

AN ACCEPTABLE MEANING OF THE CONSTITUTION

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INTRODUCTION

Judges clarify the Constitution in many plausible but different ways. The natural inclinations of a judge influence his starting premises. Some judges by nature prefer judicial restraint; others prefer selective judicial activism. The art of interpreting the Constitution involves the act of thinking, which, if disciplined, is not necessarily the same as illegitimate, judicial subjectivity. This is the hermeneutic insight presented in this Article.

I. LEGAL HERMENEUTICS

When a constitutional provision presents a puzzle for solution, judges take into account its line of growth,¹ and an almost boundless variety of factors. The Constitution's text, accordingly, provokes a continuing discourse about methods for extracting its meaning. A theory of legal hermeneutics² suggests methods that occupy a middle ground between exaggerated descriptions—interpretivism and noninterpretivism—of the interpretive process. It is not the hermeneuticist's "mission . . . to reaffirm the morality of [the] process,"³ but simply to explain how one arrives at an authentic interpretation of texts.

The Constitution's language is more than "words and phrases,"⁴

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1. *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.).

2. The theory that is presented in the essay is a revision of the theory of interpreting texts propounded by Hans-Georg Gadamer. See generally H. GADAMER, *TRUTH AND METHOD* (1975) (A discussion of the problem of "[t]he phenomenon of understanding and of the correct interpretation of what has been understood" from a hermeneutic perspective. *Id.* at xi.) I have adapted Gadamer's theory, with some substantial modifications. Gadamer himself is not primarily concerned with methodological questions.

3. See Brest, *Interpretation and Interest*, 34 *STAN. L. REV.* 765, 765 (1982).

4. H. GADAMER, *supra* note 2, at 475.

since the text has "a generative and creative power."⁵ Modern judges know that each application of the Constitution entails a continuous clarification of its meaning. With respect to the framers' intent, the specifics of the original understanding have only limited applicability. The judge who is dealing with the special problems that are presented by a concrete case knows that the relevant period of history neither began nor ended when the framers substituted a new Constitution for the Articles of Confederation. The greater socio-historical context (the conditioning of culture) enters into legal thinking and determines contemporary textual meaning, which might be quite different from the "supposed opinion of its author."⁶

It is not always practical to resolve a unique issue solely on the basis of historically distant conceptions. Indeed, there are some contemporary notions of justice which cannot be cabined by eighteenth-century normative perspectives. An informed interpretation of the Constitution's meaning does not disconnect the present from the past, but reflects the essential ties among various previous interpretations of the universal Constitution. The informed interpreter also realizes that each case ruling by adding meaning to the text stimulates "its own hermeneutic productivity."⁷

II. THE HERMENEUTIC INSIGHT INTO UNIVERSAL MEANING

The Constitution's fluid meaning cannot be reduced to a narrative which recites the burgeoning and development of concepts as if there were an origin or a middle or an anticipated end. The meandering path a concept takes as it emerges, expands, contracts, deepens, becomes overshadowed, illuminates, dims, splits, or combines is too dependent on unknown contingencies to be precisely mapped.⁸ There is interplay between published and unpublished doctrinal tendencies and counter-tendencies;⁹ there are no iron laws of history¹⁰ that determine

5. *Id.*

6. *Id.* at 473.

7. *Id.* at 472.

8. See generally Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981) (An appeal by Parker to his generation—"the generation of the 1960's"—to free themselves from "self-imposed orthodoxy." *Id.* Parker looks forward to "THE FUTURE OF CONSTITUTIONAL THEORY: WITHOUT MAPS." *Id.* at 257.).

9. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 28 (1921).

10. See Gordon, *Historicism in Legal Scholarship*, 90 YALE L. J. 1017 (1981). Gordon uses the term historicism to refer loosely "to the perspective that the meanings of words and actions are

the basic law's precise content. Notwithstanding these difficulties, the judge organizes his thoughts into the abstractions that are discussed in his opinion for the court. A judge's own theory of constitutional law can have a decisive influence on the case—if his thesis is inadequate, reflective equilibrium¹¹ or a new theory¹² must come to mind.

The text yields the general principles that provide an objective justification for a judicial decision. After a series of cases, conscientious habits of interpretation become ingrained as the judge develops a hermeneutic perspective, perhaps without full realization of exactly what that perspective entails. It entails *phronesis*,¹³ which reduces the tension between society's basic values and the ruling's articulated objective justification.

The art of judging demands more from the judge than the formal techniques of analytical positivism which connect legal norms. The judge, of course, has to evaluate the relevance of normative principles, as well as their weight, equity, and potential consequences. The art of judging also determines which principles are inchoate in the Constitution, and which are not.

