

The "Fixation Thesis" and Other Falsehoods

Frederick Mark Gedicks

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THE "FIXATION THESIS" AND OTHER FALSEHOODS

*Frederick Mark Gedicks**

Abstract

This Article challenges the so-called "fixation thesis" of public-meaning originalism. This thesis holds that the meaning of the Constitution was fixed when adopted and exists in the past as a fact, unaffected by what anyone thinks about it in the present. For public-meaning originalists, constitutional meaning is always ontologically "there" in the past to be found, even if their epistemological method sometimes fails to find it.

The fixation thesis underwrites the powerful rhetoric of fidelity that public-meaning originalists deploy against nonoriginalists, whom they deride for "making up" constitutional meaning without any interpretive theory: "it takes a theory to beat a theory."

But there is a theory that contests public-meaning originalism, though most public-meaning originalists ignore it. Philosophical hermeneutics maintains that the meaning of any text is constituted by the present as well as the past. If this claim is true, then the fixation thesis must be false because the original public meaning of the Constitution could not exist in the past as a fact unaffected by the present. And if original public meaning is not "there" in the past to be found, public-meaning originalists are "making it up," too, for no theory can discover meaning that does not exist.

The few public-meaning originalists who address hermeneutics mistake it for a criticism of public-meaning methodology. But hermeneutics claims that the original public meaning does not exist, not that public-meaning methods do not work: original public meaning is simply not "there" in the past to be found. It doesn't take an interpretive theory to beat public-meaning originalism—an ontology will do.

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It is only in all its applications that the law becomes concrete.

—Hans-Georg Gadamer**

** HANS-GEORG GADAMER, TRUTH AND METHOD 335 (Joel Weinsheimer & Donald G. Marshall trans., Bloomsbury Acad. paperback ed. 2013) (1975).

INTRODUCTION: IT DOESN'T TAKE A THEORY

Originalists contend that judges properly interpret the Constitution only when they discover and apply its original meaning.¹ They initially looked for this meaning in the intentions of the framers,² but most have abandoned intent for "original public meaning"—how the public understood the Constitution at the time it was adopted.³ This "public-meaning" or "new" originalism claims to be the most widely held theory of constitutional interpretation.⁴ Evidently, we're all public-meaning originalists now.

A crucial premise of public-meaning originalism is the transparently named "fixation thesis," which holds that the meaning of any

1. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 4 (2004) [hereinafter BARNETT, *THE LOST CONSTITUTION*]; ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 5–6 (1990); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 35 (1999) [hereinafter WHITTINGTON, *INTERPRETATION*]; Lawrence B. Solum, *Semantic Originalism* 173 (Ill. Pub. Law & Legal Theory Research Papers Series, Paper No. 07-24, 2008) [hereinafter Solum, *Semantic Originalism*], <https://papers.ssrn.com/abstract=1120244> [<https://perma.cc/KP9E-2MYV>].

2. E.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17, 22 (1971); Edwin Meese III, U.S. Attorney Gen., Address to the American Bar Association House of Delegates (July 9, 1985), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf> [<https://perma.cc/DFT5-9HRD>]. See generally Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988) (criticizing the reasons given by contemporary scholars against adhering to the original intentions of the framers).

3. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 647 (1999) [hereinafter Barnett, *Originalism for Nonoriginalists*]. Professor Lawson was the first to suggest this move. See Gary Lawson, *In Praise of Woodenness*, 11 GEO. MASON U. L. REV. 21, 22 (1988). Most other originalists followed. See, e.g., BARNETT, *THE LOST CONSTITUTION*, *supra* note 1, at 92; ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 17 (1997); WHITTINGTON, *INTERPRETATION*, *supra* note 1, at 35; Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127–33 (2003); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1758 (2015) [hereinafter McConnell, *Interpretation*]; John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 756, 761 (2009); Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 970 (2008); see also *District of Columbia v. Heller*, 554 U.S. 570, 576–619 (2008) (5–4 decision) (majority opinion by Scalia, J.) (documenting the "normal and ordinary" meaning of the text of the Second Amendment when adopted in 1791 and applied to the states in 1868).

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

4. Barnett, *Originalism for Nonoriginalists*, *supra* note 3, at 613; McGinnis & Rappaport, *supra* note 3, at 761; Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 380 (2013) [hereinafter Whittington, *Critical Introduction*]; Solum, *supra* note 1, at 4. This Article uses "new originalism" and "public-meaning originalism" interchangeably.

constitutional text is fixed when the text is adopted and cannot change.⁵ It follows that the present and its concerns cannot affect constitutional meaning. This is a feature of public-meaning originalism, not a bug: constitutions are put into writing precisely to constrain government,⁶ “locking in” or “fixing” rules of law that bind it.⁷ Judges must discover the meaning of a written constitution in the past; they may not manufacture it in the present.⁸ All originalists accept the fixation thesis,⁹ which distinguishes originalism from other interpretive theories.¹⁰

Public-meaning originalism claims that the original public meaning of the Constitution is *epistemologically* discoverable.¹¹ For public-meaning originalists, the original public meaning is an objective fact in the world,¹² which public-meaning method can recover as a fact, untainted by the interpreter’s concerns in the present.¹³ Gaps and ambiguities in the

5. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) [hereinafter Solum, *The Fixation Thesis*]; see also Kesavan & Paulsen, *supra* note 3, at 1130 (noting that “the meaning of the words and phrases of the Constitution is fixed,” unless changed by amendment).

6. BARNETT, *THE LOST CONSTITUTION*, *supra* note 1, at 103.

7. See *id.* at 105–06 (“If . . . a constitution . . . is reduced to writing and executed, where it speaks it establishes or ‘locks in’ a rule of law from that moment forward.”); SCALIA, *supra* note 3, at 40 (“One would suppose that the rule that a text does not change would apply a fortiori to a constitution. . . . [I]ts whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”); WHITTINGTON, *INTERPRETATION*, *supra* note 1, at 54 (“[O]nly a fixed text can provide judicial instruction and therefore be judicially enforceable against legislative encroachment.”); *id.* at 56 (“The constitutional constraint on the people’s agents can emerge from the text as intended . . . only if the text has the fixed meaning it is uniquely capable of carrying.”); Ramsey, *supra* note 3, at 973, 976 (Constitutional meaning must be “anchored in the text.”).

8. See, e.g., WHITTINGTON, *INTERPRETATION*, *supra* note 1, at 5–11.

9. Solum, *The Fixation Thesis*, *supra* note 5, at 4, 30; see Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011); Whittington, *Critical Introduction*, *supra* note 4, at 378.

10. See SCALIA, *supra* note 3, at 38.

11. Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 416–17 (2013) [hereinafter Barnett, *Gravitational Force*]. “Epistemology” is the study of what we can know and how we can know it. ANTHONY KENNY, *A NEW HISTORY OF WESTERN PHILOSOPHY* 118 (2010); see, e.g., ARISTOTLE, *Posterior Analytics* (G.R.G. Mure trans.), in *THE BASIC WORKS OF ARISTOTLE* 108, 183–84 ii.19 99b20–100a14 (Richard McKeon ed., 6th prtg. 1941) (arguing that one knows the world through sense perception).

All citations to Aristotle are to the page number in *THE BASIC WORKS OF ARISTOTLE*, *supra*, followed by the Roman numeral of the book, the Arabic number of the chapter, and, if applicable, the Bekker line number(s).

12. See, e.g., Lawrence B. Solum, *A Reader’s Guide to Semantic Originalism and a Reply to Professor Griffin* 41 (Ill. Pub. Law & Legal Theory Research Papers Series, Paper No. 08-12, 2008), <https://papers.ssrn.com/abstract=1130665> [<https://perma.cc/QP5Y-V3ZZ>].

13. See generally Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 [hereinafter Solum, *Triangulating Public Meaning*] (arguing that the original public meaning of the Constitution can

historical record sometimes prevent this recovery,¹⁴ but the existence of original public meaning remains, unaffected by the inability to find it.

Public-meaning originalism rests on this *ontological* assumption, that the original public meaning of the Constitution is a fact existing in the world of the past, untouched by the present and its concerns.¹⁵ The fixation thesis presupposes that original public meaning is an object existing independently of the present, always "there" in the past to be found. So, when a question arises about the meaning of the Constitution, one need only recur to the "fact" of its original public meaning to find the answer. As Randy Barnett puts it, "there is (à la Gertrude Stein) a *there* there potentially to resolve the conflict."¹⁶

Why does this matter? Public-meaning originalists insist that only judges who recover and apply the original public meaning are faithful to the Constitution;¹⁷ judges who decide cases on some other (nonoriginalist) basis are not "interpreting" the Constitution, but "making up" its meaning to suit their personal preferences.¹⁸ This rhetorical move installs public-meaning originalism as the status quo, allocating to nonoriginalists the burden of dislodging it with some alternate method (or, as new originalists often taunt, "It takes a theory to beat a theory," and nonoriginalists don't have one).¹⁹ But if the original public meaning

be objectively recovered by a three-part methodology employing corpus linguistics, immersion in the linguistic and conceptual world in which the Constitution was adopted, and deep study of the Constitution's drafting and ratification process and early implementation).

14. E.g., Barnett, *Gravitational Force*, *supra* note 11, at 416; Ramsey, *supra* note 3, at 971; Solum, *The Fixation Thesis*, *supra* note 5, at 12; Whittington, *Critical Introduction*, *supra* note 4, at 403.

15. "Ontology" is the study of being or existence, of everything that "is." KENNY, *supra* note 11, at 160; e.g., ARISTOTLE, *Metaphysics* (W.D. Ross trans.), in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 11, at 681, 779 vi.1 1026a15-16 & -30-33 ("[T]he first science deals with . . . being *qua* being—both what it is and the attributes which belong to it *qua* being.").

16. Barnett, *Gravitational Force*, *supra* note 11, at 416.

17. E.g., BARNETT, *LOST CONSTITUTION*, *supra* note 1, 103–04, 107; WHITTINGTON, *INTERPRETATION*, *supra* note 1, at 56; Solum, *Semantic Originalism*, *supra* note 1, at 4. See also Mitchell N. Berman, *Originalism Is Bunk*, 84 NYU L. REV. 1, 91 (2009) ("[O]ne frequently finds Originalism championed as the theory of integrity, honesty, and candor."); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 280 (2009) ("[O]riginalists of every stripe have insisted unflinchingly that theirs is the one true constitutional faith—that only their approach is legitimate and coherent and properly respects the Constitution and the judiciary's institutional role.").

18. See, e.g., William Baude, *Essay, Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015); Clarence Thomas, *How to Read the Constitution*, WALL ST. J. (Oct. 20, 2008, 12:01 AM), <https://www.wsj.com/articles/SB122445985683948619> [<https://perma.cc/SGY2-W8HC>] (excerpt from Justice Thomas's Wriston Lecture to the Manhattan Institute). For insightful criticism of this originalist trope, see Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1191–1205 (2008).

19. ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 74 (2011) (statement of Solum); Barnett, *Originalism for Nonoriginalists*, *supra* note 3,

of the Constitution does not exist in the past as a fact, then public-meaning originalists are “making it up” too, for no interpretive method can find meaning that does not exist. So it actually doesn’t take another interpretive theory to beat public-meaning originalism—the right ontology will do.

Philosophical hermeneutics rejects the assumption that the original public meaning of the Constitution exists in the past unaffected by the present. The meaning of any text from the past is also shaped by the demands of the interpreter in the present—textual meaning is mutually constituted by past *and* present.²⁰ It is precisely the interpretive effort in the present to understand a text from the past that generates textual meaning. *Pace* Professor Barnett (and to paraphrase Stein correctly),²¹ there isn’t any “there” in the past to yield objective answers to questions about constitutional meaning.

Consider contemporary discussions about whether the holding of *Brown v. Board of Education* is within the original public meaning of the Fourteenth Amendment.²² In *Brown*, the Court famously held that racial segregation in public education violated the Amendment, but declined to rest on the Clause’s original meaning because the Fourteenth Amendment was not generally understood to prohibit racially segregated public schools when adopted in 1868.²³ This remains the scholarly consensus.²⁴

In the years since it was decided, *Brown* has become constitutional scripture: any constitutional scholar whose interpretive theory calls *Brown* into question risks rejection of herself and her theory.²⁵ No one escapes this effect; as Robert Bork lamented, even the great Herbert

at 617; *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989) (“[N]onoriginalism confronts a practical difficulty reminiscent of the truism of elective politics that ‘You can’t beat somebody with nobody.’”).

20. *See generally* HANS-GEORG GADAMER, TRUTH AND METHOD 335 (Joel Weinsheimer & Donald G. Marshall trans., Bloomsbury Acad. paperback ed. 2013) (1960) [hereinafter GADAMER, TRUTH & METHOD].

21. *See* GERTRUDE STEIN, EVERYBODY’S AUTOBIOGRAPHY 289 (1937) (lamenting that there was little point to writing about her hometown because “there is no there there”).

22. 347 U.S. 483 (1954).

23. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 1–2 (1955) (based on a research memorandum on *Brown* written while a clerk to Justice Frankfurter). *Compare Brown*, 347 U.S. at 495 (“Separate educational facilities are inherently unequal.”), *with id.* at 492 (“[W]e cannot turn back the clock to 1868 when the [Fourteenth] Amendment was adopted . . .”).

24. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 132–46 (1997); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1881 (1995); Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 229–31 (1996); Ronald Turner, *Justice Antonin Scalia’s Flawed Originalist Justification for Brown v. Board of Education*, 9 WASH. U. JURIS. REV. 179, 180 (2017).

25. *See* Colby & Smith, *supra* note 17, at 299 & nn.281–82.

Wechsler was attacked for his suggestion that *Brown* lacked a neutral doctrinal justification.²⁶

To remain viable in this environment, public-meaning originalism required a public-meaning defense of *Brown*, and several were duly produced.²⁷ It's hardly unfair to question whether the imperative of defending public-meaning originalism motivated these defenses or influenced their readings of the historical record.

My point is not just that one's personal acceptance of *Brown*'s principle of racial equality influences how she understands the Fourteenth Amendment; the elevation of *Brown* also influences whether she accepts this principle in the first place. Understanding a text from the past always includes one's relationship to it in the present: Who we are affects how we understand the Constitution, but how the Constitution has come to be understood affects who we are. Contemporary public-meaning originalists have to take account of the canonization of *Brown* in their interpretation of the Fourteenth Amendment, but as persons already committed to racial equality as the result of *Brown*'s influence, they *want* to take this account.

Although philosophical hermeneutics attacks the very assumption that underwrites the fixation thesis—that original public meaning rests in the past as an independently existing fact—public-meaning originalists have almost entirely ignored it. Those few who have engaged it have treated it as a challenge to the discoverability of original public meaning rather than to its existence.²⁸ This, too, has gone almost entirely unexamined in the literature.²⁹

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

27. See, e.g., Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429 (2015); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) [hereinafter McConnell, *Originalism & Desegregation*]. Professor McConnell's public-meaning defense of *Brown* and Professor Solum's use of it are discussed in Section IV.C.

28. See WHITTINGTON, *INTERPRETATION*, *supra* note 1, at 74–76, 92–94, 102–08; Lawrence B. Solum, *Originalism, Hermeneutics, and the Fixation Thesis* [hereinafter Solum, *Hermeneutics and the Fixation Thesis*], in *THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY* 130 (Brian G. Slocum ed., 2017) [hereinafter *LEGAL INTERPRETATION*].

29. The only direct criticism is a short but incisive book chapter by Professor Mootz. See generally Francis J. Mootz III, *Getting Over the Originalist Fixation* [hereinafter Mootz, *Originalist Fixation*], in *LEGAL INTERPRETATION*, *supra* note 28, at 156 (criticizing Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 28). Professor Mootz offers ontological criticism of original-intent originalism in 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 (1988) [hereinafter Mootz, *Legal Hermeneutics*].

This Article argues that the fixation thesis is false. Part I provides a detailed exposition of the thesis and the ontological assumptions on which it rests. Part II discusses the hermeneutic challenge to fixation afforded by Hans-Georg Gadamer's approach to interpretation and understanding, in particular his argument that one's interpretation of a text is necessarily structured by her prior relation to it.³⁰ Part III shows how public-meaning originalists incorrectly read Gadamer epistemologically rather than ontologically, misunderstanding his argument as a critique of public-meaning methodology rather than a rejection of the "objective" existence of textual meaning in the past. Part IV criticizes examples deployed by new originalists against hermeneutics, showing how they actually demonstrate the improbability of the fixation thesis. The Conclusion briefly discusses the dubious claim of new originalists that they alone are faithful to the Constitution.

I. THE FIXATION THESIS

The fixation thesis provides that two sets of facts fix the meaning of any constitutional clause at its adoption: facts about the semantics of the text and facts about the context surrounding the text and its adoption.³¹

A. *Semantics*

The Constitution is written in clauses, which constitute the basic unit of public-meaning analysis.³² Each word in a constitutional clause possesses an ordinary linguistic meaning established by widespread

A few commentators have noted the ontological assumption underlying fixation without discussing it further. *See, e.g.*, BENNETT & SOLUM, *supra* note 19, at 107 (observation of Bennett); Berman, *supra* note 17, at 7; Vivienne Brown, *Historical Interpretation, Intentionalism and Philosophy of Mind*, 1 J. PHIL. HIST. 25, 60 (2007); Daniel S. Goldberg, Comment, *And the Walls Came Tumbling Down: How Classical Scientific Fallacies Undermine the Validity of Textualism and Originalism*, 39 HOUS. L. REV. 463, 494 (2002); Rik Peters, *Constitutional Interpretation: A View from a Distance*, 50 HIST. & THEORY 117, 117 (2011).

