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INTERPRETATION, CRITIQUE, AND ADJUDICATION: THE SEARCH FOR CONSTITUTIONAL HERMENEUTICS

JOHN T. VALAURI*

INTRODUCTION: INTERPRETATION AND EDIFICATION

Some lessons are practical lessons. They cannot be learned simply by observation, but only through trial and error. For this reason, opportunities are not always what they appear to be. Sometimes they can provide not just knowledge, but also edification. Hence, the close relation of hermeneutics and the concept of *Bildung*.¹ Things turn out, just not as planned. This is what happened to me in preparing this Article. As a result, if successful, it is an example of interpretive cultivation as well as a study of interpretation. Let me, then, begin the story.

This Symposium, in general, and this Article, in particular, initially seemed to offer me the opportunity to link in a productive way two subjects of my longtime interest, not to mention occupation. Those two topics were Hans-Georg Gadamer's philosophical hermeneutics and American constitutional law and theory. I am certainly not the first to remark on the relevance of hermeneutics to the framers' intent debate in constitutional law.

My original, straightforward if not simpleminded, plan of exposition was to supplement this first point of contact between law and philosophy by adding a second—the debate over the possibility and efficacy of critique. I hoped, thereby, to create symmetrical, complementary discussions of the law and hermeneutics interface. I intended to do this through a description and comparison of two well-known debates in modern hermeneutics. The first was the debate between Hans-Georg Gadamer and Emilio Betti over romantic hermeneutics,² and the second was the debate between Gadamer and

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1. See HANS-GEORG GADAMER, TRUTH AND METHOD 9-19 (Joel Weinsheimer & Donald G. Marshall trans., Crossroad 2d rev. ed. 1989) (1960).

2. For Betti's contribution to the debate, see Emilio Betti, *Hermeneutics As the General Methodology of the Geisteswissenschaften* (Josef Bleicher trans.), in THE HERMENEUTIC TRADITION: FROM AST TO RICOEUR 159 (Gayle L. Ormiston & Alan D. Schrift eds., 1990).

Jürgen Habermas over hermeneutics and an emancipatory cognitive interest.³ Although each debate pursued different specific issues, in a larger sense they both dealt with important questions of the proper relative roles of author, tradition, text, interpreter, and critical standards in interpretation.

Encouragingly, these three hermeneutic positions—Betti's, Gadamer's, and Habermas's—virtually arrayed themselves on an interpretive continuum from most author-centered to most interpreter-based. My intent was, then, to offer Gadamer's philosophical hermeneutics as a happy medium between the two extremes of Betti's romantic hermeneutic overemphasis of the importance of the author in textual interpretation and Habermas's critical tilt toward the interpreter and extratextual interests. Betti and Habermas could then both be faulted for leaning too heavily on just one moment of the interpretive process (albeit on different ones) and Gadamer could then be praised for maintaining a more balanced intermediate position. For, if stability and flexibility are both important desiderata in interpretation, then Betti might be taken to task for too much favoring the first factor over the second and Habermas for the opposite vice, while Gadamer could be praised for keeping both elements in equipoise.

Next, I hoped to use these results to illuminate the interminable framers' intent controversy in American constitutional law (in its several forms). The two hermeneutic debates and the three positions could, I thought, be mapped onto the legal context. An analog of Gadamer's philosophical hermeneutics could then be used to critique modern theories of constitutional interpretation as Gadamer himself had earlier critiqued the approaches to interpretation of Betti and Habermas. I was encouraged here by Gadamer's belief that philosophical hermeneutics is descriptive, not prescriptive,⁴ that his account was ontological and not epistemological.⁵ I was further emboldened by his assertion of the exemplary status of law for hermeneutics.⁶

3. For Habermas's contribution to the debate, see, for example, Jürgen Habermas, *A Review of Gadamer's Truth and Method* (Fred R. Dallmayr & Thomas McCarthy trans.), in *THE HERMENEUTIC TRADITION: FROM AST TO RICOEUR*, *supra* note 2, at 213.

4. Gadamer famously says, "Fundamentally I am *not proposing a method*; I am describing what is the case." GADAMER, *supra* note 1, at 512.

