

As time goes by: Hermeneutics and originalism

“As time goes by”: hermenêutica e originalismo

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Abstract

What is the continuing relevance of hermeneutics to legal theory in general and to constitutional theory in particular if we are all originalists now? Both seem to be vital despite the decline of interest in hermeneutics recently. This article argues for the continuing relevance of hermeneutics to both fields because of the centrality of issues of application and practical reasoning in both. Law seeks to find the meaning of texts applied over time; legal texts are truly letters of transit. That we are all originalists, yet still have the same sort of interpretive debates we have always had, only indicates the continuing need to work on hermeneutic questions of application and practical reasoning. These issues are explored in the context of the Dworkin/Scalia discussion of the distinction between expectation and semantic originalism.

Key words: originalism, hermeneutics, constitutional theory, legal interpretation.

Resumo

Qual é a relevância contínua da hermenêutica para a teoria jurídica em geral e para a teoria constitucional em particular se todos nós somos originalistas agora? Ambas parecem ser vitais, apesar do recente declínio de interesse pela hermenêutica. Este artigo discorre sobre a relevância contínua da hermenêutica para ambos os campos devido à centralidade das questões de aplicação e raciocínio prático em ambos. O direito procura encontrar o significado dos textos aplicados ao longo do tempo; textos legais são verdadeiramente cartas de trânsito. O fato de que nós somos todos originalistas, mas ainda temos o mesmo tipo de debates interpretativos que sempre tivemos, somente indica a necessidade contínua de trabalhar em questões hermenêuticas de aplicação e raciocínio prático. Estas questões serão exploradas no contexto da discussão Dworkin/Scalia a respeito da distinção entre expectativa e originalismo semântico.

Palavras-chave: originalismo, hermenêutica, teoria constitucional, interpretação legal.

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Introduction

This short article calls for a second look at the relevance of Hans-Georg Gadamer's philosophical hermeneutics to current controversies in interpretive theory and in legal/constitutional theory. A generation ago hermeneutics spoke to issues in these fields dealing with positivism and intentionalism in interpretation. At that time, hermeneutics helped explain the inadequacies of interpretation based on plain meaning and/or the intent of the author or framers of texts. However, these discussions of and citations to Gadamer and other hermeneutists, once common, have since all but vanished from the literature.

Why has hermeneutics thus faded from these discussions? This has happened, in part, because the issues it once spoke to now appear to have been dealt with and passed over and, in part, because of criticisms of Gadamer's account of philosophical hermeneutics. For these reasons, it is not at all clear what hermeneutics has left to say in today's debates in these areas. In interpretive theory, for example, Derrida has questioned the possibility and efficacy of the "good will to power" assumed in the hermeneutic approach (Derrida, 1989, p. 52) and Habermas has charged that, "Gadamer's prejudice for the rights of prejudices certified by tradition denies the power of reflection" (Habermas, 1977, p. 335).

Likewise, in constitutional theory, "We are all originalists, now!" That is to say, we all believe that the constitution ought to be interpreted according to its original public meaning. Unfortunately, we disagree as much as we did before our "agreement" as to how this meaning is to be determined and hermeneutics does not seem able to help us choose among the varieties of originalism that compete for our allegiance. In order to command our attention once again, hermeneutics must speak to and help us resolve these current concerns. Can it? Yes, by getting back to some fundamental hermeneutic paradigms.

"Hermeneutics," Gadamer tells us, "is the art of agreement" (Gadamer, 1990, p. 273). It seeks this agreement through understanding between different time horizons, between text and interpreter, and among interpreters. "Hermeneutic philosophers," Hoy tells us, "usually engage in constructing theories sufficiently general to account for all kinds of interpretation [.]" (Hoy, 1985,

p. 136). Two important issues arise from these basic claims and aims. One is "whether these disciplines share a common conception of understanding and interpretation" (Hoy, 1985, p. 136), which Gadamer and Hoy assume, or at least hope. The second is whether hermeneutics is descriptive or a normative practice – that is, whether it aims to describe what necessarily or always happens in interpretation or rather what should happen.

