CONTEMPORARY LEGAL THEORY AND PHILOSOPHICAL HERMENEUTICS: ORIGINALISM’S FAILED RELIANCE ON INTENTIONALIST THEORIES OF MEANING

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Ronald K. Rowe II

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For my loving family, without whose faith and encouragement this project would never have been attempted. Their unwavering support continues to be a cherished source of strength in my life.
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ABSTRACT


Hans Georg Gadamer’s philosophical hermeneutics requires that intentionalist claims about the determination of meaning are incorrect and that these notions of meaning determination must be reconsidered if we are to understand correctly the nature of interpretation. One goal of this project is to describe Gadamer’s theory of interpretation in contrast to claims made by intentionalists and to propose a novel distinction consistent with his theory that aids in understanding how his notion of interpretation works in reality. In the second half of the project, I consider originalist theories of legal interpretation and their reliance on intentionalist theories of meaning. In so far as these normative legal theories require the intentionalist thesis of meaning determination, they too are incorrect. I conclude by describing what a legal theory of interpretation must look like if it is to incorporate the correct notion of interpretation described by Gadamer.
INTRODUCTION

GADAMER, INTENTIONALISM, AND THE CONSTITUTION

Description of the Problem

In *Truth and Method*, Hans-Georg Gadamer develops a decidedly non-intentionalist account of interpretation, i.e. interpretation and understanding are not primarily determined by the intentions of a speaker or author. More specifically, Gadamer claims that interpretive experience is always a “fusion of horizons” of both the text and the interpreter, where these horizons include the objective content of the object considered as well as the historical background from which it originates and the interpreter’s historical background and perspective. Given this robust view of the elements of a valid interpretation, Gadamer stands against those who view the meaning of an interpretation as primarily determined by the object of interpretation or the intentions of the author of that object. That hermeneutics continues to be divided into multiple camps primarily along the lines of which element, if any, is primary in interpretive experience is a testament to the fact that the problem of the determination of meaning in these experiences is far from decided.

In his writings about the interpretation of law, Supreme Court Justice, Antonin Scalia, argues that judges should be interpreters not makers of the law. In making this claim, he assumes that an intentionalist notion of interpretation is not only possible but
necessary for valid legal interpretations. In order to obtain a valid interpretation of a legal text, he argues that one must rehearse the originally understood meanings of the text at the time the law was written. Thus, legal interpretation for Scalia is based strictly upon the original understanding and any interpretation recognizing or utilizing other sources as central to the meaning of the text is an invalid interpretation. Because Gadamer explicitly denies that original understanding or intention alone can determine the meaning of a historical text to be interpreted, his hermeneutic position disallows the notion of legal hermeneutics espoused by Scalia and others who share similar views.

If one adheres to Gadamer’s account of interpretive experience, then many, if not all, of our experiences must be understood as more than simply the intended or understood meaning of the object given to consciousness. For this reason, one cannot adhere to Gadamer’s hermeneutic position and also hold a position of legal interpretation like that of Justice Scalia. The central thesis of this dissertation project will be that Gadamer is correct about the nature of human interpretive experience and that this fact precludes the possibility of the originalist position of legal hermeneutics espoused by Justice Scalia and others today.

Significance of the Problem

While Gadamer’s hermeneutic position invites application to all areas of human experience, it has only been applied to issues of legal interpretation in limited ways. For this reason, the initial significance of my research is the continuation of earlier thought applying Gadamer philosophical hermeneutics to legal interpretive standards. Specifically, the delineation that I propose between problematized and non-problematized
conversations should provide a crucial guideline for determining the primary element or elements necessary for determining meaning in any particular legal interpretive event as well as offer an initial starting point from where to begin an inquiry toward solutions when competing interpretations must be adjudicated.

Additionally, the general question of appropriate or valid interpretation standards in law is not a novel one and has been an issue for debate in the West at least since the codification of common law several hundred years ago. However, as we in the United States have recently experienced a changing of the guard in our highest court, the proposed criterion for determining acceptable judges of constitutional law has once again brought the question of valid notions of legal interpretation to the fore. Because our current president has declared that a central criterion for his nominating judges for the federal courts is as an adherence to a strict constructionist interpretive perspective Constitution, i.e., one similar in kind to that of Justice Scalia, the theoretical plausibility of such a position is not only an interesting philosophical question – it is practical political question with contemporary ramifications as well. If Gadamer is correct in claiming that our interpretations are always more than mere recognition of authorial intention, then our current administration’s proposed criterion for determining whether or not a judge can be considered for membership on the Supreme Court is invalid and research advancing this thesis has practical as well as theoretical significance.

Plan of Research

Research for this project centers on the question of meaning in interpretive experience and on this question’s relevance for legal interpretations. Given this focus,
there are three main subtopics that need to be considered. First, the manner in which Gadamer describes a non-intentionalist hermeneutics must be addressed. I consider this general issue in chapters one and two of the project. Next, the nature of the originalist account of legal interpretation must be considered and I approach this issue and its critique in chapter three. Finally, a proposal for valid legal interpretation from a Gadamerian perspective will be described in chapter four.

What is interpretation if it is not recognition of authorial intention? In the initial chapter of the project, I consider Gadamer’s notion of the fusion of horizons in interpretive events and outline how this notion of interpretation of experience requires that we look to more than just authorial intention in the determination of meaning. For Gadamer, the ontological structure of the interpretive experience requires that understanding always be more than simply grasping the original author’s intended meaning. There is always a fusing of interpretive horizons in the productive activity of meaning determination. In some cases, it might appear that authorial intention is all that is active in interpretation and all that we need to grasp in order to understand. However, to perceive our interpretive experiences purely in this way is to level our historically effected commitments in these experiences and to invite an error in understanding future events where these commitments do not coincide. In order to better understand the difference between conversations where our commitments largely coincide with that which we are interpreting and those in which they do not, I propose the distinction of problematized and non-problematic conversation.

In the second chapter, I argue for a distinction between problematized and non-problematic conversational moments. Here, I contend that only when authorial
background assumptions line up seamlessly with the interpreter’s do we have an instance in which authorial intention is primary and one in which meaning can be derived solely from this feature of the conversation. I call such “conversations” non-problematized because the contingent elements of the horizons to be merged in interpretive experience are muted in the sense that there is not a significant difference in these for both author and interpreter with respect to the meaning to be understood. Everyday conversation among well acquainted friends serves a general example of non-problematized interpretive experience. However, even among familiar interlocutors, a divergence of even some of the features of one’s horizon of experience can lead to a divergence of goals and/or expectations of communication between speakers and interpreters. In cases where there is clearly less similarity between the historical backgrounds of the interlocutors, e.g., conversations between strangers of different cultures and languages, one encounters a problematized interpretive situation. If understanding of meaning is achieved at all in these situations, this determination is always beyond the mere intentions or expectations of the speakers/interpreters involved. Finally, I argue that regardless of whether an interpretive moment is problematized or not, Gadamer’s general non-intentionality thesis remains intact in the sense that while the additional elements of the interpretive horizons in play may sometimes be identical and thus lead to priority of authorial intention, nevertheless, they are there in a latent state and may become active if the interpreter’s background intentions or histories deviate from that of the author at some time in the future.