5. See *id.* at 438-91.

6. Gadamer says, for example, "*In reality then, legal hermeneutics is no special case but is, on the contrary, capable of restoring the hermeneutical problem to its full breadth and so re-*

And, at first, this approach seemed promising. There is, despite some notable differences, a strong affinity between the romantic hermeneutics championed by Betti and the framers' intent or originalist views in constitutional law and theory.⁷ Likewise, Habermas's assertion of an emancipatory cognitive interest that transcends the text, and so provides critical distance from it, sounded much like the extratextual fundamental values approaches to judicial review advanced by noninterpretivist constitutional theorists.⁸

But there are also important differences between the legal and hermeneutical disputes here. These dissimilarities spring mainly from the varying purposes and demands of the practices of law and philosophy. These departures have two opposing effects. For at the same time that they underscore the centrality of application in understanding,⁹ they also tend to undercut Gadamer's assertion of the universality of hermeneutics¹⁰ and, thereby, to lend support to the divisions between different sorts of interests and modes of interpretation.

Lastly, I hoped that Gadamer's philosophical hermeneutics could then be employed to critique originalist and noninterpretivist theories in constitutional law in much the same way that he had used it against the views of Betti and Habermas. A warning sign, though, of trouble ahead for my grand plan was the near total absence of a constitutional hermeneutics in modern constitutional theory. While Francis Lieber's *Legal and Political Hermeneutics*¹¹ (which presented a theory of romantic hermeneutics) greatly influenced American law in the

establishing the former unity of hermeneutics, in which jurist and theologian meet the philologist."
Id. at 328.

7. The originalist school of constitutional interpretation insists on the priority of framers' intent in determining constitutional meaning. On the current Court, Justice Scalia has perhaps been the most articulate defender of this sort of view. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

8. One critic succinctly defines noninterpretivism as the view that "the judiciary has authority to constitutionalize values, such as fundamental principles of justice, not fairly inferable from the Constitution's text or structure." Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 3 (1981).

9. In opposition to earlier hermeneutics, Gadamer sees application as hermeneutically ubiquitous. He says, "[T]he primary thing is application." He then continues, explaining, We can, then, distinguish what is truly common to all forms of hermeneutics: the meaning to be understood is concretized and fully realized only in interpretation, but the interpretive activity considers itself wholly bound by the meaning of the text. Neither jurist nor theologian regards the work of application as making free with the text.

GADAMER, *supra* note 1, at 332.

10. See *id.* at 474-91.

11. FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS* (1839).

nineteenth century, it has no contemporary counterpart. And while a few hermeneuts interested in law and several legal academics schooled in hermeneutics have written on the topic,¹² there is really no identifiable hermeneutic party in current constitutional law and theory.

Still not deterred, I then thought that this difficulty could be rectified short of founding a school of constitutional hermeneutics. But this ambition was not so easily fulfilled. In order to map philosophical hermeneutics into the constitutional context, I first had to pin down its basic positive content and features. And this turned out to be far harder than it looked.

Setting out a distinctively hermeneutic account of interpretation proved far more difficult than merely deploying hermeneutic notions to critique other views concerning interpretation and understanding. The negative aspect of hermeneutics seemed almost, dare I use the word here, natural; the positive content of hermeneutics was, in contrast, quite elusive. So, while my original plan provided the title of this Article—interpretation, critique, and adjudication, this later embarrassment gave me its subtitle—the search for constitutional hermeneutics.

Ultimately, I arrived, somewhat chastened, at two alternative explanations for my predicament. Both go back to the two factors which first led me down this path. One is Gadamer's claim of the ontological, descriptive character of philosophical hermeneutics. The other is the exemplary status of law for hermeneutics. The first explanation for my predicament is that philosophical hermeneutics cannot do what I seek to have it do—help resolve the interpretive debates in constitutional theory—because it was never meant to be normative. The alternative explanation is that I have overlooked the evidence that a hermeneutic understanding always already informs constitutional practice and is hidden in plain sight. This evidence would lie, then, not so much in constitutional theory as in constitutional practice itself, in the constitutional common law.

That these alternative explanations of my quandary are so different arises, I think, out of the ambiguity of philosophical hermeneutics itself. For if, as Lawrence Hinman pointed out twenty

12. Both groups are represented in what is, I believe, the only collection of essays on the topic: *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* (Gregory Leyh ed., 1992).

years ago,¹³ when Gadamer claims that he is not putting forth a method of interpretation, but merely describing what always takes place in interpretation, he is faced with the following dilemma. On one hand, he may be stating what always inevitably happens when we try to understand or interpret. In this case, philosophical hermeneutics would not play a vital, salient role in understanding. It would lack a contrast class. We could not fail to do it. On the other hand, Gadamer could be describing what happens only in actual or successful understanding or interpretation and not in failed attempts. But in that case, his claims would be prescriptive, rather than descriptive, contrary to his insistent efforts to distinguish his approach from Betti's and Habermas's. In addition, he would have to, at least in a general way, sort out successful from failed attempts at understanding and explain the differences between them.