This article will explore these questions in two contexts as they have evolved over the past generation or so. The first is the context of general interpretive theory construction which Hoy refers to above (which we may call "general hermeneutics") and the second is the context of the framers' intent/originalism debate in American constitutional theory (which we may call "constitutional hermeneutics"). Both fields have seen a decreasing interest in Gadamerian philosophical hermeneutics over that time span for reasons largely relating to the important issues mentioned above.

My aim here in a second look at hermeneutics is to examine some debates and developments in these fields to mutually illuminate and evaluate the claims and nature of each. The route to the renewed relevance of hermeneutics in these fields, I will argue here, lies in what Gadamer calls "the recovery of the fundamental hermeneutic problem."² This "back to basics" move means doubling down³ on three hermeneutic paradigms—the process of application (Gadamer, 1989, p. 307-311), Aristotle's notion of practical wisdom (Gadamer, 1989, p. 312-324), and legal hermeneutics (Gadamer, 1989, p. 324-341), which constitute what might be called the Aristotelian face of philosophical hermeneutics at the expense of its universal, linguistic, and ontological aspects, which may be called the Heideggerian face of hermeneutics. In doing this, we pull back from Gadamer's well-known assertion that, "Fundamentally I am *not proposing a method*; I am describing *what is the case*" (Gadamer, 1989, p. 512). This statement encapsulates the ontological or descriptive aspect of hermeneutics, while the three fundamental elements treated here emphasize the normative and practical aspect. Is this hermeneutic heresy? No, it is rather application and evolution while maintaining fidelity to the fundamental claims and the perennial problems of the practice that has always characterized the development of hermeneutic theory.

² This is, of course, the title of a central section of Gadamer's *Truth and Method* (see Gadamer 1989, p. 307-341).

³ "Doubling down" is a gambling term which has filtered into other, not unrelated, fields, especially politics and journalism. One glossary defines "double down" in this way: "In blackjack, it is the player's option to double their original bet in exchange for receiving only one more card. To do this the player turns over their first two cards and places an equal bet alongside the original bet." Available at: <http://www.casino-on-line-glossary.co.uk/gambling-advice/d/double-down.html>.

Constitutional hermeneutics

Letters of transit

The differences between the positions and theories discussed in the article are often subtle and abstract. As an expository device, then, I have taken as my title a famous song, *As Time Goes By*⁴, which is most commonly associated with a famous movie, *Casablanca* (Koch, 1973, p. 109). The song title is contained in the song's best-known lyric, "The fundamental things apply, as time goes by." In discussing hermeneutics and interpretation, I shall return to this lyric three times in the course of this article, not because its meaning is clear, but rather because it is ambiguous. Of the multiple readings of this lyric, I will examine three in this article. In this section on constitutional/legal hermeneutics the focus is one reading of this lyric—that according to the theory of meaning and interpretation, there is always a settled, core meaning and applications which can vary from case to case.

This idea was well captured in American constitutional law by Justice Sutherland in 1926 when he wrote, "[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation" (see *Euclid v. Ambler Realty Co.*, 1926, p. 387). This separation between meaning and application, philosophical hermeneutics counter, cannot be maintained. As Hoy puts the point, "Understanding is always already interpretation, Gadamer maintains, and interpretation is always already application."⁵

From Sutherland's perspective the meaning of the Constitution is also fixed, in large part, by the intent of the constitutional framers and adopters, "[T]he whole aim of construction, as applied to a provision of the Constitution, is [...] to ascertain and give effect to the intent of the framers and the people who adopted it."⁶ This view of constitutional interpretation has come to be known as strict intentionalism (see Brest, 1980, p. 204) or interpretivism.⁷

A generation ago this strict intentionalism or interpretivism competed with a view, not surprisingly, called noninterpretivism, defined by Ely as "the contrary view that courts should... enforce norms that cannot be discovered within the four corners of the document" (Ely, 1980, p. 1). Typically, this involves a moral, rather than a textual or historical, reading of the provisions of the constitution, which is to say applying some theory of equality, liberty, or fairness to the abstract values embodied in the open-ended clauses of the document. Nonoriginalists also often employ the metaphor of the living constitution, in contrast to the dead hand of the framers that is part of originalism.