Having described a modified Gadamerian account of hermeneutic experience, I turn in the next chapter to describe the general legal hermeneutic perspective that I wish
to criticize. While other public legal theorists and jurists have more extensive writings on
the subject, no one is a more recognizable public advocate of originalism in our country
than Justice Scalia and thus he serves as my central example of this view. As stated at the
outset, the general position advocated by originalists is that the original intent or
understanding of law is the sole determiner of the meaning of that law and that an
interpretation must adhere to this meaning as closely as possible in order to be legitimate.
Additionally, attempts by judges and theorists to include other elements into an
interpretation of a legal statute are illegitimate additions to such an interpretation and
normatively must be guarded against. Over the course of this chapter I also attempt to
outline the general distinctions between Scalia and other originalists but will maintain
throughout that the central feature that unites them all – the concentrated focus on
authorial intent in legal interpretation – is precisely what condemns their view as a
legitimate theory of interpretation.

In the final chapter, I consider Gadamer’s explicit comments on the nature of
legal hermeneutics and imagine a hypothetical conversation between him and Scalia on
the topic. I then consider briefly the legal theory of Ronald Dworkin and show important
similarities and differences between the Gadamerian approach that I propose and his
own. Finally, I draw upon the work of David Cousins Hoy, Gregory Leyh, and others in
outlining the framework for a Gadamerian legal hermeneutics. I conclude that an
approach that combines Gadamer’s understanding of a fusion of horizons with my
proposed distinction between problematized and non-problematized conversations best
describes the interpretation of legal texts and gives one the best chance to understand
these texts now and in the future.
CHAPTER ONE

AUTHORIAL INTENT AND THE DETERMINATION OF MEANING

In his essay, “Reconciling Gadamer’s Non-Intentionalism with Standard Conversational Goals,” David Weberman notes the tension between Hans-Georg Gadamer’s claim that interpretation always involves more than just a rehearsal of the intentions of the author and what apparently occurs in everyday conversation where it would seem that determining a speaker’s intended meaning is precisely the primary goal of the activity of interpretation. Weberman defends Gadamer’s claim of the universality of the hermeneutic situation primarily by noting how everyday conversation is not in fact centered merely on grasping a speaker’s intended meaning. In claiming this, he argues that two important theses for the intentionalists are misguided. The first, the meaning thesis, states that “the meaning of a conversational utterance is determined by the intention of the speaker”, and the second, the understanding thesis, states that “understanding conversational utterances is a matter of reconstructing the speaker’s intentions”\(^1\) A brief comment on the central arguments against these theses serves as an appropriate starting point for this discussion of the role of authorial intention in determining the meaning of a conversational utterance or text in general.

\(^1\) David Weberman. “Reconciling Gadamer’s Non-Intentionalism with Standard Conversational Goals,” 322. Note, it is these exact theses held by legal originalists that I argue against later in Chapter 3 of this work.
Against the intentionalists’ claim that meanings of words are dependent upon a speaker for their meaning, Weberman claims with Gadamer that words have independence and autonomy over and against any speaker’s particular intended meaning. By this he means that words mean something regardless of whether an author intends them to or not. The fact that we can distinguish between an utterer’s meaning in context and an utterance’s meaning in general illustrates this claim.

Further, Weberman notes that understanding is triadic and not merely dyadic in contrast to intentionalist thought. There are not two “objects” confronting one another in interpretation, but three. Most intentionalists rely on the notion that the interpreter confronts a text imbued with meanings determined by an author and that understanding is simply the retrieval of this object in the present. On this picture there are two objects that confront one another – interpreter and interpreted. As Weberman states it however, understanding is “not a relation simply between text and reader or one interlocutor and another, but between two thinking subjects and (the truth about) some subject matter (Gadamer’s die Sache).” As will be illustrated below, the notion of understanding as triadic rather than dyadic is central to Gadamerian hermeneutics.

One of the central goals of this dissertation project is to expound upon Weberman’s general type of argument – that activities like everyday conversation are not focused purely on relaying authorial intention and that authorial intent is not the only legitimate determinant of an expression’s meaning. Despite the common sense notion and

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2 Confusion over which meaning, utterer’s or utterance’s, is the determinate one will be a central topic for Chapter Two of this project when I describe a thesis outlining the difference between problematized and non-problematized interpretive horizons

3 ibid. p 325.
several prominent theories of interpretation to the contrary\(^4\), when one interprets a work that is intended to have meaning, there are more elements operative in the determination of meaning than just authorial intention alone. In other words, I wish to defend Gadamer’s claim of the universality of the hermeneutic experience against all purely intentionalist theories of meaning. I do this specifically by showing how his theory of fusion of horizons actually works particularly in those communicative situations (like conversation) where it appears to most that authorial intention is the fundamental determinant of meaning and transmission of this intention the goal of the activity.

To achieve this, I discuss the structure and function of our fore-understandings or prejudgments that we bring to all interpretive moments and introduce distinctions to distinguish between when such prejudgments align with those of our interlocutors and when they do not. As it turns out, the illusion that the meaning transmitted in a conversation is determined purely by the intentions of the speaker(s) emanates primarily from a misunderstanding about the alignment of prejudgments in such conversations. In brief, when our prejudgments align with our interlocutors, it will seem that the transmission of authorial intention is all that occurs. However, this alignment makes transparent the fact that such prejudgments have a significant role in determining the meaning of the expressions relayed. Later in this project, I propose a distinction for communicative acts to distinguish between those situations where the prejudgments of

the interlocutors are identical or nearly so and those where the prejudgments are quite different. In short, all situations where our prejudgments align appear to be cases where authorial intention alone determines meaning. However, as with the above conversational example, such appearances are misleading and the role of prejudgments in meaning determination is not recognized.

In order to situate Gadamer within the discussion concerning the nature of meaning determination in communicative acts, I offer below a brief survey of some of the most prominent theories on this topic. I hope to show how his conception of interpretation and its correlative theory of meaning fit somewhere between intentionalists like E.D. Hirsch Jr. and non-intentionalists like W. K. Wimsatt and Monroe C. Beardsley.

The Intentions of the Author and Their Function in the Determination of Meaning

What is intentionalism? What are the central tenets of this view? In short, the intentionalist is one who believes that the meaning of a work of human expression is precisely what the creator of that work intended it to mean. Beyond this central claim, there are several main types of intentionalism that differ only with respect to tangential issues. However, that a text or other form of human expression attains its meaning from nothing other than the intentions of the human who formed the expression is primary for all intentionalists. Thus, the key component of any non-intentionalism is to deny on some grounds the intentionalist thesis. As will be shown, there is a key difference between dismissing this thesis completely and claiming that elements other

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5 For the remainder of the present work, when I refer to this particular proposition, I will call it the intentionalist thesis (Hereafter IT).
than authorial intention are operative in the determination of meaning. One of the peripheral objectives for this project is to show how Gadamer’s theory of hermeneutic experience lies somewhere between intentionalism and non-intentionalism where these two camps can be defined roughly as either affirming or denying the intentionalist thesis respectively.

I begin this discussion on authorial intentions and their function in the determination of meaning with the seminal text on this issue, Wimsatt and Beardsley’s, “The Intentional Fallacy.” In this essay, the authors claim that contra classical and romantic theories of interpretation prevalent at the time of their writing, "the design or intention of the author is neither available nor desirable as a standard for judging the success of a work of literary art.” Several premises to support this thesis follow. These claims are offered specifically with respect to poetry, but one should take them to apply to all forms of human expression. These include: 1) The fact that admitting that works of art do not occur by accident, i.e., they are caused intentionally, does not require one “to grant the design or intention as a standard.” 2) If the author’s intentions are not apparent within the work itself, it is not clear where someone is to inquire about these. In other words, either the work expresses some meaning (whether the author’s intended meaning or some other) or it does not and for many works, we have nothing other than the text to determine this meaning. Thus, most often with the interpretation of the written expression of ideas, the text is the only information we have to inquire about meaning. Regardless of the intentions of the author, the meaning contained in the series of words as a whole is the

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6 Wimsatt and Beardsley, “The Intentionalist Fallacy”, 468.
7 ibid., 469.
only source we have to go on and it is there that we locate the source of meaning in most cases. 3) Human artistic expressions are like other artifacts in the sense that only if they work do we discern the meaning for which they were created. They are made of parts that work together quite independent of such intentions and creators and it is only because of the fact that they work together at all that we understand them to have meaning at all. “A poem can be only through its meaning—since its medium is words—yet it is, simply is, in the sense that we have no excuse for inquiring what part is intended or meant."

