as in the study of geometry or physics. “Matters concerned with conduct and questions of what is good for us *have no fixity*.”¹⁸⁷ This refers to the variability of the situation as well as of the agent; as Gadamer observes, “What is right . . . cannot be fully determined independently of the situation that requires a right action from me.”¹⁸⁸ Moral knowledge is thus a function of the particularities of both the agent called upon to act and the situation calling for action.

The dependence of moral knowledge on particularities is an insightful analogy showing the impossibility of method in the human sciences. Scientific knowledge is abstract, detached from any particular person, time, or place, whereas knowledge in the human sciences (as in, for example, the acquisition of moral knowledge) is qualitatively different because of its dependence on particularity.¹⁸⁹ As we’ve seen,¹⁹⁰ Gadamer argues that the interpreter can only approach traditional texts as the person she is within the textual traditions which both form and are formed by her. The *Ethics* illustrates for Gadamer the folly of method, because in understanding “the knower is not standing over against a situation that he merely observes,” but “is directly confronted

¹⁸⁷ *Id.* at 953 ii.2 1104a4-5 (emphasis added).

¹⁸⁸ GADAMER, *TRUTH & METHOD*, *supra* note 19, at 327-28. *See also id.* at 323 (“If man always encounters the good in the form of the particular practical situation in which he finds himself, the task of moral knowledge is to determine what the concrete situation asks of him . . .”).

¹⁸⁹ *Id.* at 324 (emphasis deleted):

We spoke of the interpreter’s belonging to the tradition he is interpreting, and we saw that understanding itself is a historical event. The alienation of the interpreter from the interpreted by the objectifying methods of modern science, characteristic of the hermeneutics and historiography of the nineteenth century, appeared as the consequence of a false objectification.

¹⁹⁰ *See supra* text accompanying notes 102-29.

with what he sees.”¹⁹¹ The knowledge he acquires is not just something he knows, but “something he has to do.”¹⁹² The textual interpreter is likewise never standing outside the tradition in which the text has been handed down to the present, nor the situation in which the text is to be understood/interpreted/applied, but must determine textual meaning while standing within both horizons.

Gadamer formalizes this analogy with an exegesis of book vi of the *Ethics*, in which Aristotle famously defines and contrasts the intellectual virtues, including scientific knowledge (*epistēmē*), craft or skill (*technē*), and practical wisdom (*phronēsis*).¹⁹³ Gadamer is keen to show that practical wisdom, rather than science or craft, is the epistemological model for the human sciences. His analysis of these differences is intricate and complex, but the conclusion is familiar: in acquiring scientific knowledge the observing subject is separated from the object of knowledge, and in using a skill the making subject is distinct from the object she makes, but in exercising practical wisdom the agent is defined and constituted by how she chooses and acts.¹⁹⁴ Scientific and technical knowledge always involve something like the application of an a priori universal rule to a separate and subsequent particular situation, whereas practical wisdom only emerges in the actions chosen in particular situations.¹⁹⁵

¹⁹¹ GADAMER, TRUTH & METHOD, *supra* note 19, at 324.

¹⁹² *Id.*

¹⁹³ *Id.* at 324-33 (discussing Aristotle, *Ethics*, *supra* note 179, at 1022-36 vi).

¹⁹⁴ JAMES RISSER, HERMENEUTICS AND THE VOICE OF THE OTHER: RE-READING GADAMER’S PHILOSOPHICAL HERMENEUTICS 106 (1997); Paul Schuchman, *Aristotle’s Phronēsis and Gadamer’s Hermeneutics*, 23 PHIL. TODAY 41, 43-44 (1979).

¹⁹⁵ Aristotle, *Ethics*, *supra* note 179, at 1033 vi.9 1143a32-35 (“[N]ot only must the man of practical wisdom know particular facts, but understanding and judgement are also concerned with things to be done”). *See also* Schuchman, *supra* note 194, at 43 (“Moral knowledge . . . is not a knowledge of goodness as such in its essential and unchanging structure.”); Catherine H. Zuckert, *Hermeneutics in Practice: Gadamer on Ancient Philosophy*, in CAMBRIDGE GADAMER, *supra* note 92, at 201, 212:

Gadamer concludes that the *Ethics* models the problem of application and its solution,¹⁹⁶ in three ways:

(i) The moral agent's understanding of what an ethical situation demands of her is not the later application of a predetermined good, but co-determines the good from the beginning.¹⁹⁷ This parallels Gadamer's hermeneutic conclusion that textual understanding is always application—that is, the character of the textual interpreter, and the occasion and motivation for her interpretation, necessarily contribute to the meaning of the text.

(ii) Because the good of an action is partially constituted by its applications, it cannot be determined in the abstract as a universal rule, but must respond directly to the demands of the situation.¹⁹⁸ Similarly, the meaning of a text cannot first be established in the abstract and then applied to a particular interpretive problem; rather, interpretation, application, and understanding occur simultaneously in a single event.

(iii) Because a good action depends on both the demands of the situation and the character of the agent, the agent must not ignore her own particularity, which is the only way she can understand what the situation ethically demands of her. Likewise, because we

Knowledge of the good is not like other forms of knowledge; it does not consist of generalizations from empirical data or experiences, nor does it constitute the application of general rules to particular situations, nor it is [sic] deductive like geometry It does not . . . involve cognition of an abstract or self-subsisting "idea" of the kind Aristotle criticizes in his works on ethics.

¹⁹⁶ GADAMER, TRUTH & METHOD, *supra* note 19, at 333.

¹⁹⁷ *Id.* at 333 (Like Aristotle, "[w]e too determined that application is neither a subsequent nor merely an occasional part of the phenomenon of understanding, but codetermines it as a whole from the beginning.).

¹⁹⁸ *Id.* at 333 ("Here too [as in the *Ethics*,] application did not consist in relating some pregiven universal to the particular situation.").

have no access to an “objective” understanding of a text, we can only understand the text in the traditional context in which it has been handed down, as the people we already are.¹⁹⁹

b. *Legal Interpretation*. Before Gadamer, the hermeneutic tradition had confined legal and biblical hermeneutics to a specialized domain because of their “dogmatic” purposes—resolving particular cases conforming to law, generating biblical meaning conforming to Christian doctrine and belief.²⁰⁰ “Dogma” here means something more and different than apologetic adherence to pre-ordained meaning; it has the sense of a norm “in force.”²⁰¹ Well into the 20th century, both legal and biblical hermeneutics proceeded on the assumption that the object of interpretation—the law or the Bible—is normatively binding on the interpreter, but this did not require that legal or biblical interpretation conform to fore-ordained understandings.²⁰² For example, the patristic tradition did not constrain Luther’s interpretation of biblical texts, because he rejected the tradition. But Luther still believed the Bible is true, which constrained his biblical interpretation in other ways.²⁰³

When Gadamer writes of the “dogmatic” orientation of legal hermeneutics, he is using the word in this second sense, to refer to the binding quality of legal norms. Legal interpretation always proceeds on the assumption that there exists valid law applicable to the interpretive situation. To decide a case, the judge must always ascertain the law “in force.” Gadamer argues that the

¹⁹⁹ *Id.* at 333 (“In order to understand [a] text’s meaning and significance, [an interpreter] must not try to disregard himself and his particular hermeneutical situation. He must relate the text to this situation if he wants to understand at all.”).

²⁰⁰ *Id.* at 337.

²⁰¹ WEINSHEIMER, *supra* note 53, at 192. *See also id.* at 135 (“[D]ogmatic interpretation is the endeavor to understand the past as still true, still in force . . .”).

²⁰² GADAMER, *TRUTH & METHOD*, *supra* note 19, at 319; *see* WEINSHEIMER, *supra* note 53, at 134-36.

²⁰³ *See id.* at 142-43.

dogmatic purpose of legal interpretation does not justify its confinement to law as a special hermeneutics, but actually makes it the model for a general hermeneutics applicable to all of the human sciences. There always exists a live preconception which precedes and contributes to textual meaning.

In contrast to its treatment of law, the hermeneutic tradition understood history as a human science governed by the general hermeneutics of method.²⁰⁴ So Gadamer proposes to show that law is a general hermeneutic model for history (and thus the other human sciences) by demonstrating that law and legal history each interpret the same objects—laws and judicial decisions—in the same way. The judge reads laws and decisions to resolve the case before her, but they are also sources for the writing of legal history.²⁰⁵ The judge ascertains the original meaning of laws only as a means to the end of deciding the case before her, whereas the historian wants to know the original meaning for its own sake, to determine its historical significance.

Gadamer rejects that the proposition that law and history proceed by reconstructing and applying only original meaning.²⁰⁶ The historian cannot understand a law, he argues, unless she assembles all of its applications over the course of its existence, because

[i]t is only in all its applications that the law becomes concrete. Thus the legal historian cannot be content to take the original application of the law as determining its original meaning. As a historian he will, rather, have to take account of the historical change that the law has undergone. In understanding, he will have to mediate between the original application and the present application of the law.²⁰⁷

²⁰⁴ Gadamer makes the same argument with respect to theology. GADAMER, TRUTH & METHOD, *supra* note 19, at 339-45. He observes that literary and art criticism seem to have been overtaken by method, but later concludes that—as in law, history, and theology—application in literary and art criticism is application to oneself. *Id.* at 346-49.