Despite persistent modes of so-called legal realism in jurisprudential thought, the creative art¹⁴ of disciplined judging is not properly characterized as subjectivism.¹⁵ The very attempt to mediate between the past and the present means the interpreter is not absorbed into mere self-knowledge. A poet, Rainer Maria Rilke, symbolically described the importance of understanding the universal meaning of a constitution,

to some degree dependent on the particular social and historical conditions in which they occur." *Id.* at 1017 n. 1 (emphasis added).

11. John Rawls discusses a version of reflective equilibrium. See J. RAWLS, A THEORY OF JUSTICE 48-51 (1971).

12. See R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-149 (1977) (a description of the enterprise of theory-building by judges).

13. Gadamer distinguishes the art of judging, *phronesis*, from the artisan's craft, *techne*. Following Aristotle's distinction, his point is that the interpreter with a hermeneutic perspective must bring to bear on his project a greater degree of creative imagination. He is no mere mechanic. H. GADAMER, *supra* note 2, at 280-89.

14. Learned Hand stressed the fact that the great judges are better at the art of judging because of their creative imagination in interpreting texts. L. Hand, Remarks at Proceedings of a Special Session to Commemorate Learned Hand held at United States Courthouse, New York, N.Y. 28 (April 10, 1959).

15. Subjectivism is defined as the theory that holds that "individual conscience is the only valid standard of moral judgment." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1282. (W. Morris ed. 1969).

which the judge realizes as an individual participant in its becoming. He wrote:

Catch only what you've thrown yourself, all is
mere skill and little gain;
but when you're suddenly the catcher of a ball
thrown by an eternal partner
with accurate and measured swing
towards you, to your centre, in an arch
from the great bridgebuilding of God:
why catching then becomes a power—
not yours, a world's.¹⁶

Justice Cardozo apparently understood the reality underlying Rilke's symbolism when he wrote that the standard of justice under the Constitution is "an objective one."¹⁷

There is tension between the objective and subjective components of a decision, just as there is tension between the universal Constitution and a proposed case ruling. The creative art of disciplined judging dissolves the tension. Unity overcomes tension between the interpreter and the text interpreted when a judicial opinion identifies the authentic mediating principle that justifies a particular interpretive case ruling. If the ruling is compatible with the Constitution and is socially acceptable, the court's decision has an objective dimension, which reflects the consent of the governed. The conventional judge is not a prophet¹⁸ but a servant of the governed because his decision is expected by society to conform to its reasonable expectations concerning the meaning of the law.

III. THE PROCESS OF INTERPRETING TEXTS

Hans-Georg Gadamer's description of the process of understanding texts, which have previously been understood in different ways, brings into view the inadequacies of interpretivism and noninterpretivism. These two schools of juristic thought produce "knockdown argu-

16. R. Rilke, *quoted in* H. GADAMER, *supra* note 2, at v.

17. B. CARDOZO, *supra* note 9, at 88-89.

18. Michael Perry suggests that the courts make policy in human rights cases since "judicial review represents the institutionalization of prophecy." M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 98 (1982). Perry explains that Americans have a "religious understanding of themselves . . . the notion of prophecy." *Id.* This involves "a commitment—though not necessarily a fully conscious commitment—to the notion of moral evolution." *Id.* at 99.

ments"¹⁹ that focus on parts of the hermeneutic problem but not the relevant whole. Dogmatic scholarly advocacy about the "right" interpretive technique distorts the relationship between the interpreter, the author of a text, and the constitutional language that communicates meaning. Gadamer, although failing to stress the differences between legal hermeneutics and other forms (historical, theological, literary, and artistic hermeneutics), describes "the real experience that thinking is."²⁰ Something happens to an interpreter of the Constitution "over and above his wanting and doing."²¹ What happens?

