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Conservatives, Liberals, Romantics: The Persistent Quest for Certainty in Constitutional Interpretation

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ESSAY

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I. INTRODUCTION

From the time that Robert Bork issued his first attack on the Warren Court,[1] originalism has belonged to political conservatives. This interpretive theory, which holds that the understanding of the Constitution at the time it was drafted and ratified controls its contemporary meaning, has been regularly utilized by conservative judges and politicians over the last two decades to question the legitimacy of various (mostly liberal) Supreme Court decisions.[2] Given the liberal tilt of the legal academy, it is not suprising that advocates of originalism constitute a minority of constitutional scholars.[3]

Recently, a prominent constitutional theorist with unmistakably liberal credentials announced his conversion to originalism. Michael Perry, once a self-described non-originalist, now argues that originalism is the only legitimate method of interpreting the Constitution.[4] Perry did not change his political commitments along with his methodological ones, however; his recent work is an extended argument against the "conservative originalism" advocated by Bork. Like John Ely, who sought to defend the activist decisions of the Warren Court against conservative attacks on their legitimacy,[5] Perry seeks to blunt more recent conservative criticism of the Court by demonstrating that originalist interpretation need not foreclose broad

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1. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1 (1971).

2. See, for example, Robert Dole, speech to the American Society of Newspaper Editors (Apr. 19, 1996), excerpted in N.Y. Times A10 (Apr. 20, 1996); Edwin Meese III, Speech to the American Bar Association (July 9, 1985), reprinted as *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. Tex. L. Rov. 455 (1986); William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rov. 849 (1989).

3. See, for example, Raoul Berger, *Government by Judiciary* (Harvard U., 1975); Lino A. Graglia, *Judicial Review on the Basis of "Regime Principles": A Prescription for Government by Judges*, 26 S. Tex. L. J. 435 (1985); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226 (1988); Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rov. 353 (1987). For some prominent critiques of originalism, see Renald Dworkin, *Law's Empire* (Belknap, 1986); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U., 1980); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rov. 781 (1983). For an ideologically diverse collection of position papers on constitutional interpretation and adjudication, see Symposium, *Originalism, Democracy, and the Constitution*, 19 Harv. J. L. & Pub. Pol. 237 (1996).

4. Compare Michael Perry, *Morality, Politics, and Law: A Bicentennial Essay* ch. 6 (Oxford U., 1988), with Michael Perry, *The Constitution in the Courts: Law or Politics?* ch. 3 (Oxford U., 1994).

5. See generally Ely, *Democracy and Distrust* at 73-75 (cited in note 3) (arguing that Warren Court decisions opened up the political process).

readings of the individual rights protected by the Fourteenth Amendment.[6]

Despite their considerable ideological differences, both Bork's "conservative originalism" and Perry's less constrained "progressive originalism" divide the process of understanding into cognitive and normative aspects. The determination of the original meaning of the Constitution is methodologically separated from the question of how this predetermined meaning should be applied in a particular contemporary case.[7] This places both Bork and Perry squarely in the tradition of Romantic hermeneutics, which sought to overcome the uncertainty and imprecision of textual interpretation by developing a "science of interpretation" as epistemologically reliable as the methods of the natural sciences.

The Romantic hermeneutic tradition influenced American law through the work of Francis Lieber, a German immigrant to the United States who published a treatise on legal interpretation in 1839.[8] Like contemporary originalists, Lieber exhibited the characteristic Romantic anxiety over the uncertainty of interpretation, and sought to develop a method that would guarantee the correctness of interpretive meanings ascribed to legal texts by judges and lawyers.[9]

In *Truth and Method*,[10] German philosopher Hans-Georg Gadamer argued that the presuppositions of the Romantic quest for epistemological certainty in interpretation are inconsistent with how human beings understand texts.[11] Though it is not frequently cited in American legal scholarship, *Truth and Method* has long been viewed by continental and postmodern philosophers as the most important

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6. See Perry, *Constitution in the Courts* at 9-10, 54-55 (cited in note 4) ("[T]he originalist approach to constitutional interpretation does not entail . . . a small or passive judicial role; [it] is not necessarily inconsistent with a judicial role as large or active as any apostle of 'the Warren Court' . . . could reasonably want.").

7. See Part II.

8. Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, with Remarks on Precedents and Authorities* (F.H. Thomas, 3d ed. 1880). Lieber's treatise was recently republished with extensive commentary in 16 Cardozo L. Rev. 1879 (1995).

9. See Sanford Levinson and Steven Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* ix (Northwestern U., 1988) (arguing that because interpretation "endeavors to arrive at conclusions beyond the absoluto sense of the text," judges and lawyers "must strive the more anxiously to find out safe rules, to guide us on the dangerous path") (quoting Lieber, *Legal and Political Hermenuetics* at 52-53 (cited in note 8)).

10. Hans-Georg Gadamer, *Truth and Method* (Crossroad, 2d rev. ed. 1993).

11. See Part III.

work on textual interpretation published in this century.[12] Thus, the more interesting question raised by Perry's conversion to originalism is not whether he or Bork espouses the better version of the method, but whether either (or any) version of originalism is a useful way to investigate questions about the meaning of the Constitution in light of Gadamer's argument.

I will argue that it is not. I first discuss Gadamer's point that separation of the cognitive or "objective" meaning of a text from its normative or "subjective" application is not consistent with the process of understanding.[13] Both Bork's and Perry's use of their respective versions of originalism illustrates Gadamer's central point: that the epistemological certainty in interpretation sought by separation of the cognitive from the normative cannot be achieved.[14] That theorists on both the right and the left persist in their attempts to guarantee interpretive meaning through "objective" methodologies like originalism is evidence of the extent to which constitutional theory remains confined by the questionable assumptions of the Romantic tradition.[15] Given the establishment of postmodernism as a legitimate, albeit controversial, approach to legal theory, and the increasing influence of postmodernism in American culture generally, I conclude with the suggestion that originalism must engage postmodern criticism like *Truth and Method* if it is to remain a viable theory of constitutional interpretation.

II. ORIGINALIST METHOD

Bork's theory of originalism has its roots in a fundamental question of American political theory: How can one reconcile the majoritarianism of American democracy with the countermajoritarianism of judicial review? Declaration by the federal judiciary that an act of an elected branch of government is unconstitutional is the overturning of the majority's political will by judges insulated from this will by lifetime appointment.[16] Such judicial declarations can themselves be overturned only by assembling the difficult supermajorities required to amend the Constitution. On the other hand, subjecting

12. See, for example, Jean Grondin, *Introduction to Philosophical Hermeneutics* 2 (Yale U., 1994); Joel Weinsheimer, *Gadamer's Hermeneutics: A Reading of* Truth and Method ix (Yale U., 1985).

13. See Part III.

14. See Parts IV and V.

15. See Part VI.

16. Bork, 47 Ind. L. J. at 3 (cited in note 1).

political minorities to unconstrained majority rule would inevitably result in an unjust diminution in their liberty, for there are "some areas of life in which the individual must be free of majority rule."[17] This seeming paradox in American democracy, whereby a relatively few unelected judges have the power to thwart majority will as expressed in both Congress and the state legislatures, is known as the "counter-majoritarian difficulty."[18]

How can judicial countermajoritarianism be justified in a democracy? Assuming that in a democracy the majority presumptively rules, Bork maintains that judicial invalidation of majority actions is legitimate only when such invalidation is rooted in a provision of the Constitution that expressly insulates minorities from the consequences of majority rule.[19] Otherwise, judges are not adjudicating under the Constitution, but are merely asserting their own will:

> Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able te find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure.[20]

Since it is the majority's formal, self-conscious ratification of the minority protection provisions set forth in the Constitution that justifies judicial overturning of majority will, the meaning of these provisions must be restricted to the "original understanding"—that is, the understanding of the provisions held by the people at the time of ratification.[21] In any conflict between majority and minority, the

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17. Robert H. Bork, *The Tempting of America* 139 (Free Press, 1990). See also Bork, 47 Ind. L. J. at 3 (cited in note 1) ("[T]here are some areas of life a majority should not control.").

18. See, for example, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-18 (Bobbs-Merrill, 1962).

19. Bork, *Tempting of America* at 150 (cited in note 17); Bork, 47 Ind. L. J. at 3, 10-11 (cited in note 1).

20. Bork, 47 Ind. L. J. at 9 (cited in note 1). See also Bork, *Tempting of America* at 265 (cited in note 17) ("The person who understands these issues and nevertheless continues to judge constitutional philosophy by sympathy with its results must . . . admit that he is prepared to sacrifice democracy in order that his moral views may prevail. . . . He believes in the triumph of the will."); Bork, 47 Ind. L. J. at 10 (cited in note 1) ("Where the Constitution does not embedy the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute.").