Turning to the movie *Casablanca* once again, recall that many of the characters in that movie sought letters of transit to get themselves out of Casablanca and ultimately to the United States. Let us take up this phrase here and employ it to articulate the hermeneutic critique of the interpretivism/noninterpretivism debate of a generation ago to make the point that both views overlook the important hermeneutic point that eminent texts like the Constitution are themselves letters of transit bridging the temporal, historical distance between the time of adoption and the present day and, for this reason, have a history, tradition, and trail of precedent which condition their meaning and application.⁸ These positions neglect this hermeneutic point and assume either, in the case of originalism, that this distance can be objectively and completely bridged, or in the case of nonoriginalism, that it need not be bridged at all—Justice Brennan, for example, spoke of "contemporary ratification" of the constitution in opposing the first wave of originalists (Brennan, 1985-1986, p. 433).

To state the hermeneutic critique of originalism in terms of dueling metaphors, one might say that originalism, like romantic hermeneutics before it, sees textual interpretation as a matter of reproducing the thoughts of the framers, of getting inside their heads, seeking, as Gadamer states it, to "*understand a writer better than he understands himself*" (Gadamer, 1989, p. 192). Gadamer's hermeneutic approach, in contrast, sees interpretation as a form of conversation, a back and forth of question

⁴ The song was written by Tin Pan Alley songwriter Herman Hupfeld and first appeared in the short-running 1931 Broadway show *Everyone's Welcome*. For more on the song and its history (see Steyn, 2008, p. 172-178).

⁵ See Hoy (1985, p. 139). Gadamer (1989, p. 308) himself says, "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."

⁶ In these sense, see *Home Bldg. & Loan Assn. v. Blaisdell* (1934, p. 398) (Sutherland, J., dissenting).

⁷ Ely (1980, p. 1). Which John Ely described as the view that, "[J]udges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."

⁸ Hoy (1985, p. 147). As Hoy remarks, "Central to hermeneutic theory, but most susceptible to the charge of historical relativism, is the thesis that the interpretation of a work is invariably conditioned by the prior history of effects of that work."

and answer, on the model of the Platonic dialogues (see Gadamer, 1989, p. 362-369) Gadamer's approach recognizes, but attempts to bridge, the distances between writer/framer and interpreter.⁹

Originalism, seemingly, fails as a theory of constitutional interpretation on several fronts. First, at least in its strict intentionalist form, it requires us to discover psychological information about the framers that may be unobtainable today and then it asks us to combine this psychological information into a group intent that may well have never existed.¹⁰ Second, even if this group intent can be divined, it may well produce case results which are today unacceptable.¹¹ Originalism is embarrassed by reprehensible decisions with originalist elements, such as the *Dred Scott* case¹² while it implausibly argues for originalist justifications for universally accepted decisions, such as *Brown v. Board of Education*,¹³ which have little evident originalist underpinning. Ironically, the *Brown* opinion itself presents a better hermeneutic parry of originalist objections to its result than does the secondary literature in the law reviews. Confronting evidence of discriminatory intent on the part of the framers, Chief Justice Warren says simply, "[W]e cannot turn the clock back to 1868 when the amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."¹⁴ Alexander Bickel adds the gloss that the Court's language presents "an awareness on the part of the framers that it was a *constitution* they were writing, which led to a choice of language capable of growth" (Bickel, 1955, p. 1-63).

Nonoriginalism failed simply because it was an oxymoron—constitutional theory is concerned with constitutional interpretation which nonoriginalism, by its very definition, is not.¹⁵ This resulted, as we shall see,

not in the death of this view, but rather, a morphing of it into varieties of originalism!

We are all originalists now!