²⁰⁵ *Id.* at 334.

²⁰⁶ *Id.* at 335-37.

²⁰⁷ *Id.*

This means, for example, that a legal historian does not understand the historical significance of the 14th Amendment historically by focusing on its original meaning in 1868 or its first application by the Supreme Court in 1873;²⁰⁸ she must instead identify all of the Court's applications of the Amendment down to the present, including *Brown*, before she can understand it historically. Similarly, it is impossible for a legal historian to ascertain the original meaning of the Equal Protection Clause as if he were unaware of both *Brown*'s interpretation of the clause, and that interpretation's subsequent canonization.

Nor does Gadamer believe the judge merely applies the law's original meaning to resolve her cases.²⁰⁹ One must distinguish the original meaning from the meaning applied in current practice, because the judge determines what the law means when she applies it to the case before her.²¹⁰ Though she must know the original meaning to decide her case, yet she is not bound by it.²¹¹ In deciding her case, she must instead "take account of the change in circumstances and hence define afresh the normative function of the law."²¹² To return to the 14th Amendment, the Court in *Brown* recognized that the original understanding of the Equal Protection Clause would not have required desegregation. So the Court held the original understanding irrelevant; it did not consider itself bound by the original meaning, and interpreted the Equal Protection Clause based on

²⁰⁸ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (5-4 dec.) (controversially construing the rights protected by the 14th Amendment in extremely narrow fashion).

²⁰⁹ GADAMER, *TRUTH & METHOD*, *supra* note 19, at 336.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* See also GADAMER, *AGE OF SCIENCE*, *supra* note 25, at 126 ("[T]he correct interpretation of a law is presupposed in its application. To that extent one can say that each application of a law goes beyond the mere understanding of its legal sense and *fashions a new reality.*") (emphasis added).

decisions decided since ratification, especially those in the immediately preceding years.²¹³ The Court “defined afresh” the meaning of the clause.

The “hermeneutical situation” of judge and historian, therefore, is the same: Seeking to understand a law, they each have an immediate expectation of meaning—that is, some apparently controlling preconception. Each must account for the change in circumstances between the law’s origin and its present. As Gadamer sums up,

There can be no such thing as a direct access to the historical object [represented by the law] that would objectively reveal its historical value. The historian has to undertake the same reflection as the jurist Historical knowledge can be gained only by seeing the past in its continuity with the present—which is exactly what the jurist does in his practical, normative work of “ensuring the unbroken continuance of law and preserving the tradition of the legal idea.”²¹⁴

From here, Gadamer argues that judges and legal historians not only have the same task, but legal interpretation represents the precise relationship between past and present that exists in historical interpretation and in all of the human sciences.²¹⁵ To “understand” and to “interpret” means more than merely to “discover and recognize a valid meaning”;²¹⁶ understanding and interpretation connect the origins of the law as they have been handed down in legal tradition, with

²¹³ *E.g.*, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (African American graduate student admitted to university could not be made to sit in segregated portions of classrooms, library, or cafeteria.); *Sweatt v. Painter*, 339 U.S. 629 (1950) (Newly established state law school for African Americans could not provide legal education equal to that provided by segregated University of Texas Law School.).

²¹⁴ GADAMER, *TRUTH & METHOD*, *supra* note 19, at 336 (quoting & translating EMILIO BETTI, *ZUR GRUNDLEGUNG EINER ALLGEMEINEN AUSLEGUNGSLEHRE* 91 n.14b (1954)); GADAMER, *TRUTH & METHOD*, *supra* note 19, *supp.* I at 532-35 (discussing and criticizing Betti’s hermeneutic position as rooted in the discredited Romantic quest for objective interpretive method). The essentials of Betti’s hermeneutics are set forth in English in Betti, *Hermeneutics*, *supra* note 53.

²¹⁵ GADAMER, *TRUTH & METHOD*, *supra* note 19, at 337.

²¹⁶ *Id.*

the present understanding of the law.²¹⁷ The judge is of course concerned with the “legal significance of the law—and not the historical significance of the law’s promulgation or of particular cases of its application”²¹⁸ But even though the judge is not a historian, she must be conscious of the history of the law as it has come to be understood in the present.²¹⁹ Asking, “How did the law arrive at its current state?” is identical to asking, “What is the law?”

While the legal historian does not need to use the law to resolve a particular case, neither can she disregard it.²²⁰ A person trying to understand the law from its original meaning cannot ignore the continuing effect of the law as it has moved through time.²²¹ But this is true of *any* text—it always needs to be restated in terms of the present.²²² “[H]istorical understanding always implies that the tradition reaching us speaks into the present and must be understood in this mediation—indeed *as* this mediation.”²²³ Historical understanding is the mediation of past and present, the fusion of the horizon of the text with the horizon of the interpreter,²²⁴ just as is legal understanding.

Finally, Gadamer tests his conclusion. Since belonging to a tradition is a condition of

²¹⁷ *Id.* (“The judge seeks to be in accord with the ‘legal idea’ in mediating it with the present.”); GADAMER, *AGE OF SCIENCE*, *supra* note 25, at 82 (“Finding the law means thinking the case together with the law so that what is actually just or the law gets concretized.”).

²¹⁸ GADAMER, *TRUTH & METHOD*, *supra* note 19, at 337.

²¹⁹ *Id.* (The judge’s “orientation is not that of a historian, but he has an orientation to his own history, which is his present.”).

²²⁰ *Id.*

²²¹ *Cf. id.* (The law presents the historian “with the questions that he has to ask of historical tradition.”).

²²² *Id.* at 337-38 (“Inasmuch as the actual object of historical understanding is not events but their ‘significance,’ it is clearly an incorrect description of this understanding [*i.e.*, of the text in terms of the present] to speak of an object existing in itself and of the subject’s approach to it.”).

²²³ *Id.* at 338.

²²⁴ *See supra* text accompanying notes 120-29.

understanding in the human sciences,²²⁵ this must also be the case in legal hermeneutics if it is an exemplar of hermeneutics in all of these disciplines. The tradition through which the text is handed down to the present conditions one's preconceptions of its meaning. In legal interpretation, the tradition is the rule of law. Gadamer focuses here on familiar the rule-of-law principles of generality, that "the law is binding on all members of the community in the same way,"²²⁶ and public enactment and promulgation, which make law "irrevocable and binding."²²⁷ As we have seen, the need of the judge to understand the law arises from its dogmatic character of being "in force." At the same time, the judge is subject to the law like everyone else.²²⁸

The rule-of-law tradition holds that "the legal order is recognized as valid for everyone and that no one is exempt from it."²²⁹ One does not apply the law "from the outside," as if the judge were untouched by the case calling for decision. Rather, all judges by definition belong to this tradition, so the judge's application of the law in a particular case is always application of the law to herself. It is also always possible for the judge to understand any supplement to the original understanding of the law as part of the law currently in force, because such supplements are part of the tradition in which the law is encased and handed down to the judge:

It is part of the idea of a rule of law that the judge's judgment does not proceed from an arbitrary and unpredictable decision, but from the just weighing up of the whole. This is why in a state governed by law, there is legal certainty Every lawyer and every counsel is able, in principle, to give correct advice—*i.e.*, he can accurately predict the judge's decision on the basis of existing laws.²³⁰

²²⁵ See *supra* text accompanying and following note 130.

²²⁶ *Id.* 338.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 339. See also *id.* ("[I]t is always possible to grasp the existing legal order as such—*i.e.*, to assimilate dogmatically any past supplement to the law.").

* * *

Truth and Method calls on Aristotelian ethics and legal judgment to show that the application of textual meaning includes its application to oneself. Application is thus a constituent of textual meaning, not the belated appropriation of an abstract meaning “discovered” earlier and elsewhere, because application to oneself necessarily adds the concerns of the interpreter in the present to interpretation of the text from the past. Application co-determines one’s understanding of both an ethical situation and a text. Just as application does not consist in applying some pregiven ethical rule to an objectified situation, so also the interpreter dealing with a traditionary text does not take the text as a universal that she first understands abstractly, and only afterwards applies to particular problems.²³¹ And just as an ethical decision is a constituent of the moral agent’s character, so also an interpreter understands the text through its application to herself and her situation.²³²

Like Aristotelian ethics, legal interpretation is a model of hermeneutic understanding for all of the human sciences.²³³ To properly decide a case, the judge must mediate the original meaning and the concerns of the present in an application that reflects on her as well as her case. But this is what application means in all of the human sciences; all interpretive activity requires an awareness of the effect of history, of how applications of a text through time alter both the text’s original meaning and the interpreter’s understanding of herself in relation to the text.²³⁴ As

²³¹ *Id.* at 333. See also Leiter, *supra* note 69, at 280-81 (“There is much in human judgment and action that is possible only because of practical skills and competence that remain beyond the reach of theoretical articulation.”).

²³² GADAMER, TRUTH & METHODS, *supra* note 19, at 333. See also Mootz, *Originalist Fixation*, *supra* note 23, at 166 (“All historical understanding is a play of objectivity and subjectivity.”).