Moreover, hermeneutics, in this dilemma, would either be universal, but trivial, or significant, but limited in scope. In neither case would it offer the cogent, appealing alternative to competing accounts of understanding and interpretation in philosophy or law that first drew lawyers and philosophers like those contributing to this Symposium to Gadamer. And those other theories, then, would presumably retain or regain adherents that hermeneutics might have pried away from them. Gadamer, in his debate with Betti and elsewhere, declines opportunities to clarify his position so as to resolve the dilemma, or at least grasp one horn of it. One is left, as a result, with a lingering uncertainty over the application of his account of interpretation itself.

I. BLANCHE DUBOIS AND THE INTERPRETIVE CONTINUUM

It was then, in the moment of my greatest despair over my enterprise, that things began to fall into place, at least in two dimensions, as I realized that Gadamer was correct to resist or avoid the things I sought from him and, instead, to preserve a more open, questioning stance to interpretive issues. I say two dimensions because all the legal and philosophical views here, save Gadamer's, can be placed on an interpretive continuum, ranging from most author- or framer-centered at one end to the most interpreter-based at the other end.

13. Lawrence M. Hinman, *Quid Facti or Quid Juris? The Fundamental Ambiguity of Gadamer's Understanding of Hermeneutics*, 49 PHIL. & PHENOMENOLOGICAL RES. 512, 529 (1980).

The most author-centered view holds that, to paraphrase famous football coach Vince Lombardi, framers' intent is not the most important thing, it is the only thing in interpretation. So, for example, in constitutional law, Raoul Berger defends original intention against its critics,¹⁴ identifying this with the stricture that "words must be given the meaning they had at the time they were set down."¹⁵ Similarly, Betti, in criticizing Gadamer's views, distinguishes between the legal historian and the judge, arguing that it is only the latter, as the law applier, who must concern himself or herself with the transposition of historical meaning into the present context.¹⁶

Slightly less author-centered views supplement authorial or framers' intent with later input. In law this means adding respect for precedent to adherence to framers' intent.¹⁷ In Betti's hermeneutics, this means that in application, we see "the transposition of meaning from the original perspective of the author into the subjectivity of the interpreter."¹⁸

In constitutional theory, one finds a still less author-centered view of interpretation called moderate originalism. Rather than narrowly construe constitutional terms, it treats many provisions as open-textured.¹⁹ Pushing one step further are the doctrines of nonoriginalism, which "accord the text and original history presumptive weight, but do not treat them as authoritative or binding."²⁰ There is no analog to moderate originalism or non-originalism among the hermeneutic accounts we are examining here (not even Gadamer's philosophical hermeneutics, which is not a method of interpretation).

All the notions just canvassed claim, in one way or another, to be interpreting the text in question (for this reason they are called interpretivist theories in constitutional law). But there is an alternative approach when the text and the tradition it represents are

14. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 363-72 (1977).

15. *Id.* at 370.

16. See Betti, *supra* note 2, at 182-84.

17. Why? Justice Scalia says, "I can be much more brief in describing what seems to me the second most serious objection to originalism: In its undiluted form, at least, it is medicine that seems too strong to swallow. Thus, almost every originalist would adulterate it with the doctrine of *stare decisis*." Scalia, *supra* note 7, at 861.

18. Betti, *supra* note 2, at 184.

19. Paul Brest explains this view thusly, "The original understanding is also important, but judges are more concerned with the adopters' general purposes than with their intentions in a very precise sense." Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980).

20. *Id.*

inadequate or otherwise objectionable because they are unjust or the result of distorted communication. Appeal is made to some higher, usually transcendental, value or values. In constitutional theory, this involves the use of extratextual values.²¹ In our hermeneutic debate, this move occurs in Habermas's appeal to an emancipatory cognitive interest.²² This sort of approach is not author-centered at all, thus forming the terminal point on our interpretive continuum.

The interpretive continuum can also be used, without moving any of our markers, to measure the degree of constraint imposed upon the interpreter from most constrained at the author-centered end to most free at the transcendental end. Similarly, the poles can range from the most to the least psychological or epistemological. So, for example, the strict originalist Raoul Berger says things like, "A 'transcript of their minds' was left by the framers in the debates of the 39th Congress."²³ And the romantic hermeneut, Emilio Betti, bases interpretation on the "objectivations of mind" of textual authors.²⁴

Again, the continuum can be presented as an indicator of fidelity to or identity with the author in interpretation. And this is how Gadamer's philosophical hermeneutics, which has no fixed spot on the interpretive continuum, will relate to the other views. It will take a moderate, ambivalent approach to interpretation, not in the methodological sense (after all, it is not a method of interpretation), but rather in an ethical sense.