4) The personal nature of the meaning of some expressions should not be imputed to anyone other than a dramatic speaker. To do otherwise is to go outside the work unnecessarily. 5) Through revision, an author does not better capture his original intentions; instead she has the primary intention of simply writing a better work than she achieved on her first effort. Subsequent iterations are not achievements of the original intention but attempts at new intentions.

With these observations, the authors offer reasons to believe that authorial intention is far less determinate of meaning than one might otherwise be led to believe. Now, a central question arises here: whether or not these other sources of meaning, which clearly are operative in many interpretations are in fact legitimate sources of the actual meaning of the text. Put another way, it is not clear that, just because we can and do}

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8 ibid., 469. Interestingly, Wimsatt and Beardsley note here that unlike poetry, practical messages, i.e., everyday communication, are successful “if and only if we correctly infer the intention.” By this statement, I assume the authors to mean that the interpretation of certain kinds of communication are categorically different than that of artistic expression. If this is the case, then they would not agree with Gadamer’s claim of hermeneutic universality. Perhaps more importantly, they cannot be non-intentionalists with respect to all types of human expression. In other words, they maintain the intentionalist thesis for at least certain kinds of human expression.

9 Whether this is the case or not would depend on the specific author and text in question. I think the idea though is that if some authors merely attempt to write a better work rather than better capture original intentions in revision, then the argument that authorial revision shows evidence that original intent is the bearer of meaning has been refuted.
interpret works without reference to authorial intention, that it is true that a text can have meaning outside of the author’s intended meaning. Perhaps the intentionalist would respond here that regardless of how some interpret meaning, i.e., without reference to the author’s intention, it still holds that one does not grasp the true meaning of the text unless she has captured the author’s intentions in her interpretation. As we shall see with Hirsch and others like him, the fact that one practices non-intentionalist interpretation in no way verifies a claim against the intentionalist thesis. It merely serves as evidence that some might think they are interpreting meaning when in fact they are grasping something else.\footnote{Hirsch’s distinction between \textit{meaning} and \textit{significance} comes to mind here. I will speak more about this distinction below.}

What should one glean from this early piece of non-intentionalist writing? First, Wimsatt and Beardsley clearly deny IT. Authorial intention is not operative in determining the meaning of a work of art. Second, the main thrust of this theory is epistemological rather than metaphysical. Wimsatt and Beardsley are proposing normative standards for how to go about knowing the meaning of a work of art that does not include reference to authorial intention. They are not making claims in general about the nature of interpretive experience. As shall be made clear, most of the theorists considered below, regardless of their particular stance on intentionalism, remain focused primarily on \textit{how} one should interpret meaning and not necessarily on what it is we do when we interpret meaning. This will be a distinctive contrast to Gadamer’s project in all cases.
I turn now to focus on the central intentionalist response to Wimsatt and Beardsley’s claims regarding the role of authorial intention in the determination of meaning. In *Validity in Interpretation*, E.D. Hirsch Jr. attempts to clarify what must occur if our interpretations of texts are to be successful in uncovering the meaning contained therein. What he does in the process is to propose an argument against any theory of the nature of textual meaning that does not place authorial intention as the primary determiner of meaning. Hirsch’s general claim is that any meaning grasped from a text that does not coincide with the author’s intentions in producing the text, simply is not the meaning of that text. In fact, the intentionalist thesis described above is directly attributable to Hirsch and his theory of meaning. Below I consider in brief detail specific features of Hirsch’s theory with respect to the role of an author’s intentions in the determination of meaning.

In confronting what he calls the “theory of authorial irrelevance,” Hirsch identifies two central concerns overlooked by those who attempt to deny the intentionalist thesis. First, he claims that unless one acknowledges the primacy of authorial intention in determining meaning, then an interpreter is left without an adequate criterion for judging whether or not an interpretation accurately expresses the meaning of the text.11 He states, “once the author had been ruthlessly banished as the determiner of the text’s meaning, it very gradually appeared that no adequate principle existed for judging the validity of an interpretation.”12 Here one gathers clearly, Hirsch’s intentionalism is at least somewhat a product of his focus on determining a method or criterion for objectively validating an

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11 As I note in Chapter 3, a similar charge is made repeatedly by Antonin Scalia about those who support non-originalist interpretive theories of law.
interpretation of textual meaning. If there is no objective or verifiable determiner of meaning, it appears to Hirsch that no objective method for determining meaning will be possible as well.\textsuperscript{13}

Additionally, the move away from the author toward the autonomy of the text allows theorists to neglect the fact that for a text to have meaning, it has to be somebody’s meaning. Even if we grant such non-intentionalist claims against authorial determination of meaning and allow the text to stand for itself as the arbiter of meaning, Hirsch claims that without a conscious subject to uncover this meaning, there will still be no meaning. The claim here is that even if the original author is absent, there will still need to be an "author" – in this case the interpreter of the text – in order for the text to have meaning. For, no text or any other arrangement of symbols can be said to have meaning without a conscious agent ascribing such meaning to it. Of the non-intentionalist project, Hirsch asserts that, “in its zeal to banish the author it ignored the fact that meaning is an affair of consciousness not of words… A word sequence means nothing in particular until somebody means something by it or understands something from it. There is no magic land of meanings outside human consciousness.”\textsuperscript{14} The point here quite simply is that for any series of symbols to have meaning requires that there is a conscious being ascribing such meaning purposively to these symbols. Focusing on the autonomy of the text, Hirsh

\textsuperscript{13} One could devise a simple argument to express Hirsch’s implied concern. 1) If there is no objective meaning of texts, i.e., one that is reproducible and determinate, then there is no possible objective method for determining meaning. 2) If the text does not mean what the author intended, then there is no objective meaning of the text. 3) The non-intentionalists claim that the text does not mean what the author intended. Thus, 4) The intentionalists must also accept that there is no possible objective method for determining the meaning of texts. Whether or not each of the premises is true remains to be seen. It would appear that premise 2 is the most suspect from the non-intentionalist perspective.

\textsuperscript{14} E. D. Hirsch Jr., \textit{Validity in Interpretation}, 4.
argues, allows some theorists to neglect this fact. “Whenever meaning is attached to a sequence of words it is impossible to escape an author.”

Interestingly, it seems that this particular point was in fact acknowledged by Wimsatt and Beardsley in “The Intentional Fallacy.” Their first claim against intentionalism conceded that texts were necessarily purposeful but that sometimes the purposes of the author were not in fact the determining purposes contained in interpreted meaning. Hirsch claims that regardless of whether there is an original author or merely an interpreter, there is an “author” wherever meaning is present. This claim about the necessity of authorship still fails to prove that when an original author’s intentions are present, this author’s intentions are in fact the only legitimate determiner of meaning. Regardless of whether or not Hirsch has actually provided more evidence with this latest observation to secure the intentionalist thesis, he does maintain once again that losing the original intention of an author as the bearer of meaning signifies losing the only clearly valid criterion for determining whether or not one has interpreted correctly. “To banish the original author as the determiner of meaning was to reject the only compelling normative principle that could lend validity to an interpretation.”