Reports of the death of originalism (and nonoriginalism, for that matter) have turned out to be, despite the various shortcomings of these theories, quite premature. True, one hears few proponents of strict intentionalism nowadays. And many former nonoriginalists make at least a show of paying attention to the constitutional text. One important thing has changed, though. Many of the old disputes continue, it is true, but they do so under the umbrella of originalism. So, commentators can now say with little exaggeration that, "We are all originalists now!"¹⁶ But along with this expansion of originalism has come a Balkanization (not to mention a Balkinization¹⁷) of that constitutional theory. No longer is there a sharp line separating originalism and living constitutionalism. Some writers even combine the two theories into aspects of one theory (Colby and Smith, 2008). Jack Balkin, for example, now holds that, "[T]he debate between originalism and living constitutionalism rests upon a false dichotomy" (Balkin, 2007, p. 291). This error, according to Balkin, is brought about by a conflation to two quite different things—"the *original meaning* of the constitutional text as opposed to its *original expected application*" (Balkin, 2007, p. 291).

A generation ago, originalists and nonoriginalists differed over whether or not one should give "binding authority to the text of the Constitution or the intentions of its adopters" (Brest, 1980, p. 204). In the current debate, originalists generally hold that, "a judge committed to the original understanding requires [...] that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise."¹⁸

⁹ Dworkin (1986, p. 62). Ronald Dworkin praises Gadamer, "whose account of interpretation as recognizing, while struggling against, the constraints of history strikes the right note."

¹⁰ For an influential diagnosis and description of these difficulties with strict originalism (Brest, 1980, p. 204).

¹¹ Scalia (1989, p. 849-861). As Justice Scalia notes, "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*."

¹² *Dred Scott v. Sandford* (1856, p. 393) (upholding slavery in the territories and denying the citizenship of African-Americans).

¹³ 347 U.S. 483 (1954) (declaring racial segregation in the public schools unconstitutional). For an article developing these points about both cases. see Burt (1989, p. 1).

¹⁴ 347 U.S. at 492-93.

¹⁵ For a pointed statement of this argument, see Van Alstyne (1983, p. 217).

¹⁶ Google the phrase and you will even get hundreds of hits. It is even used sarcastically--the ultimate proof that it has passed into general usage. See Conway and McIntosh (1999) (mocking the White House's portrayal of Judge Sotomayor as a "nonideological and restrained judge" in a memo sent to Republican senators during her Supreme Court confirmation hearings).

¹⁷ Fleming (2007, p. 10). I owe both the phrase and the pun to James Fleming, who when commenting on both the fracturing of the enlarged originalist camp and the recent entry of longtime living constitution proponent Jack Balkin (whose blog is called Balkinization) into the originalist fold said, "[W]e are all originalists now. Indeed, we are witnessing the Balkanization of originalism (as well as the Balkinization of it)."

¹⁸ Bork (1990, p. 162). As evidence of the congeniality of this definition to contemporary originalists, Fleming (2007, p. 12-13) gives the quotation and asks readers to guess from a list of originalists of various stripes who the author was.

They differ, however, over the content, derivation, and explication of that “major premise.” This will involve an examination of the original meaning/original expected application made by Balkin and others, which is not new with Balkin, but rather goes back to early critics of originalism a generation ago. Paul Brest, for example drew a similar distinction between strict and moderate originalism in 1980 (Brest, 1980, p. 222-224). Brest’s strict originalism tracks Balkin’s expected application originalism, while his moderate originalism (which looks at the general purpose of a constitutional provision rather than its expected application) parallels Balkin’s original meaning originalism, something which is not clear from the name Balkin gives it.

Putting the matter more clearly still, Balkin describes his interpretive approach as “the method of text and principle” (Balkin, 2007, p. 294). But even this description leaves important questions (e.g., how to derive and apply principle) unresolved. To pursue this matter further, we turn to much the same distinction discussed by Antonin Scalia and Ronald Dworkin as the distinction between semantic originalism¹⁹ and expectation originalism.²⁰ Dworkin draws this distinction in response to Justice Scalia’s statement that, “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*” (Scalia, 1997, p. 3-17).