21. See Bork, *Tempting of America* at 4-5, 143-45, 351-53 (cited in note 17). See also Robert H. Bork, *Styles in Constitutional Theory*, 26 S. Tex. L. J. 383, 389 (1985) ("[A] value-choosing theory must give a satisfactory reason why it is legitimate for a court to impose a new value on a majority against its wishes."). Bork does acknowledge the legitimacy of recognizing so-called "derivative" constitutional rights like freedom of association, the possession of which is essential to meaningful exercise of rights expressly enumerated in the constitutional text. Bork, 47 Ind. L. J. at 18 (cited in note 1).

judge must derive from the original understanding of the Constitution a rule or principle that resolves the conflict.[22] No other interpretive method, argues Bork, is consistent with democracy.[23]

Perry's originalism is also directed at the countermajoritarian difficulty, though he is less explicit about this than Bork and uses a somewhat different vocabulary. In Perry's view, the words of the Constitution represent various "norms" or "directives."[24] For Perry, the meaning of a textual provision of the Constitution is the norm or directive signified by the text: to "interpret" a constitutional provision is merely to identify and articulate the norm or directive it represents.[25] The real question is whether the understanding of those who drafted and ratified the text, or that of some more comtemporary group, should be privileged in articulating the norm or directive embodied within the provision.[26] Like Bork, Perry concludes that the original understanding must be privileged, on the similar ground that constitution-making is an intentional political act undertaken to bind future governments.[27] Thus, the Supreme Court may legitimately enforce only those norms or directives signified by the constitutional text as originally understood by its Framers and ratifiers: "It is difficult to discern any justification . . . for the Court privileging any understanding of a constitutional provision other than the original understanding—for privileging, that is, any directive other than the directive the provision was originally understood to communicate, the directive the provision was ratified to establish."[28]

Although Perry and Bork both insist that the meaning of the Constitution be defined by its original understanding, they diverge

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Bork denies that originalism requires determination of the subjective intentions of the Framers with respect to any constitutional provision: "[W]hat the ratifiers understood themselves to be enacting must he taken to be what the public of that time would have understood the words to mean. . . . The search is not for a subjective intention." Bork, *Tempting of America* at 144 (cited in note 17). See also Kay, 82 Nw. U. L. Rev. at 230 (cited in note 3) (calling for "judges to apply the rules of the written constitution *in the sense in which those rules were understood by the people who enacted them*").

22. See Bork, *Tempting of America* at 262, 352 (cited in note 17) ("Doctrine must be shaped and reshaped to conform to the original ideas of the Constitution.").

23. Id. at 155; Bork, 47 Ind. L. J. at 3 (cited in note 1).

24. I have not attempted to synthesize Perry's and Bork's respective vocabularies into third terms that encompass the meaning of hoth. In general, I understand Bork's originalist "derivation" and "definition" of constitutional "principles" as equivalent to Perry's originalist "interpretation" of constitutional "norms" or "directives," terms that Perry uses interchangeably.

25. Perry, *Constitution in the Courts* at 7-8, 28, 47-48 (cited in noto 4). Because Perry's definition of "interpretation" is somewhat different from tlie meaning of the word in ordinary usage, I enclose the word in quotation marks whenever I intend Perry's meaning.

26. Id. at 33.

27. Id. at 29-31, 48.

28. Id. at 48.

considerably on the procedure for applying this understanding in particular cases. Bork maintains that the personal value choices of judges must be excluded from the application as well as from the derivation of constitutional principle.[29] Applicative neutrality is threatened if judges can articulate a principle derived from the Constitution at any level of abstraction they choose. By expanding or contracting the generality with which a principle is articulated, judges can determine whether or not the principle applies to a particular case, thus covertly injecting personal values into the judicial process.[30] As in the derivation of constitutional principle, Bork maintains that defining the original understanding guarantees value neutrality in the application of principle by requiring that the judge "state the principle at the level of generality that the text and historical evidence warrant."[31] Although it is evident that Bork understands derivation and application as distinct steps in the interpretive process, it is also clear that for him the originalism of application seems to follow from the originalism of derivation.

Not so with Perry. Again using a vocabulary slightly different from Bork's,[32] Perry distinguishes constitutional "interpretation" from constitutional "specification."[33] Perry maintains that the constitutional norms or directives identified by originalism are often indeterminate—so abstract that it is not immediately clear how, or even whether, they should resolve a particular case or controversy to which they appear relevant.[34] Constitutional specification is the refinement and clarification of indeterminate norms and directives in the process of using them to resolve concrete disputes presented by actual cases.[35] Whereas "interpretation" results in a statement of the "textual" meaning of a constitutional provision, specification yields what Perry calls

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29. Bork, *Tempting of America* at 143, 146 (cited in note 17); Bork, 47 Ind. L. J. at 7 (cited in note 1).

30. Bork, *Tempting of America* at 146 (cited in note 17); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 San Diego L. Rev. 823, 828-29 (1986).

31. Bork, *Tempting of America* at 149 (cited in note 17). See, for example, id. at 150 ("Original understanding avoids the problem of the level of generality in equal protection analysis by finding the level of generality that interpretation of the words, structure, and histery of the Constitution fairly supports.").

32. Although Bork's "application" of principle is obviously intended to be more constrained than Perry's "specification" of norms or directives, each performs the same function in its respective methodology—that of adapting an abstract principle to a concrete situation.

33. Perry, *Constitution in the Courts* at 28, 35, 36 (cited in note 4).

34. Id. at 37. See, for example, id. at 116 (considering the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

35. Id. at 28, 37.

the provision's "contextual" meaning.[36] For Perry, "interpretation" is descriptive and positivist—what directive does the text signify in light of its original understanding?—while specification is an unambiguously normative procedure, a "species of judgment"—how (if at all) should an indeterminate originalist norm or directive resolve a particular constitutional case?[37]

Unlike Bork, Perry differentiates sharply between interpretive methodology and judicial role. Perry maintains that to have established originalism as the correct way to discern the meaning of the Constitution is not to have established judicial "minimalism"—the view that judges should be restrained in identifying and applying constitutional norms: "[T]he originalist approach to constitutional interpretation does not entail—it does not necessarily eventuate in—a small or passive judicial role."[38]

Perry's argument that "originalism does not entail minimalism" has two parts.[39] First, history alone is often insufficient to determine the "interpretive" meaning of the constitutional text, so that there are usually two or more norms that an originalist judge plausibly could ascribe to a constitutional provision.[40] In this event, originalism itself does not instruct the judge how to choose between competing plausible directives, and she thus may choose the less determinate directive—the one that maximizes judicial discretion—while remaining faithful to her originalist commitments.[41] The source of judicial restraint in such a situation is not originalism, but "interpretive minimalism," which is the view that judges should choose the more determinate directive whenever a text plausibly can be understood to represent more than one.[42]

Second, even when only one plausible "interpretive" meaning exists for a provision of the Constitution, this meaning is often insufficient to determine the normative meaning of the text in a specific situation, so that it is unclear how (if at all) the directive communicated by the text should resolve a particular dispute.[43] Again, originalism does not dictate which of several plausible specifications of the textual directive an originalist judge must choose in such a situation, and an originalist judge remains free to choose the specification with

36. Id. at 35, 36.
37. Id. at 28, 75.
38. Id. at 55.
39. See id. at chs. 4 and 5.
40. Id. at 56, 75-76.
41. Id. at 58-59.
42. Id. at 84.
43. Id. at 56, 75.

the greatest breadth and impact. Indeed, Perry argues that originalism only dictates how to "interpret" the constitutional text, and has nothing whatsoever to do with specifying the constitutional meaning identified by "interpretation":

> [O]riginalism . . . is a position about the proper judicial approach to the interpretive inquiry. It bears emphasis that originalism is not a position about the proper judicial approach to the second of those inquiries: the *normative* inquiry, the inquiry into what shape to give, in a particular context, an indeterminato directive represented . . . by a particular provision of the constitutional text.[44]

As with "interpretation" of the constitutional text, the source of judicial restraint in applying constitutional norms is not originalism, but "normative minimalism"—the view that judges should defer to the judgment of the political branches in specifying the meaning of constitutional norms when they are concretized in particular situations or controversies.[45]

III. GADAMER'S CRITIQUE OF METHOD

A. Science, Kant, and Their Epistemological Challenge to the Human Sciences

Despite their differences over the appropriate breadth of judicial power to apply the original understanding in particular cases, both Bork and Perry methodologically separate cognitive from normative interpretation. Both of them view determination of the originalist meaning of a constitutional text as an interpretive step prior to, and distinct from, application of that meaning to a particular situation. Bork's argument, for example, assumes that the derivation of constitutional principle from the original understanding is separate from the subsequent application of that principle to the facts of a particular case.[46] Perry's differentiation of interpretation and specification results in an identical separation of the cognitive and the nor-

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44. Id. at 28.

45. Id. at 87-90.

46. "Having derived and defined the principle to be applied, [the judge] must apply it consistently and without regard to his sympathy or lack of sympathy with the parties before him." Bork, *Tempting of America* at 151 (cited in note 17). See also id. at 143 (arguing that for judges meaningfully to be hound hy law, the law must have "a meaning independent of our own desires").

mative, made even sharper because specification does not share originalist premises with "interpretation" as derivation and application do in Bork's methodology.[47] Thus, both Perry and Bork assume that the original understanding has an existence apart from the cases to which it is applied.

In *Truth and Method,* Gadamer criticized the distinction between cognitive and normative interpretation, the very distinction on which both Bork's and Perry's respective accounts of constitutional interpretation depend. *Truth and Method* is a lengthy treatise the intricately related parts of which cannot be adequately summarized here.[48] Its general target is the Enlightenment idea that knowledge about the world lies exclusively within the domain of scientific methodology.[49] According to Gadamer, the essence of Enlightenment thought was its vigorous criticism of the influence of tradition and dogmatic authority in the search for truth.[50] The noticeable result of this criticism was the abandonment of authority and tradition—indeed, of all "pre-judgments" or prejudices—as the principal means of identifying truth and the installment of reason in their place:

> In general, the Enlightenment tends to accept no authority and to decide everything before the judgment seat of reason. Thus the written tradition of Scripture, like any other historical document, can claim no absolute validity; the possible truth of the tradition depends on the credibility that reason accords it. It is not tradition but reason that constitutes the ultimate source of all authority.[51]

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47. "[T]he problem [of constitutional interpretation] is deciding what the text means in two senses: first, deciding what directive the text, as originally understood, represents, and, second, deciding what that directive means, what it requires, in the context of the conflict to be resolved. . . . A judge simply cannot do the latter until she has first done the former." Perry, *Constitution in the Courts* at 35 (cited in note 4). See also id. at 37 ("*Before* the directive the text was meant to represent can be 'understood'/'applied'. . . the directive the text was meant to represent must be identified. Before the normative inquiry, the interpretive inquiry.").