²³³ GADAMER, TRUTH & METHOD, *supra* note 19, at 334.

²³⁴ *Id.* at 358-59:

Gadamer concludes, “Application does not mean first understanding a given universal in itself and then afterward applying it to a concrete case. It is the very understanding of the universal—the text. Understanding proves to be a kind of effect”²³⁵

3. Application in Public-Meaning Originalism

Professors Whittington and Solum reject Gadamer’s unity of understanding/interpretation/application. They argue that the application of textual meaning is separate from and subsequent to the textual interpretation that yields the meaning to be applied. As before, Whittington is concerned to show that the unity of interpretation and application is simply wrong, while Solum is preoccupied with demonstrating its consistency with the fixation thesis. Their arguments show that they do not understand application and the place it occupies in philosophical hermeneutics.

Whittington contends that the unity understanding/interpretation/application contradicts the “everyday experience of interpreting texts.”²³⁶ This experience suggests that specific applications change over time, but the general principle one applies does not.²³⁷ Examples and explanations are not to the contrary; they deepen understanding of the underlying principle, but

When a judge regards himself as entitled to supplement the original meaning of a text of a law, he is doing exactly what takes place in all other understanding. The old unity of hermeneutical disciplines comes into its own again if we recognize that historically effected consciousness is at work in all hermeneutical activity

²³⁵ *Id.* at 359.

²³⁶ WHITTINGTON, INTERPRETATION, *supra* note 1, at 104.

²³⁷ *Id.*:

Quite often . . . we must formulate and understand a general principle before specific applications can be considered, let alone resolved Our understandings are not set, in the sense of being unrevisable in the face of error, but neither are they essentially tied to applications such that every application results in a new, equally valid, and potentially contradictory understanding.

See also id. (“Even after an application is made, the meaning of the text remains the same, though it is now more explicit.”).

remain contingent illustrations which do not touch its content.²³⁸ At all times, “understanding and explanation remain distinct components of interpretation.”²³⁹

Whittington concedes that applications of the Constitution enhance our understanding of it by elongating the list of particular circumstances governed by the general fixed constitutional principle. They also illuminate previously unrecognized dimensions of a constitutional principle when it is applied to new situations.²⁴⁰ But adding particular dimensions to the general understanding or extending the general understanding to novel situations merely highlights a previously unnoticed aspect of the text.²⁴¹

To grasp Solum’s argument, one must first understand the specialized meanings of “interpretation” and “construction.” Like most public-meaning originalists,²⁴² Solum divides the process of ascertaining constitutional meaning into empirical and normative components. Constitutional “interpretation” is empirical, as we have seen, consisting of the recovery of the public meaning fixed by semantics and context at the time of adoption.²⁴³

Constitutional “construction,” by contrast, is the process of applying the fixed original constitutional meaning recovered by interpretation to resolve particular cases.²⁴⁴ Over time,

²³⁸ *Id.* 104.

²³⁹ *Id.*

²⁴⁰ *Id.* 105:

Each generation must read the Constitution for itself and its own concerns, but such situated readings do not produce new texts; rather, they fill in the text that has always existed. The application of the text expands along two dimensions, as particular meanings of a general text are cataloged and as the known meaning finds new significance

²⁴¹ *Id.* at 106.

²⁴² *But see* McGinnis & Rappaport, *supra* note 3.

²⁴³ *See supra* Part I.

²⁴⁴ WHITTINGTON, CONSTRUCTION, *supra* note 21, at 5.

construction develops rules and doctrines which may not be evident from the interpreted constitutional text alone. Unlike interpretation, which is empirical, construction is normative, the activity of applying original fixed meaning to ever-changing situations.²⁴⁵ Solum explains that construction consists of creating “doctrines of constitutional law” and determining “decisions of constitutional cases . . . associated with (or required by)” the constitutional meaning uncovered by interpretation.²⁴⁶ Whittington likewise states, “Something external to the text—whether political principle, social interest, or partisan consideration—must be alloyed with it in order for the text to have a determinate and controlling meaning within a given governing context.”²⁴⁷

With the interpretation-construction distinction in mind, Solum quotes two long passages from *Truth and Method*.²⁴⁸ From these Solum constructs a syllogism which purports to

Statutory “construction” has long been a part of legal interpretation, but its application to the Constitution was only recently theorized, primarily in the early work of Professor Whittington. See WHITTINGTON, INTERPRETATION, *supra* note 1, at 5-7; WHITTINGTON, CONSTRUCTION, *supra* note 21. See also *infra* note 248

²⁴⁵ *Id.* at 6; Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 22, at 134-35.

²⁴⁶ Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORD. L. REV.* 453, 457 (2013) [hereinafter Solum, *Originalism & Construction*].

Because construction is a fundamentally political process that projects meaning onto the text, Whittington considers it fundamentally inconsistent incompatible with the judicial role of interpreting the Constitution. WHITTINGTON, INTERPRETATION, *supra* note 1, at 5–6. He thus confines construction to the political branches. *Id.* at 7; WHITTINGTON, CONSTRUCTION, *supra* note 21, at 6–7. Later theorists, however—including most public-meaning originalists—have embraced construction as a necessary and legitimate part of judicial decision making in constitutional disputes. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 300–12 (2011); BARNETT, *THE LOST CONSTITUTION*, *supra* note 1, at 121–30 (2004); Solum, *Originalism & Construction*, *supra*, at 248.

²⁴⁷ WHITTINGTON, CONSTRUCTION, *supra* note 21, at 6.

²⁴⁸ See Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 22, at 146 (quoting GADAMER, *TRUTH & METHOD*, *supra* note 19, at 336, 338-39):

It is true that the jurist is always concerned with the law itself, but he determines its normative content in regard to the given case to which it is to be applied. In order to determine this content exactly, it is necessary to have historical knowledge of the original meaning, and only for this reason does the judge concern himself with the historical value that the law has through the act of legislation. But he cannot let himself be bound by what, say, an account of the parliamentary proceedings tells him about the intentions of those who first passed the law. Rather, he has to take account of the change in circumstances and hence define afresh the normative function of the law.

...

The work of interpretation is *to concretize* the law in each specific case—i.e., it is a work of *application*. The creative supplementing of the law that is involved is a task reserved to the judge, but he is

demonstrate that Gadamer’s philosophical hermeneutics incorporates—or, at least, co-exists with—the fixation thesis:

1. The translators of *Truth and Method* used “interpretation” to signify “construction,” which by definition includes application of the law to individual cases.²⁴⁹
2. The substitution of “construction” for “interpretation” makes clear that Gadamer presupposes the new-originalist distinction between “interpretation” and “construction.”²⁵⁰
 - a. Philosophical hermeneutics entails the recovery of original textual meaning by an act of interpretation,²⁵¹ and then
 - b. Application of this recovered meaning to particular cases by an act of construction.²⁵²
3. The fixation thesis is presupposed by acts of interpretation, but unaffected by acts of construction.²⁵³

Therefore, Gadamerian hermeneutics incorporates (or can co-exist with) the fixation thesis.²⁵⁴

4. New-Originalist Errors

subject to the law in the same way as is every other member of the community. It is part of the idea of a rule of law that the judge’s judgment does not proceed from an arbitrary and unpredictable decision, but from the just weighing up of the whole. Anyone who has immersed himself in the particular situation is capable of undertaking this just weighing-up. This is why in a state governed by law, there is legal certainty—i.e., it is in principle possible to know what the exact situation is. Every lawyer and every counsel is able, in principle, to give correct advice—i.e., he can accurately predict the judge’s decision on the basis of existing laws.

²⁴⁹ See Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 22, at 146 (“Notice that the English word used by the translators, ‘interpretation,’ is used to express the concept that I have represented by the word ‘construction.’”).

²⁵⁰ See *id.* (“Gadamer’s text seems to presuppose the interpretation-construction distinction as a conceptual matter.”).

²⁵¹ See *id.* (Gadamer’s “account of interpretation (in the sense stipulated here) focuses on original meaning . . .”).

²⁵² See *id.* at 146-47 (Gadamer “clearly distinguishes between the recovery of original meaning (‘interpretation’) and the application of the text to a particular case (‘construction’).”).

²⁵³ See *id.* at 142 (“The fixation thesis is a claim about constitutional interpretation; it is not a claim about constitutional construction.”).

²⁵⁴ See *id.* at 147 (“[I]t would seem that [Gadamer] accepts the fixation thesis.”).

As they misunderstood the meaning of “horizon,” Professors Whittington and Solum both misunderstand the meaning of “application” in philosophical hermeneutics. They take it to mean the disembodied deployment of a universal abstract principle to a particular concrete situation, whereas Gadamer intends “application” to be application *to oneself*, as illustrated by his discussions of Aristotle’s *Ethics* and the exemplary character of legal interpretation.²⁵⁵

Professor Whittington assumes a Cartesian ontology of knowledge, with its strict separation of knowing subject from object of knowledge.²⁵⁶ The end is ordained by this beginning: Gadamer’s account of textual understanding is not plausible on Cartesian premises, and this is what Whittington shows; Gadamer himself would have agreed. Solum also presupposes a Cartesian ontology, despite his insistence that the fixation thesis is consistent with Gadamer’s anti-Cartesian ontology. The important question here is whether Cartesian premises are plausible starting points for an account of textual understanding. I take this up in Part IV.