30. *See generally* GADAMER, *TRUTH & METHOD*, *supra* note 20; HANS-GEORG GADAMER, *PHILOSOPHICAL HERMENEUTICS* (David E. Linge ed. & trans. 1976) [hereinafter GADAMER, *HERMENEUTICS*]; HANS-GEORG GADAMER, *REASON IN THE AGE OF SCIENCE* (Frederick G. Lawrence trans., 1981) [hereinafter GADAMER, *AGE OF SCIENCE*]. Section II.B.3.a is drawn from Frederick Mark Gedicks, *It's a Wonderful Originalism! Lawrence Solum and the Thesis of Immaculate Recovery*, 31 DPCE ONLINE 653 (2017), <http://www.dpceonline.it/index.php/dpceonline/article/view/438/426> [<https://perma.cc/JTY3-KTYH>].

31. Solum, *Triangulating Public Meaning*, *supra* note 13, at 1630–31; *see* Ramsey, *supra* note 3, at 974; Solum, *The Fixation Thesis*, *supra* note 5, at 28.

32. Solum, *Semantic Originalism*, *supra* note 1, at 50–51; *see also* VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 113 (2016) (“[O]rdinary meaning, from a semantic perspective, requires at least a full sentence.”).

patterns of English usage existing at the time the clause was adopted.³³ Rules of syntax and grammar in force at adoption dictate how these words fit together as a statement.³⁴ Ordinary meaning, syntax, and grammar in use at the time of adoption, evidenced by contemporaneous usage in newspapers, magazines, pamphlets, dictionaries, statutes, judicial decisions, and other public writing, constitute and fix the original semantic meaning of a clause—the meaning people of the time would have understood solely from the words of the clause.³⁵

Public-meaning originalists maintain that once fixed in a written constitutional clause, semantic meaning exists in the past as a fact. This entails the claims that original semantic meaning is both objective and stable; it exists independently of human thought, and any person who undertakes to investigate it will find the same thing.³⁶ As Professor Barnett declares, “[T]he English language contains words with generally accepted meanings that are ascertainable independent of any of our subjective opinions about their meaning.”³⁷ Similar references to the

33. Solum, *Semantic Originalism*, *supra* note 1, at 60; see McConnell, *Interpretation*, *supra* note 3, at 1757. The view that semantic meaning is stable at the moment of utterance has not gone unchallenged. See, e.g., PETER LUDLOW, *LIVING WORDS: MEANING UNDERDETERMINATION AND THE DYNAMIC LEXICON* 3 (2014) (arguing that semantic meaning is generally underdeterminate and contested, often within the same conversation); see also J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 100 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975) (“[F]or some years we have been realizing more and more clearly that the occasion of an utterance matters seriously, and that the words used are to some extent to be ‘explained’ by the ‘context’ in which they are designed to be or have actually been spoken in a linguistic interchange. Yet still perhaps we are too prone to give these explanations in terms of ‘the meanings of the words.’”); J.L. AUSTIN, *PHILOSOPHICAL PAPERS* 62 (J.O. Urmson & G.J. Warnock eds., 2d ed. 1970) (“[T]here is *no* simple and handy appendage of a word called ‘the meaning of (the word) “x.””).

The instability of semantic meaning is a particular problem in written utterances because writing enables the severance of the utterance from its author, its addressee, and the rest of its initial context. See, e.g., PAUL RICOEUR, *FROM TEXT TO ACTION: ESSAYS IN HERMENEUTICS*, II, at 54–55, 84–85, 108 (Kathleen Blamey & John B. Thompson trans., Nw. Univ. Press 2007) (1986) (observing that semantic meaning is especially unstable in written discourse); JACQUES DERRIDA, *Signature Event Context*, in *LIMITED INC* 1, 3 (Samuel Weber & Jeffrey Mehlman trans., Nw. Univ. Press 1988) (1977) (arguing, *inter alia*, that context can never completely determine the meaning of written communication).

34. See Solum, *Semantic Originalism*, *supra* note 1, at 51.

35. See BARNETT, *LOST CONSTITUTION*, *supra* note 1, at 93; McConnell, *Interpretation*, *supra* note 3, at 1755; Ramsey, *supra* note 3, at 974.

36. See NICOLA ABBAGNANO, *DIZIONARIO DI FILOSOFIA* 379 (2d ed. 1971) (author’s translation): A “fact” is

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

37. BARNETT, *THE LOST CONSTITUTION*, *supra* note 1, at 105.

“factual” and “objective” character of original semantic meaning abound in the public-meaning literature.³⁸

Public-meaning originalists often use the Domestic Violence Clause to illustrate the role semantics plays in fixing original meaning.³⁹ This Clause provides, “The United States . . . shall protect each of [the states] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”⁴⁰ Today “domestic violence” commonly means physical or sexual abuse by one family member of another.⁴¹ This usage was unknown when the Domestic Violence Clause and the rest of the original Constitution were adopted in the late 1780s⁴²—indeed, many actions now considered abusive were then numbered among the prerogatives of male heads of household.⁴³

The fixation thesis holds that the meaning of “domestic violence” was fixed when the Domestic Violence Clause was adopted. Thus, the original semantic meaning of the Clause cannot include contemporary understandings of “domestic violence” like spousal or child abuse. Later changes in usage—“linguistic drift”—do not change the original

38. See, e.g., SCALIA, *supra* note 3, at 17 (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”); Barnett, *Gravitational Force*, *supra* note 11, at 415 (“New Originalism . . . seeks to establish an empirical fact about the objective meaning of the text at a particular point in time”); Solum, *The Fixation Thesis*, *supra* note 5, at 28 (“The public meaning of the text that was proposed in 1787 was necessarily determined in large part by the conventional semantic meanings of the words and phrases that make up the text and the regularities of usage that are sometimes summarized as rules of grammar and syntax. Conventional semantic meanings and syntax are determined by linguistic facts—that is, by regularities in usage.”).

This factual and objective meaning need not even coincide with the understanding of actual people who lived at the time. Ironically, given their accusation that nonoriginalists are “making it up,” many public-meaning originalists construct a hypothetical reader in their analyses of original semantic meaning. See, e.g., Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) (“[W]hen interpreting the Constitution, the touchstone is not the specific thoughts in the heads of any particular historical people . . . but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers.”); see also Kesavan & Paulsen, *supra* note 3, at 1132 (“[The term originalism] is in reference to the original, non-idiosyncratic meaning of words and phrases in the Constitution: how the words and phrases, and structure . . . would have been understood by a hypothetical, objective, reasonably well-informed reader”).

39. See, e.g., Barnett, *Gravitational Force*, *supra* note 11, at 416; Solum, *The Fixation Thesis*, *supra* note 5, at 16–17.

40. U.S. CONST. art. IV, § 4.

41. *Domestic Violence*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/domestic%20violence> [<https://perma.cc/5EFN-ZJM4>].

42. See *id.*

43. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122–25, 2129–30 (1996).

semantic meaning because this meaning was fixed at the Clause's adoption.⁴⁴

B. Context

Original semantic meaning is rarely sufficient to resolve constitutional cases.⁴⁵ Public-meaning originalists acknowledge the necessity of supplementing the original semantics of the text with its context—additional relevant information that specifies the original semantic meaning.⁴⁶ Just as the original semantic meaning of the Constitution is time-bound, so is its context, consisting of those circumstances known by or available to the public at the time the Constitution was adopted.⁴⁷ This “publicly available context” consists of textual context and historical context.

1. Textual

The location of a clause in the constitutional text—which clauses surround it, how a clause is grammatically marked off from others, the section and article in which a clause is placed—affects its meaning.⁴⁸ Again, the Domestic Violence Clause is illustrative. It forms part of a longer sentence containing several clauses: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”⁴⁹

Preceded immediately by the Invasion Clause, which obligates the United States to repel any forceful occupation of a state originating outside its borders, the Domestic Violence Clause takes up the analogous problem of violent rebellions occurring within a state's borders. The location of the Domestic Violence Clause immediately after the Invasion

44. Solum, *The Fixation Thesis*, *supra* note 5, at 17.

45. See NOURSE, *supra* note 32, at 107, 133; Solum, *Triangulating Public Meaning*, *supra* note 13, at 1632; see also *supra* note 33 and accompanying text (noting the importance of context to written utterance).

46. See, e.g., SCALIA, *supra* note 3, at 37; WHITTINGTON, INTERPRETATION, *supra* note 1, at 35, 60; Solum, *The Fixation Thesis*, *supra* note 5, at 28. See generally P.F. Strawson, *On Referring*, 59 MIND 320, 336 (1950) (The “context” of an utterance includes “the time, the place, the situation, the identity of the speaker, the subjects which form the immediate focus of interest, and the personal histories of both the speaker and those he is addressing.”).

47. See Solum, *The Fixation Thesis*, *supra* note 5, at 28; see also WHITTINGTON, INTERPRETATION, *supra* note 1, at 35, 60.

48. See BARNETT, LOST CONSTITUTION, *supra* note 1, at 105; KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 6 (1999) [hereinafter WHITTINGTON, CONSTRUCTION]; Ramsey, *supra* note 3, at 972; Solum, *Semantic Originalism*, *supra* note 1, at 54.

49. U.S. CONST. art. IV, § 4.

Clause offers confirmation that “domestic violence” means violent rebellions originating within a state against its legitimate authority.⁵⁰

2. Historical

Each clause of the Constitution was adopted at a particular time and place by particular groups in light of particular political imperatives and social considerations. Public-meaning originalism requires retrieval of this historical context “to elucidate the understanding of the terms involved and to indicate the principles that were supposed to be embodied in them.”⁵¹

The Domestic Violence Clause once again provides a useful illustration. While the United States was governed by the Articles of Confederation from 1781 to 1789, the states were bedeviled by internal rebellions, euphemistically called by the people “out-of-doors.”⁵² These ranged from organized attacks on state governments, such as Shays’ Rebellion, to mobs of local citizens.⁵³ At the Philadelphia Convention, Federalists insisted that the newly conceived federal government be vested with sufficient military power and constitutional authority to extinguish these rebellions and mob actions.⁵⁴

The historical context surrounding adoption of the Domestic Violence Clause thus confirms that “domestic violence” refers to anti-government violence within a state, precluding the contemporary sense of child and spousal abuse in favor of a federal obligation to deploy resources, upon state request, to put down violent intrastate rebellions.

* * *

The fixation thesis holds that the meaning of any constitutional clause is fixed when the clause is adopted, by the semantic meaning of the clause and the context surrounding its adoption. This fixed original meaning exists in the past as an objective fact, independently of the present and its concerns.

II. ONTOLOGICAL CHALLENGES

Gadamer directly challenges the fixation thesis in *Truth and Method*, easily the most consequential work on textual interpretation in the

50. Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 242–43 (2018) [hereinafter Solum, *Surprising Originalism*].

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

52. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 319–28 (1998).

53. *Id.* at 325–27.

54. See GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC: 1789–1815, at 111 (2009).

twentieth century,⁵⁵ as even some public-meaning originalists acknowledge.⁵⁶ Drawing on Martin Heidegger's ontology in *Being and Time*,⁵⁷ Gadamer argues that textual meaning is mutually constituted by past and present.⁵⁸ This directly contradicts the fixation thesis, which assumes that constitutional meaning exists in the past, unaffected by the present. If Gadamer is right, then the meaning of a text from the past *cannot exist*, unless and until someone in the present interacts with it and thereby contributes the necessary present component to textual meaning.

55. See RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 34 (1983); JEAN GRONDIN, *INTRODUCTION TO PHILOSOPHICAL HERMENEUTICS* 2 (Joel Weinsheimer trans., Yale Univ. Press 1994) (1991); JOEL C. WEINSHEIMER, *GADAMER'S HERMENEUTICS: A READING OF TRUTH AND METHOD*, at ix (1985). Important criticisms of *Truth and Method* in English include Emilio Betti, *Hermeneutics as the General Methodology of the Geisteswissenschaften* [hereinafter Betti, *Hermeneutics*], in JOSEF BLEICHER, *CONTEMPORARY HERMENEUTICS: HERMENEUTICS AS METHOD, PHILOSOPHY AND CRITIQUE* 51, 58–73 (1980), and E.D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* app. II 245–64 (1967). Betti, *Hermeneutics*, *supra*, draws its principal themes from EMILIO BETTI, *TEORIA GENERALE DELLA INTERPRETAZIONE* (2nd ed., 1992) (1955) (2 vols.) [hereinafter BETTI, *TEORIA GENERALE*].

56. See, e.g., Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 28, at 145 (“Hans-Georg Gadamer produced a powerful and influential theory of hermeneutics in . . . *Truth and Method*.”).

57. See GADAMER, *TRUTH & METHOD*, *supra* note 20, at 255–64 (discussing MARTIN HEIDEGGER, *SEIN UND ZEIT [BEING AND TIME]* (1927)); see also BERNSTEIN, *supra* note 55, at 113 (arguing that Gadamer made explicit Heidegger's implicit claims for ontology and the universality of hermeneutics).

Some years ago I attended a lecture at BYU by the late Hubert Dreyfus, an influential Heidegger scholar. As I remember, Dreyfus called Heidegger the “most important philosopher of the 20th century” and a “despicable human being.” This seems correct, then and now. Heidegger engaged in a notorious collaboration with the Nazi regime in 1933 and 1934, for which he never apologized or expressed regret; the recent publication of his journal-like “black notebooks,” containing scattered anti-Semitic entries between 1931 and 1940, has added fuel to this fire. See Philip Oltermann, *Heidegger's “Black Notebooks” Reveal Antisemitism at Core of His Philosophy*, *GUARDIAN* (Mar. 12, 2014, 8:01 PM), <https://www.theguardian.com/books/2014/mar/13/martin-heidegger-black-notebooks-reveal-nazi-ideology-antisemitism> [<https://perma.cc/N5AX-LM82>]. And yet, much of his work, especially *Being and Time*, contains stunning philosophical insights.

Brian Leiter once suggested that, whatever the influence of Nazism on Heidegger's later work—which Leiter believes is considerable—important philosophical themes in early works like *Being and Time* (published in 1927) seem unrelated to it. Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 *YALE L.J.* 253, 262 n.35 (1996) (referring to themes developed by Dreyfus). Among these themes are *Being and Time*'s critique of Cartesian epistemology and its ontological argument for “Being-in-the-world,” both of which inform Gadamer's philosophical hermeneutics. See *infra* Section II.B. See generally HUBERT L. DREYFUS, *BEING-IN-THE-WORLD: A COMMENTARY ON HEIDEGGER'S BEING AND TIME, DIVISION I*, at 3–8 (1991).

58. See, e.g., GADAMER, *TRUTH & METHOD*, *supra* note 20, at 301.

A. *The Circularity of Human Understanding*

Heidegger rejected the conceptual separation of the human subject from its objects of knowledge,⁵⁹ which underwrites so much of Western thought.⁶⁰ His fundamental claim is that subjects and objects have no existence outside of their relationships with each other;⁶¹ human beings have a prior involvement with every person and thing they seek to understand.⁶² We are not independently existing subjects who must break out of inner consciousness to understand the independently existing world outside; rather, we are always, at every moment, already out in the world alongside other persons and things.⁶³ Human “being,” in this view, is a “being-*there*,”⁶⁴ a “being-*in-the-world*.”⁶⁵ As Brian Leiter explains, the world is constituted “precisely by the practical involvements we have with the things and people in it.”⁶⁶

59. MARTIN HEIDEGGER, *BEING AND TIME* 129, 131 (John Macquarrie & Edward Robinson trans., Harper & Row, Publishers 1962) (1927) [hereinafter HEIDEGGER, *BEING & TIME*].

60. See ROBERT C. SOLOMON, *Continental Philosophy Since 1750: The Rise and Fall of the Self*, in 7 *A HISTORY OF WESTERN PHILOSOPHY* 144, 153–67 (1988).

In the conventional “Cartesian” view, each of us exists “inside” ourselves, in our subjective minds, while “outside” is the objectively real world. See RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* (1641), reprinted in *DISCOURSE ON METHOD AND MEDITATIONS ON FIRST PHILOSOPHY* 45, 49–53 (Donald A. Cress trans., 3d ed. 1993); see also KENNY, *supra* note 11, at 528 (attributing to Descartes the conceptualization of “mind and matter as the two great mutually exclusive and mutually exhaustive divisions of the universe”). This separation created an epistemological problem: how can the merely subjective “in-here” know the objectively real “out-there”? A perpetual preoccupation became how to bridge this gap between mind and matter. See, e.g., DESCARTES, *supra*, at 50. Heidegger did so with an ontology that denied that subjects and objects exist apart from each other in the first place. See MARTIN HEIDEGGER, *THE METAPHYSICAL FOUNDATIONS OF LOGIC* 160–61, 167 (Michael Heim trans. 1984) [hereinafter HEIDEGGER, *METAPHYSICAL FOUNDATIONS*] (lectures from 1928) (Ind. Univ. Press 1984).

For a pre-Heideggerian defense of Cartesian dualism, see generally Henry Bliss, *The Subject-Object Relation*, 26 *PHIL. REV.* 395 (1917).

61. See HEIDEGGER, *BEING & TIME*, *supra* note 59, at 125 (criticizing the Cartesian subject as existing “in such a way that it needs no other entity in order to *be*”); see also Harrison Hall, *Intentionality and World: Division I of Being and Time*, in *THE CAMBRIDGE COMPANION TO HEIDEGGER* 122, 135 (Charles B. Guignon ed., 1993) (observing that for Heidegger human being is inseparable from the being of the world).

62. See WILLIAM J. RICHARDSON, S.J., *HEIDEGGER: THROUGH PHENOMENOLOGY TO THOUGHT* 85 (3d ed. 1974); SOLOMON, *supra* note 60, at 162.

63. HEIDEGGER, *BEING & TIME*, *supra* note 59, at 88–89.

64. *Id.* at 153–57 (emphasis added). “Being-*there*” is the customary English translation of *Dasein*, a German noun upon whose verb form Heidegger plays for a fresh conception of the freighted term “human being.” See “*dasein*,” in *THE OXFORD-DUDEN GERMAN DICTIONARY* 191 (W. Scholze-Stubenrecht & J.B. Sykes eds., 1994) [hereinafter *OXFORD GERMAN DICTIONARY*] (intransitive verb meaning “to be”). I’ve retained “human being” and “human being-*in-the-world*” for their accessibility to nonspecialists.