Continuing on with the central theses of Hirsch’s argument, he claims that for an expression to have meaning, this meaning must be reproducible and that in order to be reproducible, it must be determinate. Reproducibility is a necessary condition of a

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15 ibid., Validity in Interpretation, 5.
16 Later, Knapp and Benn-Michaels in “Against Theory 2 – Hermeneutics and Deconstruction,” claim that it is simply incoherent to talk about meaning apart from authorial intention. It is not that any such meaning will be less reliable, but that it is not really meaning at all. All discussion that separates meaning from intention, particularly authorial intention, is incoherent according to Knapp and Benn-Michaels.
17 E. D. Hirsch Jr., Validity in Interpretation, 5.
18 E. D. Hirsch Jr., Validity in Interpretation, 44.
verbal utterance having meaning. In order for something to be reproducible, one must be able to determine its boundaries – what makes it a thing to be reproduced. Thus, for Hirsch, determinacy is a necessary precondition for meaning.

What Hirsch is after here is an apparent need for a phrase to be determinate in the manner he describes in order to have meaning at all. The question is however, how many texts or works or utterances have “meaning” without being determinate in the manner described above? One need only think of works of art underappreciated in their own time and later found to be masterpieces at a later time in order to think that determinacy as a prerequisite for meaning seems suspect. Perhaps Hirsch would remain resolute here and simply say that this meaning was not understood in the same light then as it is now, yet, the meaning is still the same. However, how could this be? If the meaning was understood at the earlier time as it was later, then why did the interpreting culture not see its greatness? And doesn’t the difference between the two interpretive events show that something other than mere recognition of authorial intention is going on in at least some interpretive events? Hirsch’s answer to this general question is to introduce the difference between a statement’s meaning and its significance to an interpreter and to continue to insist that meaning is only what the author intended in producing the work in question.

In *Aims of Interpretation*¹⁹, Hirsch explains the difference between two notions he believes are often misconstrued as equivalent in non-intentionalist interpretive theory. These notions are meaning and significance. He claims that “meaning is the determinate representation of a text for an interpreter.”²⁰ Significance on the other hand is “meaning-

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¹⁹ E. D. Hirsch Jr., *Aims of Interpretation*, 1-13 and 79-81.
²⁰ E. D. Hirsch Jr., *Aims of Interpretation*, 79.
as-related-to-something-else.” Further it is only given the self identity of the former that allows the latter to be grasped according to Hirsch. The claim here is an acknowledgement that interpreters and critics of literature certainly derive different interpretations many of which are well worth discussing and choosing as “interpretations” of a literary work. However, he seeks to delineate between mere significances to a reader which are related to a context other than the original context of the author’s intentions and the actual meaning of the text which can only be determined by an author herself. Hirsch’s approach here is to separate by definition “meaning” from what most (in fact all if Gadamer is correct) actually find when they interpret human expression.

By defining significance as relational to the context of the interpreter and implicitly acknowledging that this is quite prevalent in interpretive activities, Hirsch seeks to separate what a hermeneutic approach would distinguish as what we actually interpret from what he would like or hope for us to interpret. Whether this is actually possible is another matter altogether. Interestingly, Hirsch acknowledges that absolute certainty of meaning is, in fact, not possible on this definition and that the best we can hope for is “to reach a consensus” on the probably meaning as defined.\(^21\) It seems to the present author that perhaps if Hirsch had instead recognized meaning as something like his significance in all cases, then not only would the interpretation of meaning itself be back on the table of possible experiences, but also he could understand what most actually do when they interpret. I feel that here Hirsch indicates himself to be overly committed to the motivation that Gadamer critiques throughout *Truth and Method* that

\(^{21}\) E. D. Hirsch Jr., *Validity in Interpretation*, 17.
acknowledges only objectivity acquired through correct method as legitimate. While I have this criticism that reaches to the foundations of his basic motivations for delineating meaning in this manner, Monroe Beardsley added further substantive criticism to Hirsch’s project and the IT below.

In a later piece, Beardsley adds three further criticisms of IT and implicitly of Hirsch. In *The Possibility of Criticism*, he questions “not whether textual meaning and authorial meaning can coincide…[nor] whether textual meaning is often adequate evidence of authorial meaning… [but] whether they are one and the same thing.”22 As with the earlier work with Wimsatt, Beardsley here feels that the burden of proof is clearly on the intentionalists, particularly when we seem to understand so many texts either without knowledge of authorial intention or at the very least as separate from such intentions. In the face of so many apparent counterexamples to IT, it is left to those who assert that textual meaning is identical to authorial meaning to prove that this is in fact the case.

His first novel criticism of IT concerns examples of randomly or accidentally generated series of words acquiring meaning. Such examples include: i) misprints that are either overlooked or allowed to stand as is, ii) randomly generated, grammatically correct, series of words, as well as iii) misquotations that cannot be or are not checked against the original statement. In each of these cases, an author’s original intent is not the source of identity for the meaning of the text. These are clear examples of texts whose meaning is not identical to an authorial intention and therefore, the claim of IT is countered. Hirsch’s response here is that homophones and accidental omissions are just

that – accidents, not intentions. While he does not state it explicitly, one can also offer the possible response that such accidents’ relevance to a conversation would focus on its significance and not meaning because such statements simply do not contain the latter. Rehearsing again Hirsch’s statements about determinacy requiring a determinate will, he seems quite clear on this issue. Without a determining will, there is no determinate entity, and thus no reproducibility, ergo, no meaning. For Hirsch, the colloquial way of speaking of these types of statements as having meaning is simply an erroneous way of categorization.

In his second criticism of IT, Beardsley claims that while the meaning of a text can be altered after an author dies, the author’s intent cannot. Such incongruity shows once again that authorial intention cannot be identical to meaning – they do not share the same characteristics and therefore cannot be the same by definition. Here we recognize a direct challenge Hirsch’s claim that the determinacy requirement entails that a text’s meaning is changeless if it has meaning at all. Are these two thinkers talking past one another or is there an answer? As described above, Hirsch responds that later “meanings” gleaned from a work after the death of an author are not meanings at all but significances as related to various thoughts and purposes by the present interpreter. Rather than acknowledging the latter interpretation as meaning, he instead defines this product as significance to a particular interpreter or group of interpreters thereby sidestepping the issue. So long as what one interprets is not meaning in the cases mentioned by Beardsley, then there is no conflict for Hirsch’s notion of meaning. Whether Beardsley or others accept this definition is not discussed here. The central point is that one must now accept
Hirsch’s distinction of meaning and significance in order for his theory to avoid Beardsley’s criticisms.

Finally, Beardsley claims that a text “can have meanings the author is not aware of. Therefore it can have meanings its author did not intend.” In order for an author to intend a meaning, one would tend to think that she would have to be aware of this meaning. Hirsch argues to the contrary that it is possible to be unaware of intentions that are present just below the first level of consciousness in a great many of our daily activities. That this is possible in communicating meaning via expression is not only possible but very probable as well. Again, I feel that the two thinkers are talking past one another here. Beardsley claims implicitly that awareness is a precondition for intention and Hirsch simply denies this in response. Both seem right given their presumption about the terms as they use them. However, they still do not agree on the meaning of the term meaning and neither has put forward an adequate framework to encompass all or nearly all expressions and the interpretation of these.