As for Professor Solum’s attempt at reconciliation, he fails to show the compatibility of the fixation thesis with Gadamer’s account of textual understanding, and specifically with the unity understanding/interpretation/application.²⁵⁷ Each premise of his argument is wrong.²⁵⁸

First, the translators of *Truth and Method* did not use “interpretation” to signify “construction” in the passage Solum quoted as evidence of Gadamer’s purported incorporation of

²⁵⁵ See *supra* Part II-B.

²⁵⁶ See *supra* text accompanying notes 61-63.

²⁵⁷ Solum calls his analysis of *Truth and Method* a “reconstruction” of Gadamer’s argument rather than an “exegesis.” Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 22, at 147. But refashioning Gadamer’s argument to make it fit with the fixation thesis demonstrates nothing (except perhaps Gadamer’s own thesis that the horizon of Solum as interpreter—*e.g.*, a commitment to the fixation thesis—is a co-determinant of textual meaning—*e.g.*, the meaning of “application” in *Truth and Method*). Accordingly, I have treated Solum’s analysis of application as his good-faith understanding of the arguments Gadamer actually makes, and not his reformulation of them to suit his purposes.

²⁵⁸ See *supra* text accompanying notes 249-54.

the interpretation/construction distinction in *Truth and Method*.²⁵⁹ The German word rendered “interpretation” in the English translation is *Auslegen*.²⁶⁰ *Auslegen* means “interpretation,”²⁶¹ as the translators were no doubt aware. There was no mistranslation into English, and no warrant for reading “interpretation” in these passages as “construction.” Solum has simply read the new-originalist definition of “construction” into “interpretation” in one sentence of *Truth and Method* to make his argument work, without explaining what the scores of references to “interpretation” mean elsewhere in the book.²⁶²

Second, and more importantly, Gadamer’s account of interpretation does not separate the *empirical* function of interpretation—what does the text mean?—from the *normative* function of application—how should the text apply? For Gadamer, *these are the same question*. This

²⁵⁹ See Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 22, at 146 (“Notice that the English word used by the translators, ‘interpretation,’ is used to express the concept that I have represented by the word ‘construction.’”). Presumably Solum is referring to the appearance of “interpretation” in the language he quoted from *Truth and Method* at the outset of his argument. See *supra* note 249. The relevant passage is:

It is true that the judge is always concerned with the law itself, but he determines its normative content in regard to a given case to which it is applied. [H]e has to take account of the change in circumstances and hence define afresh the normative function of the law The work of interpretation is *to concretize* the law in each specific case—i.e., it is a work of *application*. The creative supplementing of the law that is involved is a task reserved to the judge

GADAMER, TRUTH & METHOD, *supra* note 19, at 336, 338 (italics in original, underlining added).

²⁶⁰ Compare HANS-GEORG GADAMER, WARHEIT UND METHODE 312 (3rd ed. 1972) (“Die Aufgabe des Auslegens ist”) (underlining added) with GADAMER, TRUTH & METHOD, *supra* note 19, at 338 (“The work of interpretation is”) (underlining added).

²⁶¹ See “Auslegung,” & “-en,” in THE OXFORD-DUDEN GERMAN DICTIONARY, *supra* note 56, at 109. The primary definition is “to lay out,” *id.*, which Heidegger put to good use in *Being and Time*, defining “interpretation as “to lay out one’s possibilities.” See *supra* text accompanying notes 72-73.

²⁶² If anything, in *Truth and Method* “interpretation” *always* means new-originalist “construction,” because for Gadamer “interpretation” always has a normative aspect. See *infra* note 264 and accompanying text; *cf.* Mootz, *Originalist Fixation*, *supra* note 23, at 167-68 (noting the classical roots of the interpretation/construction distinction, and the distinction’s failure to solve the problems of Romantic hermeneutics). Of course, this would not work with Solum’s argument, either.

separation is the very ground on which he criticizes Emilio Betti's Romantic hermeneutics.²⁶³ As we've seen,²⁶⁴ for Gadamer, interpretation and application combine in a single event of understanding. This is clear from (i) Gadamer's arguments that understanding is always interpretation is always application;²⁶⁵ (ii) his invocation of Aristotelian ethics, which rejects all abstract rule-bound answers to moral questions;²⁶⁶ and (iii) his designation of legal interpretation as the general model of hermeneutics in the human sciences, in which the application of a text is a necessary constituent of its meaning.²⁶⁷ As each of these discussions shows, interpretive meaning is rendered *in* application, not before it, because application is necessarily application to the interpreter and her situation, and not merely to a case or circumstance unrelated to her.²⁶⁸

²⁶³ GADAMER, TRUTH & METHOD, *supra* note 19, at 320-21; *id.*, *supp.* I at 532-39. *See also* Mootz, *Originalist Fixation*, *supra* note 23, at 168 (The "severe epistemic challenges" posed by the interpretation/construction distinction suggest "the ontological impossibility of conceptually separating the 'meaning' of a text and its significance for the reader who seeks the meaning.").

Betti argued that the separate determination of "cognitive" or descriptive meaning and normative meaning are different steps in the interpretive process. 2 BETTI, *TEORIA GENERALE*, *supra* note 53, § 54 at 802-04. He also argued that the cognitive meaning communicated by a legal text will often be too vague or ambiguous to resolve the legal conflicts presented by a particular case, in which case the interpreter would need to elaborate the meaning in order to profitably apply it to specific situations. 2 *id.*, § 54 at 804, 807-08, 822; Betti, *Hermeneutics*, *supra* note 53, at 83. *See also* 2 BETTI, *TEORIA GENERALE*, *supra* note 53, § 55 at 819 (author's translation):

[T]he task of extracting from law (or custom) the decisional holding suited to the factual situation submitted to judgment normally comprises two successive operations, different from but logically connected to each other: *a*) the ascertainment of the existing legislative or customary norms and of the categories of interests protected by them; and, where this does not sufficiently and unambiguously determine the precept to be applied, *b*) the further elaboration of the holding required for the decision of the case.

The basics of Betti's interpretive theory are set out in English in Betti, *Hermeneutics*, *supra* note 53, and he is widely summarized and discussed in the secondary English literature, often in the context of legal interpretation, *see, e.g.*, GRONDIN, *PHILOSOPHICAL HERMENEUTICS*, *supra* note 53, at 125-29; David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 48 S. CAL. L. REV. 136, 137-41 (1985); PALMER, *supra* note 56, at 46-59. *See also* HIRSCH, *supra* note 133, at xii (acknowledging the influence of Betti and *Teoria Generale*).

²⁶⁴ *See supra* Part II-B.

²⁶⁵ *See supra* text accompanying notes 171-79.

²⁶⁶ *See supra* text accompanying notes 181-199.

²⁶⁷ *See supra* text accompanying notes 200-30.

²⁶⁸ *See supra* text accompanying notes 231-35.

Third, Solum is wrong to read theoretical significance into Gadamer's assignment to judges of the "creative" or normative function of application.²⁶⁹ Understanding/interpretation/application always involves normative considerations, because understanding/interpretation/application includes the unity descriptive/normative. "To distinguish between a normative function and a cognitive one is to separate what clearly belong together."²⁷⁰ Understanding for Gadamer always incorporates a question with both descriptive and normative dimensions: how to fuse the text's horizon—the concerns of the past—with the interpreter's horizon—the concerns of the present. Gadamer emphasized the normative function in the passages Solum quoted because Gadamer wished to disabuse historicists of their norm-free self-image—by showing that the writing of history is as normative as deciding legal disputes—and not because he was engaged in new-originalist construction.²⁷¹

Without these three premises—substitution of "construction" for "interpretation," conceptual separation of interpretation from application, and exclusive assignment of normative considerations to application, Solum's conclusion that Gadamerian hermeneutics presupposes the fixation thesis is mere question-begging: "Interpretation" *as defined by public-meaning originalists* entails the fixation thesis, but this tells us nothing about "interpretation" as understood by Gadamer and philosophical hermeneutics, which includes application by definition.

²⁶⁹ See *supra* text accompanying note 213.

²⁷⁰ E.g., GADAMER, TRUTH & METHOD, *supra* note 19, at 321. See also *supra* note 262.

²⁷¹ Solum acknowledged this at the outset of his analysis, but did not discuss it further. See Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 22, at 145 (noting "Gadamer's critique of the view that the task of legal historians and jurists is fundamentally different").

IV. ACCOUNTS OF HERMENEUTIC ONTOLOGY

Professors Whittington and Solum each give illustrations purporting to show the superiority of the fixation thesis to the hermeneutic ontology which denies that textual meaning objectively exists in the past. Whittington uses art restoration, while Solum appeals to various historical events, though his reference to the Holocaust will suffice to illustrate his point.