65. HEIDEGGER, *BEING & TIME*, *supra* note 59, at 80, 107, 141 (emphasis added).

66. Leiter, *supra* note 57, at 271.

Being-in-the-world precludes purely objective knowledge. We cannot grasp the meaning and significance of things in the world independently of who we are and what we preliminarily know about them,⁶⁷ because we are bound up with them in already-existing relationships that shape our understanding of them.⁶⁸

Nevertheless, the impossibility of pure objectivity does not end in the solipsism of pure subjectivity. We cannot make of the world anything we wish. While one's presuppositions of meaning shape one's understanding of the world, the "brute facts" of the world—including its physical reality—also make their claims on understanding;⁶⁹ we find ourselves thrown into situations open to some possibilities of existence but closed off to others.⁷⁰ We participate with the world in creating the meaning of our existence. This does not mean that subjectivity or objectivity vanishes, only that they combine in our understanding. One's choices among possibilities give her life meaning, but this meaning determines the possibilities she finds attractive enough to choose. For Heidegger, understanding is always self-understanding, interpretation always self-interpretation.⁷¹

67. HEIDEGGER, BEING & TIME, *supra* note 59, at 191–92; *see also id.* at 190–91 (“[W]hen something within-the-world is encountered as such, the thing in question already has an involvement which is disclosed in our understanding of the world, and this involvement is one which gets laid out by the interpretation of the thing.”).

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

69. Heidegger and other anti-foundationist philosophers, notably Richard Rorty, are sometimes accused of denying that physical reality exists independently of human thought. *See, e.g.,* Douglas V. Porpora, *Nonreductive Materialism and the Materialisms of Marx and Heidegger*, 5 HUM. STUD. 13, 28 (1982). This is a gross misreading of both Heidegger and Rorty, in my opinion, but it has little relevance to my argument here. While investigation of physical reality involves hermeneutic challenges, *see generally* THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962), these are greatly multiplied in investigations of textual meaning: humans investigating the meaning of texts authored by other humans is circular or reflexive in a way that humans investigating physical reality is not. Whatever the “being” of a rock, we can be certain it is not *human* being.

70. Heidegger calls this the “facticity” of the world, HEIDEGGER, BEING & TIME, *supra* note 59, at 82 (emphasis omitted), to avoid the Cartesian implications of “factual.” We cannot become anything we wish, although precisely how our possibilities and limitations interact with our choices is never fixed in advance as “factual” might imply. *See* DREYFUS, *supra* note 57, at 44, 119; David Couzens Hoy, *Heidegger and the Hermeneutic Turn*, in *THE CAMBRIDGE COMPANION TO HEIDEGGER*, *supra* note 61, at 170, 179–80.

71. Hoy, *supra* note 70, at 188–90; *see* DREYFUS, *supra* note 57, at 189.

B. *The Circularity of Textual Understanding*

Gadamer adapted Heidegger's ontology to textual interpretation in *Truth and Method*.⁷² Just as human being-in-the-world implies the circularity or reflexivity of human understanding, the interpretation of texts has the same character.

1. The Problem of the Circle

Reformation theologians held that the meaning of the Bible is constituted by its individual parts, but the meaning of each such part is constituted by its place in the Bible.⁷³ This "hermeneutic circle" is an illustrative metaphor of Gadamer's account of textual understanding, according to which meaning has this circular character in all of the "human sciences."⁷⁴

Suppose I am an expert in classical philosophy reviewing a book about Plato. A review setting out only my own views of Plato, without considering the book's approach and its place in the classical tradition, would not be a review of the book. At the same time, it would be absurd to write the review as if I had no views about Plato and no knowledge of the tradition and its critics. Nor can I neutralize how the tradition and its critics have informed my view of Plato, or how my views might have reciprocally influenced the tradition and the critics. I do not exist in "intellectual nowhere," without any preconceptions of the book.⁷⁵ In short, how I understand the book depends on its place within the classical tradition that has also shaped my own views about Plato. But I am also a participant in this tradition, and thus have influenced the very tradition that influences me.

The methodological problem of the circle is this: It seems that textual interpretation in the human sciences cannot yield knowledge, because it

72. GADAMER, *TRUTH & METHOD*, *supra* note 20, at 278–317.

73. More specifically, the meaning of any particular biblical text is constituted by its place in the history of salvation recounted in the Bible, but the meaning of this history is itself constituted by each biblical text—the aphorisms, miracles, parables, poems, and stories contributing to the whole of salvation history. HANS W. FREI, *THE ECLIPSE OF BIBLICAL NARRATIVE: A STUDY IN EIGHTEENTH AND NINETEENTH CENTURY HERMENEUTICS* 172–83 (1974).

74. *See, e.g.*, Charles Taylor, *Interpretation and the Sciences of Man*, 25 *REV. METAPHYSICS* 3, 6, 50 (1971). "Human sciences" is a common translation of the German *Geisteswissenschaften*, whose sense is somewhat broader than the English "humanities," including as well law and most of what are now known as the "social sciences." *See, e.g.*, RICHARD E. PALMER, *HERMENEUTICS: INTERPRETATION THEORY IN SCHLEIERMACHER, DILTHEY, HEIDEGGER, AND GADAMER* 98 (1969). The term literally translates as "sciences of the spirit," which refers to those areas of study in which humans interpret other humans and their work rather than natural objects or phenomena. *See generally* "Geist," "Geisteswissenschaften," and "Wissenschaft," in *OXFORD GERMAN DICTIONARY*, *supra* note 64, at 319, 811.

75. *See* Mootz, *Originalist Fixation*, *supra* note 29, at 161–62 ("Apprehending a text as a static and closed meaning from the past would require an interpreter from nowhere.").

has no objective, noncircular foundation. Every text is encased in a tradition, which preconditions how readers understand both the text and themselves, at the same time that readers themselves contribute to this same tradition by interpreting the texts that form it, including the text they are currently interpreting.⁷⁶

2. The Promise of the Circle

As Heidegger argued that our pre-existing relations with the world condition how we understand it, so Gadamer maintains that comparable preconceptions about the meaning of a text—he calls them “prejudices” in the sense of judgments—shape how we understand it.⁷⁷ Gadamer dealt with this circularity by embracing it. The circle is not a “problem” for textual understanding, but the condition of its possibility. Interpretive neutrality is impossible.⁷⁸ We cannot free ourselves from traditions and the textual preconceptions they engender, to see traditions and texts “as they really are,” independently of our understandings of them or their influence on us. Instead, we are always within traditions, which shape how we understand ourselves as well as the texts we interpret.⁷⁹ Thus, our preconceptions of a text’s meaning are the only basis on which we can initially understand anything about it.⁸⁰

Gadamer illustrates this with the concept of the classical. “Classical” here refers generically to the height of achievement, an exemplar of the perfect.⁸¹ This sense of “classical” depends on both past and present; one cannot describe a past summit of literature or art as “classic” without the sense of a present in relative decline.⁸² When we encounter a “classic”—say, a Shakespearean play—we are predisposed to regard it as exceptional, and simultaneously to regard contemporary works as diminished by comparison. Our understanding of a classical work, therefore, “will always involve *more* than merely historically

76. See, e.g., Taylor, *supra* note 74, at 6:

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

77. GADAMER, TRUTH & METHOD, *supra* note 20, at 284.

78. See BERNSTEIN, *supra* note 55, at 45.

79. GADAMER, TRUTH & METHOD, *supra* note 20, at 294.

80. See *id.* at 279.

81. *Id.* at 297, 299.

82. *Id.* at 301 (“[T]he classical [is] . . . preservation amid the ruins of time.”).

reconstructing the past ‘world’ to which the work belongs.”⁸³ There is always also the sense that the world of the work and the world that calls it “classic” are connected, that “we too belong to that world, and correlatively that the work too belongs to our world.”⁸⁴

The idea of the classical illustrates how the circular structure of understanding constitutes meaning from both past and present. The metaphor of the hermeneutic circle captures the dialogical relation of the text (from the past) with the interpreter (in the present). “Understanding” means to grasp the content expressed by the text in the past, from one’s own place in the present.⁸⁵ Our current preconceptions are our only means of connecting with the classical past, as a height of achievement which necessarily presupposes a perception of current decline. The “real meaning of a text,” therefore, is determined by *both* the original situation of the author and her audience *and* the present situation of the interpreter.⁸⁶

3. Two Examples

What would it mean for “original public meaning” not to exist, for textual meaning to be a function of present as well as past, as Gadamer maintains? A classic American film, *It’s a Wonderful Life*,⁸⁷ and a canonical Supreme Court decision, *Brown v. Board of Education*,⁸⁸ illustrate Gadamer’s account of textual meaning and show that it directly challenges the account of meaning presupposed by the fixation thesis.

a. It’s a Wonderful Life

Imagine trying to “discover” the original public meaning of *It’s a Wonderful Life*, a popular 1946 comedy/drama that tells the life story of the bright and talented George Bailey, thwarted at every turn in his burning ambition to leave the provincial “Bedford Falls” of his youth, until a series of improbable events shows that, despite all, his is a wonderful life.⁸⁹

83. *Id.*

84. *Id.*

85. *Id.* at 306.

86. *Id.* at 307.

87. *IT’S A WONDERFUL LIFE* (Liberty Films 1946).

88. 347 U.S. 483 (1954).

89. The early part of the film depicts George’s slow abandonment of his dreams. He settles down with a local girl, Mary Hatch, to start a family. Instead of college, he is trapped into running his father’s financially beleaguered “Building and Loan,” which grants home mortgages to working class folks who cannot qualify anywhere else. All this is played mostly for laughs until a serially incompetent relative employed at the Building and Loan loses \$8,000 of its funds, over \$100,000 in current dollars. Unable to replace the missing money and facing bankruptcy and ruin,

In the more than seventy years since the film was released, it has become embedded in a tradition that necessarily shapes how a person in the present can approach its meaning. It is universally acclaimed,⁹⁰ a "classic" that captures all the crises and courage of the "greatest generation," which endured the flu epidemic, the Great Depression, and the war against fascism. It is a powerfully nostalgic representation of a simpler, more faithful America that defined success by belief and family, not fame or fortune.

All of this affects how one can engage the film today. Most contemporary critics praise it; those who dislike it come off as grumps. Either way, one must reckon with what the film has become—what it is now, not what it was at its release in 1946. We in the present are not pure subjects who can see the film's narrative of George's life as a pure object, because we are at every moment already within the tradition that surrounds the film and shapes our present understanding of it.

This is particularly evident in the portrayal of Mary, the woman whom George eventually marries. The film reflects (what we today call) the sexist assumptions of seven decades past. Mary's success in life rests on her marriage to some successful man; her mother is dismayed when Mary rejects a wealthy, politically connected suitor to drop out of college and marry the broke and impractical George. But marriage to George fulfills all of Mary's dreams—mother, homemaker, helpmeet; at one point she declares only half-jokingly that she married George to keep from becoming an "old maid." Mary is the nurturing, virtuous, domestic mother devoted to home, husband, and children, naturally unsuited for life in the real world of aggression, competition, and conflict—the world of men.

George brings himself to the edge of suicide, despairing at the meaninglessness of his pitiful life and wishing he had never been born.

The conceit of the film is a bevy of guardian angels keeping watch over George and his troubles. They send Clarence, a kindly though befuddled junior angel, to "earn his wings" by saving George from the mortal sin he is about to commit. Clarence does so by half-granting George's wish, giving him a tour of Bedford Falls as if George had never been born. The town in these visions—called "Pottersville" because in George's absence the wealthy and pitiless Henry Potter has taken over everything—is bereft of all the good George would have done had he lived. So horribly grim is the world without him that George begs to return to his real life in Bedford Falls. The film ends happily, with all the people George touched pitching in to make good the Building and Loan shortfall and Clarence earning his wings.

90. See Peter Bradshaw, *It's a Wonderful Life*, GUARDIAN (Dec. 14, 2007, 6:37 PM), <https://www.theguardian.com/film/2007/dec/14/family.drama> [https://perma.cc/247S-6KLT]; Michael Wilmington, *5 Films That Are Modern or Would-Be Christmas Classics*, CHI. TRIB. (Dec. 21, 2001), <http://www.chicagotribune.com/news/ct-xpm-2001-12-21-0112210380-story.html> [https://perma.cc/D6L3-M4QQ]. The film scores absurdly high marks on review aggregation websites. See, e.g., *Review of It's a Wonderful Life*, ROTTEN TOMATOES, https://www.rottentomatoes.com/m/1010792_its_a_wonderful_life/ [https://perma.cc/SJ99-CRJQ] (showing 93% positive reviews from professional film critics and 95% positive from audiences).

The 1946 reviews did not note these sexist stereotypes,⁹¹ not even reviews in the urban liberal press,⁹² because in 1946 they were neither sexist nor stereotypes. Mary's character captured the tenor of the times, the then-conventional picture of how women are and what they want, assumed even by cultural elites. The gender stereotypes are evident to us in the present because we live in a different world in which this gender role is no longer the "natural" destiny of women. It is precisely the contemporary commitment to gender equality that brings into focus Mary's portrayal as stereotypically sexist. Without the "prejudice" or preconception of gender equality, Mary's character would pass as an unremarkable reflection of natural female aspiration, as it apparently did in 1946. A feminist understanding of the film cannot exist until feminism becomes a noticeable part of the American cultural landscape a generation later.

A double irony is that gender equality, which creates the film's sexist meanings, also produces feminist understandings of certain moments when Mary acts against type. Mary, not George, offers their honeymoon savings to rescue the Building and Loan during a Depression bank run. Mary, not George, buys the dilapidated mansion that becomes their home. And finally it is Mary—and certainly not George, who by now is off wallowing in self-pity—who raises the money whose loss put George and the Building and Loan at the brink of ruin. Indeed, Mary is the only character in the film besides Potter with any financial know-how.⁹³ Our present preconception of gender equality creates a feminist meaning for those of Mary's actions passed off as merely "spunky" in 1946.

By "objectively" removing our contemporary commitment to gender equality, were it even possible, we would remove one of the ways we understand *It's a Wonderful Life*, extinguishing both its gender stereotyping and its proto-feminist moments.

91. See, e.g., Bert Briller, *Review: It's a Wonderful Life*, VARIETY (Dec. 16, 1946, 11:00 PM), <http://variety.com/1946/film/reviews/it-s-a-wonderful-life-1200414860/> [<https://perma.cc/SQ92-FE66>]; Kate Cameron, *'It's a Wonderful Life' Lifts the Spirit*, N.Y. DAILY NEWS (Dec. 21, 1946), <https://www.nydailynews.com/entertainment/movies/wonderful-life-designed-lift-spirits-1946-review-article-1.2916205> [<https://perma.cc/GC4B-RK9M>]; *'It's a Wonderful Life': THR's 1946 Review*, HOLLYWOOD REP. (Dec. 6, 2014, 3:59 PM), <http://www.hollywoodreporter.com/news/a-wonderful-life-1946-movie-754681> [<https://perma.cc/XD7F-2J4J>].

92. See, e.g., James Agee, *Films*, 163 THE NATION, Dec. 28, 1946, at 766; Bosley Crowther, *The Screen in Review: At Three Theatres*, N.Y. TIMES (Dec. 23, 1946), <https://www.nytimes.com/1946/12/23/archives/the-screen-in-review-at-three-theatres-its-a-wonderful-life-with.html> [<https://perma.cc/K5BJ-EUZ9>]; *Current Cinema: Angel of Whimsy*, NEW YORKER, Dec. 21, 1946, at 87.

93. See Robert Beuka, *Imagining the Postwar Small Town: Gender and the Politics of Landscape*, in *It's a Wonderful Life*, 51 J. FILM & VIDEO 36, 41 (1999).

b. *Brown v. Board of Education*

Consider again contemporary discussions about whether *Brown v. Board of Education* is consistent with the original public meaning of the Fourteenth Amendment. Judge Bork himself conceded that “no one [in 1868] imagined the equal protection clause might affect school segregation.”⁹⁴ Nevertheless, he defended *Brown* on originalist grounds, suggesting that the framers and ratifiers of the Fourteenth Amendment misunderstood that racial segregation is inconsistent with the principle of equality constitutionalized by the Clause.⁹⁵ As Professor Solum later elaborated this point, we are bound to the public meaning of the Fourteenth Amendment when it was adopted, but not to “factual” errors the public made about possible applications of that meaning.⁹⁶

The salient point is not whether Bork’s and Solum’s use of “original mistake of fact” is consistent with the public-meaning originalism they espouse (though it is not),⁹⁷ but why they felt compelled to make this distinction at all. Bork answered the question himself: the “end of state-mandated segregation was the greatest moral triumph constitutional law had ever produced,” the “high ground of constitutional theory”—“it *had* to be right.”⁹⁸ Then and now, law professors and (especially) aspirants to the Supreme Court are powerfully influenced to defend the result in *Brown*. All theories of constitutional interpretation, no less than public-meaning originalism, enhance their viability by explaining how they, too, account for *Brown*.⁹⁹

Bork’s and Solum’s arguments exhibit what Gadamer calls (in the awkward English translation) “working-effective history”—roughly, the effects that history imposes on interpretation and meaning through time.¹⁰⁰ “Understanding,” Gadamer observes, is a “historically effected event. . . . [W]e are always already affected by history.”¹⁰¹ We do not stand outside of the history and events we investigate; what we choose to examine and how we understand it are influenced by the current effect on us of the past we examine and seek to understand.¹⁰² Consciousness of

94. BORK, *supra* note 1, at 75.

95. *Id.* at 82.

96. Solum, *Surprising Originalism*, *supra* note 50, at 252–55, 261.

97. *See infra* Section IV.C.2.

98. BORK, *supra* note 1, at 77.

99. *See supra* text accompanying notes 25–27.

100. GADAMER, *TRUTH & METHOD*, *supra* note 20, at 310–18. David Hoy suggests “hermeneutical awareness” of history as a less awkward alternative translation. David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135, 147 (1985).