An interpreter, influenced by his previous experience in a multitude of ways, has certain preconceived opinions when he approaches a text. He already has an anticipation of its meaning, but he might see that his pre-judgment is in error. He may read the text again to determine whether it corresponds to his preconception. If not, it remains a puzzle. By this time, he suspects that none of his pre-judgments (prejudices, if you prefer) captures the pertinent meaning of the text as it applies to the pending case, and he protects himself from being victimized by his own hasty or unfocused biases. An experienced interpreter knows that "the tyranny of hidden prejudices"²² distorts meaning; he realizes that, frequently, he must reformulate his initial impressions and start fresh. He may consult precedent, talk to his law clerk, read the relevant literature, and then, after reflection, return to the text. Each time he does so, he approaches it with an expectation of its meaning.²³ If he is still doubtful, the decisionmaking process is prolonged until he is satisfied that he understands the text's applicability to the case. Gadamer writes "that a text does not speak to us in the same way as does another per-

19. The literature on the difference between interpretivism and noninterpretivism is growing at an accelerated rate. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); M. PERRY, *supra* note 18; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); GREY, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Maltz, *Some New Thoughts on an Old Problem—the Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811 (1983); Symposium, *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U.L. REV. 259 (1981); Symposium, *Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981); Wellington, *History and Morals in Constitutional Adjudication* (Book Review), 97 HARV. L. REV. 326 (1983).

For a discussion of the coercive use of the "knockdown argument," see R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* (1981).

20. H. GADAMER, *supra* note 2, at xxiv.

21. *Id.* at xvi.

22. *Id.* at 239.

23. *Id.* at 237-50, 273.

son. We, who are attempting to understand, must ourselves make it speak."²⁴ To continue Gadamer's metaphor, what the *Constitution* is saying is the affirmed concretization of its meaning. Gadamer expresses the common sense notion that we tend to find in a text our preconceived ideas. We cannot always extricate ourselves from our historicity, nor are all our prejudices incompatible with the text. The careful judge, therefore, will often re-examine his ideas, his values, and the text along with its elaborations.

It is a mistake to think that the hermeneutic perspective of a judge is solipsistic.²⁵ Solipsism is a "theory that the self is the only thing that can be known and verified."²⁶ The theory of interpretation that I am describing discloses what happens psychologically to a judge who studies a text over and above that which he consciously realizes.²⁷

Legal hermeneutics does not suggest that the judge's understanding is whatever he wants it to be. Sometimes, the judge's understanding occurs, as it were, behind his back. Much more than the subjective preferences is involved when personal experience informs judgment, since personal experience acquaints individuals with the reasonable expectations of others.

The conscientious judge realizes that private views are subordinated to a socially acceptable standard of impartiality. The judge's duty is not to inject meaning, but rather to extract meaning from the text,²⁸ which is the valid source of law. A judge, having the hermeneutic perspective, is never completely free of the text, since the text suggests the parameters and factors that he must take into account, and place in context. This requires an exercise of will, but it is a mistake to always equate will with improper subjectivism.

The judge cannot dominate the text relied upon to channel his discretion. The public expects his judgment to be verifiable as a valid norm by another valid norm contained within the Constitution. Al-

24. *Id.* at 340.

25. Professor Brest writes that Gadamer holds an "essentially solipsistic view of historical knowledge." Brest, *supra* note 19, at 222. Gadamer is also trapped in a footnote by Professor Cover. See Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 1, 6 n.11 (1983). Gadamer is not a "statist." *Id.* Gadamer, however, recognizes that the imminent meaning of words is filtered through the mind set of the existing dominant cultural forces in society. Brest's statement is somewhat misleading.

26. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1229 (1969).

27. See H. GADAMER, *supra* note 2, at xvi.

28. See *id.* at 297.

though he is often compelled to look outside the four corners of the Constitution, he is looking outside to determine the acceptable meaning of the language within.

The judge does not interpret the text as if he were a literary critic, a theologian, a critical legal historian, or a moral philosopher. Legal hermeneutics requires a different perspective. For example, the historian uses a text primarily to learn something about the past; the judge uses the past to learn something about the text. The pending case might "have nothing to do with the intended meaning of the text."²⁹ Hence, the judge's challenging task is to integrate the intended meaning of the Constitution with its perceived authentic and socially acceptable meaning.

The challenging relationship between the interpreter, who has preconceptions, and a puzzling text presents the problem that gives the hermeneutic enterprise its experiential thrust.³⁰ The Constitution's actual meaning is extracted from a reluctant text only after the conscientious judge experiments with several plausible, alternative interpretations. A similar thinking process occurs when attempts are made to understand, interpret, and apply a case with apparent precedential value. The reader may test the suggestion, presented here, by reading a recent case in order to extract its meaning for a particular legal problem. At some point, the reader will have an anticipation of the case's meaning. He will, however, re-read the case until he actually understands the meaning—this understanding occurs at the instant when he is confident that his gradually modified anticipation is finally affirmed. Understanding the import of a case does not necessarily involve reconstruction of its intended meaning at the time it was decided; often, the object is to understand how it might apply to a different, yet perhaps analogous, set of facts.