A. *Whittington and Art Restoration*

At the end of Whittington's argument against the unity understanding/interpretation/application, he sums up with this example:

[A]n originalist seeking to salvage a soiled painting would gradually clear away smudges in order to see better the original portrait beneath. As layers of dirt are removed and the canvas and paints tested, details emerge to deepen our perception of the figure who was always vaguely visible, and occasionally false marks are removed to reveal the original underneath. A Gadamerian interpreter, on the other hand, would not be seeking to deepen our understanding of the artist's portrait by revealing details contained in the original. Rather, he would seek to expand the artist's vision for the new audience, adding new details with fresh paint, multiplying the portraits appearing on the canvas.²⁷²

The originalist art restorationist is epistemologically familiar. She works on the assumption that the original exists under the many layers of varnish and grime. Using proper restorationist methods designed to recover the original without altering it, she removes the accumulations from the painting so that it comes into view just as the artist painted it. Fidelity to the original preserved, the painting is restored for all to see and understand.

The second art restorationist is evidently Gadamer, but he's not recognizable even as caricature. The hermeneutic restorationist would not expand on the original by using "fresh paint" to create a different portrait. To the contrary, she would be just as concerned to uncover the original painting as the originalist. But having done so, she would ask, "What does the painting mean?"

²⁷² WHITTINGTON, INTERPRETATION, *supra* note 1, at 105.

No painting has self-declaring meaning, not even at its unveiling.²⁷³ And no recognized classic obtains that status from its initial reception (“instant classics” notwithstanding).²⁷⁴ The *Mona Lisa* is the portrait of a medieval merchant’s wife, but this original understanding hardly matters today.

The hermeneutic restorationist would also be interested in how and why the “varnish and grime” ended up on the painting. Were they simply unavoidable, like soot from medieval oil and lamps? Did the artist add extra varnish at the very end to tone down some colors that looked too bright? Or did the artist paint the original with more boldness than she preferred to ensure a certain color and contrast after the inevitable accumulation of dust and dirt?²⁷⁵ Above all, the hermeneutic restorationist, knowing that meaning is necessarily the product of past and present, would never imagine that she might achieve an understanding of the painting identical to the understanding it enjoyed among those present at its unveiling.

The question of artistic meaning is not answered by exposing the work as it was originally seen. No matter how much we know about that era and the people in it, we cannot see the painting as they saw it then, but only as we see it now. We cannot appropriate the horizon of the painting as an object with which we are uninvolved; we might pretend this, but this is self-deception. We fuse the painting’s horizon with our own by projecting ourselves into its past, but still, it remains ourselves whom we project.

²⁷³ Cf. Mootz, *Originalist Fixation*, *supra* note 23, at 160 (“[M]eaning is not a feature of a world that exists separate from the interpreter.”).

²⁷⁴ See *supra* text accompanying notes 97-100.

²⁷⁵ These and related issues were raised by the controversial cleaning of the frescoes in the Sistine Chapel, which illustrates the ontological problematics of the “original” even in art. See generally Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *ILLUMINATIONS* 219 (Hannah Arendt ed. & Harry Zohn trans. 1968) (1935).

Gadamer himself uses art to illustrate this point: “The way the interpreter belongs to his text is like the way the point from which we are to view a picture belongs to its perspective.”²⁷⁶ No matter how clear the original portrait, what one sees will depend upon where one stands to see it—up close, far away, left, right, or center. Likewise, *historical* perspective varies with time, place, and person.

Consider a mythic event from Roman history, the rape of Lucretia. As recounted by Livy,²⁷⁷ around 500 B.C.E. during the siege of a nearby city, Sextus, a son of the Roman king, assaulted Lucretia, wife of another prince, Collatinus, while a guest in her home. Lucretia swore Collatinus and his friend, Brutus, to avenge her “lost honour.”²⁷⁸ They sought to comfort her, as “sick at heart” as she was, “by diverting the blame from her who was forced to the doer of the wrong.”²⁷⁹ But Lucretia would not be comforted. “Taking a knife . . . concealed beneath her dress, she plunged it into her heart.”²⁸⁰ In the aftermath Collatinus and Brutus raised an army in rebellion against the king as revenge for his son’s crime. The people flocked to their banner, for “[e]very man had his own complaint to make of the prince’s crime and his violence.”²⁸¹ They deposed the king and drove Sextus into exile, where he was murdered by old enemies. Freed from tyranny, the people choose Brutus and Collatinus prefects of a new Roman republic.

²⁷⁶ Gadamer, *Truth & Method*, *supra* note 19, at 338.

²⁷⁷ 1 TITUS LIVIUS, *HISTORY OF ROME* i.197-209 (B.O. Foster trans. 1919) (c.28 B.C.E.), https://www.loebclassics.com/view/livy-history_rome_1/1919/pb_LCL114.197.xml?mainRsKey=ERKSbp&result=1&rskey=2sko2W.

²⁷⁸ 1 *id.* at i.203.

²⁷⁹ 1 *id.*

²⁸⁰ 1 *id.*

²⁸¹ 1 *id.* at i.205.

Scores of Renaissance, Baroque, and Romantic artists painted this story, a common depiction being Sextus threatening Lucretia in her bed with his drawn sword. A public-meaning originalist would seek to document how any such painting was understood at the time it was unveiled to the public; this would fix its meaning, irrespective of anything that followed. Yet, it takes little imagination to realize that a contemporary classical historian will understand the painting differently than a 19th-century Romantic. Both will differ from the understanding of rape survivor in the Victorian era, whose understanding will, in turn, differ from that of a survivor in the contemporary West. And all of these potential meanings differ dramatically from Livy's intention to justify the violent revolution in which the Roman republic was born.²⁸²

How plausible is it to insist that the meaning of an original Lucretian painting is fixed by the public understanding of it at the time it was finished and unveiled? Gadamer's observation seems indisputable: "[U]nderstanding art always includes historical mediation."²⁸³ Vastly different understandings of a Lucretian painting do not come about because someone added "fresh paint" to the original. They are the consequence of the joint constitution of artistic meaning by past and present.

B. *Solum and Historical Events*

Unlike Professor Whittington, Professor Solum recognizes that philosophical hermeneutics might make ontological claims. He seizes on a statement by Professor Mootz, who has also

²⁸² See generally MELISSA M. MATTHES, THE RAPE OF LUCRETIA AND THE FOUNDING OF REPUBLICS: READINGS IN LIVY, MACHIAVELLI, AND ROUSSEAU ch.2 (2000).

²⁸³ GADAMER, TRUTH & METHOD, *supra* note 19, at 165. See also *id.* at 166:

Reconstructing the conditions in which a work passed down from the past was originally constituted is undoubtedly an important aid to understanding it. But we may ask whether what we obtain is really the *meaning* of the work of art that we are looking for, and whether it is correct to see understanding as a second creation, the reproduction of the original production.

criticized Solum's position: "There are no objective facts about the past existing independently of our inquiries; rather, history is our mode of being; as finite beings who can never rise out of our historical situation."²⁸⁴ Solum accuses Mootz of claiming "there are no objective facts at all," which Solum swiftly dispatches as a *reductio*:

[T]his means there is no fact of the matter about such mundane and insignificant questions as whether this paragraph was first composed on July 17, 2015. Nor could there be an objective fact of the matter about the occurrence of the Holocaust or indeed whether the Allied forces invaded Normandy beginning on June 6, 1944.²⁸⁵

I take Mootz's point, though I would have put it this way: "The meaning of the past is not an objective fact existing independently of our inquiries." Solum acknowledges Mootz might have meant merely to distinguish facts about events from facts about meaning, but insists that the implications are still "radical and implausible."²⁸⁶ As a matter of objective fact, he argues, there can be no doubt that the Constitution's assignment of "two" senators to each state "meant two and not three or lasagna."²⁸⁷ If there were no objective facts about the meaning of numbers, Solum reasons, then there would not be any objective linguistic facts at all, either. This, Solum concludes, is clearly wrong:

Linguistic facts are facts about patterns of human behavior in the world; they are not facts about some mystical realm that cannot be the subject of empirical investigation. Indeed, a whole subfield of linguistics, called semantics, is devoted to empirical investigation of linguistic facts about semantic meaning.²⁸⁸

²⁸⁴ Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 22, at 149 (quoting Mootz, *supra* note 23, at 165).

²⁸⁵ Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 22, at 149.

²⁸⁶ *Id.* at 150.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

Again, Solum chose an easy target. As Mootz points out, numbers are a special case, able to retain unambiguous meaning even over long periods of time.²⁸⁹ No reasonable person disputes, for example, the date of *Kristallnacht* or the liberation of Auschwitz. But what does it mean that throughout Europe Nazis and their allies persecuted, tortured, and ultimately attempted kill every Jew in Europe, succeeding to the extent of murdering six million (along with millions of non-Jews)? Does it mean humans are naturally depraved, or only Germans, or only Nazis? Was Christianity responsible, with its theology of the blood libel and the passive refusal of most churches to intervene? Does it represent an unanswerable theodicy that drives people to unbelief? Did it create contemporary Israel, or would that have happened anyway? Is it related to the current resurgence of anti-Semitism in the West?