48. For a concise summary of Gadamer's argument, see Grondin, *Philosophical Hermeneutics* ch. VI (cited in note 12).

49. See Weinsheimer, *Gadamer's Hermeneutics* at 17, 28, 41 (cited in note 12). Gadamer states:

> Ultimately, it has always been known that the possibilities of rational proof and instruction do not fully exhaust the sphere of knowledge. . . .
>
> We . . . must laboriously make our way back into this tradition by first showing the difficulties that result from the application of the modern concept of method to the human sciences. Let us therefore consider how this tradition became so impoverished and how the human sciences' claim to know something true came to be measured by a standard foreign to it—namely the methodical thinking of modern science.

Gadamer, *Truth and Method* at 23-24 (cited in note 10).

50. Gadamer, *Truth and Method* at 270-72 (cited in note 10).

51. Id. at 272.

Scientific method exemplified this Enlightenment "prejudice against prejudice."[52] The distinctive attribute of scientific method is its rigorous separation of the investigator from the object of investigation.[53] The validity of the results of scientific investigation is not understood to depend on either the identity of the investigator or the consistency of the results with conventional wisdom about the subject matter. Rather, the validity of the results depends on the validity of the procedure used to generate them. "What makes modern scholarship scientific," argues Gadamer, "is precisely the fact that it objectifies tradition and methodically eliminates the influence of the interpreter and his time on understanding.... [A]ccording to this view, science claims to remain independent of all subjective applications by reason of its method."[54] In other words, a valid method purports to objectify the process of obtaining knowledge by yielding true results regardless of who employs the method.[55] Consequently, method was thought to have freed scientific investigation from the biases of tradition and authority against which Enlightenment thinkers so vigorously fought.[56]

The emergence of method in the natural sciences had ominous consequences for the "moral" or "human" sciences: law, literature, and theology. In the human sciences, knowledge had long been thought to depend on the cultivation of a proper sense of community, judgment, and taste.[57] For example, nineteenth-century German sci-

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52. Id. at 270-71.

53. See id. at 4 ("The use of the inductive method is... free from all metaphysical assumptions and remains perfectly independent of how one conceives of the phenomena that one is observing.").

54. Id. at 333. Weinsheimer adds:

> A prejudice may be quite correct, but the Enlightenment considered all prejudices (that is, all pre-judgments predetermined by tradition) as false because it was willing to call true only those judgments that had received the imprimatur of method. The only certainty derived from methodological certification, and any certainty that had not passed the test of doubt was deemed not only uncertain but at least provisionally false.

Weinsheimer, *Gadamer's Hermeneutics* at 168 (cited in note 12)

55. Weinsheimer points out that this view of science as neutral and value-free investigation of the world is no longer considered tenable by most contemporary historians and philosophers of science. See Weinsheimer, *Gadamer's Hermeneutics* at 15-32 (cited in note 12). See also Robert P. Crease, *The Play of Nature: Experimentation as Performance* (Indiana U., 1993); Thomas S. Kuhn, *The Structure of Scientific Revolutions* (U. of Chicago, 2d ed. 1970).

56. See Gadamer, *Truth and Method* at 182 (cited in note 10) ("[T]he enemy against which the new science of nature has to assert itself is the knowledge gained from Scripture and authorities. By contrast, the essence of the new science consists in its special methodology, which leads through mathematics and reason to an insight into what is intelligible in itself.").

57. Id. at 19-40. This sense was thought to be achieved through *Bildung*, a complex German concept defined by Herder as the "rising up to humanity through culture." Id. at 10. According to Gadamer, *Bildung* is "intimately associated with the idea of culture and designates primarily the properly human way of developing one's natural talents and capacities." Id. See

entist Hermann Helmholtz described knowledge in the human sciences as the result of "an unconscious process" requiring "a kind of tact" as well as "a well-stocked memory and the acceptance of authorities."[58] The true meaning of a text was not understood to depend on proper application of an impersonal method. To the contrary, it was precisely a developed aesthetic sense in the interpreter that was thought to enable the discernment of a text's true meaning.[59] In short, the human sciences were a way of knowing built upon ability rather than method.[60]

At the same time that method was emerging as the means of discovering truth and knowledge, Kant was demonstrating the subjective dimension of aesthetics in his *Critique of Judgment.* Kant established that the knowledge given by aesthetics constituted knowledge of the interpreter, not knowledge of the artistic or textual object, thereby divesting aesthetic sense, and by extension the human sciences, of authority as a way of knowing the world, and leaving epistemology to the natural sciences.[61] Whereas the humanistic concepts of judgment and taste "had previously possessed a *cognitive* function," writes Jean Grondin, Kant's critique "subjectivized and aestheticized judgment and taste and (what amounts to the same thing) denied it any cognitive value. Whatever did not measure up to the standards of the objective and methodical natural sciences, was thereafter considered merely 'subjective' and 'aesthetic'—that is, excommunicated from the realm of hard knowledge."[62]

The objectification of knowledge by method and the subjectification of aesthetics by Kant combined to make the human

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also Weinsheimer, *Gadamer's Hermeneutics* at 69 (cited in note 12) ("Originating in medieval mysticism, Bildung first suggests cultivating the image . . . of God in man; and the post-Renaissance usage of the term retains the sense of full, almost supernatural, realization of human potential.").

58. Gadamer, *Truth and Method* at 5 (cited in note 10).

59. See id. at 27-29 (describing the Pietists' belief that scriptural and all other knowledge stemmed from the *sensus communis*); id. at 37-38 (elaborating the historical concept of taste as a "mode" or "way of knowing").

60. See id. at 31 ("[Judgment] cannot be taught in the abstract but only practiced from case to case, and is therefore more an ability like the senses. It is something that cannot be learned, because no demonstration from concepts can guide the application of rules.").

61. Id. at 40-43, 97; Weinsheimer, *Gadamer's Hermeneutics* at 65-66, 81 (cited in note 12). Some confusion arises over the fact that Kant believed the aesthetic senses were "subjective"—that is, they constituted knowledge of the interpreter rather than knowledge of the work of art—yet "universal"—they functioned in the same way in every person. As Gadamer points out, this "universality of taste" is not the same as "empirical universality." While the "universality of taste" does tell something about the artistic object, it does so only through the interpreter. See Gadamer, *Truth and Method* at 37 (cited in note 10).

62. Grondin, *Philosophical Hermeneutics* at 109-10 (cited in note 12).

sciences appear wholly inadequate as a means of discovering truth.[63] For the human sciences to retain their status as sources of knowledge in this intellectual environment, they needed a general method of interpretation modeled after the methods used in the natural sciences.[64] A general method, it was thought, would put the insights gained from interpretation in the human sciences on the same epistemological footing as the results of investigation in the natural sciences.[65] The development of such a method was the principal preoccupation of Romantic hermeneutics in the nineteenth century.[66]

B. Heidegger, Gadamer, and the "Problem of Application"

The ontological premises of the Romantic impulse to develop a science of interpretation were challenged by Martin Heidegger in *Being and Time*.[67] Heidegger rejected as "superficial" and "formal" the separation of subject and object that forms the principal premise of the scientific method.[68] Heidegger argued instead that human beings have a constant, prior, and inevitable involvement with those things in the world which they seek to understand.[69] Any effort at

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63. Gadamer, *Truth and Method* at 5, 271 (cited in note 10); id. at 84 ("The shift in the ontological definition of the aesthetic toward the concept of aesthetic appearance has its theoretical basis in the fact that the domination of the scientific model of epistemology leads to discrediting all the possibilities of knowing that lie outside this new methodology ['fiction']." (brackets in original)). Gadamer continues: "Is there to be no knowledge in art? Does not the experience of art contain a claim to truth which is certainly different from that of science, but just as certainly is not inferior to it? This can hardly be recognized if, with Kant, one measures the truth of knowledge by the scientific concepts of knowledge and reality." Id. at 97.

64. Id. at 3-4, 6-7. Some Romantics, such as Droysen, argued that although the human sciences needed a methodology to establish their epistemological credentials, such a methodology need not be modeled on natural science. Id. at 6. Others, such as Dilthey, argued for the epistemological independence of the human sciences, but somewhat paradoxically remained strongly committed to the epistemological model of method in the natural sciences. Dilthey thus argued that the human sciences required a method distinct from scientific method, yet modelled his human sciences method on the methods of the natural sciences. Id. at 7-8.

65. See Grondin, *Philosophical Hermeneutics* at 6, 110 (cited in note 12).

66. See id. at ch. IV.

67. Martin Heidegger, *Being and Time* (Harper & Row, 1962).

68. Id. at 86-87. See also Allen Thiher, *Words in Reflection: Modern Language Theory and Postmodern Fiction* 38 (U. of Chicago 1984) ("*Being and Time* seeks to show that our experience of the world is not based on any subject-object dichotomy.").