The purpose of Dworkin’s proffered distinction between semantic and expectation originalism is not to reject Scalia’s statement of approach, but rather to get him to further clarify and specify it. How would the two differ in practice? The example Dworkin gives is the constitutionality of public school segregation under the Equal Protection Clause of the Fourteenth Amendment (the focus of the *Brown v. Board of Education* case). Expectation originalism would uphold the constitutionality of public school segregation because “[T]he majority of the members of Congress who voted for that amendment did not expect or intend it to have that consequence: they themselves sustained racial segregation in the schools of the District of Columbia” (Dworkin, 1997, p. 119). But their semantic intention, what they actually said, (“equal protection of the laws”) leads to the contrary result.

Dworkin next offers “two clarifying translations” of semantic originalism—actual practices of the day and abstract principle (Dworkin, 1997, p. 120). Justice Scalia accepts Dworkin’s distinction between expectation and

semantic originalism and agrees that they are both semantic originalists (Scalia, 1997, p. 144). But he rejects Dworkin’s “two clarifying translations” as a distortion of views like his. His view, he says, is based not on the practices of the day, but rather it is “rooted in the moral perceptions of the time” (Scalia, 1997, p. 145).

The difference between the two men can be best further explained in terms of an earlier distinction drawn by Dworkin in his discussion of constitutional interpretation—the distinction between concepts and conceptions (Dworkin, 1978, p. 134-136). The use of this distinction is to differentiate between a theory like Scalia’s which holds that a constitutional provision embodies a particular conception or version of a moral concept (in the *Brown* example, Scalia holds the Equal Protection Clause embodies the view of equality “rooted in the moral perceptions of the time.”) and a theory like Dworkin’s which holds that the clause embodies the best moral/political theory of equality we have today. This disagreement is the central issue of the current originalism debate, at least for our purposes here, and is an important issue I seek to explore in the remainder of this article.

Dialogues with the dead

Before suggesting a way of hermeneutically adjudicating the disagreement between Scalia and Dworkin over their conflicting versions of semantic originalism, let us briefly examine two criticisms of Gadamer’s philosophical hermeneutics that complicate the task of using his dialogic approach for this purpose. For even if it is granted that the dialogic or reciprocal approach to constitutional interpretation on offer from philosophical hermeneutics answers several difficulties raised by an originalist account of constitutional interpretation, especially in its strict intentionalist interpretive form, hermeneutics nevertheless has serious problems of its own. One significant problem of the conversational hermeneutic model is that it is not and cannot be truly conversational when applied to old, eminent texts such as the Constitution. In a normal conversation there are two or more interlocutors present and each is able to hold up his own side in the verbal give and take of actual conversation. Interpretation of old, eminent texts on the hermeneutic model is, in contrast, a dialogue with the dead. There can be no true exchange of thoughts,

¹⁹ As Dworkin (1997, p. 115-119) defines it, semantic originalism “insists that the rights-granting clauses be read to say what those who made them intended them to say.”

²⁰ “Which holds that these clauses should be understood to have the consequences that those who made them expected them to have” (Dworkin, 1997, p. 115-119).

no questioning from the other, no critical resistance because there is only one live speaker.²¹

What does this mean? Let me answer with another cinematic illustration: in *Casablanca*, when Rick, the protagonist, asks to speak to Signor Ugarte, the man who first stole the letters of transit by killing the German couriers who were carrying them and was himself then arrested by the Germans, the German Major Strasser replies, “You would find the conversation a trifle one-sided. Signor Ugarte is dead” (Koch, 1973, p. 109). The dialogic problem we confront in the remainder of this article is how to prevent the hermeneutic interpretive conversation from becoming “a trifle one-side” itself. Without an adequate answer to this question, the conversational metaphor will not carry us very far. A theory, it seems, is only as good as its metaphors. The metaphors in the theory of interpretation apply mainly to explaining and working through the tensions between values of flexibility and constraint and fidelity and a critical perspective. In a successful actual conversation, the interlocutors work this out as they go between themselves. The interpreter of eminent texts must perform both roles, it seems, herself.