So, this Article will not end on a note of failure or resignation. Instead, it will suggest²⁵ an additional plank for the hermeneutic platform. What Gadamer's account of philosophical hermeneutics needs is a more prominent ethical mode to supplement the aesthetic and practical aspects it already presents. And that ethical perspective can be found in the same text that has already been such a rich source of inspiration to Gadamer—Aristotle's *Nicomachean Ethics*. Except that the suggestive provocation will now come from Aristotle's

21. See *supra* note 8 and accompanying text. This approach belies Gadamer's assertion that, "Neither jurist nor theologian regards the work of application as making free with the text." GADAMER, *supra* note 1, at 332.

22. Speaking of the critique of ideology, Habermas says, "The methodological framework that determines the meaning of the validity of critical propositions of this category is established by the concept of *self-reflection*. . . . Self-reflection is determined by an emancipatory cognitive interest." JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 310 (Jeremy J. Shapiro trans., Beacon Press 1971) (1968).

23. BERGER, *supra* note 14, at 372.

24. Betti, *supra* note 2, at 160.

25. But will not here have the space to do more than suggest. The development will have to come later.

account of friendship, rather than from his doctrine of practical reason. The interpreter as friend lies once more as a happy medium between two extremes, one futile and the other undesirable. All parties here would doubtless grant that historical texts are, in an important sense, orphans—their authors no longer present to speak for, defend, or explicate them. Hence, the futility of romantic hermeneutics (and of originalism in constitutional law). But when the author is gone, critics and noninterpretivists are little more than unfriendly strangers, objects of suspicion. And *A Streetcar Named Desire*'s Blanche DuBois shows us what happens when one attempts to survive by depending on the kindness of strangers.

II. AUTHOR! AUTHOR! OR, OBJECTIVITY AND INTERPRETATION

In the hermeneutic triad of author, text, and interpreter, there is a running danger that the deceased and distanced author will be slighted or overlooked altogether by the interpreter, who may wish, for selfish motives, to bend the text to his or her own purposes. To avoid arbitrary and subjective readings of texts, romantic hermeneutists like Betti therefore insist on the autonomy of the interpreted object.²⁶ Likewise, in constitutional law, originalists assert the primacy of framers' intent in determining the meaning of constitutional provisions in hard cases.

In Betti's hermeneutics, there can be no objectivity without an object. When the aim is to understand the other's meaning, this means that the interpreter must grasp the "objectivations of mind"²⁷ of the other. How? The gulf separating different consciousnesses is bridged reconstructively. He says, "[U]nderstanding is here the recognition and re-construction of a meaning—and with it of the mind that is known through the forms of its objectivations—that addresses a thinking mind congenial with it on the basis of a shared humanity."²⁸

In this way, the distance between the author and the interpreter is overcome and objective understanding is achieved. The meaning of the mind objectivated is thereby fixed on its own terms as "meaningful forms," independent of the interpreter's opinions and desires, and

26. Betti's first guideline for interpretation is "The Canon of the Hermeneutical Autonomy of the Object." Betti, *supra* note 2, at 164.

27. *Id.* at 160.

28. *Id.* at 163.

arbitrariness is avoided.²⁹ Without this fixed, final interpretation, Betti believes, there can be no objectivity.³⁰

What the interpreter does with these meaning-full forms, according to Betti, depends largely upon the aims the interpreter is pursuing.³¹ The historian and the judge, to take two examples relevant to our concerns here, would pursue the understanding of the same historical legal materials in different ways. The historian's task would aim at an end with the fixing of the meaning-full forms, the objectivations of the mind(s) that created the writings in question. The judge, in contrast, would have the further need to apply the meaning of the text to a current, pending case. Legal hermeneutics, then, for Betti would be a specialized branch of interpretation, one set apart by its own peculiar purposes and procedures.³²

Although he shares a triadic understanding and an interpretive focus with Betti, Gadamer would differ with him on almost every particular just discussed. And, in doing so, he would insist that he is not offering an alternative method of interpretation. Instead, he says, "I am *not proposing a method*; I am describing *what is the case*."³³

Rather than reify authorial intent, Gadamer presents it as a moment in the ongoing reciprocal process of interpretation.³⁴ He seeks critical distance and not unification as the route to understanding.³⁵ Truth and meaning emerge not from objectivations of mind, but from application in different cases over time. Textual meaning, as a result, is not fixed, but unfolds with new events.³⁶ From Gadamer's perspective, legal hermeneutics has an exemplary status within the study of interpretation,³⁷ and historical investigation and

29. *Id.* at 160.