69. See Heidegger, *Being and Time* at 190-91 (cited in note 67) ("[W]hen something within-the-world is encountered as such, the thing in question already has an involvemenet which is disclosed in our understanding of the world."). See also id. at 89 ("When *Dasein* ["Being" or "Being-there"] 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 tbat it is always 'outside' alongside entities which it encounters and which belong to a world already discovered."); Thiher, *Words in Refleetion* at 39 (cited in note 68) ("*Dasein*—being-there—stresses by its form that man is always already present in the world and not separated from it as mind from matter or subject from object.").

understanding is affected by the weight and influence of this prior involvement. When we try to understand something, we cannot help but "project" certain interpretive possibilities onto what we seek to understand as the result of our prior involvement in the world. At the same time, these possibilities are themselves conditioned by the way in which interpretive possibilities have been projected in the past.[70] These projections of meaning constitute what Heidegger called the "fore-structure of understanding."[71] For Heidegger, interpretation in any given context consists of working out the possibilities of meaning implicit in this fore-structure.[72] The point is nicely summarized by Grondin:

> [I]t is not the case that first there are naked things "out there" which are subsequently given a certain coloring by our "subjective" and circumspective understanding. On the contrary, what is primarily there is precisely our involvement in the world, which takes the form of interpretive projects.... Correlative to the factical and therefore fundamentally projective forestructure of understanding is that it always finds itself within pregiven perspectives that guide its expectations of meaning.[73]

Elaborating the hermeneutical implications of Heidegger's fore-structure of understanding, Gadamer seeks to show that understanding the meaning of texts in the human sciences is precisely the result of this fore-structure. Understanding occurs as a result, not of the separation of human beings from the texts they seek to understand, but of their unavoidable prior involvement with such texts:

> 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. Working out

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70. See Heidegger, *Being and Time* at 184-85 (cited in note 67). See also Georgia Warnke, *Gadamer: Hermeneutics, Tradition and Reason* 38 (Polity, 1987) ("[T]he past acquires its meaning in light of present experiences and anticipations while the meaning of the present and anticipation of the future are conditioned by the way in which the past has been understood.").

71. Heidegger, *Being and Time* at 151-52 (cited in note 67).

72. Id. at 188-89.

73. Grondin, *Philosophical Hermeneutics* at 95 (cited in note 12). Grondin states elsewhere:

> According to Heidegger, *Dasein* already finds itself immersed in possibilities of understanding, that is, more or less conscious projects whose function it is to forestall a potentially threatening course of events. In order to stay afloat in this world in which we are and feel "thrown into," our understanding clings to different possibilities of being and behaving that represent as many interpretive, caring or "fore-caring" ... anticipations on the world. Before we become aware of it, we find ourselves entangled in historical perspectives and ways of understanding the world (and thus ourselves since we are essentially, following Heidegger, "beings-in-the-world").

Jean Grondin, *Sources of Hermeneutics* 51-52 (Stato U. of New York, 1995)

> this fore-projection, which is constantly revised in terms of what emerges as he penetrates into the meaning, is understanding what is there.[74]

The conceptual heart of Gadamer's argument is a section entitled "The Hermeneutic Problem of Application."[75] Gadamer here maintains that "understanding always involves something like applying the text to be understood to the interpreter's present situation."[76] For Gadamer, there is no such thing as understanding the abstract meaning of a text—that is, the text's meaning apart from the situation in which it is to be applied. For Gadamer, the meaning of a text is always already shaped by the tradition in which it is embedded—those situations in which the text has previously been applied—and its apparent relevance to the problem faced by the interpreter.

Consider, for example, the question whether *Huckleberry Finn* is a racist text. As Georgia Warnke has pointed out, this "is a question posed from a contemporary point of view."[77] Questions of racism can only arise in a society which holds to the ideal that race ought to be irrelevant to judgments about a person's moral worth. Thus, whether particular books or other works were "racist" could not have been asked in the nineteenth century, which generally believed that African Americans were "naturally" inferior.[78] Moreover, one cannot simply read *Huckleberry Finn* and determine its meaning apart from the question whether this meaning would now be considered racist, because the question conditions the reading, and thus the meaning.[79] In short, the fore-structure of understanding means that a text is understood only when it is applied in a particular situation.[80]

In introducing his argument for the unity of understanding and application, Gadamer draws a helpful analogy between textual

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74. Gadamer, *Truth and Method* at 267 (cited in note 10). Gadamer adds:

> Just as the recipient of a letter understands the news that it contains and first sees things with the eyes of the person who wrote the letter—i.e., considers what he writes as true, and is not trying to understand the writer's peculiar opinions as such—so also do we understand traditionary texts on the basis of expectations of meaning drawn from our own prior relation to the subject matter.

Id. at 294.

75. Id. at 307-11.

76. Id. at 308.

77. Warnke, *Hermeneutics, Tradition and Reason* at 96 (cited in note 70).

78. See Robin West, *Narrative, Authority, and Law* 128-29 (U. of Michigan, 1993) (stating that given the pervasive nineteenth-century view that African Americans were morally inferior as a group, the question what African Americans did to merit condemnation "is not just *unanswerable*" but "*unaskable*").

79. Warnke, *Hermeneutics, Tradition and Reason* at 96 (cited in note 70).

80. Gadamer, *Truth and Method* at 309 (cited in note 10).

understanding and the identification of the good in Aristotelian ethics. Aristotle constructed an ethics that defined the good in terms of human action. Plato's ethics, in contrast, sought to identify the good through metaphysics.[81] In Aristotelian ethics, the goal of moral knowledge is to ascertain what a particular situation requires of the human actor.[82] In other words, ethics is not a matter of applying an abstract rule in a particular situation, of "applying something *to* something," in David Hoy's words, "but is rather a question of perceiving what is at stake in a given situation."[83] This conception of ethics has two important implications. First, knowledge that is not or cannot be applied in a concrete situation is ethically meaningless.[84] Second, moral knowledge cannot be conceptually separated from the concrete situation out of which such knowledge arises.[85] This is true because moral knowledge is not objective, but experiential; it is the kind of knowledge yielded by one's experience of the concrete situation.[86]

Gadamer maintains that legal interpretation exemplifies the identity of understanding and application illustrated by Aristotelian ethics. For Gadamer, it makes no sense to speak in terms of abstract legal meaning; the interpreter of a law understands that law only in terms of the cases in which the law has been and is being applied.[87] Accordingly, legal meaning does not exist outside of the concrete situations in which law has been and must be applied. To be understood at all, the legal text "must be understood at every moment, in every concrete situation, in a new and different way. Understanding

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81. Id. at 312.

82. Id. at 313.

83. David Couzens Hoy, *The Critical Circle: Literature, History, and Philosophical Hermeneutics* 58 (U. of California, 1978).

84. Gadamer, *Truth and Method* at 313 (cited in note 10). "Moral knowledge can never be knowable in advance like knowledge that can be taught." Id. at 321.

85. "What is right, for example, cannot be fully determined independently of the situation that requires a right action from me." Id. at 317. See also id. ("The task of making a moral decision is that of doing the right thing in a particular situation—i.e., seeing what is right within the situation and grasping it.").

86. Id. at 322. See also id. at 314 ("[M]oral knowledge, as Aristotle describes it, is clearly not objective knowledge—i.e., the knower is not standing over against a situation that he merely observes; he is directly confronted with what he sees. It is something that he has to do.").

87. Id. at 325. See id. at 309 ("A law does not exist in order to be understood historically, but to be concretized in its legal validity by being interpreted."). Scriptural intorpretation is another exemplar. See Weinsheimer, *Gadamer's Hermeneutics* at 185-86 (cited in note 12) ("Law and Scripture cannot be understood merely aesthetically or merely historically because their claim on the present, their claim to be applicable, is part of what they are.").

here is always application."[88] Again, Warnke gives a helpful example: If one wants to determine whether the Fourth Amendment prohibits wire-taps, one has to know how the Amendment has been applied in previous cases. At the same time, the understanding of an "illegal search" under the Fourth Amendment will be affected by the determination whether wire-taps are considered illegal. "We thus do not have a purely exegetical knowledge of the meaning of an unlawful search which we can then apply to wire-tapping; rather, our knowledge of what an unlawful search is already involves application."[89] In Gadamer's view, therefore, there is no difference between "cognitive" meaning—what does a legal text mean?—and "normative" meaning—how should this textual meaning be applied in a particular case?[90] Meaning always—and only—arises out of application.

IV. PERRY'S PROBLEM WITH APPLICATION

Given Bork's open disdain for interdisciplinary legal scholarship,[91] one should not be surprised to find that he makes no attempt to engage the arguments of *Truth and Method*, or of hermeneutics generally. Perry, however, does attempt to harmonize his account of constitutional interpretation with *Truth and Method*, denying that the distinction between "understanding" and "application" criticized by Gadamer is the same as Perry's distinction between "interpretation" and specification. In Perry's view, the need for "interpretation" is simply a consequence of the fact that the meaning of some constitutional provisions is not obvious; some interpretive work will be required to identify the norm or directive signified by the text.[92] Perry sees Gadamerian understanding/application as being

88. Gadamer, *Truth and Method* at 308-09 (cited in note 10). See also id. at 329 ("The work of interpretation is *to concretize* the law in each specific case—i.e., it is a work of *application*.").

89. Warnke, *Hermeneutics, Tradition and Reason* at 95-96 (cited in note 70). See also Hoy, *Critical Circle* at 54 (cited in note 83) ("Since understanding is always embedded in a situation, the problem is not one of fitting preconceived notions to a situation, but of seeing *in the situation* what is happening and, most important, what is to be done.").

90. See Warnke, *Hermeneutics, Tradition and Reason* at 95 (cited in note 70) (maintaining that Gadamer views "exegetical" interpretation—attempting te ascertain the meaning of a text apart from any potential applications—and "dogmatic" interpretation—interpreting a text according to a settled or traditional meaning—as essentially the same).

91. See Bork, *Tempting of America* at 134, 207 (cited in note 17) (lamenting that te understand modern legal scholarship "it would be necessary to read widely in moral philosophy, hermeneutics, deconstructionism, Marxism, and who-knows-what-will-come-next").