The process that I have described might again suggest (to those expecting to find it) excessive subjectivity because the interpreter's own reflections are ultimately decisive. The judge's idea of the Constitution's meaning, however, depends in part on what others think; indeed the Constitution acquires meaning³¹ from evidence that exists indepen-

29. *Id.* at 301.

30. *See id.* at 239; *see also id.* 310-25.

31. Owen Fiss writes: "Adjudication is interpretation: Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text." Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739 (1982). He

dently of the judge's own biases. Thus, judicial discretion is conditioned by the impersonal factors³² that justify the validity of a case ruling.³³

IV. LEGAL HERMENEUTICS AND INTERPRETIVISM

So long as the framers' supposed intent remains a vital part of the nation's legal traditions, it will continue to be an important determinant of contemporary meaning, an excellent justification, and a comforting personification³⁴—good reasons why the framers' intent still is respected authority. Nevertheless, the actual meaning of the Constitution links the present with the past, as eighteenth-, nineteenth-, and twentieth-century horizons of thought combine in the judge's mind to be integrated into the law by a concrete case ruling.

A ruling is not necessarily contra-constitutional nor extra-constitutional when the contemporary interpreter's horizon of thought enables him to influence the previously understood meaning of a constitutional provision. The framers' horizon of thought did not include the present social context, but the present horizon of thought includes important remnants of the past—"together they constitute one great horizon that

adds, "Viewing adjudication as interpretation helps to stop the slide toward nihilism. It makes law possible." *Id.* at 750.

32. Objectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation. Objectivity implies that the interpretation can be judged by something other than one's own notion of correctness. It imparts a notion of impersonality. The idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the judge, but only that it be constrained.

Id. at 744. *But see* Brest, *supra* note 3, at 765. Brest writes that the notion of "constitutional adjudication as hermeneutics" is "'sophisticated'" but "by making constitutional law inaccessible to laypersons" it tends to augment a coercive power relationship. *Id.* at 771-72. Brest sees the line between law and politics determined by politics. *Id.* at 765, 773. The hermeneutic perspective enables the judge to understand both sides of that line, and to understand which side of the line is his domain.

33. *See generally* N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978). MacCormick relies on the conventional theory of formal justice which "requires that the justification of decisions in individual cases be always decided on the basis of universal propositions to which the judge is prepared to adhere as a basis for determining other like cases and deciding them in the like manner to the present one." *Id.* at 99. The judge is certainly expected to conform to this elementary notion of the rule of law.

Fiss writes that the judge can preserve objectivity that is compromised by "a number of disparate and conflicting roles" and "the pressures of instrumentalism" by a proper response: "increased effort, clarity of vision and determination, not surrender." Fiss, *supra* note 31, at 762.

34. *See* Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1038-39 (1981).

. . . embraces the historical depths of our self-consciousness."³⁵ Far from being extra- or contra-constitutional, the meaning of the Constitution at the moment of decision is properly placed by the judge in a context quite possibly different from anything that was foreseen by the most prescient framers. To put the matter bluntly, the framers' understanding of the Constitution with respect to the pending case is often inadequate.³⁶ The judge accordingly bases his decision on his "sense of what is feasible, what is possible, what is correct, here and now."³⁷ Each new decision is the product of accumulated wisdom.

Extremists among interpretivists are wholly concerned with reproducing the original understanding of a text, as if its original meaning could be recaptured or restored.³⁸ Attempts to recover traces of past meaning that have faded are not always beneficial or useful. It follows that the interpreter with hermeneutic insights restores only the useful remnants of the original core meaning of first principles "in thoughtful mediation with contemporary life."³⁹

Now we reach the pith of the controversy that is engendered by an extreme interpretivist point of view. Professor Perry argues that a judge who bans a practice that is not a modern analogue of a particular past practice banned by the framers is often engaged in illegitimate

35. H. GADAMER, *supra* note 2, at 271.

36. Sandalow writes that "[b]y wrenching" ourselves from the framers' particular judgments, "we are not serving larger ends determined by the framers but making room for the introduction of contemporary values." Sandalow, *supra* note 34, at 1046. He adds, quoting Karl Llewellyn, "The 'quest does not run primarily in terms of historical intent. It runs in terms of what the words can be made to bear, in making sense in the new light of what was originally unforeseen.'" *Id.* at 1060 (quoting K. LLEWELLYN, *THE COMMON LAW TRADITION* 374 (1960)).

37. H. GADAMER, *supra* note 2, at xxv.

38. Gadamer refers to this undertaking as "the recovery of a dead meaning." *Id.* at 149. He also refers to it as "this romantic reflective enjoyment of history." *Id.* at 172.