30. *See id.* at 163-64.

31. *See id.* at 188-89.

32. *See id.* at 183-84.

33. GADAMER, *supra* note 1, at 512.

34. Gadamer insists that textual understanding requires the fusion of author's and interpreter's horizons in the ongoing process of application. *Id.* at 306-09.

35. He tells us, "The second mode of the experience of alienation is the historical consciousness—the noble and slowly perfected art of holding ourselves at a critical distance in dealing with witnesses to past life." Hans-Georg Gadamer, *The Universality of the Hermeneutical Problem* (David E. Linge trans.), in *THE HERMENEUTIC TRADITION: FROM AST TO RICOEUR*, *supra* note 2, at 147, 149.

36. Gadamer writes, "Historical knowledge can be gained only by seeing the past in its continuity with the present." GADAMER, *supra* note 1, at 327.

37. "Legal hermeneutics serves to remind us what the real procedure of the human sciences is. Here we have the model for the relationship between past and present that we are seeking." *Id.* at 327-28.

adjudication are not so different at all—they both seek, out of current concerns, to apply past historical texts in contemporary contexts.

I need not add that Betti will have none of this. He sees Gadamer's hermeneutics as leading to subjective arbitrariness, not historical truth. He accuses Gadamer of confounding the history of law with the application of law.³⁸ Gadamer's loss of object and, therefore, objectivity is not, he feels, compensated for by gains in interpretive self-awareness, if any.³⁹ Gadamer disrespects both author and text by acting like an investigative magistrate toward the historical sources, employing them merely as "an aid for arriving at a finding" and not an object of knowledge,⁴⁰ i.e., treating them as means and not as ends.

One might joke that this debate about understanding the other has been productive of very little understanding of the other (or his interpretive doctrines), except that the situation is no better in constitutional law (nor is it, I suspect, in other sorts of interpretive polemics). In constitutional theory, champions of framers' intent are often called originalists out of their adherence to the original meaning of the Constitution. Sometimes they are referred to as interpretivists because they see the constitutional text as the only legitimate basis for judicial review. These two terms, as we will see, are not identical but they do largely pick out the same group of individuals.

In constitutional theory, the desire for objectivity in interpretation is tied to the need to justify the exercise of judicial review. Joseph Grano, for example, writes, "When a judge engages in interpretivist constitutional review, objective sources of judgment exist."⁴¹ In contrast, he continues, "Were the issue over legitimacy otherwise close, noninterpretivism should nonetheless be rejected, because objective criteria to select these extra-constitutional sources of judgment do not exist."⁴² Why? Because these sources "inevitably reduce to the judge's personal preferences."⁴³

This quotation from Professor Grano will also serve to illustrate the quite different purposes of the constitutionalist and the hermeneut. While Betti the hermeneut seeks to capture the intent of the author, Grano the lawyer is more concerned with constraining the

38. Betti, *supra* note 2, at 183.

39. *Id.* at 181.

40. *Id.* at 185.

41. Grano, *supra* note 8, at 18.

42. *Id.* at 19.

43. *Id.*

discretion of the interpreting judge. Or, to put it another way, where Betti frets over interpretive subjectivity because it departs from truth, Grano seeks to cabin judicial power because of his fear of judicial arbitrariness.

This difference in concerns leads also to a different interpretive value structure. Betti seeks truth and objectivity, which he wishes to derive from re-cognition of the author's thoughts. Grano, instead, values constraint over truth and will employ convention to do this when epistemological truth is unknown and unavailable. In this, he is no different than other legal scholars.

To illustrate this, let me use an example from my teaching of constitutional law. As part of my introduction to the methodology of constitutional interpretation, I tell the following edifying joke (edifying here means that the joke does not have to be funny):

I was walking down Main Street the other day and spotted a friend in a new suit crawling in the gutter as if he were searching for something. "What ever are you doing?" I asked. "I'm looking for my ring," he replied. "Well, where did you drop it?" I asked. "Way over there in that dark alley," he continued. "Why, then, are you looking for it here on Main Street?" "Because the light is so much better here," he concluded.