Where does the above discussion leave us? Far from deciding the issue on the location of meaning determination, the discussion from the opposite ends of the intentionalist spectrum leaves us looking to the middle for definitive answers. At this point, it seems to me that the meaning/significance distinction is the most promising addition to the discussion thus far with respect to understanding both what meaning is and what happens when we interpret texts and utterances. It is just true that we do not always interpret purely the intentions of an author or speaker when we encounter a text or

speaker. As Wimsatt and Beardsley make clear, there are obvious counterexamples in which authorial intention or meaning is not identical to interpreted meaning. And while some will claim that if interpreted meaning is not identical to authorial meaning then by definition, it is not meaning\textsuperscript{25}, the simple fact that there are everyday examples in which interpreters clearly are deriving some kind of meaning separate from authorial intention is enough in my eyes to compel one to attempt to construct a notion of meaning and interpretation that allows for meaning outside of identity to authorial intention alone. As I will discuss in further detail after the discussion of Gadamer, to require that only meaning that is identical to authorial intention be counted as meaning seems to i) limit the number of texts and utterances that we can claim to know the meaning of and ii) to fundamentally misunderstand the nature of interpretation itself in claiming so. Finally, while the meaning/significance distinction is a promising step in the right direction, it upholds this misunderstanding of the nature of interpretive experience. Gadamer will help us here.

Having considered briefly some of the views regarding the nature of textual and utterance meaning with respect to authorial intention, I now move to consider Gadamer’s hermeneutic theory particularly with respect to the issue of intentionalism.

**Interpretation and the Role of Authorial Intentions – Understanding is Interpretation**

On Gadamer’s conception of interpretation and meaning, authorial intentions clearly hold a central position in the determination of meaning and in the transmission of this meaning to an interpreter. However, they are not the sole determiner of meaning as the intentionalists described above would have one believe. Neither are they irrelevant to

\textsuperscript{25} See Knapp and Benn-Michaels “Against Theory 2 – Hermeneutics and Deconstruction.”
the meaning of the text as Beardsley and those who follow his thought would assert. Instead, I will show below that on Gadamer’s position, interpretation of the meaning of texts (and all experience in general for that matter) is an activity in which the meaning to be gleaned is in fact a product of the activity of interpretation itself which includes both the intentions and historical background of the author as well as those of the interpreter herself. For Gadamer, meaning is produced each time we interpret and is the fusion of multiple historical horizons, the most important ones being the perspectives of both author/speaker and interpreter. What follows is a very brief synopsis of Gadamerian hermeneutics.

In order to understand the ontological structure of understanding meaning suggested by Gadamer, one must grasp the significance of three central concepts: fusion of horizons, prejudice and tradition, and historically effected consciousness. Only after a discussion of these concepts can one begin to discuss the role of intentions in Gadamer and thus place him within the conversation begun above. I begin with the notion of fusion of horizons.

In conventional terms, a horizon is the totality of a field of vision. It is all that can be seen or surmised from a certain vantage point. For Gadamer, this definition will not be far off the mark, but it must be applied to the specific vantage point of one who interprets and that which is interpreted. Gadamer begins his discussion of horizons by describing the concept of “situation”. He states, “We define the concept of “situation” by saying that it represents a standpoint that limits the possibility of vision.”26 Here one is supposed to understand that one’s situation both encompasses the possibility of multiple perspectives

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given to one at any moment and also limits those possibilities finitely. For example, my particular “situation” at the present moment as I type in my favorite coffee shop is one of multiple sensory perspectives of the sensible fields of this place and time. The totality of these possible experiences is the “situation” in which I find myself. At the same time, this situation limits what is in fact possible for me. For instance, I am not unable to see the building where my office is located in this situation nor am I able to hear my niece’s voice. Without enumerating all the many things that I cannot perceive from this vantage point, it goes without saying that it is my “situation” that determines what is in or out of the realm of possibility. This limit to my situation is what Gadamer would call the horizon of my experience. He claims, “Hence, essential to the concept of situation is the concept of “horizon” The horizon is the range of vision that includes everything that can be seen from a particular vantage point.”

The question remains: what exactly is a fusion of horizons? In order to answer this question we must inquire further into the elements of a horizon and in particular, Gadamer’s concepts of prejudice and tradition. These notions along with concepts substantively consistent with them comprise the working elements of an interpretive horizon.

As Gadamer notes repeatedly in Truth and Method, prejudice has most often been viewed as an element to be avoided in inquiry in general. Referring particularly to scholarship since the Enlightenment, he states “the fundamental prejudice of the

27 ibid., 302.
28 In Chapter 2, I will show how horizons with significant differences in more than one of these elements will be what I call problematized.
Enlightenment is the prejudice against prejudice itself.”²⁹ By this Gadamer intends both to note the criticism of prejudice after the Enlightenment, but also the fact that prejudice itself is unavoidable in inquiry – even the intellectual movement against prejudice itself must have prejudices. But what does Gadamer mean by prejudice? When we approach experience we bring with us a host of judgments about how the world exists and will continue to exist as we maneuver through it. In a sense, these are our guesses about the world to be confirmed or disconfirmed by subsequent experience.³⁰ Collectively, these “pre-judgments” are necessary conditions for having experience at all for we cannot understand anything without first having a prior judgment about what it could mean to begin with. Contrary to the Enlightenment disavowal of prejudices, these are necessary in order to have experience at all.

Yet, it is true that while some prejudices are confirmed by experience, others are not and it is this admission that leaves some cautious about this element being operative in the interpretation of texts. If some prejudgments can cloud or hide meaning in a text, how do we know when we have the “correct” meaning? Further, if our prejudices are mostly hidden from us as Gadamer thinks, how do we determine which are “good” prejudices, i.e., those which lead to understanding, and which are “bad”, i.e., those which lead to misunderstanding? Gadamer’s answer here is telling. He claims that the only way to foreground a prejudice that operates otherwise unnoticed is to put it at risk.³¹ By this he means explicitly to encounter an idea or text outside our tradition in which case we must suspend the “provoked” prejudice in order to most effectively grasp the meaning of

²⁹ ibid., 270.
³⁰ “Actually, prejudice means a judgment that is rendered before all the elements that determine a situation have been finally examined” ibid., 270.
³¹ ibid., 299.
that text. What he means in general is that the best way to guard against bad, false, or unproductive prejudices\(^\text{32}\) is to constantly engage texts and ideas at least somewhat outside one’s home horizon of tradition and history.

I find this prescription to openness extremely illustrative of Gadamer’s overall project and its relation to the intentionalist notion of meaning. Intentionalists generally seem wary of losing truth and meaning to wandering conceptions infiltrating what they hope is instead some pure object of meaning to be discovered. This concern causes them to eschew elements other than the intention of the author as the determiner of meaning. Thus, these theorists prescribe methods for determining this apparently very precise object as the locus of interpretation regardless of whether or not this is what we truly encounter in interpretation – in the name of all that is definite, they claim \textit{it should be}. Gadamer, in contrast, recognizes that in the actual practice of interpretation other elements are operative in meaning production. Rather than hide from these, he prescribes first that we understand their place in the activity of interpretation (i.e., read and understand his work) and second that we place them at risk by confronting other contrasting notions so that we can produce a meaning that is most consistent with our overall but finite picture of reality.\(^\text{33}\) On Gadamer’s picture, learning itself takes in a very distinctive characteristic – it is a questioning of our understood prejudices about our experience to this point. From a practical point of view, one might say that the prejudices

\[^{32}\text{Notice I do not say true or false. There is a value issue here and not an epistemic one. Those prejudices which bring about more consistent or comprehensive understanding or fusion are to be valued – truth is not discussed explicitly – and those that do not are to be disvalued.}\]

\[^{33}\text{At the end of the day, I think intentionalists generally wish for something ideal or infinite that is simply not possible by our limited experience and faculties. I could compare this desire to other philosophical ventures with similar best wishes that fail but that should be left for another paper.}\]
that “work” are those that can be understood consistently within our interpretive horizon’s fusion with new horizons.