101. GADAMER, *TRUTH & METHOD*, *supra* note 20, at 310–11 (emphasis omitted).

102. *See* BERNSTEIN, *supra* note 55, at 142.

history is consciousness that the interpreter is standing *within* a historical situation.¹⁰³

By 1990, Judge Bork could not have objectively, independently, dispassionately analyzed whether *Brown* is consistent with the original public meaning of the Equal Protection Clause, nor could he have objectively, independently, dispassionately analyzed whether *Brown* does or should have the moral authority it now has. By then, Bork was already entangled in the twin realities that academics (and Supreme Court nominees) risk their reputations when they criticize or undermine the result in *Brown*, and that public-meaning originalism is not a viable interpretive theory in the current academic environment if it cannot account for this result. The hermeneutic circle is always at play in interpretation, even when, like Bork, one doesn't notice it.

* * *

The hermeneutic circle suggested the impossibility of objective interpretation in the human sciences. Since there is no “God’s Eye” point of view of the text from which we might understand it “as it really is,”¹⁰⁴ our preconceptions, our necessarily prior relationship to the texts we interpret, are where understanding must start. The hermeneutic circle is not an obstacle to understanding, but the very condition of its possibility.

III. PUBLIC-MEANING ERRORS

Public-meaning originalists assume that the original public meaning of the Constitution is a fixed object, resting in the past independently of the present. By contrast, philosophical hermeneutics maintains that textual meaning is mutually constituted by past and present—by the text and tradition by which the text is handed down from the past and by the contemporary influences of the interpreter and her life and times. In this view, textual meaning cannot be a fixed object in the past: because meaning is partially constituted by the present, it necessarily varies with time. If this is right, the fixation thesis is wrong: fixed textual meaning is simply not ontologically “there” in the past—it does not exist.

A few public meaning originalists have engaged philosophical hermeneutics. Keith Whittington and Professor Solum each reject the hermeneutic contention that the present contributes to constitutional meaning. Professor Whittington attacks philosophical hermeneutics directly as a contradiction of the fixation thesis, while Solum paradoxically maintains that hermeneutic critique and fixed constitutional meaning are compatible. Nevertheless, they both err in the

103. See GADAMER, TRUTH & METHOD, *supra* note 20, at 301.

104. Cf. HILLARY PUTNAM, REASON, TRUTH AND HISTORY 49–50 (1981) (criticizing metaphysical realism’s “God’s Eye point of view”).

same way, responding to hermeneutic ontology with mostly epistemological arguments. This is most evident in their readings of two crucial parts of *Truth and Method*: its metaphor of "fused" interpretive "horizons"¹⁰⁵ and its argument that "application" is part of "interpretation."¹⁰⁶

A. "Horizons"

Perhaps the most famous section of *Truth and Method* is Gadamer's comparison of textual understanding to a "fusion of horizons"—that of the text in the past and the interpreter in the present.¹⁰⁷ Gadamer suggests that an interpreter's horizon constitutes a limit beyond which she cannot see,¹⁰⁸ unless she is prompted to question and suspend the preconceptions prevailing within her horizon.¹⁰⁹ Gadamer describes this as being "pulled up short" by a text whose apparent meaning contradicts one's preconceptions.¹¹⁰ An interpreter challenged in this way becomes aware of interpretive possibilities previously hidden by her horizontal limits.¹¹¹ Understanding is the fusion of these two horizons, those of the text in the past and the interpreter in the present.¹¹²

Professors Whittington and Solum both mistakenly understand the interpreter's horizon as an epistemological obstacle to be overcome, an impediment to discovering independently existing original meaning fixed in the horizon of the past. By contrast, Gadamer deploys the metaphor ontologically, to illustrate how the interpreter's horizon combines with that of the text to create textual meaning.

Whittington's and Solum's failures to engage hermeneutics ontologically leaves unanswered its challenge to the fixation thesis: original public meaning does not exist; there simply is no constitutional meaning fixed in the past unaffected by the present.

105. See *infra* Section III.A.

106. See *infra* Section III.B.

107. GADAMER, TRUTH & METHOD, *supra* note 20, at 313–17.

108. *Id.* at 313.

109. See *id.* at 302.

110. *Id.* at 280; see also GADAMER, HERMENEUTICS, *supra* note 30, at 92 (“[W]e are guided by preconceptions and anticipations in our talking in such a way that these continually remain hidden . . . it takes a disruption in oneself of the intended meaning of what one is saying to become conscious of these prejudices as such.”).

The phenomenon Gadamer describes suggests the common academic reaction to a provocative presentation: “I am struck by Professor Smith’s point that”

111. See GADAMER, HERMENEUTICS, *supra* note 30, at 27, 28; GADAMER, TRUTH & METHOD, *supra* note 20, at 298.

112. GADAMER, TRUTH & METHOD, *supra* note 20, at 305.

1. Epistemological Limit

a. *Whittington*. Professor Whittington rejects outright the circular structure of textual understanding espoused by Gadamer.¹¹³ He contends that Gadamer's account is self-refuting, requiring an interpreter to fuse incommensurables.¹¹⁴

Drawing on E.D. Hirsch,¹¹⁵ Whittington misreads Gadamer to argue that a textual interpreter is epistemologically trapped within her own interpretive horizon, wholly unable to comprehend anything outside it.¹¹⁶ If the interpreter cannot see beyond her horizon, he reasons, she cannot understand interpretive questions rooted in other horizons,¹¹⁷ making their fusion with hers impossible.¹¹⁸ Walled off from the horizon of the text, the interpreter is left as the only available source of textual meaning.¹¹⁹ In that event, meaning would result from *submersion* or disappearance of the text's horizon into the interpreter's, not from their fusion.¹²⁰

Whittington concludes that the horizontal metaphor is either wrong or superfluous.¹²¹ If the interpreter cannot access the original public meaning resting outside her textual horizon, there is nothing to fuse with her horizon. But if the resources within the interpreter's horizon enable her to access the textual horizon, she can just as easily discover the original public meaning resting within it and obviate the need for fusion altogether.¹²²

113. See *supra* Section II.B

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

115. See HIRSCH, *supra* note 55, app. II at 252–54.

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

117. See *id.* (Because “interpretation depends upon the resources of an interpretive tradition, it cannot exceed that tradition.”) (citing HANS-GEORG GADAMER, TRUTH & METHOD 99, 148, 200–07, 296, 340–44, 374, 390–95 (Sheed & Ward trans. Gareth Barden & John Cumming ed. 1975); DAVID COUZENS HOY, THE CRITICAL CIRCLE: LITERATURE, HISTORY, AND PHILOSOPHICAL HERMENEUTICS 50, 68–72 (1978)). Many of Whittington's citations to *Truth and Method* seem unrelated to the proposition that an interpreter is epistemologically limited by her horizon.

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

119. *Id.*

120. *Id.*

121. *Id.* at 103–04.

122.

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

b. *Solum*. Though Professor Solum seeks to demonstrate the compatibility of fusion with fixation, he, too, reads the interpreter's horizon as an epistemological obstacle to textual understanding.¹²³ He suggests that the interpreter's horizontal frame may mislead her about the content of the Constitution's original public meaning.¹²⁴ For example, harsh criminal punishments common when the Eighth Amendment was adopted may so starkly clash with contemporary sensibilities that we are led astray from the original public meaning of "cruel" or "unusual."¹²⁵

Casting the interpreter's horizon as an epistemological obstacle to accessing fixed textual meaning in the past enables Solum to distinguish the purported *fact* of the original public meaning from the interpreter's *beliefs* about that fact: "our *understanding* of original meaning (as opposed to the original meaning itself) is always subject to change."¹²⁶ This distinction, in turn, enables an *asymptotic* fusion of horizons: The progressive accretion of information about original meaning illuminates textual interpretations that more closely approximate the fixed original public meaning.¹²⁷ The interpreter's horizon approaches the horizon of the constitutional text ever more closely, but it is only ever the interpreter's horizon that moves—the textual horizon remains fixed, anchored in place by the semantics and context existing at adoption.¹²⁸ This enables Solum to conclude that "nothing in Gadamer's hermeneutics . . . undermines the fixation thesis."¹²⁹

* * *

Whittington and Solum read the horizontal metaphor in the same way despite their contrasting goals, as an illustration of epistemological obstacles to interpretation. Gadamer, by contrast, deployed the metaphor to show something quite different.

contemporary one, then it is admitted in principle that he *can* break out of his own perspective.

Cf. HIRSCH, *supra* note 55, app. II at 254.

123. "[A] hermeneutical situation is determined by the prejudices that we bring with us. They constitute, then, the horizon of a particular present, for they represent that beyond which it is impossible to see." Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 28, at 147 (alteration in original) (quoting GADAMER, *TRUTH & METHOD*, *supra* note 20, at 316). This passage is quoted out of context. See *infra* Section III.A.2.b.

124. Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 28, at 148.

125. *Id.*

126. *Id.* at 148–49 ("The fact that our knowledge of original meaning is imperfect does not entail that there is no original meaning."). As will become clear, this distinction is crucial to Solum's purported reconciliation of public-meaning originalism with *Brown v. Board of Education*. See *infra* Sections IV.B, IV.C.

127. Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 28, at 148.

128. See *supra* Part I.

129. Solum, *Hermeneutics & the Fixation Thesis*, *supra* note 28, at 149.

2. Phenomenological Expansion

These epistemological readings of “horizon” suggest that the present horizon swallows the past, as Whittington feared, or the past horizon (eventually) swallows the present, as Solum concluded. The fusing of past and present horizons, however, illustrates Gadamer’s ontology of understanding: how textual meaning comes into being from the contributions of *both* past and present.

a. *Phenomenological Horizons*. Gadamer drew the horizontal metaphor from the founder of the phenomenological movement, Edmund Husserl.¹³⁰ Husserl noted that when we directly observe an object in three-dimensional space, we can literally see only a part of it at any one time.¹³¹ Nevertheless, our mental perception is of the *entire* object, not just the part observed directly.¹³² We always perceive more than is directly given to our senses.¹³³ Standing on the street, we see only the front side of a house, not its back. We can move around to the back, but this will preclude us from directly observing the front. Still, our perception is of an entire house, not merely the side we observe directly.

How can this be? Our experience of houses and the contexts in which they normally appear fills out what is missing from direct observation,¹³⁴ enabling mental perception of the entire house though only a part is directly visible. So in a residential neighborhood, we would be shocked

130. See EDMUND HUSSERL, *IDEAS PERTAINING TO A PURE PHENOMENOLOGY AND TO A PHENOMENOLOGICAL PHILOSOPHY* § 33 at 65–66, § 52 at 117–18 (F. Kersten trans., 1982) (1913). See generally KENNY, *supra* note 11, at 817.

131. HUSSERL, *supra* note 130, § 44 at 94–95.

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

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

133. See David Vessey, *Gadamer and the Fusion of Horizons*, 17 INT’L J. PHIL. STUD. 531, 533 (2009). Heidegger calls this the “as” structure of interpretation: we always interpret something *as* something else, within the web of relevant relations that constitute our world. HEIDEGGER, *BEING & TIME*, *supra* note 59, at 189; see HEIDEGGER, *METAPHYSICAL FOUNDATIONS*, *supra* note 60, at 127–28. A train whistle, for example, is usually perceived as a train, not as a sound *simpliciter*. Indeed, it requires extraordinary mental effort to hear a train whistle and *not* perceive the train emitting it.

134. See HUSSERL, *supra* note 130, § 113, at 267 (“Every perception has . . . its background of perception.”); see also EDMUND HUSSERL, *CARTESIAN MEDITATIONS* 44 (Dorian Cairns trans., 1973) (“[P]erception has horizons made up of other possibilities of perception, as perceptions that we could have, if we actively directed the course of perception otherwise: if, for example, we turned our eyes that way instead of this, or if we were to step forward or to one side, and so forth.” (emphasis omitted)).

to walk behind a house to discover that the front side is a mere façade, even though from the front we cannot see the back. But on a Hollywood backlot, we'd be shocked to find a whole house behind (what we would assume from experience is) a mere façade, again without ever having actually seen more than the front. Our knowledge and experience of houses and façades and the contexts in which they normally appear fills in our perception in both cases, even though we cannot ever directly observe the entirety of either all at once. The sum of these experiences and contexts is the "horizon" of the house or the façade.¹³⁵

A Husserlian horizon, therefore, enlarges understanding. It includes all possible experiences of an object, not just those given to the senses from one particular time and place. It *expands* the limits of sensory perception.

b. *Ontology of Meaning.* Gadamer expressly adopts the Husserlian concept of horizon, adapting it from mental perception to textual interpretation.¹³⁶ Neither the interpreter's nor the text's horizon represents an epistemological limit to understanding.¹³⁷ While a present

135. See Vessey, *supra* note 133, at 534 ("Those aspects of an object that are not directly accessible to our senses, but make it possible to see an object as an object, Husserl call[s] the object's 'horizon.'" (quoting HUSSERL, *supra* note 130, §§ 27, 44)).

136. E.g., GADAMER, *TRUTH & METHOD*, *supra* note 20, at 247 ("[T]he concept and phenomenon of the horizon is of crucial importance for Husserl's phenomenological research. With this concept, which we too shall have occasion to use, Husserl is obviously seeking to capture the way all limited intentionality of meaning merges into the fundamental continuity of the whole." (emphasis omitted)); *id.* at 464 & n.83 ("Seen phenomenologically, the 'thing-in-itself' is, as Husserl has shown, nothing but the continuity with which the various perceptual perspectives on objects shade into one another." (footnote omitted)) (quoting HUSSERL, *supra* note 130, § 41)); see also Walter Lammi, *Gadamer's Debt to Husserl*, in 71 ANALECTA HUSSERLIANA: THE YEARBOOK OF PHENOMENOLOGICAL RESEARCH 167, 176 (Anna-Teresa Tymieniecka ed., 2001) (observing that Gadamer understands "horizon" in terms of Husserl's phenomenology).

137. See GADAMER, *TRUTH & METHOD*, *supra* note 20, at 247 ("A horizon is not a rigid boundary but something that moves with one and invites one to advance further."); *id.* at 313 (footnote omitted):

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

See also RICOEUR, *supra* note 33, at 73 ("[A]ccording to Gadamer . . . the finite condition of historical knowledge . . . does not enclose me in one point of view. Wherever there is a situation, there is a horizon that can be contracted or enlarged."); Dermot Moran, *Gadamer and Husserl on Horizon, Intentionality, Intersubjectivity, and the Life-World*, in 2 INTERNATIONAL STUDIES IN HERMENEUTICS AND PHENOMENOLOGY 73, 84 (Andrzej Wierciński ed., 2011) ("Gadamer opposes the view that horizons are mutually exclusive or that world views are hermetically sealed and nonporous. . . . Horizons are not just limits but are essentially open to other horizons; they are moving boundaries.").

horizon dictates conventional understandings of texts from the past, the interpreter is always aware—or can be made aware—that there exist other horizons incorporating alternate understandings of these texts.¹³⁸

We “fuse” horizons by thinking two things together: the alterity of textual meaning from the past that has brought us “up short,”¹³⁹ in concert with our present expectations of this meaning.¹⁴⁰ It is because the text “makes a claim on us” that we are spurred to try to understand it differently than unreflective conventions in the present would suggest.¹⁴¹ The interpreter in her present horizon imaginatively projects herself into the past horizon of the text.¹⁴² This does not mean objectifying the past, as if one were an uninvolved subject observing it from the outside.¹⁴³ This would put nothing of the interpreter at risk, foreclosing that the text can be a claim *on her*.¹⁴⁴ We are not horizontal tourists who visit the text like a theme park before returning safely home. Nor is this fusion a loss of oneself in the past (a Romantic delusion).¹⁴⁵ It is precisely *oneself* whom one must project into the past horizon,¹⁴⁶ only then does the interpreter place in question her expectations of meaning.¹⁴⁷ With the interpreter’s preconceptions at risk within the horizon of the text, she is in a position to consider if what the text is saying “could be right.”¹⁴⁸

With the proper understanding of “horizon,” the horizontal submersion feared by Whittington is not an interpretive possibility. A text can make new claims on the interpreter that she can understand because she can

138. See GADAMER, *TRUTH & METHOD*, *supra* note 20, at 315; see also Mootz, *Legal Hermeneutics*, *supra* note 29, at 535; Vessey, *supra* note 133, at 533, 536, 540.

139. See *supra* text accompanying note 110.

140. See GADAMER, *TRUTH & METHOD*, *supra* note 20, at 317 (noting the “tension between the text and the present”).

141. *Id.* app. at 522–23.

142. *Id.* at 315–16.

143. *Id.* at 312, 320.

144. See *id.* at 314, app. at 522–23.

145. See *id.* at 315; see also BERNSTEIN, *supra* note 55, at 143 (“[T]he idea that we can escape our own standpoint and leap into the horizon of the past . . . is not the right answer. . . . [W]e are always ontologically grounded in our situation and horizon.”).

146. GADAMER, *TRUTH & METHOD*, *supra* note 20, at 315.

147.

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

Id. at 281.

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

always be made aware of the past horizon of the text despite its difference from her own; the text is never "submerged" in the interpreter's horizon, as Whittington claims.¹⁴⁹ As Francis Mootz explains, the "text stands as a provocation that cannot be wholly subordinated by the reader's perspective."¹⁵⁰

Likewise, the interpreter's horizon is not an epistemological obstacle to textual meaning fixed in the past,¹⁵¹ as Solum argued.¹⁵² Meaning occurs from fusion of both horizons—interpreter and text, present and past. Fusion excludes the possibility of Solum's distinction between beliefs and facts about original meaning, and thus also his conclusion that the fixation thesis coheres with philosophical hermeneutics.