92. Perry states:

part of constitutional specification—the process of deciding how the already-determined cognitive meaning of a constitutional text should be effectuated in a specific situation.[93] He purports to agree with Gadamer that understanding and application are the same, but nevertheless insists that in some cases the constitutional text must be "interpreted" before it can be applied: "*Before* the directive the text was meant to represent can be 'understood'/'applied'—which, pace Gadamer, is not two moves, but one—the directive the text was meant to represent must be identified. Before the normative inquiry, the interpretive inquiry."[94]

Although Perry attempts to reconcile his methodological separation of cognitive and normative meaning with Gadamer's critique, identifying "the directive the text was meant to represent" apart from the situation in which this directive is to be applied is precisely the kind of decontextualized exegetical procedure that Gadamer rejects as inconsistent with how human beings understand texts. Gadamer criticized this procedure in the work of Emilio Betti, a twentieth century Italian legal philosopher who wrote in the Romantic hermeneutical tradition. Betti, like Perry, argued that the determination of cognitive meaning and normative meaning are separate steps in the

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> [S]ome legal texts—not all, but some—are, to the Court, initially unintelligible (opaque, vague, ambiguous, etc.), in the sense that it is not initially clear to the Court what norm or directive the text represents or, pace originalism, was meant to represent. If it is not clear to the Court what directive a legal text was meant to represent, the Court must translate or decode the text: The Court must identify, or try to, the directive the text was meant to represent.

Perry, *Constitution in the Courts* at 37 (cited in note 4).

93. Perry comments:

> [Specification] presupposes that there is no difference between understanding the *contextual* meaning of a legal norm or directive and "applying" the norm, bringing it to bear, in the case at hand; to do the latter is te establish the contextual meaning of the norm (by specifying the norm).

Id. at 37. Elsewhere Perry insists on a distinction between specification of an indeterminate constitutional norm and "application" of a determinate one:

> Whereas the process of applying a determinate directive is essentially deductive, the process of specifying an indeterminate directive is essentially nondeductive. A specification "of a principle for a specific class of cases is not a deduction from it, nor a discovery of some implicit meaning; it is the act of setting a more concrete and categorical requirement in the spirit of the principle, and guided both by a sense of what is practically realizable (or enforceable), and by a recognition of the risk of conflict with other principles or values."

Id. at 75 (quoting Neil MacCormick, *Reconstruction after Deconstruction: A Response to CLS*, 10 Oxford J. Legal Stud. 539, 548 (1990)). Since Perry insists that an indeterminate directive must first be "interpreted" before it can be specified in a particular context, it is likely that he understands "application" to include only the enforcement of a determinate directive. See Perry, *Constitution in the Courts* at 167 (cited in note 4) ("To specify a contextually indeterminate directive is one thing. To enforce ('apply') a contextually determinate directive—a directive already specified in the relevant context—is something else.").

94. Perry, *Constitution in the Courts* at 37 (cited in note 4).

interpretive process.[95] Betti, again like Perry, also argued that the cognitive meaning initially communicated by a legal text will often be too vague or ambiguous to resolve the legal conflicts presented by a particular case. In this event, Betti maintained that the cognitive meaning would need to be elaborated so that it could be profitably applied to specific situations.[96] In short, for both Betti and Perry legal interpretation requires identification of the cognitive meaning of a law with sufficient specificity that the law's normative meaning can be clarified subsequently by applying the cognitive meaning to the facts of the case at hand.

Gadamer suggests that the attempt to separate methodologically the cognitive from the normative meaning of a text is a consequence of the influence of Romantic hermeneutics, particularly the work of Friedrich Schleiermacher. The Pietist tradition[97] of scriptural

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95. Emilio Betti, 2 *Teoria generale della interpretazione* § 54 at 802-04 (Giuliano Crifò, ed., Giuffrè 1955). See generally Grondin, *Philosophical Hermeneutics* at 127 (cited in note 12); Richard E. Palmer, *Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer* 58 (Northwestern U., 1969); David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. Cal. L. Rev. 136, 137 (1985).

Teoria generale is a two-volume treatise which attempted to fulfill the Romantic dream of developing an epistemologically sound "science of interpretation." It has not been translated into English. A summary of the main points of the treatise appeared in German in 1962 as part of an essay by Betti providing a general critique of post-Heideggerian hermeneutics. This essay was subsequently translated into English. See Emilio Betti, *Hermeneutics as the General Methodology of the Geisteswissenschaften [Human Sciences]* (J.C.B. Mohr, 1962), in Joseph Bleicher, *Contemporary Hermeneutics: Hermeneutics as Method, Philosophy and Critique* 51 (Routledge & Kegan Paul, 1980). Where they exist, I give parallel English citations to Betti's essay.

In addition, Betti's work is discussed in a number of secondary English sources. See, for example, Grondin, *Philosophical Hermeneutics* at 125-29 (cited in note 10); Palmer, *Interpretation Theory* at 46-59 (cited in this note); Hoy, 58 S. Cal. L. Rev. at 137-41 (cited in this note). See also E.D. Hirsch, Jr., *Validity in Interpretation* xii (Yale U., 1967) (acknowledging the influence of Betti and *Teoria generale* on Hirsch's work).

96. See Betti, 2 *Teoria generale* § 54 at 804, 807-08, 822 (cited in note 95); Betti, *Hermeneutics*, in Bleicher, *Contemporary Hermeneutics* at 83 (cited in note 95). Betti writes:

> [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.

Betti, 2 *Teoria generale* § 55 at 819 (cited in note 95) (author's translation).

97. The Pietists comprised a school of eighteenth century interpretive thought which held that biblical texts had dual meanings: a literal, semantic meaning, and a transcending spiritual meaning. Hans W. Frei, *The Eclipse of Biblical Narrative: A Study in Eighteenth and Nineteenth Century Hermeneutics* 38 (Yale U., 1974). Johann Jacob Rambach, for example, maintained that "[t]he inspiring activity of the Spirit is clearly distributed equally and evenly over the sacred pages and the hearts and minds of those who attend them properly," so that one ought to be able to discern "a spiritual sense above the ordinary grammatical and logical senses in at least some of the sacred words." Id. The Pietists believed that this spiritual meaning of the Bible was available to all those who read the Bible devoutly and with the Holy Spirit, rather

interpretation originally divided the process of understanding into three moments or "subtleties": "understanding," the immediate grasp of the meaning of a text; "interpretation," the explication of a text when its meaning is not immediately clear; and "application," in which the understood or explicated text is applied to a particular situation.[98] For the Pietists, understanding was the normal consequence of reading a text, whereas interpretation was necessary when textual meaning was not immediately clear.[99]

Schleiermacher erased the distinction between understanding and interpretation, arguing that *mis*understanding, not understanding, is the usual consequence of reading a text.[100] In other words, the obvious or apparent meaning of the text could not be taken uncritically as its true meaning. To the contrary, this "natural" meaning generally must be assumed incorrect. Interpretation determines the correct meaning of a text, and thus is a necessary condition for understanding.[101]

The Romantic fusion of understanding and interpretation made application seem unconnected to understanding.[102] The Romantics viewed the moment of application as occurring "after" interpretation/understanding, a "post facto supplement" to it.[103] Since for Gadamer understanding always involves application, he regards understanding, interpretation, and application as comprising one unified process.[104] Thus, "discovering 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."[105]

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than through the lens of tradition or philosophy. Id. at 158. Their helief in a "higher" spiritual sense "above" the semantic sense of the Bible required that the Pietists engage in interpretation to uncover and articulate this higher meaning when it was not clear from semantics.

98. Gadamer, *Truth and Method* at 307 (cited in note 10).

99. Id. at 182-83.

100. Id. at 179, 184-85.

101. See Weinsheimer, *Gadamer's Hermeneutics* at 185 (cited in note 12) ("Understanding is never immediate but always mediated by interpretation; and since this is always the case, understanding is indivisible from interpretation."). See also Gadamer, *Truth and Method* at 307 (cited in note 10) ("Interpretation is not an occasional, post facto supplement to understanding; rather, understanding is always interpretation, and hence interpretation is the explicit form of understanding.").

102. Hoy, *Critical Circle* at 53 (cited in note 83).

103. Gadamer, *Truth and Method* at 308 (cited in note 10).

104. Id.

105. Id. at 310. See also Hoy, 58 S. Cal. L. Rev. at 139 (cited in note 95) ("Understanding is always already interpretation, Gadamer maintains, and interpretation is always already application.").

Gadamer expressly disputes the phenomenological possibility of Betti's separation of cognitive interpretation from normative application:

> Our line of thought prevents us from dividing the hermeneutic problem in terms of the subjectivity of the interpreter and the objectivity of the meaning to be understood. This would be starting from a false antithesis that cannot be resolved even by recognizing the dialectic of subjective and objective. To distingnish between a normative function and a cognitive one is to separate what clearly belong together. The meaning of a law that emerges in its normative application is fundamentally no different from the meaning reached in understanding a text.[106]

A cognitive/normative separation implicitly denies the existence of the Heideggarian fore-structure of understanding[107]—that is, it does not recognize that when we seek to understand a text, our prior experience in the world causes us to approach the text with certain expectations of meaning that are themselves historically contingent. This prior experience thus channels and narrows the possible meanings that the text will yield.[108] In Gadamer's view, there is no "objective" cognitive meaning distinct from the "subjective" normative concerns of the interpreter. Understanding a text does not depend solely on clarifying its semantic meaning, but also on the interpreter's understanding of the subject matter to which the text is situated, how this tradition has previously interpreted this text as well as other relevant texts, and the methods and themes current within the tradition.[109] For Gadamer, the interpreting "subject" cannot be meaningfully separated from the textual "object,"[110] as Betti's cognitive/normative distinction, Perry's "interpretation"/specification distinction, and Bork's derivation/application distinction all imply. Any approach that insists on such separation is not consistent with Gadamer's account of human understanding.