The role of tradition in interpretive experience is an extension of that of prejudices. Tradition is a relative whole of which prejudices and other consistent concepts are a part. One’s horizon of experience will inevitably consist of several overlapping traditions most of whose prejudices are consistent with one another. These traditions affect us from outside of ourselves as something that confronts us in the world, i.e., the tradition of the “South” in American culture as experienced by a northerner, as well as something that defines us from within. As we move in the world, we will do so as member of several different types of traditional groups often all at the same time. As we do so, we take the family of prejudices of these traditions with us in the interpretation of our experiences. Needless to say, a plumber in Chicago will have a different set of traditional prejudices than will a goat farmer in Turkey or an Eskimo fisherman in the Yukon. These ideas are handed down over time within a group and are not owned by any one individual member. In the interpretation of texts, a tradition of interpretation can become its own horizon, the prejudices of which limit meaning or challenge the kinds of prejudices that might confront it in subsequent interpretations.

As with the discussion of prejudice, traditions remain largely transparent to us and are never fully justifiable from a transcendent point of view. Actually, it easier to see flaws in their assumptions than their strengths as the former are readily apparent when we

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34 A thought that often occurs to me while thinking of this concept is the possibility of “real” human beings holding contrasting ideas and prejudices at once. In logic, this leads to the breakdown of a system. In real life, this leads to a reconsideration of one’s preconceived notions.

35 A further observation can be made that in a more diverse culture, one’s traditional affiliations tend to multiply. While the isolated farmer or fisherman may utilize one single traditional horizon, the Chicagoan will presumably use several.
encounter other ideas that make sense of a situation more clearly, i.e., they help us to approach and understand ideas presented better or more completely. Again, as with prejudices in general, the implied prescription from Gadamer for “correcting” the precepts of tradition is to seek out multi-traditional exposure – get out of our shell in order to test and hone our overall horizon of experience. The experience of divergent horizons between text and interpreted via temporal distance is the engine of self-understanding for Gadamer. He states,

“In fact the important thing is to recognize temporal distance as a positive and productive condition enabling understanding. It is not a yawning abyss but is filled with the continuity of custom and tradition, in light of which everything handed down presents itself to us.”\(^{36}\)

And further,

“Often temporal distance can solve [the] question of critique in hermeneutics, namely how to distinguish the true prejudices, by which we understand, from the false ones, by which we misunderstand…It is impossible to make ourselves aware of a prejudice while it is constantly operating unnoticed, but only when it is, so to speak, provoked. The encounter with a traditionary text can provide this provocation.”\(^{37}\)

\(^{36}\) ibid., 297.
\(^{37}\) ibid., 298-99. Gadamer states further, “…a person trying to understand a text is prepared for it to tell him something. That is why a hermeneutically trained consciousness must be, from the
I take these comments to be the closest thing to a prescription that Gadamer offers in *Truth and Method*. While the overwhelming majority of the text is devoted to an explication of the nature of interpretation via the recounting and critique of the historical tradition of the human sciences, comments regarding the way to proceed in interpretation are almost nonexistent. With the comment above, Gadamer is saying to us that the way to guarding against false prejudgments about the world we encounter is to offer those up in contrast to others unlike them in the activity of interpretation of documents temporally distant to us. This is as close to an explicit normative claim as he will make in the work. Further, this check on our prejudices also brings with it the key to self-understanding itself as it is only through exposure to the “alterity” of another horizon that we truly see our own. The encounter with tradition, then, is not simply the goal of the interpretation of historical texts – it is the conduit through which we achieve self-understanding and the manner in which we become better interpreters of experience.

The next topic to be discussed is Gadamer’s ephemeral notion of **historically effected consciousness**. At the most basic level, the idea to be grasped here is that we are apart of history as we encounter history. We cannot press the pause button, stand outside of the continuity of historical understanding which brings us to this particular time and our particular understanding of it, and see the world from an ahistorical perspective. We are necessarily a part of the continuity of history of which we must study when we encounter a text or idea that is temporally or culturally distant to us and this situation places constraints on our awareness and understanding of history. While the tendency start, sensitive to the text’s alterity. But this kind of sensitivity involves neither “neutrality” with respect to content nor the extinction of one’s self, but the foregrounding and appropriation of one’s own fore-meanings and prejudices.” 269.
here might be to contrast such a position with one of science which purports to have no such constraints, Gadamer is quick to point out that the methodological sciences only apparently disavow the historical situations of their inquiries by declaring that historical awareness is not their object and does not effect their object.\textsuperscript{38} To this he simply claims that such prejudgments and goals are built into the activity of the natural sciences and in interaction with one another, these assumptions largely are not challenged and thus remain beneath the surface of inquiry.\textsuperscript{39} As I will claim in the next chapter, in the context of scientific discussion, their tradition and historically effected quality remain non-problematized aspects of their interpretive horizons.

Returning to historically effected consciousness, it is important to recognize that not only are we affected by history but we are also aware of this effect. However, this awareness does not allow us to discard our temporality and see ourselves or history from some privileged vantage point. Instead, history and our knowledge of it must remain incomplete to us\textsuperscript{40}. Gadamer states,

\begin{quote}
I note here that a good deal of twentieth century philosophy makes similar claims about its lack of reliance on history and the progression of ideas.

\textsuperscript{39} "What makes modern scholarship scientific is precisely the fact that it objectifies tradition and methodically eliminates the influence of the interpreter and his time on understanding." Truth and Method, 333. At least, it views itself as eliminating this influence on the inquiry. Instead, it artificially de-problematizes the horizon by standardizing the inquiry and the assumptions that one brings to the activity. See also Gadamer's comments on scientific certainty and Cartesianism on 237-242 and further comments on the scientific attitude on 346-349.

\textsuperscript{40} In fact, this applies to self-knowledge as well. Because of history's effect on our horizon of experience, knowledge of ourselves too is always in motion and we are a continued part of that motion. Weinsheimer notes this. "There is always a remainder, an excess of what we are beyond what we know of ourselves, that makes self-consciousness incomplete. For just this reason it is always possible to become more aware of our own historical situation, the situation in which understanding takes place. Having such awareness does not mean that once the situation has become more fully conscious, we can step outside it, any more than seeing our shadow means that we can outrun it. Rather our shadow moves along with us." Gadamer's Hermeneutics, 182.
\end{quote}
“Consciousness of being effected by history…is primarily consciousness of the hermeneutical situation. To acquire and awareness of a situation is, however, always a task of peculiar difficulty. The very idea of a situation means that we are not standing outside it and hence are unable to have any objective knowledge of it.”

The horizon of tradition within which we find ourselves is both the precondition for understanding and a limitation on it.

I note here that historically effected consciousness should also be viewed as historically effective consciousness as well. For just as one is effected by the historical tradition of which she is a part, one propels the history of a tradition forward through confronting history and its texts. Historically effected consciousness is at one and the same time recognition of the movement of a horizon of tradition via historical inquiry as well as the production of a historically effected consciousness within the individual herself. It is the simultaneously the recognition of history’s effects on us – our acceptance of it prejudices that we take with us to experiences – and its movement through us into the future.