39. *Id.* at 150. Gadamer noted that Hegel went far beyond romantic hermeneutics, but Gadamer rejects the ultra-metaphysical Hegelian approach for understanding history. Gadamer, however, is influenced by Heidegger's development of "the fore-structure of understanding." *Id.* at 235. Heidegger warned that the approach described in somewhat modified form in the text, *see supra* text accompanying notes 21-22, "is not to be reduced to the level of a vicious circle." *Id.* at 235. While "[a] person who is trying to understand a text is always performing an act of projecting" it is always necessary for him to keep his gaze on the text "as he penetrates into the meaning." *Id.* at 236. Although this projective process will result in a large variety of readings depending on the reader, "it is not the case that within this variety . . . everything is possible." *Id.* at 238. "The important thing is to be aware of one's own bias, so that the text may present itself in all its newness and thus be able to assert its own truth against one's own fore-meanings." *Id.*

polycymaking.⁴⁰ He writes:

When is a present-day political practice no more than a modern analogue of a past, constitutionally banned practice? The answer, I think, is fairly straightforward: A present-day political practice, P', is simply an analogue of a past constitutionally banned practice, P, when a person—one who aspires to logical consistency and moral coherence—who would endorse the political-moral proposition that P ought to be banned, could point to no difference between P and P' that could count as a principled reason for failing to endorse the distinct proposition that P' ought to be banned.⁴¹

This quote is not an accurate description of current methods of adjudicating constitutional cases. Judges do not ignore the whole of a political problem simply because the framers focused their attention on a part. Past practices and their analogues are deemed simply particular but not exclusive applications of the principles that the framers constitutionalized. In short, the framers' intent is but a provisionally held guide to the interpreter in the search for authentic meaning.

V. CONCLUSION

Legal hermeneutics is a common-sense view of interpretation which describes and explains the art of removing textual ambiguity. It is an approach that is misunderstood when some judge's abuse of power is blamed on the hermeneutic process. Blaming legal hermeneutics, a perspective describing the ontology of interpretation, is nonsense. No descriptive theory can guarantee that a rebel, delinquent, or otherwise hyperpolitical judge will not inject unconventional norms into the Con-

40. See M. PERRY, *supra* note 18, at x, 4-8.

Perry himself is not an interpretivist. He wears an interpretivist strawman's hat which he knocks off and replaces with a wrongheaded emphasis on a "functional justification of noninterpretive review with respect to human rights issues." *Id.* at 7. The functional justification involves the judiciary "as an agency of ongoing, insistent moral reevaluation and ultimately of moral growth." *Id.* at 163. The approach attempts to reconcile judicial review with the demands of representative democracy but the authoritarian ethics that Perry urges the courts to prescribe tend to make matters worse, even though Perry envisions a congressional supervisory role, in the form "of a broad jurisdiction-limiting power." *Id.* at 138. See generally *Symposium: Judicial Review and the Constitution—The Text and Beyond*, 8 DAYTON L. REV. 443 (1983) (symposium discussing Perry's thesis).

41. M. PERRY, *supra* note 18, at 74. Perry writes that evidence is "wholly lacking" to support the proposition that the framers "intended to constitutionalize broad 'concepts' rather than particular 'conceptions.'" *Id.* at 70. But see THE FEDERALIST No. 37, at 286-89 (J. Madison) (J. Hamilton ed. 1864); C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, at 1207-1388 (1971).

stitution to further his political strategy. Obviously, legal hermeneutics, standing alone, can do nothing about judges who refuse to recognize the authority of the universal Constitution.

Legal hermeneutics is a conventional explanation of the judicial process. Old wine has been poured into new bottles, but the basic insight merely recognizes the commonplace idea that the judge's power to legislate major changes in legal concepts is substantial but limited. The theory of legal hermeneutics presupposes the existence of an orderly legal system that employs traditional methods of adjudication which facilitate gradual, incremental, and socially acceptable change. Willful judges or visionaries, impatient with this conventional discipline, have no need for legal hermeneutics; indeed, they have no need for a text. The Constitution, for some, has always been expendable.

An interpretation of the Constitution will have social acceptance when the judge can explain persuasively that the basic values of society, the self-imposed and legally imposed constraints upon his role, the case ruling, and the text of the Constitution are all compatible. Interpretation that is attentive to a disciplined methodology, the reasonable expectations of litigants, and the *sensus communis* diminishes the danger that the judge will be partial to some elitist or anachronistic view of the Constitution. In short, the judge's active intellectual involvement in interpretation can be legitimate, adequately impartial, and objective.