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106. Gadamer, *Truth and Method* at 311 (cited in note 10). See also id. at 310 ("[W]e cannot avoid the conclusion that [Betti's] suggested distinction between cognitive, normative, and reproductive interpretation has no fundamental validity, but all three constitute one unitary phenomenon.").

107. See notes 67-74 and accompanying text.

108. Gadamer, *Truth and Method* at 300 (cited in note 10) ("If we are trying to understand a historical phenomenon from the historical distance that is characteristic of our hermeneutical situation, we are always already affected by history. It detormines in advance both what seems to us worth inquiring about and what will appear as an object of investigation. . . .").

109. Hoy, *Critical Circle* at 53 (cited in noto 83).

110. Gadamer, *Truth and Method* at 311 (cited in note 10).

V. THE IMPOSSIBILITY OF ORIGINALIST METHOD

Gadamer's argument that cognitive and normative interpretation cannot be separated is not trivial. It attacks the foundation of all originalist methodology, be it progressive or conservative, ultimately calling into question whether "originalism" is phenomenologically possible. Originalism distinguishes itself as an interpretive method by differentiating and privileging the meaning intended by the author from all other possible meanings. Bork, for example, repeatedly contends that the only way that judges can be said to be bound by law is if they interpret the Constitution according to its original understanding. Those who contend that the Constitution must be interpreted according to contemporary conceptions of morality and justice are dismissed as heretics who purposefully distort or ignore the meaning of the constitutional text to suit their own political agendas.[111] Perry similarly believes that non-originalism is afflicted by relativism, though he makes the point in subtler fashion. Perry characterizes the originalist question as, "What directive does this provision, as originally understood, represent?," whereas non-originalism asks, "What directive does this provision, as understood by X, represent?"[112] If X is the interpreter, then no constraint external to this interpreter is evident.

For Gadamer, what the constitutional text meant to the Framers and their contemporaries, and what it means to us in the light of contemporary notions of morality and justice, are simply different dimensions of the same question.[113] Whenever originalists, or anyone else, seek to understand a textual provision of the Constitution, they approach it with a contemporary case in mind, a present question that needs an answer. Every such provision has a history of past understandings/applications (for Gadamer these are, of course, synonymous). The task of the judge or other interpreter of the Constitution is to work back to the origin, examining the history of how the provision has come to be understood, its constitutional "tradition," from the standpoint of the present case.[114] This examina-

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111. Bork, *Tempting of America* at 5-7 (cited in note 17).

112. Perry, *Constitution in the Courts* at 33 (cited in note 4).

113. Gadamer, *Truth and Method* at 327 (cited in note 10). See Hoy, *Critical Circle* at 51-52 (cited in note 83).

114. Gadamer states:

> 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

tion elaborates the constitutional tradition so as to include in it the answer to the question posed by the case at hand.

In this process—which Gadamer describes metaphorically as the "fusion" of past and present horizons[115]—the tradition does not function as a static rule from which one logically deduces a conclusion in the present. To the contrary, it is through the tradition that the past and the present exert mutual interpretive pressure when the attempt to understand is made.[116] The influence of tradition on the present is obvious, but it must be noted that tradition itself is changed as the result of being extended or reformulated in response to a present question. Application of the tradition to the case not only makes the case understandable in terms of the tradition, but causes the tradition to be understood differently as the result of its application in the case.[117]

The only understanding that can be had of a constitutional text is that of an interpreter approaching the history of the provision from the standpoint of a present question. Consequently, "the present context is not really separated from the original context. Both are joined by an intervening tradition."[118] Present interpreters always approach texts from the past with a view to understanding the original context of these texts for present purposes.[119] The meaning of the constitutional text is thus neither merely what the Framers and their contemporaries understood it to mean, nor merely what we in the present understand it to mean, but both.[120]

> 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 tolls 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.

Gadamer, *Truth and Method* at 326-27 (cited in note 10).

115. Id. at 306.

116. Id. at 306-07.

117. See id. ("In the process of understanding, a real fusing of horizons occurs—which means that as the historical horizon is projected, it is simultaneously superseded."). See also Hoy, *Critical Circle* at 54 (cited in note 83) ("Since the present situation is never exactly the same as the situations of the previous interpretations . . . , even the judge cannot merely repeat a precedent. In order to be just, he . . . has to reinterpret the history of precedents in terms of the new factors in the present contoxt."); Francis J. Mootz III, *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, 542 (1988) ("An interpretive appropriation of a text further develops the tradition that grips the interpreter.").

118. David Couzons Hoy, *A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction*, 15 N. Ky. L. Rev. 479, 497 (1988).

119. See Mootz, 68 B.U. L. Rev. at 541-42 (cited in note 117) ("The normative content of a statute or constitution is revealed only when the horizon of a situated interpreter confronts the effective-history of the legal text.").

120. Hoy writes:

Application of the tradition of a constitutional provision in a present case does not require that an "objective" principle be articulated prior to consideration of the present case, even if such a thing were possible. Given the nature of legal reasoning and the current state of constitutional scholarship, abstract principals may well—in fact, will usually—be the vehicle lawyers and judges use to establish connections between legal past and present. Nevertheless, such principles are not formulated prior to their application in the present case, but *only* for the sake of the present case, and they are *always* reformulated for the sake of application in every subsequent case. In other words, although we can induce general principles that account for decisions in past cases, such principles cannot control the next case, because the next case always functions to alter the principle. In short, *a priori* principles have no vitality outside of the case or cases in which they are applied and for whose sake they are formulated.

Both Bork and Perry illustrate this phenomenon. Bork strives mightily to show how *Brown v. Board of Education* could have been decided in a manner consistent with the original understanding of the Equal Protection Clause. Conceding that the ratifiers of the Fourteenth Amendment saw no contradiction between equality and segregation, Bork argues that by the time *Brown* came up for decision, it had long been apparent that segregation could not produce equality.[121] Endless litigation over the inequality of innumerable separate but allegedly equal facilities now loomed before the Court.[122] Whatever might have been the possibilities in theory, Bork argues, in practice "equality and segregation were mutually inconsistent," although "the ratifiers did not understand that."[123] According to Bork, the only two realistic courses open to the Court were to abandon the quest for equality, or to abandon the separate-but-equal doctrine. Both choices were inconsistent with the original understanding but the latter choice, Bork maintains, was less inconsistent and thus

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> The connectedness of tradition explains an important reason why we still find the original text authoritative in our present context, despite differences from the original context. That we feel that the constitutional provisions are still very much *present* law suggests that we understand ourselves as having a single tradition (however complex and polysemous), stretching back and including the context in which the provisions were first written down and ratified. In understanding the law we are really trying te understand ourselves, and the tradition of legal interpretation and judicial practice is an important part of what we have become.

Hoy, 15 N. Ky. L. Rev. at 497 (cited in note 118).

121. Bork, *Tempting of America* at 82 (cited in note 17).

122. Id.

123. Id.

preferable.[124] In short, Bork contends that the ratifiers of the Fourteenth Amendment misunderstood the practical implications of the principle of equality. Because it is the principle that binds, and not the ratifiers' subjective understanding of that principle,[125] Bork concludes that originalism justifies contemporary courts when they apply it in a manner strongly objectionable to the ratifiers.

Bork's "originalist" defense of *Brown* is weak. First, Bork insists with respect to other constitutional texts that when the original understanding of a text is unknown, judges are not justified in interpreting the text according to their best lights, but instead must abstain from adjudicating at all under the authority of the text.[126] Abstention would likewise seem to be appropriate in the analogous situation when the original understanding of a text is known but incoherent. Since for Bork it is the original understanding that constrains judges from deciding on the basis of their personal values, it follows that deciding a case on the basis of one of two contradictory concepts that both form part of the original understanding can only be done on the basis of the judge's personal values.[127] Why, for example, must the Court have chosen equality over segregation in *Brown*? Though there are obvious answers to this question, none of them is originalist.[128]

Even more importantly, Bork can maintain that the ratifiers erroneously believed that the practice of segregation was consistent with the principle of equality, only if the principle of equality is articulated very abstractly, as it was in *Brown*—that is, at a very high level of generality, like "separate but equal is inherently unequal." Bork himself claims that the original understanding of a constitutional text should be articulated only at that level of generality justified by constitutional language, structure, and history.[129] Given that the ratifiers clearly did not think they were outlawing state-mandated segregation by ratifying the Equal Protection Clause, Bork's own

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124. Id.

125. See note 21 and accompanying text.

126. Bork, *Tempting of America* at 166-67 (cited in note 17). See, for example, id. at 166 (suggesting that the Privileges and Immunities Clause of the Fourteenth Amendment is like "a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot on the ground that there must be something under it."); id. at 183 ("There is almost no history that would indicate what the ninth amendment was intended to accomplish. But nothing about it suggests that it is a warrant for judges to create constitutional rights not mentioned in the Constitution.").

127. See notes 146-47 and accompanying text.

128. For a more sophisticated originalist defense of *Brown*, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

129. See notes 29-31 and accompanying text.

methodology requires that the original understanding of the principle of equality be articulated at a level of generality that accommodates this practice. Such an equality principle is hardly unimaginable; there is evidence that many of the ratifiers intended that the clause ensure the "legal" but not the "political" or "social" equality of the newly freed slaves.[130] In other words, the clause was intended to protect the rights of African Americans, say, to hold title to property, to sue on contracts, and to receive criminal due process, but was not meant to protect a right to vote in state elections or a right to marry outside of their race.[131] This conception of equality as confined to a limited set of common law rights is perfectly consistent with government mechanisms of social segregation and discrimination deployed in both the South and North prior to *Brown*. It could not, therefore, account for the result in *Brown* itself.