A final question remains: So where do intentions fit into the picture for Gadamer? Where does he discuss intentions with respect to meaning in interpretation? The short answer is that he all but neglects to discuss this notion other than to discuss theories by Schleiermacher and others who find intentions central in meaning.

41 Gadamer, Truth and Method, 301.
Rather than discuss the role of intentions, his focus is on the prejudgments of the interpreter as these are much more central to the production of meaning in interpretive experience than is the intention of an original author. I remind the reader again, interpretation is a productive and not simply a reproductive act for Gadamer. He states, “Not just occasionally but always, the meaning of the text goes beyond its author. That is why understanding is not merely a reproductive but always a productive activity as well.”

Thus, regardless of the status of intentions in the fusion of horizons, the notion that a reproduction of authorial intention is what occurs in interpretation is not what Gadamer describes. Here there is a clear break with the intentionalist thought described above, especially Hirsch who explicitly prescribes that such a reproduction is what interpretation must be if it is to be legitimate. Hirsch argues that historical reproduction is what interpretation is and should be. Gadamer thinks that only a fusion of shifting horizons is what does or could occur and thus the meaning that is produced by such a fusion, while it may include elements such as authorial intention (among other things), it is not a reproduction of such elements.

At this point, I would like to shift gears briefly to discuss a meta-difference between intentionalists and Gadamer that seems quite important. Arguing from a Gadamerian position, one is inclined to approach the normative claims of intentionalists

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42 ibid., 184-197.
43 ibid., 296.
45 To say that Gadamer must also conclude from this point that interpretation should not be reproduction and Irwin claims seems to overstep Gadamer’s purely ontological description. At best, one might claim that since Gadamer thinks reproduction cannot occur then he surely thinks also that one should not interpret in this way. But even this reading misconstrues the ontological claim in a normative way. Gadamer can only be read normatively if one takes a claim about what he thinks is not possible and assumes that he prescribes us not to interpret in that way. It is more accurate to simply state that Gadamer thinks such interpretive endeavors are not doing what they think they are. More on this distinction below.
mentioned above, e.g., those claims that prescribe certain methods for the correct interpretation of texts, with some degree of frustration in misunderstanding in a fundamental way what is possible in interpretation at the ontological level. To require that one recover the author’s intentions in producing a particular text in order to understand successfully its actual meaning is not unlike claiming that in order to fly one must necessarily do so without the aid of an instrument of flight, i.e., to require that one must fly under her own power in order to be classified as flying. Because the ability to achieve flight under one’s own power is clearly not something humans are capable of, to define flight as only that activity done under such power necessarily precludes all humans from claiming that they can achieve flight. Similarly, requiring that interpretation reconnect with authorial intention in order have meaning precludes us from ever claiming to actually know the meaning of the text. This is clearly the case if Gadamer is correct in his derivation of the triadic structure of understanding in which there are more elements operating in the determination of meaning than authorial intention alone. For Gadamer, if meaning is confined to the requirements of the IT, then we can never attain meaning – to recover only the pure intentions of an author in an interpretation is a metaphysical impossibility precluded by the nature of our interpretive powers.46

To return to the analogy, just as we do not possess the natural ability to fly, neither do we possess the ability to interpret the work of another without adding our own horizon of understanding (our tradition and prejudgments) to the activity of meaning production. Interestingly, just as we clearly achieve “flight” by other means, contrary to

46 And as we noted above, Hirsch seems to agree with this claim in theory but asks to us to continue to seek this ideal regardless of the impossibility of the task.
any restrictive definition otherwise, clearly we interpret the meaning of many, if not most texts, without explicit reference or access to the author’s intentions in writing the text. As Gadamer states in his Foreward to the Second Edition of *Truth and Method*, he seeks to describe, not what we think we accomplish or want to in interpretation, but what we do over and above these wanting and doings. I turn now to finish this chapter by considering another potential analogy that should turn further light on the mistaken conceptions emanating from the IT.

In the final comments of chapter 1, I want to make clear what one *is not* doing when interpreting something. It appears to this author that a central assumption made by those that accept the IT is that the meaning determined by authorial intent is objective in the sense that it stands uniquely against our inquiry into it. If this is in fact the case, then we could think of the interpretation of texts and the process by which this occurs as similar to the apprehension of the identity of a far off distant object. In approaching a distant object that cannot be identified immediately, one progresses “closer” toward the object, its identity becoming more and more clear in our understanding until - Ah-HAH!! you have it! Presumably, if a text’s meaning is determinate in the way assumed by those who accept IT, then a simple analogy between interpretive and visual experience follows:

understanding a text : visual apprehension :: a text’s meaning : distant object

However, following Gadamer’s hermeneutics, I contend that a central mistake here is the equation of a text’s meaning with a physical object. While an object to be perceived does
in fact exist apart from our perceiving it, a text’s meaning does not. At least it does not exist as some stable entity to be ascertained by closer analysis of it.

The second error is directly attributable to the first, in that once we have mistaken meaning for a stable object, we set out to take steps to assure that we will grasp this object as it truly is. In the case of walking down the beach toward a distant object, this simply requires us to move closer to the object. The instruction to move “closer” to the “object” in interpretive endeavors is an instruction that Gadamer argues against in the first half of Truth and Method and by his estimation is directly attributable to the human sciences’ need to develop a method that would put their truths on par with those of science. The problem here begins with assuming meaning as an object like that of natural science.

The fundamental mistake operative in this false analogy is the equation of the physical stability of the text and its symbols (these do not change and are an object that we can “move” toward) with the meaning of this text. While the former is more or less determinate over time, the latter cannot be. While the lighthouse at the end of the horizon down the beach will remain whether or not we move closer to it or not, the meaning of a text simply does not exist apart from the engagement of a reader. Most assuredly, if no one reads Hamlet from this day forward, all the books that contain its lines continue to exist – I am not here claiming that the physical carrier of meaning does not exist if no one interprets it. However, the meaning to be transmitted by these lines cannot be said to exist apart from a consciousness engaging it – understanding it – and according to Gadamer,

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47 It turns out that science too has a bit of a problem here. The universality of the hermeneutic problem dictates that all experience, including scientific experimentation, proceeds necessarily in the same structural way interpretively. Thus, the “objects” of natural science too are at least in some sense only interpreted as stable entities.
this only occurs as an event – a fusion of multiple historical horizons together with one another. It is the process of interpretation that gives meaning existence and this process includes the motivations, history and tradition of the interpreter who sets upon it.

In his work defending the intentionalist project, William Irwin makes this very mistake when he apparently misunderstands the notion of interpretation as play promoted by Gadamer in *Truth and Method*. In the attempt to distinguish the activity of textual interpretation from the activity play, Irwin makes the following statement:

“A game is something that, in a very real sense, exists only in being played. We can have a detailed account of the rules of baseball, but without playing it, there is, in some sense, no game of baseball. On the other hand, the text exists in and of itself once the author has produced it; it does not need to be interpreted in the same way that the game needs to be played.”