As the class snickers, I then say, "In law, we don't act like my friend, do we?" To their denials, I respond,

Why, then, do we use *The Federalist* as a primary source of the intent of the framers of the Constitution, when it was written after the Constitutional Convention by three framers and was used for partisan political purposes—and then only in one state? And why, more generally, in seeking legislative intent in legal interpretation, do we rely on committee reports and the like usually written by staff rather than the legislators themselves (who often do not even see, let alone consider, the reports purporting to convey their intent)? Why? Because, we will take a substitute when we can't get the real thing. Such is the practical value of a proxy.

And in the contexts of our concerns here, should it surprise us that the more practical interpretive discipline is more concerned with, well, *practice*? The dirty little secret of hermeneutics is that clear, sufficient evidence of original intent is frequently lacking. This is especially true in theology and law, which interpret old texts with multiple authors and contested current meanings. The "objectivations of mind" Betti seeks present more an aspiration or a Holy Grail than a practically achievable goal.

This flaw is made manifest in the critique of originalism in constitutional law made by nonoriginalists such as Paul Brest.⁴⁴ The difficulties normally encountered in determining legislative intent (Whose intent counts? How do you sum up multiple intentions?) are exacerbated because of the limits of the historical record and because the framers and the adopters are different groups of people.

A further problem is caused by the conflict between what Brest calls the framers' specific intent (what they took the meaning of the documents' provisions to be) and their interpretive intentions (a second-order intent concerning the methods or rules of interpretation they wished future interpreters to follow).⁴⁵ A strong historical argument has been made that the framers' interpretive intent was that future constitutional interpreters disregard their specific intent and instead look for meaning within the four corners of the document.⁴⁶ The ensuing conflict between the two levels of framers' intent here makes a nonstarter of originalism.

This internal contradiction in constitutional originalism makes a virtue of what first seemed to be a weakness in Gadamer's philosophical hermeneutics—its nonmethodical ambiguity, its open and questioning character. For while Betti's romantic hermeneutics at first appears to provide a clear guide to objective interpretation, it runs headlong into the levels conflict problem in constitutional interpretation and offers no way out. Betti assumes the interpreter is after a single, objective source of meaning.⁴⁷ Instead, he is here confronted by many, contested sources. Gadamer's philosophical hermeneutics is undaunted by this conflict. This is because interpretive communities or traditions for Gadamer are constituted by common questions⁴⁸ rather than by shared beliefs or knowledge. The participants in the tradition partake in an ongoing conversation modeled on the Platonic dialogue.⁴⁹ As with families, conversation in a tradition can become argument.⁵⁰

44. See Brest, *supra* note 19, at 209-17.

45. On this distinction, see *id.* at 212.

46. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

47. See *supra* notes 26-32 and accompanying text.

48. Gadamer endorses Plato's "priority of the question in all knowledge and discourse." GADAMER, *supra* note 1, at 363.

49. See *id.* at 362-69.

50. Alasdair MacIntyre, for example, writes, "A tradition is an argument extended through time in which certain fundamental agreements are defined and redefined." ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 12 (1988).

Gadamer's view of hermeneutics is also superior to Betti's in dealing with the embarrassment of interpretive options on the interpretive continuum surveyed above.⁵¹ Betti can neither account for the variety of approaches nor adjudicate among them. Gadamer's account of tradition allows for this multiplicity and does not require us to choose among—after all, many voices make up the conversation of tradition.

III. CRITIQUE AND FUNDAMENTAL VALUES

Turning now to our second topic, let us inquire whether the Gadamer-Habermas debate similarly illuminates constitutional noninterpretivism, the opponent of the originalism we have just examined. There is a certain symmetry in the criticisms of Gadamer made by Betti and Habermas. Both disputes are intramural hermeneutic spats. They all reject positivism. Each claims to be more-hermeneutic-than-thou. The three writers accept the interpretive tradition of text, tradition, and interpreter.⁵² They differ in how they relate these terms and in the significance they give them in the overall process.

Both Betti and Habermas essentially accuse Gadamer of privileging tradition and marginalizing their favored element. So just as Betti objects that Gadamer fails to maintain the independence and importance of re-cognition and thereby jeopardizes objectivity in interpretation, Habermas feels that the primacy of tradition in philosophical hermeneutics undercuts the critical reflective capacity of the interpreter.