It is difficult to believe that Bork's strained effort to defend *Brown* on originalist grounds is unrelated to the fact that *Brown* has come to be viewed as one of the great Supreme Court decisions of the twentieth century.[132] The legitimacy of any constitutional theory now depends, at least in part, on whether it can accommodate the holding in *Brown*. As Bork himself acknowledges:

> The end of state-mandated segregation was the greatest moral triumph constitutional law had ever produced. It is not surprising that academic lawyers were unwilling to give it up; it *had* to be right. Thus, *Brown* has become the high ground of constitutional theory. Theorists of all persuasions seek to capture it, because any theory that seeks acceptance must, as a matter of psychological fact, if not of logical necessity, account for the result in *Brown*.[133]

Though Bork maintains that the ability of originalism to account for *Brown* is irrelevant to its validity as an interpretive methodology, his concoction of a barely credible originalist account of *Brown* belies this assertion. A Gadamerian explanation is more plausible. As Bork acknowledges, *Brown* has entered the constitutional tradition that connects the original understanding of the Equal Protection Clause to any application of that understanding in contemporary situations. Even an originalist as committed as Bork *must* account for it. Thus, Bork himself proves that one cannot simply pick

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130. See, for example, Paul Brest and Sanford Levinson, *Processes of Constitutional Decisionmaking* 241-43 (Little, Brown, 3d ed. 1992) (noting that "suffrage was intentionally excluded from the rights that the fourteenth amendment [was] to guarantee" because "[l]egal thinkers defined suffrage as a political privilege").

131. Id. at 230-35.

132. Bork, *Tempting of America* at 74-81 (cited in note 17).

133. Id. at 77.

up the original understanding of the Equal Protection Clause from 1868 and drop it into 1997 as the major premise in a constitutional syllogism;[134] rather, the expectations of meaning that attached to the clause after *Brown* unavoidably affect how the original understanding is understood in any contemporary post-*Brown* situation.[135] The original understanding of equality continues to affect adjudication of contemporary cases, but contemporary cases like *Brown* have just as clearly affected the original understanding of equality.

Perry "interprets" the directive of the Equal Protection Clause of the Fourteenth Amendment as follows:

> First, the directive forbids states to enact or enforce laws that deny protected privileges or immunities to a group . . . on the ground that the members of the group are inferior, as human beings, to persons not members of the group, *if the group is defined, explicitly or implicitly, in terms of a trait irrelevant to their status as human beings.*
>
> . . . .
>
> Second, the directive also forbids states to enact or enforce laws that deny protected privileges or immunities to a group on the basis of hostility towards the members of a group, *if the group is defined, explicitly or implicitly, in terms of an activity, a way of life, or a set of beliefs . . . towards which no state may, as a constitutional matter, express hostility.*[136]

In Perry's interpretive procedure, this directive stands as the meaning of the Equal Protection Clause. Perry subsequently "specifies" it in the context of various government actions to determine whether such actions violate the Equal Protection Clause. In Perry's interpretive scheme, however, this directive would remain the meaning of the clause irrespective of whether these subsequent specifications were made or not. Perry has not formulated this directive in the abstract,

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134. Bork states:

> [A]ll that a judge committed to original understanding requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him. The answer to that question provides his minor premise, and the conclusion follows. It does not follow without difficulty . . . .

Id. at 162-63.

135. Gadamer writes:

> Of course, the reader before whose eyes the great book of world history simply lies open does not exist. But neither does the reader exist who, when he has his text before him, simply reads what is there. Rather, all reading involves application, so that a person reading a text is himself part of the meaning he apprehends. He belongs to the text that he is reading.

Gadamer, *Truth and Method* at 340 (cited in note 10).

136. Perry, *Constitution in the Courts* at 130-31 (cited in note 4).

but for the sake of a question he candidly admits: How can the history of the Equal Protection Clause plausibly be interpreted so as to preserve and extend broad, progressive readings of the clause—namely, to avoid a declaration that affirmative action on behalf of racial and ethnic minorities is unconstitutional, and to provide broad protection to individuals from government discrimination on the basis of race, gender, and sexual orientation?[137] The history of the Equal Protection Clause yields Perry's directive because of the question he puts to that history. A different question, such as, "How can the history of the Equal Protection Clause be interpreted so as to minimize judicial discretion?," as Judge Bork might formulate it, would undoubtedly yield a different directive.[138] Perry's "interpretation" of the clause adds nothing that would not have emerged in his application of the history of the Equal Protection Clause directly to his question.

Perry's treatment of the Ninth Amendment is another example. Perry argues that although this amendment "does not state that the people have other unenumerated constitutional rights . . . [,] it does, on any plausible reading, presuppose that they do."[139] Noting that the Tenth Amendment by its terms confirms that the newly formed federal government was one of limited and specifically delegated powers, Perry seeks to buttress this reading of the Ninth Amendment by asserting that "[i]t is difficult to see . . . the point of a Ninth Amendment that does only what the Tenth Amendment does and nothing more."[140] In the eighteenth century, however, many of the Framers saw little difference between protecting individual liberty against federal encroachment through affirmative restrictions on the federal government's powers like the Bill of Rights, and protecting such liberty by limiting the powers delegated to the federal government.[141] It is "difficult to see" the Ninth Amendment as something

137. Compare id. at 55 ("[T]he originalist approach is not necessarily inconsistent with a judicial role as large or as active as any apostle of 'the Warren Court' (I count myself one) could reasonably want."), with id. at 143-49 (defending *Brown v. Board of Education*, *Bolling v. Sharpe*, and strict scrutiny of racial classifications); id. at 149-53 (defending heightened scrutiny of gender classifications); id. at 155-60 (arguing that affirmative action programs should not be subjected to more than rational basis scrutiny); id. at 175-79 (arguing that classifications based on same-sex orientation violato the antidiscrimination directive of the Equal Protection Clause).

138. See Bork, *Tempting of America* at 37-39 (cited in note 17) (endorsing the narrow reading of the Fourteenth Amendment set forth in *The Slaughterhouse Cases* because a broader reading would give the Court unrestrained power to enact public policy).

139. Perry, *Constitution in the Courts* at 63 (cited in note 4).

140. Id. at 65.

141. See, for example, Brest and Levinson, *Processes of Constitutional Decisionmaking* at 110 (cited in note 130) ("Neither Wilson nor Madison seemed to draw a sharp line between restricting the powers of the national government and protecting individual liberties."); Steven

other than a constitutionalization of unenumerated rights only because in the intervening years the limited powers doctrine has wholly failed as a means of protecting individual liberty against government, having been replaced by enforcement of the affirmative individual rights enumerated in the Bill of Rights.[142] Without this history, the Ninth and Tenth Amendments could be understood as complementary jurisdictional statements, together confirming that the states retained sovereign power over individual common law and state constitutional rights not enumerated in the Constitution, and that the federal government could exercise sovereign power only over those matters expressly delegated to it by the Constitution.[143]

VI. THE ROMANTIC QUEST FOR EPISTEMOLOGICAL CERTAINTY

The contemporary need to separate the cognitive from the normative in constitutional interpretation stems from the same need for epistemological certainty that motivated the nineteenth century Romantics to develop a "scientific" method of interpretation. If truth and knowledge depend on the separation of the investigator from the object of her investigation, then any demonstration that this separation has not occurred—that is, that "subjectivity" is present, meaning that "objectivity" is not—disqualifies the results of the investigation as knowledge, hence both Bork's and Perry's respective conclusions that nonoriginalist interpretation is illegitimate. If one assumes a distinction between "subjective" and "objective" meaning, then demonstrating that a method does not yield "objective" meaning seems to lead to interpretive relativism—no particular meaning is demonstra-

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D. Smith, *The Writing of the Constitution and the Writing on the Wall*, 19 Harv. J. L. & Pub. Pol. 391, 394-400 (1996) (arguing that the Framers understood the Bill of Rights merely to have made explicit the rights-protection motivation for separation of powers).

142. See Smith, 19 Harv. J. L. & Pub. Pol. at 394-95 (cited in note 141).

143. See Bork, *Tempting of America* at 184-85 (cited in note 17) ("Both the ninth and tenth amendments appear to be protections of the states and the people against the national government."). John Ely calls this the "received" understanding of the Ninth and Tenth Amendments, an understanding linked most closely with Justice Black. See Ely, *Democracy and Distrust* at 34-36 (cited in note 3) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 520 (1965) (Black, J., dissenting)). Ely himself rejects this interpretation in favor of one which sees the Ninth Amendment as a warrant for judicial identification of unenumerated constitutional rights. See id. at 35, 38-41 ("[T]he conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution is the only conclusion its language seems comfortably able to support."). For a careful defense of the "received" understanding, see Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 Colum. L. Rev. 1215 (1990).

bly more valid than any other—or interpretive nihilism—no valid meaning exists at all.