B. "Application"

The conceptual heart of *Truth and Method* is a section titled "The recovery of the fundamental hermeneutic problem," referring to both the historical disappearance of application from the process of textual understanding and the philosophical problem created by its restoration to that process.¹⁵³ Whittington and (for the most part) Solum again read Gadamer epistemologically rather than ontologically.¹⁵⁴ They insist that application is a procedure divorced from interpretation: one first discovers the original public meaning of the Constitution, and only thereafter applies it to a particular case or problem. This is the very conceptual error Gadamer is at pains to correct: application combines with interpretation in a single event of understanding; it is not a separate and subsequent procedure. Textual meaning does not exist apart from textual application: one understands a text *in* its application, *not* beforehand.

1. Interpretive Exclusion

The biblical hermeneutics that emerged from the Reformation recognized understanding, interpretation, and application as three separate modes of textual comprehension.¹⁵⁵ The Romantics combined understanding and interpretation, believing interpretation necessary for

149. See *supra* Section II.A.1.a.

150. Mootz, *Originalist Fixation*, *supra* note 29, at 161.

151. Cf. Ian Crosby, Note, *Worlds in Stone: Gadamer, Heidegger, and Originalism*, 76 TEX. L. REV. 849, 853 (1998) (explaining that philosophical hermeneutics rejects that interpretation approaches the "author's understanding as to a limit").

152. See *supra* Section II.A.1.b.

153. GADAMER, TRUTH & METHOD, *supra* note 20, at 318–50.

154. See *supra* Section III.A.1.

155. See GADAMER, TRUTH & METHOD, *supra* note 20, at 318.

correct understanding.¹⁵⁶ This left application an interpretive afterthought, a belated procedure placed elsewhere and after understanding/interpretation.¹⁵⁷

Gadamer melds application to the Romantic unity understanding/interpretation so as to combine understanding/interpretation/application into a single event of textual comprehension:

[U]nderstanding always involves something like applying the text to be understood to the interpreter's present situation. Thus we are forced to go one step beyond romantic hermeneutics, as it were, by regarding not only understanding and interpretation, but also application as comprising *one unified process*. . . . [W]e consider application to be *just as integral a part* of the hermeneutical process as are understanding and interpretation.¹⁵⁸

In the Romantic sense of application, a person takes a principle and deploys it to a particular situation involving someone or something else—*i.e.*, to a situation the interpreter is figuratively standing “outside of.” By contrast, a Gadamerian interpreter is always interpreting herself along with the text, because no interpretation is free of the interpreter's horizon. This is the effect of history, what it means for textual meaning to be constituted by present as well as past. Every interpreter is standing *within* the interpretive situation; when she applies the text from within that situation, *she applies it to herself*.¹⁵⁹ As we saw, when Judge Bork interpreted the Equal Protection Clause in light of *Brown*, he could not avoid also interpreting himself and public-meaning originalism.¹⁶⁰

156. *See id.*; *see also id.* at 185–86 (summarizing Schleiermacher's argument that the normal consequence of textual understanding is misunderstanding, which can be corrected only by interpretation).

157. *See, e.g., id.* at 318 (“The inner fusion of understanding and interpretation led to the third element in the hermeneutical problem, *application*, becoming wholly excluded from any connection with hermeneutics. The edifying application of Scripture in Christian preaching, for example, now seemed very different from the historical and theological understanding of it.” (emphasis omitted)).

158. *Id.* at 318–19 (emphasis added).

159. *Id.* at 416; *see also* GADAMER, HERMENEUTICS, *supra* note 30, at 55 (“In the last analysis, *all* understanding is self-understanding . . .”).

160. *See supra* notes 91–96 and accompanying text.

A text is understandable only *through* its applications because its meaning *is* those applications.¹⁶¹ Gadamer could hardly be clearer: "Understanding here is always application."¹⁶²

2. Interpretive Unity

Having committed himself to the unity understanding–interpretation–application, Gadamer moves to the philosophical problem this unity creates: we can "apply" only something we already possess, so it seems we cannot possess textual meaning before the application that co-determines that meaning.¹⁶³ Gadamer turns to two sources to illustrate this problem and its solution: Aristotle's account of moral knowledge,¹⁶⁴ and the similarity of legal to historical interpretation.¹⁶⁵ In both ethical and legal decision-making, he concludes, one already possesses what she applies in understanding–interpretation–application, because she is applying herself from within the ethical or legal interpretive situation as a co-determinant of meaning.

a. *Aristotelian Ethics*. Gadamer reads the *Ethics* to show that we are not subjects related to moral knowledge as an object, as if it were a skill or set of rules we first learn and then apply.¹⁶⁶ Aristotle emphasizes the importance of the moral agent's particularity to ethical decision-making. How to act rightly in a situation depends on the actor's experience of prior situations and the character she developed by acting in those situations.¹⁶⁷ Education is important, but less for the knowledge it imparts than for the

161. See, e.g., GADAMER, TRUTH & METHOD, *supra* note 20, at 321–22 ("The meaning of a law that emerges in its normative application is fundamentally no different from the meaning reached in understanding a text."); *id.* at 338 ("The work of interpretation is *to concretize* the law in each specific case—i.e., it is a work of *application*." (footnote omitted)).

162. *Id.* at 320; see also *id.* at xxix ("[A]pplication is an element of understanding itself."); *id.* at 321 ("[D]iscovering the meaning of a legal text and discovering how to apply it in a particular legal instance are not two separate actions, but one unitary process."); *id.* at 421 ("[U]nderstanding always includes an element of application . . .").

163. See *id.* at 321.

164. *Id.* at 322–33 (discussing ARISTOTLE, *Nicomachean Ethics* (W.D. Ross trans.) [hereinafter ARISTOTLE, *Ethics*], in THE BASIC WORKS OF ARISTOTLE, *supra* note 11, at 927, 935–1112 i-x 1094a1-1181b25.).

165. GADAMER, TRUTH & METHOD, *supra* note 20, at 334–39.

166. See *id.* at 327.

167. ARISTOTLE, *Ethics*, *supra* note 164, at 952 ii.1 1103a16-17, 953 1103b14-17:

[M]oral virtue comes about as the result of habit . . . [B]y doing the acts that we do in our transactions with other men we become just or unjust, and by doing the acts that we do in the presence of danger, and being habituated to feel fear or confidence, we become brave or cowardly."); see also *id.* at 953 ("[W]e must examine the nature of actions . . . for these determine also the nature of the states of character that are produced . . .").

character it develops.¹⁶⁸ Who we are determines what we can understand of a situation calling for action, and what we understand of such a situation determines how we will act in it.¹⁶⁹ The particularities of the situation also play a part. “What is right . . . cannot be fully determined independently of the situation that requires a right action from me”¹⁷⁰ Because of the dependence of moral knowledge on the particularities of agent and situation, one cannot acquire moral knowledge by learning rules.¹⁷¹

Gadamer analogizes the process of ascertaining textual meaning to ethical decision-making, formalizing it with an exegesis of Book VI of the *Ethics*.¹⁷² There, Aristotle famously defined and contrasted the intellectual virtues, including scientific knowledge (*epistēmē*), craft or skill (*technē*), and practical wisdom (*phronēsis*).¹⁷³ Gadamer is keen to show that practical wisdom is the model of understanding for the human sciences. In acquiring scientific knowledge, the observing subject is separated from the object of knowledge, and in using a craft or skill the subject is distinct from the object she makes; in exercising practical wisdom, however, the agent is defined and constituted precisely by her choices and actions.¹⁷⁴ Scientific and technical knowledge always involve something like the application of an a priori rule to a separate and subsequent situation, whereas practical wisdom emerges only in the actions chosen within particular situations.¹⁷⁵

168. See *id.* at 936 i.3 1094b28-1095a2, 937 i.4 1095b3; see also *id.* at 937–38 i.4 1095b6-8 (“For the fact is the starting-point . . . and the man who has been well brought up has or can easily get starting-points.”).

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

170. GADAMER, TRUTH & METHOD, *supra* note 20, at 327–28; see also *id.* at 323 (“If man always encounters the good in the form of the particular practical situation in which he finds himself, the task of moral knowledge is to determine what the concrete situation asks of him”).

171. See ARISTOTLE, *Ethics*, *supra* note 164, at 953 ii.2 1104a4-5 (“[M]atters concerned with conduct and questions of what is good for us have no fixity”).

172. See GADAMER, TRUTH & METHOD, *supra* note 20, at 324–33.

173. See Aristotle, *Ethics*, in THE BASIC WORKS OF ARISTOTLE, *supra* note 11, at 1022–36 vi 1138b13-34a14.

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

175. See ARISTOTLE, *Ethics*, *supra* note 164, at 1033 vi.9 1143a32-35 (“[N]ot only must the man of practical wisdom know particular facts, but understanding and judgement are also concerned with things to be done”); see also BERNSTEIN, *supra* note 55, at 147 (“In ethical know-how there can be no prior knowledge of the right means by which we realize the end in a particular situation.”); Catherine H. Zuckert, *Hermeneutics in Practice: Gadamer on Ancient Philosophy*, in THE CAMBRIDGE COMPANION TO GADAMER 201, 212 (Robert J. Dostal ed., 2002):

Gadamer concludes that the *Ethics* models the problem of application, and its solution, in three ways. First, the moral agent's understanding of what an ethical situation demands of her is not the later application of a predetermined good, but co-determines the good from the beginning.¹⁷⁶ This parallels Gadamer's hermeneutic thesis that textual understanding is always application—the character of the textual interpreter and the occasion and motivation for her interpretation necessarily contribute to the meaning of the text.¹⁷⁷

Second, because the good of an action is partially constituted by its applications, it cannot be predetermined as an abstract rule, but must respond directly to the demands of the situation.¹⁷⁸ Similarly, the meaning of a text cannot first be established in the abstract and then applied to a particular interpretive problem; rather, interpretation, application, and understanding occur simultaneously in a single event.¹⁷⁹

Finally, because a good action depends on both the demands of the situation and the character of the agent, the agent must not ignore her own particularity, which is the only way she can understand what the situation ethically requires of her.¹⁸⁰ Likewise, because we have no access to an "objective" understanding of a text, we can understand the text only in the traditional context in which it has been handed down, as the people we already are with the preconceptions we already have.¹⁸¹

In short, just as moral knowledge arises from the character of the agent and the situation calling her to act, textual meaning is a function of the interpreter in the present and the text from the past. In neither case can rules govern the crucial event of ethical decision or textual understanding.

b. *Legal Interpretation.* The Romantics excluded legal interpretation from the general hermeneutics of the human sciences because of its

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

176. *See id.* at 330.

177. *See id.* at 333.

178. *Id.* at 330–32.

179. *See id.* at 324, 333.

180. *Id.* at 332–33.

181. *See id.* at 333; *see also id.* at 324:

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

“dogmatic” requirement that cases be decided in conformity to law.¹⁸² “Dogma” here means something more and different than pre-ordained meaning; it has the sense of a norm “in force.”¹⁸³ Legal interpretation always proceeds on the assumption that there exists valid law applicable to the interpretive situation.¹⁸⁴ To decide a case, the judge must always ascertain the law in force.

The Romantics understood history as a science governed by the general hermeneutics of method, like the natural sciences.¹⁸⁵ The judge thus seemed more constrained than the legal historian, in that the judge was dogmatically bound to decide cases in accordance with the law, whereas the historian was free to deal with law on the basis of its historical significance alone.¹⁸⁶ Gadamer rejects this distinction, arguing that the dogmatic purpose of legal interpretation actually makes it the model for all of the human sciences.¹⁸⁷ All interpretation dogmatically assumes a norm in force, a live preconception that precedes and contributes to textual meaning.

Gadamer first argues that neither law nor history reconstructs and applies original meaning alone.¹⁸⁸ The historian cannot understand a law’s historical significance unless she assembles all of its applications over the course of its existence:

It is only in all its applications that the law becomes concrete. Thus the legal historian cannot be content to take the original application of the law as determining its original meaning. As a historian he will, rather, have to take account of the historical change that the law has undergone. In understanding, he will have to mediate between the original application and the present application of the law.¹⁸⁹

For example, a legal historian cannot understand the Fourteenth Amendment by focusing on its original meaning upon ratification in 1868. She must also understand all of the Court’s applications of the Amendment down to the present, including *Brown*, before she can truly understand it historically. And yet, it is impossible for a legal historian to

182. *See id.* at 334, 337.

183. WEINSHEIMER, *supra* note 55, at 192.

184. *See* GADAMER, TRUTH & METHOD, *supra* note 20, at 319; WEINSHEIMER, *supra* note 55, at 194 (“In an application that sets precedent, the judge determines the law, not just what it was but what it is and will be. He revises the law, not by enacting a new law, but precisely in understanding the law already in force.”).

185. *Cf.* GADAMER, TRUTH & METHOD, *supra* note 20, at 334.

186. *See id.* at 334.

187. *Id.* at 337.

188. *See id.* at 335–37.

189. *Id.* at 335.

do this as if she were unaware of and not influenced by *Brown's* canonization, which is the norm in force.

Nor does the judge merely apply original meaning to resolve her cases.¹⁹⁰ One must distinguish the original meaning from the meaning applied in current practice because the judge determines what the law means *at the time she applies it* to the case before her.¹⁹¹ Though she must start with original meaning, she is not bound by it—or rather, only by it.¹⁹² She must “take account of the change in circumstances and hence define afresh the normative function of the law.”¹⁹³ For example, the Court in *Brown* held the original understanding of the Equal Protection Clause irrelevant,¹⁹⁴ relying instead on decisions decided since ratification, especially those in the immediately preceding years.¹⁹⁵

The “hermeneutical situation” of judge and historian, therefore, is the same: seeking to understand a law, they each have an immediate expectation of meaning—that is, some interpretive preconception. Each must account for the change in circumstances between the law’s origin and its present, which requires knowledge of both the meaning of the text in the past and its permutations through time into the present. As Gadamer sums up,

The historian has to undertake the same reflection as the jurist. . . . Historical knowledge can be gained only by seeing the past in its continuity with the present—which is exactly what the jurist does in his practical, normative work of “ensuring the unbroken continuance of law and preserving the tradition of the legal idea.”¹⁹⁶

From here, Gadamer argues that legal interpretation represents the precise relationship between past and present that exists in all of the

190. *See id.* at 336.

191. *Id.*

192. *Id.*

193. *Id.*; *see also* GADAMER, AGE OF SCIENCE, *supra* note 30, at 126 (“[T]he correct interpretation of a law is presupposed in its application.”).

194. *See supra* note 23 and accompanying text.

195. *See, e.g.,* McLaurin v. Okla. State Regents, 339 U.S. 637, 640, 642 (1950) (African-American graduate student admitted to university could not be made to sit in segregated portions of classrooms, library, or cafeteria); Sweatt v. Painter, 339 U.S. 629, 632, 635–36 (1950) (Newly established state law school for African-Americans could not provide legal education equal to that provided by the segregated University of Texas law school).

196. GADAMER, TRUTH & METHOD, *supra* note 20, at 336 (quoting EMILIO BETTI, ZUR GRUNDLEGUNG EINER ALLGEMEINEN AUSLEGUNGSLEHRE 91 n.62a (1988)); *see also* GADAMER, TRUTH & METHOD, *supra* note 20, *supp.* I at 532–35 (discussing and criticizing Betti’s hermeneutic position as rooted in the discredited Romantic quest for objective interpretive method). The essentials of Betti’s hermeneutics are set forth in English in Betti, *Hermeneutics*, *supra* note 55.

human sciences.¹⁹⁷ To “understand” and to “interpret” mean to apply a norm in force in a legal or historical controversy. Application of this norm connects the origins of the law as they have been handed down in legal tradition with the present understanding of the law.¹⁹⁸ The judge is of course concerned with legal rather than historical significance.¹⁹⁹ Though the judge is not a historian, she must be conscious of the history of the law, how it has come to be understood in the present.²⁰⁰ Asking, “How did the law arrive at its current state?” is the same as asking, “What is the current law?”

While the legal historian need not use current law to resolve a particular case, neither can she disregard it.²⁰¹ A person trying to understand the law from its origin cannot ignore its continuing effect as it has moved through time.²⁰² But this is true of *any* text—it always needs to be restated in terms of the present.²⁰³ Historical understanding is the mediation of past and present, the fusion of the horizon of the text with the horizon of the interpreter,²⁰⁴ just as is legal understanding.²⁰⁵

197. GADAMER, TRUTH & METHOD, *supra* note 20, at 337.

198. See GADAMER, AGE OF SCIENCE, *supra* note 30, at 82 (“Finding the law means thinking the case together with the law so that what is actually just or the law gets concretized.”); GADAMER, TRUTH & METHOD, *supra* note 20, at 337 (“The judge seeks to be in accord with the ‘legal idea’ in mediating it with the present.”).

199. See GADAMER, TRUTH & METHOD, *supra* note 20, at 337.

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

201. *Id.*

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

203. *Id.* at 337–38 (“Inasmuch as the actual object of historical understanding is not events but their ‘significance,’ it is clearly an incorrect description of this understanding [*i.e.*, of the text in terms of the present] to speak of an object existing in itself and of the subject’s approach to it.”); *id.* at 338 (“[H]istorical understanding always implies that the tradition reaching us speaks into the present and must be understood in this mediation—indeed *as* this mediation.”).

204. See *infra* Section III.B.3.

205. Gadamer’s discussion here suggests something like the Madisonian “liquidation” of meaning, whereby the vague, ambiguous, or otherwise uncertain meaning of constitutional provisions is specified by custom and usage over the course of time, rather than by semantic meaning and historical context at the time of adoption. See, e.g., William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019). Liquidation’s sense of the evolution and eventual coalescence of textual meaning over time resonates with Gadamer’s idea that a crucial component of historical and legal interpretation is understanding how the law has come down to the present with the meaning it now has. For Gadamer, however, textual meaning is never finally and fully liquidated. *Cf. id.* at 13–21 (arguing that liquidation occurs when a course of historical practice specifies a consistent meaning for an indeterminate constitutional text, which comes to be generally accepted). Because textual meaning is always constituted by the present as well as the past, it is never final, always subject to alteration at the next application.