Gadamer's emphasis on tradition is part and parcel of his assertion, taken from Heidegger, of the "ontological shift of hermeneutics."⁵³ When conceptualized primarily as a process or event taking place in the minds of persons, hermeneutics inevitably takes on an epistemological, if not psychological, form. But Gadamer has changed the scene here so that our focus is not on the minds of men and women so much as it is on the history of speech communities. These manifest themselves to us as tradition, handed

51. See *supra* notes 14-25 and accompanying text.

52. See GADAMER, *supra* note 1, at 307-11 ("The Hermeneutic Problem of Application"); Betti, *supra* note 2, at 162-63 ("Interpretation as a Triadic Process"); Habermas, *supra* note 3, at 239 ("[H]ermeneutic self-reflection . . . overcomes the transcendental conception . . . of language.").

53. GADAMER, *supra* note 1, at 381-491.

down from persons and times past.⁵⁴ Gadamer does not cringe from the fact that traditions may consist more of prejudices than of reasoned judgments; in fact, he attempts to rehabilitate the discredited notion of prejudice.⁵⁵

Habermas is concerned here that ontological facticity not be taken as tantamount to political legitimacy, and that our openness to tradition not be an uncritical receptivity. He worries that this “shifts the balance between authority and reason.”⁵⁶ He asks, “But does it follow from the unavoidability of hermeneutic anticipation *eo ipso* that there are legitimate prejudices?”⁵⁷ Just in case the reader misses the rhetorical nature of the question, he later adds, “Gadamer’s prejudice for the rights of prejudices certified by tradition denies the power of reflection.”⁵⁸ Habermas asserts the existence of an emancipatory cognitive interest to forestall this evil.

One might say that Habermas worries that critical reflection will not even be able to get off the ground in a tradition-centered hermeneutics. In his response to Habermas, Gadamer may deny that he forbids us the ability to “break with tradition, to criticise and dissolve it,”⁵⁹ but neither does he explain how this criticism can happen. As a result, Habermas fears, systematically distorted communication will continue in society as power disparities are perpetuated. In addition to causing negative social consequences, this will serve to put the “*ontological self-understanding of . . . philosophical hermeneutic[s]*”⁶⁰ into question.

In constitutional theory, Habermas’s transcendental emancipatory cognitive interest finds its analog in the fundamental values theories of constitutional noninterpretivists, which assert that “the judiciary has authority to constitutionalize values, such as fundamental principles of justice, not fairly inferable from the

54. “At the beginning of all historical hermeneutics, then, *the abstract antithesis between tradition and historical research, between history and the knowledge of it, must be discarded.*” *Id.* at 282.

55. “[T]he prejudices of the individual, far more than his judgments, constitute the historical reality of his being.” *Id.* at 276-77.

56. Habermas, *supra* note 3, at 236.

57. *Id.*

58. *Id.* at 237.

59. HANS-GEORG GADAMER, *Introduction and Foreword to the Second Edition to TRUTH AND METHOD* (Garrett Barden & John Cumming trans.), in *THE HERMENEUTIC TRADITION: FROM AST TO RICOEUR*, *supra* note 2, at 198, 210.

60. Jürgen Habermas, *The Hermeneutic Claim to Universality* (Josef Bleicher trans.), in *THE HERMENEUTIC TRADITION: FROM AST TO RICOEUR*, *supra* note 2, at 245, 265.

Constitution's text or structure."⁶¹ These values, in both cases, are, initially at least, negatively defined as not being part of received intent or tradition. Because they can claim no pedigree, their justification must be substantive, deriving from their inherent rightness.

Functionality is the term frequently used in constitutional theory to describe the prime virtue of noninterpretivism. In areas like affirmative action and abortion rights, framers' intent and precedent have given progressives the "You can't get there from here" sort of message they disdain. Fundamental values, in contrast, offer them a direct path to the case results they seek by upholding both practices.

The problem with this view is that functionality is in the eye of the beholder; its pull is proportional to the desire for the result in question. The fact that fundamental values theories of adjudication ease the path to pro-affirmative action and abortion rights decisions is a mark against those views from the perspective of the defenders of tradition. And without the argument of functionality, the lack of legal pedigree sorely counts against noninterpretivism from the interpretivist perspective, too.

Let us take a brief look at some objections lodged against noninterpretivism in constitutional theory debates, because they throw light on the debate just discussed between Gadamer and Habermas over critique and tradition. These objections all deal with noninterpretivism's rhetorical weaknesses as a mode of justification in constitutional adjudication.