Fear of relativism and nihilism motivates attempts to formulate originalist methods of interpretation that purport to be ideologically neutral and epistemologically reliable. As part of an originalist methodology, a procedure like Perry's "interpretation" and Bork's derivation, in which the "objective" cognitive meaning of a text is sought to be articulated apart from the interpreter's "subjective" normative concerns, usually seeks to ensure that the results of the methodology will count as knowledge—that is, that there is some "objective" basis for preferring the meaning of the text yielded by the methodology over other possible meanings. Betti, for example, maintains that restricting textual meaning to what the author intended provides a basis for distinguishing valid from invalid interpretations. Without this control, he contends that meaning would be unavoidably indeterminate, and that there would be no nonarbitrary way of selecting among competing interpretations.[144] Bork represents this position in extreme form, repeatedly insisting that if interpretation does not proceed in the objective fashion purportedly guaranteed by the original understanding, judges can make the Constitution mean anything they want.[145]

Perry's originalism claims less than Bork's in the name of "objective" knowledge, allocating a significant role to subjectivity in both cognitive and normative constitutional interpretation. Perry concedes, for example, that an originalist judge's conception of the judicial role will often influence her determination of the intended cognitive meaning of an opaque text—that is, a minimalist originalist will tend to find most plausible an "interpretation" of the constitutional text that tends to minimize judicial discretion, and vice versa

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144. Betti, *Teoria generale* § 11 at 262-63, § 16 at 305-07 (cited in note 95); Palmer, *Hermeneutics* at 58, 73, 79-81 (cited in note 95). Hoy states:

> Some hermeneutical theorists, such as the Italian jurisprudent Emilio Betti or the American literary critic E.D. Hirsch, follow an older tradition by distinguisbing a first operation, the cognitive act of understanding or explicating a text's meaning, from a second, the normative interpretation of a text's significance. The second operation is then distinguished in turn from a third, the reproductive application of that sense to a specific situation, one that is similar in some respects but different in others. These theorists insist that these operations are distinct from one another and maintain that any attempt to conflate them will undermine the objectivity of understanding and lead to relativism or nihilism.

Hoy, 58 S. Cal. L. Rev. at 137 (cited in note 95).

145. See, for example, Bork, *Tempting of America* at 43, 81 (cited in note 17); Bork, 26 S. Tex. L. Rev. at 387-88 (cited in note 21); Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U. L. Q. 695, 696.

for a judicial non-minimalist.[146] In most cases a judge will not find two competing meanings equally plausible, and in no case will a minimalist judge be able to maintain the "objective" validity of her "interpretation" against a competing "interpretation" preferred by a non-minimalist. Similarly, a judge is likely to be predisposed to see as most plausible that specification that comports with her personal notions of political morality.[147]

Still, Perry seeks to preserve at least a limited domain of objectivity in his methodology. As his last chapter emphasizes, constitutional interpretation for Perry is both "law *and* politics."[148] Perry's account of interpretation is more nuanced than Bork's, but they share a common premise: Validity in interpretation depends at some point on a demonstration of objective meaning in the interpretive process. Without this demonstration, interpretive method cannot designate as valid one among differing interpretations without being random or arbitrary.

Even without objectivity, however, it is not true that legal meaning is arbitrary in the sense of being random or unpredictable. Gadamer maintains that although the law cannot be understood outside of its particular applications, it is possible, at least in principal, for one to be sufficiently familiar with the practice of law within a particular legal tradition to be able to predict accurately how a law will be applied in a particular situation by a judge operating within that tradition.[149] By "legal certainty,"[150] Gadamer means to suggest

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146. Perry, *Constitution in the Courts* at 56-58, 82 (cited in note 4).

147. Id. at 61-62, 71-72, 82.

148. Id. at 192, 204.

149. Gadamer states:

> It is part of the idea of the 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.

Gadamer, *Truth and Method* at 329 (cited in note 10). See also Mootz, 68 B.U. L. Rev. at 567 (cited in note 117) ("Admittedly, there are tremendous communal ties that guarantee to some extent that legal meaning will be intersubjective."). William Eskridge adds:

> Application helps Gadamer avoid the objection of subjectivism because the jurist's dialogue with the text is rooted in an actual set of facts and a specific histerical moment.... For Gadamer, the jurist's situatedness in society, her situatedness in a particular case and her situatedness in a well-known tradition of laws and interpretations, ensure "legal certainty"....

William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 Colum. L. Rev. 609, 635, 636 (1990). Joseph Singer gives an extended illustration of the predictability of American law notwithstanding that legal doctrine is indeterminate. See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L. J. 1, 19-25 (1984).

150. A better translation would be "legal security."

only that a lawyer who knows the exact situation in which the law will be applied, at least in theory, is able to give correct advice because the lawyer "can accurately predict the judge's decision on the basis of existing laws."[151] This is not to suggest that one can speak of the meaning of law apart from its particular applications, that "objective" interpretation is possible. Rather, it means that, in a state governed by law, legal meaning is not random, though it does not exist as an abstract or universal entity apart from the applications in which it occurs.

This explanation is unlikely to satisfy those, like Perry and Bork, who are committed to some measure of "objectivity" in interpretation. The problem lies in their premise that valid interpretation depends at some point on method, with its division of subject from object. From this it follows that any meaning resulting from a non-methodological judgment by the interpreting subject cannot count as the true meaning of the text (objective knowledge), but only as the subject's belief about that meaning (subjective belief). If one proceeds from the Heideggerian premise that subject and object are always inseparably intertwined in relationships, however, then a demonstration that a methodology is not purely "objective," that the meaning it yields is the result of prior relationships between subject and object, does not disqualify such meaning as knowledge, but merely describes how the text has come to be understood.[152]

This is precisely what Gadamer wishes to show in *Truth and Method.* His purpose "is not to develop a *procedure* of understanding, but to clarify the conditions in which understanding takes place. But these conditions are not of the nature of a 'procedure' or a method."[153] To the contrary, *Truth and Method* seeks to demonstrate that method

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151. Gadamer, *Truth and Method* at 329-30 (cited in note 10).

152. Eskridge writes:

> For Gadamer, neither the text nor the interpreter is the "object" of interpretation; if there be an object it would be the truth that is sought by both interpreter and text. It is blinking reality to think that the text has a pre-existing meaning that one can retrieve through any methodology. The interpreter, therefore, is not constrained by method. She is, instead, constrained by precedent and the ongoing story of law, and by her good faith dialogue with the text.

Eskridge, 90 Colum. L. Rev. at 672 (cited in note 149).

153. Gadamer, *Truth and Method* at xiii (cited in note 10). Hoy states:

> The best tack for hermeneutical philosophy . . . is not to start, as epistemology does, by legislating *a priori* a method that any discipline must follow if it is to count as a rigorous science. Instead, hermeneutics must take seriously the self-understanding of practitioners of various disciplines, and scrutinize those particular disciplines to see how understanding and interpretation really work.

Hoy, 58 S. Cal. L. Rev. at 136-37 (cited in note 95).

is an obstacle to truth, particularly in the human sciences.[154] Thus, it would be self-contradictory to make this demonstration methodologically.[155] "If we accept Gadamer's claim, we do so because we believe that Gadamer has accurately retrieved the interpretive tradition most meaningful to us, or has told a story we find believable, not because he has presented irrefutable arguments for his position."[156] There are certainly ways to distinguish valid from invalid legal interpretations, but they are contingent and local, peculiar to the case, the judge, and the tradition, and thus cannot be demonstrated in rigorous and "objective" scientific fashion.

VII. CONCLUSION

Perry's separation of originalism from minimalism is a genuine accomplishment. For years, political conservatives have occupied the rhetorical high ground by arguing that originalism is the only approach to constitutional interpretation that preserves the "objective" meaning of the Constitution and that enables judges to enforce the Constitution without reading their own political/moral views into it. Aligning oneself with objectivity is a familiar rhetorical move in modern American life; it installs one's own views as "truth"—knowledge about the nature of the world that cannot be disputed—while marginalizing the views of those with whom one disagrees to the contestable realms of subjectivity and irrationality. This move enabled political conservatives to portray liberal judicial decisions as not simply the consequence of good faith differences in political philosophy, but as purposeful departures from the "rule of law" dictated by the Constitution, a sort of liberal will to power.[157] By methodologically separating originalism as interpretive methodology from judicial restraint as political philosophy, Perry removes this pseudo-epistemological prop to the conservative position. That a judge may search for the meaning of the text at a more abstract level

154. Gadamer, *Truth and Method* at xxi-xxiii (cited in note 10).

155. Eskridge, 90 Colum. L. Rev. at 615 (cited in note 149).

156. Id.

157. See, for example, Bork, *Tempting of America* at 8 (cited in note 17) ("[Liberal theorists] see the Constitution as a weapon in a class struggle about political and social values."); id. at 136 ("The new theorists of constitutional law deserve to be better known than they are, not because their theories are good but because, as a group, they are influential and their enterprise involves nothing less than the subversion of the law's foundations. Some of them are quite explicit about their intention to convert the Constitution from law to politics, and judges from magistrates to politicians.").

of generality or apply the text to a broader range of cases than another judge does not make such a judge less originalist, merely less minimalist. This centers the debate where it belongs: on differences in one's political understanding of the Constitution.[158]

Nevertheless, Perry's approach, like Bork's, is still methodological. Like the Romantics over a century before them, Perry and Bork both proceed on the assumption that validity in interpretation depends at some point on separating the interpreter from the textual object being interpreted. To Gadamer's argument that this division of understanding fundamentally misconceives how human beings relate to the world, they respond inadequately or not at all. Certainly neither of them gives *Truth and Method* the sort of engaged, sustained attention that a work of its stature demands. One may, and probably should, question the usefulness of an interpretive methodology that has not come to terms with those who contend that the method does not reflect how human beings actually come to understand texts. Accordingly, it remains very much in doubt whether originalism's claims to certainty in interpretation can overcome the limitations of the Romantic foundation on which they rest.

158. See Kay, 82 Nw. U. L. Rev. at 285 (cited in note 3) ("The choice of following or rejecting the original intentions is necessarily not a legal choice, hut a moral and political one. It must be prior to law even—indeed especially—the law of the Constitution and is, in this sense, preconstitutional.").