These questions barely scratch the surface of potential plausible meanings. The Holocaust is a fact in the world, as are the acts and utterances that constitute it. But events do not naturally possess objective meaning, or any meaning at all; their meaning does not exist until we try to ascertain it.²⁹⁰ Similarly, that the Constitution was ratified in 1788 in the precise linguistic form we possess today does not tell us its meaning, either of the whole or of its many individual clauses. This is the dilemma of the human sciences, in which meaning is a circle of self-interpretation. About this most difficult ontological problem, Solum says nothing.

²⁸⁹ Mootz, *supra* note 23, at 180. See also GADAMER, TRUTH & METHOD, *supra* note 19, at 433 (“Only through mathematical symbolism would it be possible to rise entirely above the contingency of the historical languages and the vagueness of their concepts.”).

²⁹⁰ The enormity of the Holocaust seems to place it beyond any meaning, even when one looks for it.

C. Domestic Violence

Professor Solum and other public-meaning originalists regularly employ the Domestic Violence Clause to illustrate the pitfalls of “linguistic drift,” as I’ve discussed.²⁹¹ The contemporary usage signifying physical or sexual abuse of spouse or children was unknown in the late 1780s when the clause was ratified along with the rest of the Constitution; what we now understand as “abuse” was considered the unremarkable right of male heads of household during this period. Solum draws what he thinks is the easy and obvious conclusion: the Domestic Violence Clause has nothing to do with spousal or child abuse, because the semantic meaning of the clause was fixed by the semantics existing at the time of its constitutional adoption in the late 1780s.

This conclusion is easily complicated. The historical context of the Domestic Violence Clause strongly indicates that it was understood to apply to slave revolts. The southern states, with their huge enslaved populations, feared slave insurrections and sought constitutional guarantees of federal assistance when these rebellions exceeded state militia and law enforcement resources.²⁹² The legal concept of a household in the late 18th century (and for most of the 19th century) encompassed not just husband, wife, and children, but also servants, apprentices, long term

²⁹¹ See *supra* text accompanying notes 38-40.

²⁹² E.g., *Debate in the Virginia Ratifying Convention* (14 June 1788), in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 at 365, 427 (Jonathan Elliot 2nd ed. 1891) (remarks of George Nicholas) (The Domestic Violence Clause provides “greater security” to slave states by authorizing use of federal power to “quell an insurrection of slaves” upon state application.); St. George Tucker, *View of the Constitution of the United States*, in 1 BLACKSTONE’S COMMENTARIES App. Note D at 140, 367 (St. George Tucker ed. 1803) (The Domestic Violence Clause “secures . . . additional force to the aid of any of the state governments, in case of an internal rebellion or insurrection against it’s [sic] authority,” and the “southern states” are “more peculiarly open to danger from this quarter.”). See also Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 NW. U.L. REV. 785, 791 (1995) (suggesting that the Domestic Violence Clause was a pro-slavery provision “applicable to slave revolts”); Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 429 & n.23 (1999) (noting that abolitionist Wendell Phillips considered the Domestic Violence Clause one of “five key proslavery provisions of the Constitution”).

The first slave rebellion took place in Virginia little more than a decade after the Constitution was ratified, WOOD, EMPIRE OF LIBERTY, *supra* note 50, at 534-36, and slave insurrections remained a fact of southern life until slavery was formally abolished after the Civil War, see U.S. CONST., amend XIII (1866).

visitors, and anyone else living on the householder's premises or property at his sufferance, including slaves. While there is, quite literally, no evidence the framers intended the clause to apply to anything other than insurrections (including slave revolts) against the state governments and the established private order they upheld, is irrelevant to new-originalist method, which focuses on the original semantic meaning of the Constitution, not the framers' subjective understanding. A slave revolt in the late 18th century, directed at the householder and control of his household, was "domestic violence" in the same plausible semantic sense that spousal and child abuse is today. Contrary to Solum's assumption, application of the Domestic Violence Clause to contemporary spousal and child abuse would actually entail very little linguistic drift.

I will not be arguing that the original public meaning of the Domestic Violence Clause authorizes the federal government to deploy troops and resources upon state request to eliminate child and spousal abuse within state borders. I raise this to emphasize the crucial role played by historical context. Our current belief that the phrase "domestic violence" in Article IV cannot plausibly refer to spousal or child abuse overwhelms the original semantic meaning, making it impossible to take it seriously despite the presence of a plausible semantic argument. In many cases, therefore, if not most, the purported discovery of original public meaning will depend on objective recovery the factual historical context that stabilizes and specifies original semantic meaning. This not a simple matter.

For example, it is virtually impossible for any reasonable contemporary American to imagine him- or herself in a society in which men, women, and children are bought, sold, and abused as mere property, and male heads of household have substantial control of bodies, labor, liberty, and property of their spouses, children, and servants, including the right to inflict corporal punishment whose legality and propriety is judged by him alone. To recover the original public

meaning of the Domestic Violence Clause requires that we understand its original semantic meaning *as specified by its original context*. Everything depends on what I've elsewhere called the "immaculate recovery" of context: we must recover "facts about context" without tainting their factual character with our subjective particularities, and then we must understand those facts as they were understood by those acting in their original context.²⁹³ In this hypothetical, this means transforming ourselves into southern lords of the manor who believed in their bones that both God and law justified their use of African Americans human beings as chattel, and their commission of (what is now but was not then) illegal abuse of women and children. No reasonable person in the present can do this.

D. *It's a Wonderful New Originalism!*

The ontological implausibility of the fixation thesis is exposed in analysis of any traditional text, but especially one acclaimed as a classic like the film, *It's a Wonderful Life*.²⁹⁴ The film's classical status ensures that most people have seen it or know the plot, yet it presupposes a dramatically different America than the one we live in now. It also contains an especially accessible understanding of the difference between a Cartesian world divided between into human subjects and worldly objects, and human being-in-the-world in which people are always already in relationships with other people and things in the world.

²⁹³ See Gedicks, *supra* note 26.

²⁹⁴ *It's a Wonderful Life* (RKO Liberty 1946). See also *supra* text accompanying notes 97-101.

Despite its old-fashioned sentimentality—or perhaps because of it—the film is on every critic's "best-movies" list and remains immensely popular. *E.g.*, Peter Bradshaw, *It's a Wonderful Life*, THE GUARDIAN, Dec. 14, 2007, available at <https://www.theguardian.com/film/2007/dec/14/family.drama>; Michael Wilmington, *5 Films That Are Modern or Would-Be Christmas Classics*, CHI. TRIB, Dec. 21, 2001, available at <http://www.chicagotribune.com/news/ct-xpm-2001-12-21-0112210380-story.html>. The film scores absurdly high marks on review aggregation websites. See, *e.g.*, "It's a Wonderful Life," ROTTEN TOMATOES (accessed Oct. 17, 2018) (showing 92% positive reviews from "top" professional film critics, 94% positive from all critics, and 95% positive from audiences), https://www.rottentomatoes.com/m/1010792_its_a_wonderful_life?.

It's a Wonderful Life is a 1946 comedy/drama produced and directed by Frank Capra, starring James Stewart, Donna Reed, Lionel Barrymore, and Henry Travers. It tells the life story of the bright and talented George Bailey (Stewart), who is thwarted at every turn in his burning ambition to leave the provincial “Bedford Falls” of his youth for fame and fortune elsewhere. He settles down with a local girl, Mary Hatch (Reed), and starts a family. Instead of college, he is trapped into running his father’s financially beleaguered “Bailey Building and Loan,” which grants home mortgages to working class folks who cannot qualify anywhere else. In the course of the story the Building and Loan is left as the only humane institution standing in Bedford Falls after the wealthy and pitiless Henry Potter (Barrymore) absorbs everything else.

All this is played mostly for laughs until the plot reaches its dramatic climax. George’s serially incompetent Uncle Billy, kept on at the Building and Loan as a charity case, loses \$8,000 of its funds (over \$108,000 in current dollars). Unable to replace the missing money and facing bankruptcy and ruin, George brings himself to the edge of suicide, despairing at the meaninglessness of his pitiful life and wishing he had never been born.

The conceit of the film is a bevy of guardian angels keeping close watch over George and his troubles. They send Clarence, a kindly though befuddled junior angel (Travers), to “earn his wings” by saving George from the mortal sin he is about to commit. Clarence does so by half-granting George’s wish, giving him a tour of Bedford Falls as if George had never been born. (George is physically present during this tour, but interacts with family, friends, and neighbors as a stranger.) Bedford Falls in these visions—called “Pottersville” because in George’s absence Potter has taken over everything in town—is bereft of all the good George would have done and all the people he would have saved had he lived. So horribly grim is the world without him in it that George begs to return to his real life in Bedford Falls. The film ends happily, with all the

people George touched pitching in to make good the Building and Loan's shortfall, and Clarence earning his wings. Surrounded by family and friends, George realizes that despite all, his is a wonderful life.