* * *

Truth and Method calls on Aristotelian ethics and legal decision-making to show that textual meaning is created by the application of oneself within an interpretive situation. Application co-determines one's understanding of both an ethical situation and a text from the past. Just as application does not consist in applying some pregiven ethical rule to an objectified situation, so also the interpreter of a text does not take the text as a universal that she first understands abstractly and only afterwards applies to particular situations.²⁰⁶ And just as an ethical decision is a constituent of the moral agent's character, so also the interpreter understands the text through its application to herself and her situation.²⁰⁷

Legal interpretation models the general hermeneutics of the human sciences in a similar way.²⁰⁸ To properly decide a case, the judge must mediate the original meaning and the concerns of the present in an application that reflects on her as well as her case. But this is what application means in all of the human sciences; all interpretive activity requires an awareness of the effect of history, of how applications of a text through time alter both the text's original meaning and the interpreter's understanding of herself in relation to the text.²⁰⁹

3. Epistemological Application

Professors Whittington and Solum each reject the unity understanding/interpretation/application, arguing that the application of textual meaning is separate from and subsequent to the textual interpretation that yields the meaning to be applied.

a. *Whittington*. Whittington asserts that understanding–interpretation–application contradicts the “everyday experience of interpreting texts”:

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

206. GADAMER, *TRUTH & METHOD*, *supra* note 20, at 333; *see also* Leiter, *supra* note 57, at 280–81 (“There is much in human judgment and action that is possible only because of practical skills and competence that remain beyond the reach of theoretical articulation.”).

207. GADAMER, *TRUTH & METHOD*, *supra* note 20, at 333; *see also* Mootz, *Originalist Fixation*, *supra* note 29, at 166 (“All historical understanding is a play of objectivity and subjectivity.”).

208. *See* GADAMER, *TRUTH & METHOD*, *supra* note 20, at 334.

209. *See id.* at 349–50 (“When a judge regards himself as entitled to supplement the original meaning of the text of a law, he is doing exactly what takes place in all other understanding. . . . [H]istorically effected consciousness is at work in all hermeneutical activity” (emphasis omitted)).

application results in a new, equally valid, and potentially contradictory understanding.²¹⁰

Specific applications change over time, he allows, but the general principle one applies does not.²¹¹

b. *Solum*. To grasp Solum's argument, one must understand the meaning he ascribes to constitutional "construction." Like most public-meaning originalists,²¹² Solum divides the process of ascertaining constitutional meaning into empirical and normative components.²¹³ As we have seen, constitutional "interpretation" is the empirical discovery of fixed original public meaning.²¹⁴ Public-meaning "construction," by contrast, is the normative process of *applying* the fixed original constitutional meaning to create doctrine and resolve cases.²¹⁵

With the interpretation–construction distinction in mind, Solum quotes two paragraphs from *Truth and Method* from which he constructs a syllogism purporting to demonstrate that philosophical hermeneutics is compatible with the fixation thesis:²¹⁶

210. WHITTINGTON, INTERPRETATION, *supra* note 1, at 104. The value of critical analysis, of course, is precisely its challenge to naïve or unreflective experience, whose immediacy so often leads us astray. See Stephen M. Feldman, *How to Be Critical*, 76 CHI.-KENT L. REV. 893, 893–94 (2000).

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

212. *But see* McGinnis & Rappaport, *supra* note 3, at 752–53 (rejecting constitutional "construction").

213. See Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 28, at 134.

214. See *supra* Part I.

215. WHITTINGTON, CONSTRUCTION, *supra* note 48, at 5–6; Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 28, at 134–35; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 457 (2013) [hereinafter Solum, *Originalism & Construction*].

Statutory "construction" has long been a part of legal interpretation, but its application to the Constitution was theorized only recently, primarily in the early work of Professor Whittington. See WHITTINGTON, INTERPRETATION, *supra* note 1, at 6–7; WHITTINGTON, CONSTRUCTION, *supra* note 48, at 5–7.

Because construction is a normative process that projects meaning onto the text, Whittington considers it fundamentally incompatible with the judicial role of merely interpreting the Constitution. WHITTINGTON, INTERPRETATION, *supra* note 1, at 5–6. He thus confines construction to the political branches. WHITTINGTON, CONSTRUCTION, *supra* note 48, at 6–8; WHITTINGTON, INTERPRETATION, *supra* note 1, at 7. Later theorists, however—including most public-meaning originalists—have embraced construction as a necessary and legitimate part of judicial decision-making in constitutional disputes. See, e.g., JACK M. BALKIN, LIVING ORIGINALISM 300–12 (2011); BARNETT, THE LOST CONSTITUTION, *supra* note 1, at 121–30; Solum, *Originalism & Construction*, *supra*.

216.

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 applied. In order to determine this content exactly, it is necessary to have historical knowledge of

1. The translators of *Truth and Method* used "interpretation" to signify "construction," which by definition includes application of law to decide individual cases.²¹⁷

2. This substitution of "construction" for "interpretation" makes clear that *Truth and Method* distinguishes "interpretation" from "construction."²¹⁸

a. Philosophical hermeneutics entails discovery of original textual meaning by an act of interpretation,²¹⁹ and then

b. Application of discovered meaning to particular cases by an act of construction.²²⁰

the original meaning, and only for this reason does the judge concern himself with the historical value that the law has through the act of legislation. But he cannot let himself be bound by what, say, an account of the parliamentary proceedings tells him about the intentions of those who first passed the law. Rather, he has to take account of the change in circumstances and hence define afresh the normative function of the law. . . .

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

Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 28, at 146 (citation omitted) (quoting GADAMER, *TRUTH & METHOD*, *supra* note 20, at 336, 338–39).

217. *See id.* ("Notice that the English word used by the translators, 'interpretation,' is used to express the concept that I have represented by the word 'construction.'")

218. *See id.* ("Gadamer's text seems to presuppose the interpretation-construction distinction as a conceptual matter . . .").

219. *See id.* at 147 ("[Gadamer's] account of interpretation (in the sense stipulated here) focuses on original meaning . . .").

220. *See id.* at 146–47 ("[Gadamer] clearly distinguishes between the recovery of original meaning ('interpretation') and the application of the text to a particular case ('construction').").

3. The fixation thesis is presupposed by acts of interpretation, but unaffected by acts of construction.²²¹

Therefore, the hermeneutics of *Truth and Method* is compatible with the fixation thesis.²²²

4. Ontological Application

Professors Whittington and Solum both contend that “application” is the deployment of a pre-existing abstract legal principle to a subsequent concrete case. This directly conflicts with the claim of *Truth and Method* that legal and other principles are defined in the act of application, not before.

a. *Ontological Conflict.* Whittington’s and Solum’s accounts of application presupposes the strict subject–object dualism of Cartesian ontology, under which the object of knowledge—*e.g.*, the fixed meaning of the text in the past—exists independently of the knowing subject—the interpreter in the present.²²³ This ontological presupposition is essential to public-meaning originalism’s epistemological claim that, if properly followed, public-meaning method discovers the “objective” meaning of the Constitution—its original public meaning.²²⁴ It is also a critical component of the claim that one can discover a legal principle prior to applying it, for this is possible only if the principle exists apart from its application.

Philosophical hermeneutics rejects the subject–object dualism.²²⁵ Hermeneutics presupposes a competing ontology, according to which the knowing subject and the object of knowledge are always already entangled with each other.²²⁶ The meaning of the Constitution, therefore, is constituted by both subject and object, interpreter and text, present and past. This obviously precludes the possibility that constitutional meaning exists in the past as a fact, independently of the present. It also dictates a particular meaning of “application,” according to which legal principles are defined concretely in the act of application, not as a priori abstractions.²²⁷

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

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

223. *See supra* notes 59–60 and accompanying text.

224. *Cf.* Bliss, *supra* note 60, at 408 (“The object, existing external to and independent of subjects, may appear to any subject that is so qualified and so related as to apprehend it. It is not the exclusive property of one subject, but may be apprehended by any normal subject. Your perception will lead you to apprehend the very things . . . which my perceptions discern We therefore infer and believe that we both perceive the same objects”).

225. *See supra* Section III.B.4.

226. *See supra* Section II.A.

227. *See supra* Part III.

Which ontology enables the correct account of textual meaning: subject–object dualism, under which meaning is a self-existent fact in the past, or the subject–object entanglement of being-in-the-world, whereby meaning is the mutual constituent of past and present? Epistemology cannot answer this. All epistemologies presuppose an ontology; any epistemology that purports to prove an ontology, therefore, begs the ontological question. The best one can do is to examine carefully each account and offer observations about which is more plausible, more closely coheres with our experience of understanding texts. I take this up in Part IV.

b. *Hermeneutics and Fixation*. Solum rejects the ontology of *Truth and Method* derived from human being-in-the-world.²²⁸ By substituting the subject–object distinction of Cartesian ontology, however, he trivializes his conclusion. It should be obvious that replacing the ontology on which Gadamer’s argument is founded with the ontology presupposed by the fixation thesis does not demonstrate either the soundness of fixation or its compatibility with *Truth and Method*. Solum’s argument for the compatibility of fixation and philosophical hermeneutics fails. Each premise of his argument is wrong.²²⁹

First, Solum provides no justification for reading the new-originalist definition of “construction” into “interpretation” in a single sentence of *Truth and Method*.²³⁰ “Interpretation” is the standard translation of the German *Auslegen*, used throughout *Truth and Method*, *Being and Time*, and other German works on hermeneutics.²³¹ If anything, Solum should read “interpretation” as “construction” *everywhere* in *Truth and Method*

228. Professor Solum advised me in email correspondence that he thinks Gadamer’s ontology is clearly wrong. This would explain why he substituted a Cartesian ontology, and why he calls his analysis of *Truth and Method* a “reconstruction” rather than an “exegesis.” Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 28, at 147; *see also id.* (referring to Gadamer’s account of interpretation “in the sense stipulated here”).

229. *See supra* text accompanying notes 216–22. Though it fails on its own terms, Solum’s ontological substitution perhaps illustrates Gadamer’s thesis that textual meaning is created by a fusion of the interpreter’s concerns in the present with the tradition of the text from the past. Solum’s deep commitment to public-meaning originalism, and his awareness that *Truth and Method* is among the most important works on textual interpretation in the twentieth century, *see supra* notes 55–56 and accompanying text, might have prompted his effort to reconcile the fixation thesis with the account of application in this celebrated text. In any event, readers may judge for themselves which of our respective readings of *Truth and Method* is the more plausible.

230. *See supra* note 217 and accompanying text. Solum is presumably referring to the appearance of “interpretation” in one of the paragraphs he quoted from *Truth and Method* at the outset of his argument. *See supra* note 216 (quoting GADAMER, TRUTH & METHOD, *supra* note 20, at 338 (“The work of interpretation is to concretize the law in each specific case—i.e., it is a work of application.”) (italics in original, underlining added))).

231. The primary sense of *Auslegen* is “laying out” or “laying open,” *see Auslegung* and *-en*, OXFORD GERMAN DICTIONARY, *supra* note 64, at 109, as in, for example, laying out one’s possibilities of existence or a text’s possible of meaning, *see supra* text accompanying notes 70–71.

because, as Gadamer's discussion of application shows, Gadamerian interpretation always includes a normative component.²³² Solum's conclusion, however, could not follow from this premise; it would not leave "interpretation" anything to do because there would be no textual meaning fixed in the past awaiting interpretive discovery.

Second, Solum's suggestion that *Truth and Method* presupposes the interpretation–construction distinction is not a plausible reading of Gadamer's discussion of application.²³³ Gadamer writes that application "concretize[s]" the law because he adheres to the Aristotelian view that universals, such as laws, exist only in their exemplifications and not abstractly as ideals.²³⁴ "It is only in all its applications that the law becomes concrete," as Gadamer puts it.²³⁵ The meaning of any law is not a platonic abstraction, but the sum of its applications.²³⁶

Gadamer's account does not separate the *empirical* function of interpretation—what does the text mean?—from the *normative* function of application—how should the text apply?—because, for Gadamer, *these are the same question*.²³⁷ The application in the present of a text from the past is precisely what yields textual meaning.²³⁸

As we have seen, Gadamer maintains that interpretation and application combine in a single event of textual understanding.²³⁹ This is clear from Gadamer's arguments that understanding is always interpretation is always application;²⁴⁰ his invocation of Aristotelian ethics, which rejects rule-bound answers to moral questions;²⁴¹ and his

232. See *supra* Section III.B.2; *infra* note 237 and accompanying text.

233. See *supra* notes 217–18 and accompanying text.

234. William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 635 (1990) (emphasis omitted) (quoting GADAMER, TRUTH & METHOD, *supra* note 20, at 329). See generally NICHOLAS WOLTERSTORFF, ON UNIVERSALS: AN ESSAY IN ONTOLOGY 137–38, 183–84 (1970) (referring to the Aristotelian view); A.D. Woozley, *Universals*, in 8 THE ENCYCLOPEDIA OF PHILOSOPHY 194, 197–98 (Paul Edwards ed., 1967) (same).

235. GADAMER, TRUTH & METHOD, *supra* note 20, at 335.

236. See *id.* at 322–23 (reading the *Ethics* to have liberated moral decision-making from Platonic metaphysics); *cf. id.* at 323 (arguing that the principle of moral knowledge is doing the right thing, not thinking it.).

237. *Cf. Mootz, Originalist Fixation, supra* note 29, at 168 (noting that the "severe epistemic challenges" posed by the interpretation–construction distinction suggest "the ontological impossibility of conceptually separating the 'meaning' of a text and its significance for the reader who seeks the meaning").

The separability of interpretation and application is the very ground on which Gadamer criticized Emilio Betti's hermeneutics. Compare 2 BETTI, TEORIA GENERALE, *supra* note 55, § 54 at 802–04 (arguing for the separation of "cognitive" and "normative" interpretation) (author's translation), with GADAMER, TRUTH & METHOD, *supra* note 20, app. at 533–35 (disputing that the cognitive and the normative are separated in understanding).

238. See *supra* Section III.A.2.

239. See *supra* Section II.B.

240. See *supra* Section III.B.2.

241. See *supra* Section III.B.2.a.

designation of legal interpretation, in which the application of a law is a necessary constituent of the law's meaning, as the general model of hermeneutics in the human sciences.²⁴² Each of these discussions shows that interpretive meaning emerges *in* application, not before it; application is necessarily application by the interpreter of herself within her interpretive situation, not application of an abstract principle to a circumstance external and unrelated to her and her situation.²⁴³

Finally, Solum is wrong to read new-originalist significance into Gadamer's assignment to judges of the "creative" or normative function of application.²⁴⁴ Gadamer emphasized the normative function in the paragraphs Solum quoted because Gadamer wrote here to disabuse historicists of their norm-free self-image—by showing that writing history is as normative as deciding legal disputes—and not because he was engaged in new-originalist construction.²⁴⁵

Without these premises—substitution of construction for interpretation, conceptual separation of interpretation from application, and exclusion of normative activity from interpretation—Solum's argument evaporates. Solum's conclusion that Gadamerian hermeneutics presupposes the fixation thesis reduces to a question-begging banality: "interpretation" *as defined by public-meaning originalists* is compatible with the fixation thesis. This tells us nothing about "interpretation" as defined by Gadamer, whose unification of understanding, application, and interpretation makes fixed textual meaning impossible.

IV. BAD EXAMPLES

Professors Whittington and Solum each give examples purporting to illustrate the soundness of the fixation thesis against hermeneutic critique. The examples actually accomplish the opposite: they illustrate that philosophical hermeneutics provides a more plausible account of textual meaning than the subject-object dualism on which fixation rests.

A. *Art Restoration*

After defending new originalism's conceptual separation of application from interpretation, Whittington sums up with this example:

[A]n originalist seeking to salvage a soiled painting would gradually clear away smudges in order to see better the original portrait beneath. As layers of dirt are removed and the canvas and paints tested, details emerge to deepen our

242. See *supra* Section III.B.2.b.

243. See *supra* text accompanying notes 206–09.

244. See *supra* notes 220–21 and accompanying text.

245. Solum acknowledged this but did not discuss its implications. See Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 28, at 145–46.

perception of the figure who was always vaguely visible, and occasionally false marks are removed to reveal the original underneath. A Gadamerian interpreter, on the other hand, would not be seeking to deepen our understanding of the artist's portrait by revealing details contained in the original. Rather, he would seek to expand the artist's vision for the new audience, adding new details with fresh paint, multiplying the portraits appearing on the canvas.²⁴⁶

The originalist restorationist is familiar. She works on the ontological assumption that the original meaning of the painting lies under all those layers of medieval varnish and grime. Once the painting is uncovered just as the artist painted it, it will be seen and understood as it was at its unveiling.

But Whittington's hermeneutic restorationist is not even a good caricature. A hermeneutic restorationist would not expand on the original by using "fresh paint" to create a "different portrait." To the contrary, she would be just as concerned as the originalist to uncover the original painting. "Reconstructing the conditions in which a work passed down to us from the past was originally constituted is undoubtedly an important aid to understanding it."²⁴⁷ Whittington assumes that the original image of the painting is identical to the meaning of the painting. Yet, how can we know that the meaning of the restored work to us matches its meaning to those present at its unveiling? No painting has self-declaring meaning, even at its origin, let alone centuries later.²⁴⁸ We cannot even be certain the restoration matches the "original." Did the artist add extra varnish at the end to tone down colors that looked too bright? Or did she paint with extra boldness to ensure color and contrast even after the inevitable accumulation of dust and dirt?²⁴⁹

Most crucially, the hermeneutic restorationist is not isolated from the centuries-old tradition in which the painting is embedded nor the imperatives of the present in which she lives. She would not imagine that her understanding of the restored painting matches the meaning at its

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

247. GADAMER, TRUTH & METHOD, *supra* note 20, at 166; *see also* Frank S. Ravitch, *The Continued Relevance of Philosophical Hermeneutics in Legal Thought*, in LEGAL INTERPRETATION, *supra* note 28, at 88, 91 ("[I]nterpretive methodologies . . . obfuscat[e] what is really going on. It is not that interpretive methodology is useless, but rather that it does not do what it purports to do—reach an objective meaning.").