In this part of the article, I will look at the effect of the “trifle one-sided” conversation of interpretive theory by looking at criticisms of Gadamer’s hermeneutics raised by Jacques Derrida and Jurgen Habermas.²² They both flow from a second possible understanding of my title lyric, “The fundamental things apply, as time goes by.” This reading springs from Gadamer’s assertion that, “Fundamentally I am *not proposing a method*; I am describing *what is the case*” (Gadamer, 1989, p. 512). The reading concludes from the lyric and the assertion that hermeneutics just happens, that the fundamental things will always already apply without any particular skill or effort. Put this way, Gadamer’s assertion seems to be an exaggeration, at best. Derrida’s main criticism here is that any agreement that arises out of this hermeneutic dialogue with the dead is little more than the concealed will of the (live) interpreter. Habermas’ primary criticism is that, because of its focus on dialogic agreement, hermeneutics cannot achieve sufficient critical distance and attitude.

In Jacques Derrida’s 1981 “encounter”²³ with Gadamer, he posed three questions to the hermeneut. All

three revolve around the notion of good will and its role in interpretation. In the first question Derrida asks, “What is the will if, as Kant says, nothing is absolutely good except the good will?” (Derrida, 1989, p. 52). In the second he asks, “What to do about the good will—the condition for consensus even in disagreement—if one wants to integrate a psychological hermeneutics into a general hermeneutics?” (Derrida, 1989, p. 52). And in the third he says, “[O]ne needs to ask whether the precondition for *Verstehen*, far from being continuity of *rapport* [...] is not rather the interruption of *rapport*, a certain *rapport* of interruption, the suspending of all mediation?” (Derrida, 1989, p. 53). After these questions concerning good will, Derrida concludes, “I am not convinced that we ever really do have this experience that Professor Gadamer describes, of knowing in dialogue that one has been perfectly understood or experiencing the success of confirmation” (Derrida, 1989, p. 54).

The sum of Derrida’s questions and conclusion is a denial that Gadamer actually describes “what is the case” in interpretation, but only what might occur in some ideal, perhaps unattainable, situation, one limited to the presence of the only absolutely good thing, the good will. This amounts to a denial of the ontological and universal claims (i.e., the Heideggerian face) of philosophical hermeneutics. Derrida presents psychoanalysis as a counterexample to Gadamer’s picture of hermeneutics as the art of agreement. In psychoanalysis, the analyst is presumably not seeking to come to understanding and agreement with the patient, but something quite the contrary—to get the patient to see the distortion in their own beliefs.

Likewise, Habermas doubts the universality of hermeneutic understanding while presenting a psychoanalytic counterexample. He charges that, “Hermeneutic consciousness remains incomplete as long as it does not include a reflection upon the limits of hermeneutic understanding” (Habermas, 1980, p. 181). For Habermas, the prime limit on hermeneutic understanding is posed by what he calls “systematically distorted communication.”²⁴ He points to Freud’s account of psychoanalysis as an example of this limit.²⁵

²¹ “[T]here are problems of interpretation because the relation writing-reading is not a particular case of the relation speaking-hearing in the dialogic situation” (Ricoeur, 1974, p. 95).

²² I will be discussing only one main criticism from each theorist, the one I take to be most telling and most important, rather than all the criticisms they make of Gadamer, which, especially in Habermas’ case, are extensive.

²³ Derrida (1989, p. 52). The editors of the English translation of the proceedings refer to “the problematical phenomenon we have called ‘the Gadamer-Derrida encounter.’” The editors speak in this way because the interchange between Gadamer and Derrida can scarcely be called a debate, let alone a conversation, because of their failure to join issue.

²⁴ “This hermeneutic consciousness proves inadequate in the case of systematically distorted communication: incomprehensibility is here the result of a defective organization of speech itself” (Habermas, 1980, p. 191).