George cannot make sense of Pottersville. Scores of friends and family are in prison, or insane, or trapped in grinding poverty because George was not there to help them overcome their situations. His children don't exist because he was not there to father them with Mary, who instead never married (and to whom George is a total stranger). By removing George from the scene, Clarence has not provided an "objective" rendering of life in Bedford Falls, but the entirely different world of Pottersville—the one that George cannot comprehend.²⁹⁵

The denouement of *It's a Wonderful Life* captures the intuitive implausibility of the fixation thesis. If George can only find the meaning of his life in the world in which he actually lives, then he must examine his own life—he must interpret *himself*. There is no fixed objective George-life meaning which he can recover as a fact, resting in the past unaffected by who George is and where and when he lives. Whatever meaning he recovers is historical and temporal, his present understanding of his past as that past has affected his life down to the moment when he stands on the edge of suicide.

Though the meaning of his life is not objective, George is not free to make anything he wishes of it. George finds himself in a world with particular possibilities rather than others.²⁹⁶ His possibilities are constrained by the entangling relationships and physical and cultural priors of Bedford Falls with which he is already involved at every moment.²⁹⁷ He enjoyed a middle-class

²⁹⁵ Cf. SOLOMON, *supra* note 61, at 162 (“The idea of a world known by us which is distinct from the one in which we act (as in Kant’s ‘two-world’ view) is unintelligible.”).

²⁹⁶ See *supra* notes 78-79 and accompanying text. I owe this formulation of the point to Jim Faulconer.

²⁹⁷ See *supra* notes 64-70 and accompanying text.

upbringing (not an impoverished one); he is a white male (not the African American woman who is his family's maid); he lives in a small town (not an urban center); a childhood loss of hearing in one ear disqualified him from military service (so he could never have become the war hero his younger brother was); he and Mary have children and build a life together (which eventually make leaving Bedford Falls impossible); and so on. In short, the meaning of George's life is indeterminate within ever-changing bounds, and none of these possibilities is the only or inevitably true one.

Even so, there remain plenty of interpretive possibilities within the constraints of George's situation. He does not "discover" the meaning of his life as a fact, as if it were there all along before he tried to find it. Rather, this meaning is constantly made for him and by him in the choices he makes from among the possibilities that remain in the moment he chooses. Every day George must confront both what his past has made of him and what he still might realistically become.

This interpretive circularity constrains others, too. There is no Mary without George; the meaning of her life is bound up with the meaning of his. Any examination of George's life by Mary would thus also be an examination of her own. Nor can someone wholly unconnected with George and Mary and their intertwined lives interpret them objectively—say, a film critic in the present. In the more than 70 years since *It's a Wonderful Life* was released, it has become embedded in a tradition which necessarily shapes how even an apparently disconnected person in the present can approach its meaning. It is universally acclaimed, a classic, Capra's (and Stewart's) favorite film and possibly Capra's best; it captures all the crises and courage of the "greatest generation" which survived the flu epidemic after World War I, suffered the hardship of the Depression, and then endured even more in the war against fascism; it is a powerfully nostalgic

representation of a simpler, more faithful America which defines success by belief and family, not fame or fortune.

All of this predetermines how one can engage the film. Most critics praise it; it's hard to criticize it without coming off badly. Either way, one must reckon with what the film has become, what it is now, not what it was in 1946 when it was released. We in the present are not pure subjects who can see the film and George's life as pure objects, because we are at every moment already within the tradition which surrounds the film and shapes our present understanding of it. Only the angels can watch the movie "as it really is."

To understand the past is to understand ourselves, embedded in prior relationships and traditions that link past and present before we engage in any act of interpretation. We can only understand the past, therefore, from a point of view that is constituted both by the people we are and the past we have inherited. There is neither past without the present, nor present without the past. Present preconceptions and prejudices are not obstacles to understanding the past but the very ground of this understanding.

This is evident in the portrayal of Mary in *It's a Wonderful Life*. The film reflects (what we today call) the sexist assumptions of seven decades past. Mary's success in life rests on her marriage to some successful man; her mother is dismayed when Mary rejects a wealthy, politically connected suitor to drop out of college and marry the broke and impractical George. But marriage fulfills all of Mary's dreams—mother, homemaker, helpmeet; at one point she declares only half-jokingly that she married George to "keep from becoming an old maid" (which is precisely what she is in Pottersville: a fearful spinster librarian who faints in horror at the insistence of George, a complete stranger, that together they had sex and produced children.) Mary is the nurturing,

virtuous, domestic mother devoted to home, husband, and children, naturally unsuited for life in the real world of aggression, competition, and conflict—the world of men.

The 1946 reviews did not note these sexist stereotypes,²⁹⁸ not even reviews in the urban liberal press,²⁹⁹ because in 1946 they were neither sexist nor stereotypes. Mary's character captured the tenor of the times, the conventional picture of how women are and what they want, assumed even by cultural elites. The gender stereotypes are evident in the present because we live in a radically different world in which gender roles are not passively accepted as destinies of Nature. It is precisely the contemporary commitment to gender equality that brings into focus Mary's portrayal as stereotypically sexist. Without this preconception, Mary's character would pass as an unremarkable reflection of natural female aspiration, as it did in 1946. A feminist critique of the film *cannot exist* until feminism becomes a noticeable part of the American cultural landscape a generation later.

A double irony is that the gender equality that creates the sexism in the film also produces several moments in which Mary acts against type. It is Mary, not George, who offers their honeymoon savings to rescue the Building and Loan during a Depression bank run. It is Mary, not George, who buys the dilapidated mansion they fix up as their home. And it is Mary—and certainly not George, who by now is off wallowing in self-pity—who raises the missing \$8,000 to rescue George and the Building and Loan from ruin. Mary seems to be the only person in the film besides

²⁹⁸ E.g., Bert Briller, *Review: It's a Wonderful Life*, VARIETY, Dec. 16, 1946, available at <http://variety.com/1946/film/reviews/it-s-a-wonderful-life-1200414860/>; Kate Cameron, *James Stewart Back in 'A Wonderful Life'*, N.Y. DAILY NEWS, Dec. 21, 1946, at 22 col.1; *It's a Wonderful Life*, HOLLYWOOD RPT., Dec. 19, 1946, available at <http://www.hollywoodreporter.com/news/a-wonderful-life-1946-movie-754681>.

²⁹⁹ E.g., James Agee, *Films*, 163 THE NATION, Dec. 28, 1946, at 766; Bosley Crowther, *The Screen in Review: At Three Theatres*, N.Y. TIMES, Dec. 23, 1946, available at <https://www.nytimes.com/1946/12/23/archives/the-screen-in-review-at-three-theatres-its-a-wonderful-life-with.html>; *Current Cinema: Angel of Whimsey*, THE NEW YORKER, Dec. 21, 1946, at 87.

Potter with any financial know-how.³⁰⁰ Our present preconception of gender equality, virtually nonexistent in 1946, creates a feminist understanding of some of Mary's actions in a film filled with sexist anachronisms.

By “objectively” removing our contemporary commitment to gender equality and every other contemporary prejudice, were it even possible, we would remove one of the ways we understand *It's a Wonderful Life*, extinguishing both its gender stereotyping and its recognizably proto-feminist moments. It would also leave us safe in our present, unable to take seriously Mary's life as a model even though women still choose it. To call Mary's character stereotypical and repressed is already to reject her life as a model for one's own.

E. Public-Meaning Originalism and Brown

Conforming to the contemporary imperative that one's interpretive theory account for *Brown v. Board of Education*, Professor Solum has offered an abbreviated originalist defense of *Brown*,³⁰¹ based on a revisionist interpretation of the 14th Amendment by Professor McConnell.³⁰² McConnell argues that a series of congressional debates and votes on the Civil Rights Act of 1875 two to six years *after* ratification of the amendment demonstrates that *Brown* was either “correctly decided on originalist grounds” or “within the legitimate range of interpretations commonly held”

³⁰⁰ See Robert Beuka, *Imagining the Postwar Small Town: Gender and the Politics of Landscape in It's a Wonderful Life*, 51 J. FILM & VIDEO 41, 43 (1999-2000).

³⁰¹ Lawrence Solum, *Hearings on the Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the Sen. Comm. on the Judiciary*, 31 DPCE ONLINE 575, 577 & n.5 (2017), <http://www.dpceonline.it/index.php/dpceonline/article/view/428/417>. (DCPE Online is published by *Diritto Pubblico Comparato e Europeo*.) This statement is a slightly expanded and footnoted version of Statement of Lawrence Solum, *Hearings on the Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the Sen. Comm. on the Judiciary*, 115th Cong. (March 23, 2017), <https://www.judiciary.senate.gov/download/03-23-17-solum-testimony>. All citations hereafter are to the later, expanded DPCE Online version.

³⁰² Michael McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL. 457 (1995) [hereinafter McConnell, *Originalist Case*]. This essay is a much abridged version of Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) [hereinafter McConnell, *Originalism & Desegregation*].

in 1868.³⁰³ Legal historians praised McConnell’s work for the new light it shed on public school segregation during Reconstruction, but forcefully rejected his claim that the original meaning of the 14th Amendment precluded racially segregated public schools.³⁰⁴ Nevertheless, McConnell’s account remains the leading originalist justification of *Brown*.