248. *Cf.* Mootz, *Originalist Fixation*, *supra* note 29, at 160 ("[M]eaning is not a feature of a world that exists separate from the interpreter.").

249. These and related issues were raised by the controversial cleaning of Michelangelo's frescoes in the Sistine Chapel, which illustrates the ontological problematics of the "original" even in art. *See generally* WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 219 (Hannah Arendt ed., Harry Zohn trans., 1968) (1955) (explaining the ontological problems associated with the "original" in art).

unveiling, because she knows that who she is and the present in which she lives also contribute to its meaning. Restoration of a painting does not yield the original work or its original meaning. It constitutes a "second creation, the reproduction of the original production."²⁵⁰ No matter how much we know about the painting and its era and the people in it, we cannot see and understand the painting as they saw and understood it, but only as we imagine they might have. We can fuse the painting's horizon with our own by projecting ourselves into its origin and subsequent history, but it remains *ourselves* whom we project.

Consider a mythic event from Roman history, the rape of Lucretia. As recounted by Livy, around 500 B.C.E. during the siege of a nearby city, Sextus, a son of the Roman king, assaulted Lucretia, wife of another prince, Collatinus, while a guest in her home.²⁵¹ Lucretia swore Collatinus and his friend, Brutus, to avenge her "lost . . . honour."²⁵² They sought to comfort her, as "sick at heart" as she was, "by diverting the blame from her who was forced to the doer of the wrong."²⁵³ But Lucretia would not be comforted; innocent though she was, she took a knife "concealed beneath her dress" and "plunged it into her heart," so that no woman could use her plight to justify adulterous behavior.²⁵⁴ In the aftermath, Collatinus and Brutus raised an army in rebellion against the king as revenge for his son's crime. The people flocked to their banner, for "[e]very man had his own complaint to make of the prince's crime and his violence."²⁵⁵ They deposed the king and drove Sextus into exile, where he was murdered by old enemies. Freed from tyranny, the people chose Brutus and Collatinus prefects of a new Roman republic.

Scores of artists have painted this story, two common depictions being Sextus threatening Lucretia in her bed with his drawn sword, and Lucretia in the moment of her suicide.²⁵⁶ A public-meaning originalist would seek to document how any such painting was understood at the time it was first viewed by the public; this understanding would fix its meaning, irrespective of anything that followed. Yet, it takes little imagination to realize that a contemporary art historian will understand a Lucretian painting differently than a nineteenth century Romantic. Both will differ from the understanding of a rape survivor in the Victorian Era, whose understanding will differ from that of a survivor in the contemporary West. Women will understand it differently than men. While a

250. GADAMER, TRUTH & METHOD, *supra* note 20, at 166.

251. 1 LIVY, HISTORY OF ROME 197–209 (B.O. Foster trans., 1919) (27–25 B.C.E.).

252. *Id.* at 203.

253. *Id.*

254. *Id.*

255. *Id.*

256. See, e.g., *Lucretia*, NAT'L GALLERY ART, <https://www.nga.gov/collection/art-object-page.83.html> [<https://perma.cc/2YAB-HAHU>].

contemporary rape survivor may understandably suffer from suicidal depression, it is not because she fears that others will point to her assault as excuse for infidelity. And all of these potential meanings will differ dramatically from Livy's political intention to justify the violence and revolution by which the Roman republic was born.²⁵⁷

Is it plausible that the meaning of a Lucretian painting is fixed by the public's understanding at the time it was unveiled, and all subsequent meanings simply "made up"? Vastly different understandings of any painting do not come about because someone added "fresh paint."²⁵⁸ They are the consequence of the joint constitution of artistic meaning by the successive traditions through which the painting is handed down from the past and successive interpreters located in different presents.²⁵⁹ No matter how clear a restored portrait, how faithful to the original, what one sees in it will depend upon the historical situation from which one sees it. Gadamer's observation is indisputable: "[U]nderstanding art always includes historical mediation."²⁶⁰

Likewise with constitutional meaning. "The way the interpreter belongs to his text is like the way the point from which we are to view a picture belongs to its perspective."²⁶¹ The judge who decides a constitutional case cannot jump over centuries of decisions interpreting the Constitution as if they are not there (and never were), leaving her a direct, fully transparent view of its original public meaning. She instead builds a bridge from past to present by reconstructing the meaning of a clause, not just at its origin, but at all points down to the present.²⁶² Her decision is thus historically informed, though not historically determined.

B. *Historical Events*

Professor Solum recognizes that philosophical hermeneutics might be making ontological claims.²⁶³ He responds by seizing on a statement by Professor Mootz, who has also criticized Solum's position using

257. See generally MELISSA M. MATTHES, *THE RAPE OF LUCRETIA AND THE FOUNDING OF REPUBLICS: READINGS IN LIVY, MACHIAVELLI, AND ROUSSEAU* ch. 2 (2000) (examining potential differing meanings of the rape of Lucretia); Eleanor Glendinning, *Reinventing Lucretia: Rape, Suicide and Redemption from Classical Antiquity to the Medieval Era*, 20 INT'L J. CLASSICAL TRADITION 61 (2013) (examining how Lucretia's rape has been represented across literature).

258. See *supra* text accompanying note 246 (quoting WHITTINGTON, INTERPRETATION, *supra* note 1, at 105).

259. Cf. Mootz, *Legal Hermeneutics*, *supra* note 29, at 535–36, 537 (arguing similarly regarding written text).

260. GADAMER, *TRUTH & METHOD*, *supra* note 20, at 165.

261. *Id.* at 338.

262. Cf. Ravitch, *supra* note 247, at 90 ("[P]hilosophical hermeneutics seems especially useful in the context of legal interpretation because of the potential time lag and cultural shifts between the drafting of laws and their application to a variety of fact scenarios.").

263. See Solum, *Hermeneutics and the Fixation Thesis*, *supra* note 28, at 149.

philosophical hermeneutics: "There are no objective facts about the past existing independently of our inquiries; rather, history is our mode of being; as finite beings who can never rise out of our historical situation."²⁶⁴ Solum accuses Mootz (and by extension Gadamer) of claiming "there are no objective facts at all," which he swiftly dispatches as a *reductio*:

[T]his means that there is no fact of the matter about such mundane and insignificant questions as whether this paragraph was first composed on July 17, 2015. Nor could there be an objective fact of the matter about the occurrence of the Holocaust or indeed whether the Allied forces invaded Normandy beginning on June 6, 1944.²⁶⁵

I take Mootz's point, though I would have put it this way: the meaning of the past is not an objective fact existing independently of our present inquiries about this meaning. Solum acknowledges that Mootz might have meant merely to distinguish facts about events from facts about meaning, but insists the implications remain "radical and implausible."²⁶⁶ As a matter of objective fact, he argues, there can be no doubt that the Constitution's assignment of "two" senators to each state "meant two and not three or lasagna."²⁶⁷ If there were no objective facts about the meaning of numbers, Solum reasons, there would not be any objective linguistic facts, either.²⁶⁸ But this would be wrong, he concludes, because the existence of linguistic facts is empirically demonstrable.²⁶⁹

Again, Solum chose an easy target. As Mootz, Gadamer, and others point out, numbers are a special case, able to retain unambiguous meaning even over long periods of time.²⁷⁰ It does not follow that linguistic symbols do so as well. No reasonable person disputes, for example, the date of *Kristallnacht* or of the opening of the concentration camp at Auschwitz. But what does it *mean* that for more than a decade Nazis and their allies persecuted, tortured, and attempted to kill every Jew they could find, succeeding in murdering six million (along with nearly

264. *Id.* (quoting Mootz, *Originalism & Fixation*, *supra* note 29, at 165).

265. *Id.*

266. *Id.* at 150.

267. *Id.*

268. *See id.*

269. *Id.*

270. *See* Mootz, *Originalism & Fixation*, *supra* note 29, at 180; *see also* GADAMER, TRUTH & METHOD, *supra* note 20, at 433 ("Only through mathematical symbolism would it be possible to rise entirely above the contingency of the historical languages and the vagueness of their concepts."); Ian Bartrum, *Two Dogmas of Originalism*, 7 WASH. U. JURIS. REV. 157, 174 (2015) ("[W]hen reading the Presidential Age Requirement we are all *textualists*, not *originalists*. . . . [I]n the case of the Presidential Age Requirement, the 'original' and the 'modern' public meanings are virtually identical.").

as many non-Jews)? That humans are naturally depraved, or only Germans, or only Nazis? Was institutional Christianity responsible, with its theology of the blood libel and passivity in the face of these atrocities? Is the Holocaust an unanswerable theodicy that drives people to unbelief? Did it create contemporary Israel? Is it related to a resurgence of anti-Semitism in the West? These questions barely scratch the surface.

Events are facts in the world. But they do not naturally possess objective, self-declaring meaning, or any meaning at all. The events and facts known as “the Holocaust,” for example, are linked by a name that sought to give them meaning literally years after they occurred.²⁷¹ The meaning of events in the past does not exist until we in the present try to ascertain it.

C. *Brown v. Board of Education*

Conforming to the contemporary imperative that one’s interpretive theory account for *Brown v. Board of Education*,²⁷² Professor Solum has offered two new-originalist defenses of *Brown*, one based on a revisionist interpretation of the Fourteenth Amendment by Michael McConnell relying on post-ratification evidence of congressional understanding,²⁷³

271. See *Holocaust*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/87793?rskey=a0zSBv&result=1#eid> [<https://perma.cc/22PD-9WSL>] (noting in definition 2.d. that use of “the Holocaust,” with definite article and capital “H” was introduced in English by historians and other academicians in the late 1950s and early 1960s). The enormity of the Holocaust seems to place it beyond any meaning.

272. 347 U.S. 483 (1954). Professor Marshall suggests that *Brown* is actually only one item on a long list of widely held contemporary constitutional values that originalist method cannot justify, including gender equality; the guarantee of one person, one vote; privacy protection of decisions whether or how to conceive, bear, raise, and educate children; *Miranda* warnings; and application of equal protection norms to the federal government. See *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 478–79 (2017) (statement of William Marshall, William Rand Kenan, Jr. Distinguished Professor of Law, University of North Carolina, Chapel Hill, North Carolina).

273. See McConnell, *Originalism & Desegregation*, *supra* note 27, at 1140; Michael McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL’Y 457, 459, 461, 464 (1995) [hereinafter McConnell, *Originalist Case*]; see also AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 143–46 (2012) [hereinafter AMAR, *UNWRITTEN CONSTITUTION*] (reading the original purposes and effects of the Preamble, the Guarantee Clause, the Titles of Nobility Clauses, and the Bill of Attainder Clauses with the Reconstruction Amendments to show that *Brown* and *Bolling v. Sharpe*, 347 U.S. 497 (1954), “vindicated the central meaning of the Reconstruction Amendments”); AKHIL REED AMAR, *THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC* 116 (2015) (reading the same Clauses as showing that Jim Crow laws unconstitutionally created a “subordinated caste” and “two classes of unequal citizenship . . . deprive[d African-Americans] of genuinely equal laws” and prevented “different races” from “com[ing] together as equals” in violation of the original understanding of the Fourteenth Amendment); Calabresi & Perl, *supra*

and the other drawn from a purported distinction between original public meaning and what we might call "original factual errors."²⁷⁴ Oddly, and yet predictably, both defenses depart from public-meaning methodology.

1. Elite Post-Ratification Evidence

Professor McConnell maintains that a series of congressional debates and votes on the Civil Rights Act of 1875 two to six years *after* ratification of the Fourteenth Amendment demonstrates that *Brown* was either "correctly decided on originalist grounds" or "within the legitimate range of interpretations commonly held" in 1868.²⁷⁵ Legal historians praised McConnell's work for the new light it shed on public school segregation during Reconstruction, but forcefully rejected his claim that this evidence demonstrated that one widely held understanding of the Fourteenth Amendment in 1868 precluded racially segregated public schools.²⁷⁶

Professor Solum endorses McConnell's account despite its departure from both halves of the new-originalist method to which he is committed. McConnell provides scant evidence of the original public meaning of the Fourteenth Amendment—that is, whether a member of the *public* in 1868, actual or hypothetical, would have understood the semantic meaning of "privileges or immunities of citizenship" or "equal protection of the laws" to prohibit racial segregation of public schools.²⁷⁷ Nor does McConnell produce contextual evidence that might have clarified the semantic meaning of these clauses to include such a prohibition.²⁷⁸ And finally, the evidence McConnell does produce is not from the period of drafting, ratification, and adoption, 1866 to 1868, but a post-ratification

note 27, at 435 (arguing that, because most state laws in 1868 presupposed access to public education to be "a privilege or immunity of state citizenship," the Fourteenth Amendment's bar on state abridgement of "privilege[s] or immunit[ies] of state citizenship" prohibited racially segregated public education).

274. Solum, *Surprising Originalism*, *supra* note 50, at 259–67; Lawrence B. Solum, *Hearings on the Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the U.S.*, 31 DPCE ONLINE 575, 577 & n.5 (2017). This latter source is a footnoted and slightly expanded version of Statement of Lawrence Solum.

275. McConnell, *Originalist Case*, *supra* note 273, at 458 (discussing the many and lengthy debates over what was eventually enacted as Ch. 114, 18 Stat. 335).

276. *E.g.*, Klarman, *supra* note 24; Maltz, *supra* note 24; McConnell replied to Klarman in Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995) [hereinafter McConnell, *Reply to Klarman*], and to Maltz in Michael W. McConnell, *Segregation and the Original Understanding: A Reply to Professor Maltz*, 13 CONST. COMMENT. 233 (1996).

277. *Cf. supra* Part I.A.

278. *Cf. supra* Part I.B.

period, 1870 to 1875, and comes not from the public, but a subset of elite Americans—certain members of Congress.²⁷⁹

McConnell draws from understandings of the Fourteenth Amendment publicly expressed by certain members of the 41st, 42nd, and 43rd Congresses between 1870 and 1874 in their unsuccessful attempt to include a prohibition of racially segregated public schools in the Civil Rights Act of 1875;²⁸⁰ he especially concentrates on the handful of these Senators who were also part of the 39th Congress, which drafted the Amendment and reported it to the states for ratification in 1868.²⁸¹

McConnell's critics agree that during congressional debates on the Civil Rights Act, some Republican members expressed their belief that the Privileges or Immunities or Equal Protection Clause of Section 1 of the Fourteenth Amendment banned school segregation, and thus the enforcement power of Section 5 empowered Congress to ban it by statute.²⁸² But other Republicans, and virtually all Democrats, rejected this understanding, and it never became law.²⁸³ In short, rather than relying on the original semantic meaning of the Amendment in its historical context at adoption in 1868, as prescribed by public-meaning methodology, McConnell relies on contested understandings of the Amendment expressed during the early 1870s by a small group of elite federal officeholders in their failed attempt to prohibit segregated schools by statute.²⁸⁴ None of this is persuasive evidence that the public meaning

279. In this regard, Amar's account of *Brown* is more consistent with public-meaning method, because it relies on the public understanding of the relevant texts in the textual and historical contexts existing at adoption. See *supra* note 273 and accompanying text.

280. See McConnell, *Originalism & Desegregation*, *supra* note 27, at 1092–1100.

281. See *id.* at 1099 (showing that between nine and twelve senators who voted for the Fourteenth Amendment later cast votes against school segregation during debates over the Civil Rights Act).

282. See, e.g., Klarman, *supra* note 24, at 1884; Maltz, *supra* note 24, at 224.

283. See Klarman, *supra* note 24, at 1914.

284. McConnell concedes that racially integrated public schools were deeply unpopular in both the North and the South in the late 1860s, despite occasional incidents of integration. McConnell, *Reply to Klarman*, *supra* note 276, at 1938–39. He contends that political support for integrated schools grew in the early 1870s, after which it quickly dissipated with the waning of political and popular support for Reconstruction in the mid- and late-1870s. *Id.* at 969–70.

McConnell further contends that congressional debates about school desegregation in connection with the Civil Rights Act of 1875 were rich and robust, making them far better evidence of the meaning of the Fourteenth Amendment than what he calls the weak and scattered evidence available during the actual ratification debates in 1868. See McConnell, *Originalism & Desegregation*, *supra* note 27, at 459; McConnell, *Reply to Klarman*, *supra* note 276, at 1944; McConnell, *Originalist Case*, *supra* note 273, at 459.

Nevertheless, post-ratification debates and votes are not evidence of the public meaning of the Fourteenth Amendment at the time of ratification unless there is reason to believe that post-ratification understandings coincided with understandings at ratification. McConnell gives no such reasons, and his critics provide reasons to believe that by the early 1870s public

of the Fourteenth Amendment in 1868 prohibited racially segregated public schools.

Whether McConnell's argument succeeds on its own terms is not my concern. My point is that he does not rely on public-meaning methodology as defined by public-meaning originalists like Solum. The puzzle is why Solum endorses it.

2. Mistaken Beliefs

As discussed above,²⁸⁵ Judge Bork shoe-horned *Brown* into public-meaning originalism by suggesting that the American public in 1868 erroneously thought racially segregated schools cohered with the Fourteenth Amendment's principle of equality. This enabled Bork to conclude that *Brown* abandoned a factual misunderstanding about the meaning and effect of segregation, not the original public meaning of the Fourteenth Amendment.²⁸⁶

Professor Solum makes a similar argument. "Originalists believe that the original meaning of the constitutional text is fixed and that it binds us, but they do not believe that the framers' beliefs about facts are binding."²⁸⁷ He identifies *Bradwell v. Illinois*,²⁸⁸ a Reconstruction-era decision that upheld a state's refusal to admit a highly qualified woman to the bar, as a case in which the Court was led astray by "factual" misunderstandings from the past.²⁸⁹ Solum observes that in 1868 the "privileges" or "immunities" of citizenship protected by the Fourteenth Amendment included the right of any citizen to pursue a lawful occupation,²⁹⁰ and "[w]hat . . . could be more 'lawful' than the practice of law?"²⁹¹ The original semantic meaning of the Privileges and Immunities Clause, he concludes, included the right of any U.S. citizen, male or female, to be admitted to the bar.

understandings of the Fourteenth Amendment had diverged sharply from those in evidence at its ratification in 1868. *See, e.g.*, Klarman, *supra* note 24, at 1884, 1900 (arguing that Republican understandings of the Fourteenth Amendment radicalized in proportion to their loss of political power in the aftermath of ratification).