The primary objection by critics of noninterpretivism is the impossibility of discovering (i.e., justifying) fundamental values choices. A leading writer, John Ely, spends a chapter in his book on constitutional theory rounding up the usual suspects (judge's own values, natural law, neutral principles, reason, tradition, consensus, and predicting progress) and finding them wanting.⁶² The reason for the failure of this search is summed up by Joseph Grano in this way: "[O]bjective criteria to select these extra-constitutional sources of judgment do not exist."⁶³ Why not? Because all the likely candidates "inevitably reduce to the judge's personal preferences."⁶⁴ This, in

61. Grano, *supra* note 8, at 3.

62. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 43-72 (1980).

63. Grano, *supra* note 8, at 19.

64. *Id.*

turn, leads to a second objection—that noninterpretive judicial review is undemocratic.⁶⁵

The most straightforward and, for our purposes here, relevant objection to noninterpretivism is that it is an oxymoron.⁶⁶ As one commentator notes, if one did not know better, “one might have supposed that its use was limited and purely pejorative, a mere epithet.”⁶⁷ Noninterpretivism, it turns out, is not a theory of constitutional interpretation at all.

For these reasons and others, noninterpretivism has lost favor in constitutional theory, so that it now enjoys little of the acceptance it found twenty years ago. But that does not mean that originalism occupies the field without opposition in contemporary constitutional theory. No, its old (formerly noninterpretivist) critics have simply made an interpretive turn to nonoriginalism as their favored approach to constitutional theory.

And the rhetorical superiority of nonoriginalism to noninterpretivism points to an adjudication of the Gadamer-Habermas debate. Because it is avowedly within the tradition and conversation of constitutional theory, nonoriginalism is inoculated against the charges rehearsed above that proved so harmful to noninterpretivism. In addition, it is positioned to benefit from the difficulties in making originalism workable.⁶⁸

The superiority of nonoriginalism can be explained in quite Gadamerian terms here. In order to win the game of adjudication, it is necessary to be a player in the game. As Allan Hutchinson tells us—“it’s all in the game.”⁶⁹ The “game” of adjudication is, in MacIntyre’s terms, a tradition made up of running arguments revolving around perennial constitutional questions.⁷⁰

Most relevant here is Gadamer’s close association of hermeneutics and rhetoric,⁷¹ on the one hand, and of hermeneutics and the

65. See, e.g., ELY, *supra* note 62, at 4-7.

66. See Richard B. Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 NW. U. L. REV. 1435, 1439 n.26 (1984).

67. William Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 217 n.27 (1983).

68. See *supra* notes 44-46 and accompanying text.

69. ALLAN C. HUTCHINSON, *IT’S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION* (2000).

70. See MACINTYRE, *supra* note 50, at 12.

71. He bemoans, for example, “the lack of recognition of the fact that hermeneutics and rhetoric share this area, the area of convincing arguments.” Hans-Georg Gadamer, *Reply to My Critics* (George H. Leiner trans.), in *THE HERMENEUTIC TRADITION: FROM AST TO RICOEUR*, *supra* note 2, at 273, 292.

questionable,⁷² on the other. Together, they open up a space for questioning and critique *within the tradition*. Habermas's critique (and the nonoriginalist's, too) is an external critique. It has no purchase within the tradition. It can be efficacious only as a vehicle for conversion. And even as a spur to revolution, it may well be inferior, rhetorically and otherwise, to internal hermeneutical questioning.

CONCLUSION

Looking back on my original plan in this Article to search for a constitutional hermeneutics through an examination of the Betti-Gadamer and Gadamer-Habermas debates in hermeneutics and the framers' intent and nonoriginalism debates in constitutional theory, I see now that my goal has been (at least provisionally) accomplished, but not at all in the way that I then intended. Because, at the outset, I did not see that it could not be achieved in the way that I then desired. Philosophical hermeneutics is not the best of the methods of interpretation. It does not have a discrete place on the interpretive continuum. It is instead a philosophical critique of methods of interpretation, a way of edifyingly questioning these methods.

At one point, constitutional hermeneutics seemed to be simultaneously nowhere and everywhere. And so it turned out to be. It cannot exist as a discrete method of constitutional interpretation, but it always already exists as a possible space for questioning interpretive methods and moves within the tradition of constitutional adjudication and interpretation.

In the end, then, the hermeneutic debates have been rendered more concrete through comparison with the constitutional disputes. Likewise, the constitutional disputes have been illuminated by the hermeneutic debates. And the universality of hermeneutics is the only thing that is not questionable.

72. "The real power of hermeneutical consciousness is our ability to see what is questionable." Gadamer, *supra* note 35, at 154.