²⁵ “Freud has drawn on the experience of systematically distorted communication in order to demarcate a sphere of specifically incomprehensible expressions” (Habermas, 1980, p. 191).

The point of the use of psychoanalysis by Derrida and Habermas to demonstrate the limitations of Gadamer's philosophical hermeneutics as a vehicle of insight and critique is perhaps most simply and effectively summarized by a 2007 Mankoff cartoon (*The New Yorker*, 2007, p. 92), in which at the end of a session a forlorn patient is sitting at the edge of the couch. The notepad holding analyst leans forward to him and says to the patient, "Look, making you happy is out of the question, but I can give you a compelling narrative for your misery."

Doubling down

The grand issue in legal and constitutional interpretation is always how to go forward and apply the law or constitution to the next case in a manner that demonstrates fidelity to text and tradition while, at the same time, paying sufficient attention to both larger values and the particular facts and circumstances of the case. Interpretation must be able to identify the underlying relevant principles and implement them at the proper level of generality and with the proper respect for tradition and precedent. Stated simply, interpretation is always a question of judgment. Judgment, in turn, is a matter of experience and virtue, rather than of method or rote application of rules. But how can judgment help us decide between the "two clarifying translations" concerning which Dworkin and Scalia disagree and can it answer the charges of bad will and lack of critical dimension that Derrida and Habermas raise?

The answer lies in a getting back to basics in hermeneutics or, as Gadamer puts it, "the recovery of the fundamental hermeneutic problem" (see Gadamer, 1989, p. 307-341). More specifically, this means doubling down on the centrality of application, Aristotle and law in hermeneutics. These constitute the core or fundamental problematic for Gadamer. It might be useful to consider why this is so. Why these three and not, say, literature, art, or history (or psychoanalysis, for that matter)?

Application, Aristotle, and law share several important features which underlie Gadamer's account of

philosophical hermeneutics, features which are not so prominent, if they are present at all, in other interpretive fields discussed by Gadamer and other hermeneutists. Above all, they are practical. Because of this, they are action-guiding²⁶. They are not merely verbal or theoretical. For this reason, they are present-oriented²⁷ and not merely historical in focus. They are holistic, concerned with the general and the particular, rules and ends, not giving absolute priority to any element. They are also holistic because they are self-interpretive, that is, they involve and effect not only the particular decision or act in the particular instant case or situation, but rather the larger self-understanding of the individual and social group.

Application is necessary simply because hermeneutic interpretation is unlike normal conversation. Gadamer recognizes this point²⁸ and answers the "dialogue with the dead" problem with these hermeneutic fundamentals, which is not say that they are foolproof, but rather that they are the models to follow if one wishes to interpret well.

While application requires judgment, judgment in turn requires practical wisdom and virtue. This is where Gadamer's discussion turns from application to Aristotle, who explains the interrelation of practical wisdom, virtue and character.²⁹ Gadamer sums it up in this way, "[T]he basis of moral knowledge in man is *orexis*, striving, and its development into a fixed demeanor (*hexis*). The very name 'ethics' indicates that Aristotle bases *arête* on practice and 'ethos'" (Gadamer, 1989, p. 312). According to Aristotle, moral knowledge and virtue arises from practice and not theory. He says, "[M]oral virtue comes about as a result of habit" (Aristotle, 1980, p. 228).

Moral knowledge is not factual or theoretical knowledge (i.e., knowing that), but rather practical knowledge (know how)—it manifests itself in the doing.³⁰

As between Scalia and Dworkin, then, in the choice between treating a shared ethos as a moral conception or a moral concept, both Aristotle and Gadamer come closer to Scalia and moral conception because that approach more approximates the shared virtue, habit, and practice they see as key to hermeneutic in-

²⁶ Discussing Aristotle and moral knowledge, Gadamer (1989, p. 317) says, "[W]e are always already in the situation of having to act".

²⁷ In this way, but not in all ways, they are like Dworkin's "law as integrity" which "begins in the present and pursues the past only so far as and in the way its contemporary focus dictates" (Dworkin, 1986, p. 27).