285. *See supra* notes 94–96 and accompanying text.

286. BORK, *supra* note 1, at 82 ("[W]hen *Brown* came up for decision, it had been apparent for some time that segregation rarely if ever produced equality.").

287. Solum, *Surprising Originalism*, *supra* note 50, at 254; *see also id.* at 261 ("Originalism is committed to the constitutional text—not the factual beliefs of those who wrote the text.").

288. 83 U.S. (16 Wall.) 130 (1873).

289. *Id.* at 139.

290. Solum, *Surprising Originalism*, *supra* note 50, at 252–53 (quoting M. Frances Rooney, *The Privileges or Immunities Clause of the Fourteenth Amendment and an Originalist Defense of Gender Nondiscrimination*, 15 GEO. J.L. & PUB. POL'Y 737, 32–33 (2017)).

290. Solum, *Surprising Originalism*, *supra* note 50, at 253.

291. *Id.*

Then why didn't Bradwell win? According to Solum, the Court and the public in 1873 mistakenly believed that "women lacked the intellectual capacity" to practice law.²⁹² But we are bound only to the original public meaning of the Privileges or Immunities Clause, not to the original public's misunderstandings about the world in which the Clause would function. In Solum's view, *Bradwell* was wrongly decided because of its mistaken factual predicate about female capabilities, while the Court's gender-equality decisions more than a century later are actually faithful to the original public meaning, having merely abandoned the original mistake of fact about female capability.²⁹³

A comparable public-meaning defense of *Brown* easily follows.²⁹⁴ The original public meaning of the Fourteenth Amendment clearly prohibited racial segregation of public schools under either the Privileges or Immunities or Equal Protection Clause,²⁹⁵ but the Court and the general public of the time erroneously believed some combination of factual errors like "African American children are incapable of benefiting from public education" (or "incapable of benefiting from the education afforded to white children"), "separate-but-equal public schools do not send a social message of African American inferiority," or "white supremacy is part of the natural order."²⁹⁶ In this view, *Brown* merely corrected original mistakes of fact about the capabilities of racial minorities, the social meaning of segregation, and the supposedly "natural" inevitability of white supremacy, but had no effect on the original public meaning of the Amendment itself. Its guarantee of African-American access to white public schools, as either a privilege or immunity of citizenship or a mandate of the equal protection of the laws, had never changed.

Solum sums up:

[O]riginalism is not committed to the patently ridiculous proposition that facts about the world are fixed or the even

292. *Id.* at 254.

293. Solum's argument ignores that the exclusion of women from the bar was based as much on a range of complex value judgments about marriage and family as on what he calls "factual" assumptions about female capability. For example, excluding women from professional and other well-paying jobs outside the home was thought to promote marital unity by keeping wives economically dependent on their husbands. *Cf.* Erin Blakemore, *Why Many Married Women Were Banned from Working During the Great Depression*, HIST. (Mar. 5, 2019), <https://www.history.com/news/great-depression-married-women-employment> [<https://perma.cc/B3QT-MNAV>] (noting that a state banned married women from working when their spouses were employed).

294. Though Solum does not offer it, instead simply recurring to McConnell without explanation. *See* Solum, *Surprising Originalism*, *supra* note 50, at 261–63.

295. Either access to integrated public schools is a "privilege . . . of citizens[hip]," or refusing such access violates an "immunit[y] of citizens[hip]" against racial exclusion or denies the "equal protection of the laws." *See* U.S. CONST. amend. XIV, § 1.

296. *Cf.* *Plessy v. Ferguson*, 163 U.S. 537, 549–52 (1896) (making comparable assertions).

more ludicrous position that the application of public meaning to current facts should be guided by the factual beliefs of the public at the time constitutional provisions were framed and ratified—much less the absolutely insane idea that the false beliefs of the framers about facts bind us today.²⁹⁷

Like Professor McConnell's account of original meaning based on post-ratification evidence, however, Solum's distinction of original mistakes of fact from original public meaning departs from public-meaning methodology. Public-meaning originalism relies on context to specify the ubiquitous vagaries and ambiguities in the original semantic meaning of constitutional clauses; beliefs of the original public about facts in the world would seem self-evidently part of this context, even when mistaken. Take, yet again, the Domestic Violence Clause. As related above, the framers feared popular uprisings against state authority and included the Clause to obligate the federal government to assist quelling such rebellions on state request.²⁹⁸ Southern slave-holding states were especially supportive: they feared slave insurrections that might exceed their law-enforcement resources.²⁹⁹ Suppose this fear had been mistaken, and no slave rebellions had ever exceeded state enforcement resources so that no state ever requested federal assistance to put down a slave rebellion. Using Solum's "original mistake of fact" analysis, the belief of southern slave-holding states in 1787 that they had a special need for the Domestic Violence Clause could not inform the historical context surrounding the original semantic meaning of the Clause, because this belief was factually wrong.

297. Solum, *Surprising Originalism*, *supra* note 50, at 261.

298. See *supra* text accompanying notes 39–44, 49–50, 52–54.

299. See, e.g., *Debate in the Virginia Ratifying Convention (June 14, 1788)*, in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 365, 427 (Jonathan Elliot ed., 2d ed. 1891) (remarks of George Nicholas) (noting that the Domestic Violence Clause provides "additional security" to slave states by authorizing use of federal power "to quell an insurrection of slaves" upon state application); *View of the Constitution of the United States*, in 1 BLACKSTONE'S COMMENTARIES app. Note D at 140, 367 (St. George Tucker ed., Augustus M. Kelley Publishers 1969) (1803) ("[The Domestic Violence Clause] secures . . . additional force to the aid of any of the state governments, in case of an internal rebellion or insurrection against it's [sic] authority. . . . The southern states [are] more peculiarly open to danger from this quarter" (third alteration in original)); see also Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785, 791 (1995) (noting that the Domestic Violence Clause was a pro-slavery provision "applicable to slave revolts."); Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 429 & n.23 (1999) (noting that abolitionist Wendell Phillips considered the Domestic Violence Clause one of "five key proslavery provisions of the Constitution").

This “original mistake of fact” analysis fails on its own terms. It confuses two kinds of facts—those about belief and those about its content. The truth or falsity of a belief has no bearing on the truth or falsity of the act of believing—a person can, in fact, believe something that is, in fact, mistaken.³⁰⁰ Thus, it is factually correct that the southern states feared their inability to deal with slave rebellions, even if this inability might have proven factually mistaken. The first fact—inhabitants of the southern states actually thought this way—is not mistaken, and thus properly informs the original semantic meaning of the Clause as a true fact about historical context,³⁰¹ even though the content of this thought—the feared deficiency of state enforcement resources in case of slave rebellions—might have been wrong.

Likewise with *Brown*. The original semantic meanings of the “privileges or immunities of citizenship” and the “equal protection of the

300. In “intensional” statements of the form, “I believe that *x*,” the truth of the main (subject) clause, “I believe,” does not necessarily depend on the truth of the subordinate (object) clause, “that *x*”—i.e., the main clause can be true even if the subordinate clause is false. See Gottlob Frege, *Sense and Reference*, 57 PHIL. REV. 209, 218–20 (1948); see also Richard M. Gale, *Propositions, Judgments, Sentences, and Statements*, in 6 THE ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 234, at 494, 499 (“The main attraction of this analysis is that it answers the thorny question of how a sentence can be both meaningful and false.”).

Professor Green has proposed a provocative originalist theory that argues we are bound by the original fixed “intension” or “sense” of the constitutional text, but not by its variable “extensions” or references in the world. See Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS L.J. 555, 564 (2006). Green’s theory preserves fixed constitutional meaning without committing to fixed constitutional outcomes, just as the distinction of application from interpretation purports to free public-meaning originalists from an original understanding of the Fourteenth Amendment that accommodated segregated public schools. See *id.* at 593–627 (using the sense–reference distinction to conclude that by 1954, desegregation, one of many possible original referents of the Fourteenth Amendment, was consistent with the Amendment’s original anti-discrimination sense).

However, just as Gadamer holds that interpretation of a text is not distinct from its application, other philosophers—notably Wittgenstein—dispute that sense can be isolated from its references. See, e.g., LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 40 (G.E.M. Anscombe trans., 2d ed. 1958) (“[A] word has no meaning if nothing corresponds to it.”); *id.* ¶ 43 (“For a *large* class of cases . . . the meaning of a word is its use in the language.”); *id.* ¶ 139 (arguing that the meaning of words is determined by one’s understanding of their use); David Weberman, *A New Defense of Gadamer’s Hermeneutics*, 60 PHIL. & PHENOMENOLOGICAL RES. 45, 58 (2000) (rejecting Hirsch’s analogous distinction between the meaning of a text and its significance); see also John M. Connolly, *Gadamer and the Author’s Authority: a Language-Game Approach*, 44 J. AESTHETICS & ART CRITICISM 271, 272 (1986) (suggesting Wittgenstein shared Gadamer’s view that meaning includes application). A full consideration of the sense–reference distinction and its possible originalist uses is beyond the scope of this Article.

301. Cf. NOURSE, *supra* note 32, at 40 (“[O]rdinary meaning is prototypical meaning, which is to say that it is meaning which picks the best example, rather than all logical extensions, of the term. The best example is typically the best undisputed application of the law based on bipartisan legislative evidence.” (footnote omitted)).

laws" need contextual supplementation to specify their respective original *public* meanings. Segregation was based on erroneous beliefs about African-American capacities, the social meaning of segregation, the supposed naturalness of white supremacy, and much else. But these erroneous beliefs do not cancel or erase the separate fact that they were widely held by the American public and federal office-holders in 1868 (and, for that matter, from 1870 to 1875 when the Civil Rights Act of 1875 was debated),³⁰² as even Professor McConnell acknowledges.³⁰³ In public-meaning method, such widely held beliefs are relevant contextual evidence, "facts about context,"³⁰⁴ which properly supplement the original semantic meaning of the Privileges or Immunities and Equal Protection Clauses. Such beliefs cannot be ruled out as "original mistakes of fact" because the fact that they were widely held is not mistaken.

How can one "immerse" oneself in the 1868 world of Fourteenth Amendment ratification, as public-meaning methodology requires,³⁰⁵ without taking note of the *fact* of then-widespread discriminatory racial attitudes about integrated public schooling, repugnant as they are today?³⁰⁶ These attitudes provide the very facts about historical context that enable specification of the Fourteenth Amendment's otherwise imprecise semantic meaning;³⁰⁷ they are a proper part of public-meaning analysis, however inconvenient they might be for an originalist defense of *Brown*.

It is neither "patently ridiculous," "ludicrous," nor "insane" ("absolutely" or otherwise) to include facts about contemporaneous relevant beliefs within the original context of constitutional meaning.³⁰⁸ To the contrary, how can one not? Otherwise, we are asked to accept that the original public meaning of the Fourteenth Amendment constitutionally guaranteed women a right to practice law, and African-American children a right to attend public schools with white children, despite the *fact* that hardly any member of the public thought it meant either of these things and numerous public officials publicly denied them. If this is *public-meaning* originalism, it is badly named.

302. See, e.g., Klarman, *supra* note 24, at 1884 ("It is inconceivable that most—indeed even very many—Americans in 1866–68 would have endorsed a constitutional amendment to forbid public school segregation.").

303. See *supra* note 284.

304. See *supra* text accompanying note 31.

305. See *supra* note 13.

306. Cf. Klarman, *supra* note 24, at 1895 ("One senses that McConnell is playing upon our modern abhorrence of racism and our tendency to regard racial prejudice as 'irrational' and racial differences as socially rather than biologically constructed.").

307. See *supra* Part I.B.

308. Cf. Solum, *Surprising Originalism*, *supra* note 50, at 261.

3. Present Influence

Philosophical hermeneutics holds that textual meaning is constituted by the present as well as the past. This manifests itself in three ways: textual interpretation always entails the interpreter's self-interpretation, the interpreter's fusion of her (present) horizon with the (past) horizon of the text expands both horizons, and the separation of application from interpretation is an implausible account of textual meaning. Each of these propositions is evident in Professor Solum's effort to square *Brown* with public-meaning originalism.

Why did Professor Solum embrace reconciliations of *Brown* with the Fourteenth Amendment's original public meaning that so obviously depart from public-meaning methodology? We already know this answer. McConnell embarked on his defense of *Brown*, and Solum endorsed it, long after accounting for *Brown* became an interpretive imperative and also after the rise of originalism and its critics in the 1980s. This likewise explains the *ipse dixit* excluding "original public errors" from the historical context of original semantic meaning.

The canonization of *Brown* is evidently at work in the strenuous efforts of Bork, McConnell, Solum, and other public-meaning originalists to square their theory with *Brown* and thereby blunt the moral opprobrium that attaches to any theory that might justify the racist regime *Brown* overthrew. In short, the past of the Fourteenth Amendment—its original public meaning—is necessarily bound up with a present imperative—that any viable theory of constitutional interpretation account for the result in *Brown*.

The attempts of public-meaning originalists to find a public-meaning justification of *Brown* also illustrate the error of conceptualizing interpretive horizons in epistemological terms. The Fourteenth Amendment arrived in 1954 encased in a constitutional tradition that permitted "separate-but-equal" public education. Had the Warren Court been epistemologically imprisoned in its own interpretive horizon, it would not have been able to see past the conventional wisdom of segregation to any different understanding. The Court's horizon was not epistemologically bound, however, but phenomenologically open: it knew, from its own recent experiences and those of other federal departments, that other possible understandings of the Amendment existed, created by the dramatically enhanced importance of public education in 1954 (compared to 1868) and erosion of nineteenth-century beliefs about African-American capacities, the social meaning of segregation, and the supposed supremacy of whites. As the Court said, "[W]e cannot turn the clock back to 1868"³⁰⁹ Rather, it fused its present with the past of the constitutional text, creating a new

309. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954).

understanding of the Equal Protection Clause, which nevertheless honored the claims of the text: "[I]n the field of public education . . . 'separate-but-equal' has no place. Separate education facilities are inherently unequal."³¹⁰

Finally, public-meaning defenses of *Brown* show the poverty of conceptually dividing application from interpretation. Racially segregated and racially integrated public schools are equally consistent with an abstract guarantee of the "privileges or immunities of citizenship" and the "equal protection of the laws."³¹¹ In the abstract, segregated public schools that are equally funded might conceivably provide equal opportunities and need have no pejorative social meaning about the status of African-Americans. But in the real world, where segregation blocks African-American opportunity and sends a message of inferiority irrespective of equal funding, these norms are violated. It does no good to adjudicate the contradiction of racial separation and racial equality within the abstract original public meaning of the Fourteenth Amendment; this would simply raise the particulars of the cases to the status of universals. It was not the abstract definition of equality that dictated *Brown* any more than it dictated *Plessy v. Ferguson*; rather, the *particular* result in both cases defined and created the meanings of Fourteenth Amendment "equality." Or, as Gadamer would have concluded, application of the law in each instance concretized the law's meaning; the meaning of any law, abstracted from its applications, is merely provisional. Each instance of applying the law is always its (re)interpretation and (re)creation.

CONCLUSION: ONTOLOGY BEATS THIS THEORY

The task of constitutional interpretation is to connect the Constitution and the traditions in which it is embedded with the world in which we live, to "fuse the horizons" of constitutional past with constitutional present. We cannot abandon the present for the past, as public-meaning originalism presupposes, because the present is already baked into the past. Nor can we cut loose the past from the present like those ubiquitous bogeys, the "living constitutionalists," because the past is also baked into the present. This problem is neither normative ("How *should* we determine constitutional meaning?") nor epistemological ("How *can* we determine constitutional meaning?"), but ontological ("What *is* constitutional meaning?"). Constitutional meaning necessarily combines, and *cannot do other than combine*, the effect of the past on our present concerns and the effect of those present concerns on our understanding of the very past that has shaped us in the present.

310. *Id.* at 495.

311. See Klarman, *supra* note 24, at 1931.

The rhetorical power of originalism is its claim that only originalists are virtuously applying objective method (“discovering constitutional meaning”), while nonoriginalists are tainted by dishonest subjectivity (“making it up”). But this dichotomy is false because the ontology on which it rests is false: original public meaning doesn’t exist. This leaves no room for the commonly voiced intermediate position that public-meaning originalism (or some other version) is, despite its flaws and limitations, “the best we can do” at ascertaining constitutional meaning.³¹² This position misses the ontological point: if original public meaning does not exist, then there is, quite literally, nothing to support the conclusion that public-meaning originalism yields results more faithful to the Constitution than non-originalist theories or, indeed, than flipping coins or throwing dice.³¹³

Meaning is not a fact fixed in the past unaffected by the present. Fixed constitutional meaning and the other purported objectivities in which new originalists wrap their theory are no less touched by interpretive subjectivity in the present than the interpretive approaches new originalists attack. Like all human inquiries into proper action in particular situations, constitutional meaning is not determined by a priori rule or objective method, but co-determined by the text and its traditions from the past, together with the constitutional, political, social, and other contemporary imperatives that always and already shape the judge and her case.

The failure of public-meaning originalists to defend the ontology of fixation leaves unanswered the hermeneutic claim that original public meaning simply is not “there” in the past to be found. It takes an ontology to beat an ontology, and new originalists haven’t got one.

312. See, e.g., McConnell, *Reply to Klarman*, *supra* note 276, at 1944. Several commentators on earlier drafts also suggested this position.

313. Originalist taunts notwithstanding, see *supra* text accompanying note 19, there exist plausible nonoriginalist theories of constitutional interpretation. See, e.g., STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 143–52 (2005); Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987). See generally PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (surveying nonoriginalist approaches to constitutional interpretation).