Professor Solum endorses McConnell’s account despite its departure from both halves of the new-originalist method to which he is committed. First, McConnell does not attempt to ascertain the original semantic meaning of the 14th Amendment in 1868—that is, whether a literate person of the time would have understood the amendment’s guarantee of the “privileges or immunities of citizenship” or the “equal protection of the laws” to have prohibited state-mandated racial segregation of public schools.³⁰⁵ Nor does McConnell produce contextual evidence from the drafting or ratification of the Amendment between 1866 to 1868 which might have specified the Amendment’s ambiguous semantic meaning to prohibit segregated public schools.³⁰⁶

³⁰³ McConnell, *Originalist Case*, *supra* note 302, at 458.

³⁰⁴ E.g., Michael J. Klarman, *A Response to Professor McConnell*, VA. L. REV. 1881 (1995); Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, CONST. COMM. 223 (1996). McConnell replied to Klarman in Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995) [hereinafter McConnell, *Reply to Klarman*].

³⁰⁵ Compare *supra* text accompanying notes 29-40. McConnell instead draws from the subjective understandings of the amendment held by members of 41st, 42nd, and 43rd Congresses which drafted, debated, and enacted the Civil Rights Act of 1875 between 1870 and 1874; he especially concentrates on those (many fewer) members were also part of the 39th Congress which reported the 14th Amendment to the states for ratification. See McConnell, *Originalism & Desegregation*, *supra* note 302, at 1092-100.

³⁰⁶ Compare *supra* text accompanying notes 41-52. Instead, McConnell relies primarily on the understandings of the amendment expressed by members of Congress in connection with the drafting, debate and ratification of the Civil Rights Act of 1875 office between 1870 and 1874, or two to six years *after* ratification of the 14th Amendment. McConnell concedes that racially integrated public schools were generally unpopular in both North and South in the late 1860s. He contends that political support for integrated schools grew in the early 1870s, after which it quickly dissipated in the general waning of political and popular support for Reconstruction in the mid- and late-1870s. McConnell, *Reply to Klarman*, *supra* note 304, at 1946.

McConnell argues that congressional debates about school desegregation in the early 1870s were rich and robust, making them far better evidence of the meaning of the 14th Amendment than what he calls the “weak and scattered” evidence available during the actual ratification debates in 1868. McConnell, *Reply to Klarman*, *supra* note 304, at 1944; McConnell, *Originalist Case*, *supra* note 302, at 459. This is a nonsequitur; congressional debates after ratification of the 14th Amendment are not evidence of the public meaning of the 14th Amendment at the time of ratification, unless there is reason to believe that post-ratification understandings coincided with the public meaning

Professor McConnell's originalist defense of *Brown* and Professor Solum's wholesale adoption of it are examples of what Gadamer calls (in the awkward English translation) "working-effective history" or, roughly, the effects that history imposes on meaning through time.³⁰⁷ We do not stand outside of the history we investigate; what we choose to examine and how we understand it are influenced by the current effect on us of the very history we study. I do not doubt that McConnell undertook his originalist defense of *Brown*, as he recounts, after reading an 1873 Supreme Court decision which seemed to undermine the conventional wisdom that the 14th Amendment did not prohibit segregated schools.³⁰⁸ But a Supreme Court with new-originalist integrity would reverse many of its prior, nonoriginalist decisions; why pick *Brown* off the pile to save?

Influence is notoriously difficult to prove. Still, it seems likely that McConnell's decision to develop his defense of *Brown*, however flawed an example of public-meaning originalism, and Solum's decision to endorse it despite these flaws,³⁰⁹ were related to their respective methodological commitments to public-meaning originalism in the shadow of *Brown*'s

at the time of ratification. McConnell gives no such reasons, and his critics provide reasons to believe that public understandings of the 14th Amendment in the early 1870s diverged sharply from public understandings upon ratification in 1868. See, e.g., Klarman, *supra* note 304, at 1884, 1900 (arguing that Republican understandings of the 14th Amendment radicalized as they steadily lost political power in the aftermath of ratification). McConnell implicitly acknowledges the force of Professor Klarman's argument when he suggests the belated legislative history of the Civil Rights Act of 1875 is the best evidence available of the original meaning of the 14th Amendment ratified several years earlier. See McConnell, *Reply to Klarman*, *supra* note 308, at 1944.

³⁰⁷ GADAMER, TRUTH & METHOD, *supra* note 19, at 310-18.

³⁰⁸ See McConnell, *Originalist Case*, *supra* note 306, at 458 (discussing *Railroad Co. v. Brown*, 84 U.S. (17 Wall.) 455 (1873)).

³⁰⁹ Solum adopted McConnell's argument despite its suffering from deficits for which Solum has criticized others. See, e.g., Lawrence Solum, *Turner on Scalia & Brown v. Board*, LEGAL THEORY BLOG (Feb. 4, 2015) (criticizing Ronald Turner, *Justice Antonin Scalia's Flawed Originalist Justification for Brown v. Board of Education*, 9 WASH. U. JURIS. REV. 179 (2017), for, *inter alia*, articulating and applying "some form of originalism," but not the "public meaning originalism" endorsed and elaborated by Scalia, Solum, and others), <https://lsolum.typepad.com/legaltheory/2015/02/turner-on-scalia-brown-v-board.html>.

canonization. McConnell is a prominent originalist, although he tends to deploy it in practice more than preach it in theory.³¹⁰ Professor Solum is also a prominent originalist, and a foremost theorist of public-meaning originalism from the 1990s to the present.³¹¹

The moral prestige of *Brown* requires that any viable interpretive theory justify its result. But McConnell embarked on his defense of *Brown*, and Solum endorsed it, long after *Brown* was widely acclaimed as a moral highpoint in Supreme Court history, and also after the rise of originalism and its critics in the 1980s. And the canonization of *Brown* occurred years after the decision issued in 1954, and nearly a century after the ratification of the 14th Amendment, which should make *Brown*'s very belated prestige methodologically beside the point for public-meaning originalists. *Brown*'s canonized after-life generates a *present* concern: how to defend public-meaning originalism in the face of (i) *Brown*'s moral imperative of racial equality, and (ii) evidence that the 14th Amendment was not understood to have enacted any such principle when it was ratified in 1868?

In short, the past of the 14th Amendment—its original public meaning—is necessarily bound up with a present imperative—that any viable theory of constitutional interpretation account for the result in *Brown*. Even so committed an originalist as Solum is compelled to transgress public-meaning methodology to satisfy this imperative.

CONCLUSION: WE'RE ALL NONORIGINALISTS NOW

Just as the contemporary commitment to gender equality creates the understanding of gender-stereotyping in *It's a Wonderful Life*, the contemporary commitment to racial equality

³¹⁰ In addition to McConnell, *Originalism & Desegregation*, *supra* note 302, see, e.g., Nathan Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

³¹¹ See *supra* note 22.

symbolized by *Brown* demands an original understanding of the 14th Amendment that includes an historically implausible warrant for desegregating public schools. The semantic expressions that compose both film and decision have remained literally unchanged through the intervening decades; there has been no “linguistic drift.”³¹² Nevertheless, each now means something different than it did in the past.

It's a Wonderful Life and *Brown v. Board of Education* have passed down to the present encased in traditions which affect how we now understand them, at the same time that our present concerns affect how we understand the past that generated these very traditions. The task of interpretation is to connect this present with this past, to “fuse their horizons.”³¹³ We cannot abandon the present for the past as public-meaning originalism presupposes, because the present is already baked into the past. Nor can we cut loose the present from the past like those ubiquitous bogeys, the “living constitutionalists,”³¹⁴ because the present is always already affected by the past. This problem is neither purely normative (“How *should* we interpret the constitution?”) nor purely epistemological (“How *can* we interpret the constitution?”), but ontological (“What *is* interpretation of the Constitution?”). Constitutional meaning circles among past and present; it necessarily combines, *cannot do other than combine*, the effect of the past through history and tradition on our present concerns, and the shaping exerted by those same present concerns on our understanding of history and tradition.

Why does this matter? The rhetorical power of originalism is its claim that originalists are applying objective method (“discovering constitutional meaning”), while nonoriginalists are

³¹² See *supra* text accompanying notes 38-40.

³¹³ See *supra* Part III-A.

³¹⁴ See *supra* text accompanying notes 16-17.

tainted by subjectivity (“making it up”).³¹⁵ But this dichotomy is false, because the fixation thesis is false. “Fixed constitutional meaning” and the other purported objectivities in which new originalists wrap their method are no less touched by interpretive subjectivity in the present than the interpretive approaches new originalists attack. Like all human inquiries into proper action in particular situations, constitutional interpretation is necessarily affected by particularities of the judge, the issue before her, and their relation to constitutional history and contemporary constitutional, political, and social imperatives. None of this is subject to adjudication by a priori rule or objective method, as public-meaning originalists imagine.

No one occupies an interpretive high ground, because none exists. Everyone—judges, lawyers, and professors, those on the right and the left, originalists and not—is doing the same interpretive thing—trying to connect the exigencies of the present with a document more than two centuries in force, adopted under radically different circumstances, reflecting sometimes anachronistic and occasionally repugnant values, with a peculiar ongoing history that perpetually closes off some interpretive options even as it opens up others. We are all non-originalists now, though not everyone will admit it.

³¹⁵ See *supra* text accompanying and preceding note 18.