²⁸ "That is not to say, of course, that the hermeneutic situation in regard to texts is exactly the same as that between two people in conversation. Texts are 'enduringly fixed expressions of life' that are to be understood; and that means that one partner in the hermeneutical conversation, the text, speaks only through the other partner, the interpreter" (Gadamer, 1989, p. 387, citation omitted).

²⁹ "Virtue, then, is a state of character, concerned with choice, lying in a mean [...] that being determined by a rational principle, and that principle by which the man of practical wisdom would determine it" (Aristotle, 1980, p. 38).

³⁰ "For we can only apply something that we already have; but we do not possess moral knowledge in such a way that we already have it and then apply it to specific situations" (Gadamer, 1989, p. 317).

terpretation³¹. Moreover, they provide a plausible way in which to try to bridge the temporal and other distances between framers and current interpreters.

Philia (variously translated as love or friendship—it is one of many Greek terms with no precise English equivalent) also plays an unexpected, but important role here in helping answer questions involving dialogues with the dead and good will. Three points Aristotle makes about friendship are of most relevance here. The first is that a man views “his friend as another self” (Aristotle, 1980, p. 228). The second is that he sees friendship as a kind of active and strong goodwill (Aristotle, 1980, p. 230-231). And the third is that, “Concord also seems to be a friendly relation” (Aristotle, 1980, p. 231). These points taken together and combined with the earlier description of virtue, character, and practical wisdom act as a reply to the criticisms of bad will and conservatism brought against Gadamer by Derrida and Habermas.

Let us turn, finally, to the exemplary status of legal hermeneutics for Gadamer. Legal hermeneutics differs from other sorts of interpretation, Gadamer says, because of its “dogmatic purpose” (Gadamer, 1989, p. 325). To put this less ponderously, we can say that it has a friendly relationship with the legal text and its framers, as opposed to the suspicious attitude taken in the psychoanalytic counterexample offered by Derrida and Habermas. There is no reason that different sciences or practices cannot have different purposes and, therefore, different attitudes in interpretation.

Legal hermeneutics for Aristotle and Gadamer is no uncritical slave to the text and original understanding of the law (although these will be the presumptive guides of the law). Equity, for example, stands as a corrective to law based upon justice. As Aristotle says, “[T]he equitable is just, but not the legally just but a corrective of legal justice.”³² This model of legal interpretation is more situation-sensitive and, so, at once both more and less expansive than the text and principle originalism of Dworkin or Balkin.

Conclusion

In this article, I have argued for an emphasis on the Aristotelian face of philosophical hermeneutics in what is perhaps an excessively abstract way, which is a defect in a theory calling for a practical approach to interpretation. Let me make some minor amends for

that by closing with an imagined dialogue between a constitutional framer (call her Ilsa) and a contemporary interpreter (call him Rick) inspired by a famous scene in *Casablanca* (Koch, 1973, p. 174-175):

Rick: You said I was to do the thinking for both of us and it all adds up to one thing.

Ilsa: You're only saying it to make me go.

Rick: I'm saying it because it's true. Inside of us we both know it's true.

Ilsa: But what about us?

Rick: We'll always have Philadelphia. We lost it until you came to Casablanca. We got it back last night.

Ilsa: And I said I'd never leave you.

Rick: And you never will. I've got a job to do. Where I'm going you can't follow. What I've got to do, you can't be any part of. Ilsa, I'm not very good at being noble, but it doesn't take much to see that the intentions of three framers don't amount to a hill of beans in this world. Someday, you'll understand that.... Here's looking at you, kid.

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³¹ With an important exception for the notion of equity, which will be discussed below.

³² Aristotle (1980, p. 133). Gadamer (1989, p. 318) glosses the Aristotelian notion of equity in this way, “Aristotle shows that every law is in a necessary tension with concrete action, in that it is general and hence cannot contain practical reality in its full concreteness.”

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Submetido em: 12/03/2011

Aceito em: 07/04/2011