In comparing the text to a game, Irwin is making a level distinction error with the analogy. The text itself is more like the rules of the game than it is like the game itself. The former surely exist regardless of whether the game is played or not, just as a text will exist as a unique sequence of symbols regardless of whether anyone pays any attention to

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48 Admittedly, Hirsch would seem to agree on this point – there is no meaning without an author consciously considering such meaning. However, while he focuses decidedly at the original author alone as the lonely legitimate bearer of this meaning, Gadamer understands the interpretive experience to include an extra horizon, that of the truth of the matter that occurs as a result of the fusion of horizons between text and interpreter. Meaning is thus a third object produced rather than a second object recovered. Again, we see the notion production rather than reproduction in Gadamer.

them. However, just as the game itself does not exist without being played, Gadamer contends that the *meaning* of the text does not exist without the activity of the interpreter. Like a game, without the player/interpreter, the meaning of a text does not exist – it is the activity of the player/interpreter that gives life to the rules of the game and the text. Irwin is correct in claiming that the game is different from the text. But what he had hoped to claim was that it was different from the meaning of the text.

I think this distinction between what exists without the interpreter and what comes into being with the introduction of the interpreter is one foundation of the difference in interpretive perspectives between the intentionalist and the Gadamerian hermeneuticist. The intentionalists generally equate the determinacy of the text with meaning and neglect the activity of interaction that brings this meaning into being. As I claimed earlier in the discussion of the questioning of prejudices, the value and disvalue of them for Gadamer and intentionalists respectfully and the prescriptions that emanate as a result represent another foundational difference between views.

In the following chapter I will consider in further detail how horizons interact in the production of meaning and I will offer an additional distinction to the Gadamerian position in order to further explain how we sometimes appear to be merely reproducing authorial meaning rather than producing anew at each moment a fusion of horizons. This discussion and the distinction should further illustrate the differences between Gadamer and intentionalists and also the inadequacies of the latter in the description of meaning determination.
CHAPTER TWO
THE DISTINCTION BETWEEN PROBLEMATIZED AND NON-PROBLEMATIZED INTERPRETIVE EVENTS

In this chapter, I describe a novel distinction for interpretive horizons with the general goal of expounding upon a crucial element of interpretation within Gadamer’s philosophical hermeneutics while also explaining further how the intentionalist thesis for the determination of meaning is incorrect. The distinction is what I call here problematized and non-problematized interpretive horizons. In addition to describing this distinction and showing examples of it in interpretive practice, I also describe a general outline for how to proceed when we recognize the conflict between problematized interpretive horizons.

Before I discuss the distinction itself, I would like to begin with a brief rehearsal of the notion of the hermeneutic circle. In its most abbreviated form, this concept describes the cyclical process by which an interpreter proceeds to greater understanding of an experience or text dialectically by first assuming meaning that is consistent with an initial whole, checking this meaning against the particular experience or text, and then comparing this received meaning with the assumed whole originally projected. As the process continues, the whole becomes clearer and the projected meanings to be reaffirmed by subsequent experience or text become more certain.
When we read a novel by an author new to us, we begin with very little information to assume about the meaning of the whole of this new work. We may have an expectation about the nature of a novel itself or of the genre of literature that the work purports to be. Yet, until we read several pages, we have no substantive meaning to seek in the words set out to convey the meaning of a new story for us. However, as we become acquainted with the figures and events of those opening pages and fuse them with our own experiences and general expectations for such events, we begin to project more and more specific ideas of what we believe to be occurring as we read further into the text. When our assumptions are thwarted, we must take a step back and perceive where we might have gone wrong in our former “understanding” of events. We come back to the text with a renewed set of assumptions and do so with increasingly more certainty. We continue this process until we have finished the remaining text and the action of the characters comes to a close. Now of course, for most exceptional works this does not mean that all who come to the end of the book will go away with the exact same understood meaning of the events and the whole within which they are a part. However, it is possible to imagine stories which after careful scrutiny most if not all readers come to a very similar conclusion about the meaning of the parts with respect to the whole.\(^1\)

Insofar as one has assumptions that she brings to the interpretation which are not confirmed by the parts or the whole of the interpreted text, then these assumptions and

\(^1\) I have an urge to discuss the difference some claim between literature and law. While my description of the circle might be applicable to literature – it is not so for many interpreters of law. One might claim that law is not supposed to be open ended. It points instead to a specific overall claim or meaning and must do so or it would not perform its function as a clear standard of legal guideline. In Chapter 3, I claim that while this is a concern of some, it does not change the universality of the hermeneutic situation and the fact that all interpretation is subject to the fusion of horizons regardless of the practical result for human experience that relies upon interpretation in a significant way.
the horizon of which they are a part are what I name problematized with respect to the interpreted horizon.

In its most basic form, the distinction between problematized and non-problematic horizons may be illustrated simply by noting the difference between the horizon of understanding one has at the outset of the novel cited above and that of a body of interpreters who agree completely about the connection between the meaning of the parts and whole of the text in such a way that no questions are necessary about the fit of any of these together. The latter group’s non-problematic horizons “see” the book in the same way because the elements needed to hermeneutically construct the work have all been developed to be the same. I note here that this explanation of a perfect interpretive paradigm resulting in a non-problematic fusion for experienced interpreters is quite implausible in actuality. However, I think it illustrates an initial picture of what I am pointing to by distinguishing between interpretive backgrounds that fundamentally line up and those that do not.

Non-problematic events

To say that a horizon is non-problematic is at the very least to say that those who speak and interpret together about a certain topic share a common basic understanding of the background assumptions that make the transmission of meaning possible, i.e., they share a historical interpretive horizon. When these assumptions line up seamlessly or very nearly so, meaning transmission is simply the transmission of an utterer’s intended meaning to those who listen. So long as the paradigm assumptions remain in line, this transmission will occur seamlessly. If something goes awry in our
background assumptions about the terms used or the nature of the context within which we are conversing, then these divergent elements may problematize the interpreted meaning and divergent meanings may arise. A good part of everyday conversation is scene setting, whether verbal or nonverbal, so that we can share a horizon with our discussion participant.² So long as we are not clear about this background or do not share similar understandings of crucial elements beforehand then we will most likely not communicate effectively during the conversation. This can occur in everyday conversation and the potential difficulty is only heightened when the speaker and interpreter are not even “discussing” from the same century. As will be explained, the inevitable problematization of most historical interpretive contexts is a fundamental reason that IT fails. Fusing my horizon with another across a great historical or cultural distance requires that I simply “go with” my projected fore-understandings regardless of how they line up with the original author’s. In other words, I have to make the best sense of a historical text as I can and this requires a fusion of my own prejudgments about central issues that I am to encounter as element of the historical work. While I will speak more about this below, I want to consider now a non-problematized context.

One example of such a paradigm would be simple verbal commands. Anyone who has ever been in a crowded area and heard someone yell, “Stop!!!”, whether the comment was intended for you or not, usually has the immediate reaction to halt any

² The reality is though that even in everyday discussion, the usage of even the slightest non-agreed upon term can change the meaning of the conversation for the participants. As this conversation continues, divergent interpretations of the meaning of the conversation will arise. Because both had a hand in constructing the conversation it is difficult to say which interpretation is correct without reviewing the precise terms whose meaning are not shared. In fact, unless some stark or apparent inconsistency in usage appears, it may not occur to either conversant that a divergence of meaning occurred and both could go away with a different “understanding”. Imagine how this situation plays itself out when historical distance divides us from the text and its historical horizon. Purely non-problematized contexts are quite rare.
current movement and focus one’s attention on the source of the command. While the source of the comment is yet unknown, the shared assumption that all have in this situation is that the verbal exhortation means that someone is to stop what they are presently doing, that this person could be them, and that cessation of movement is needed until further information is gathered about the source of the command. That someone could hear this command (or its corollary in other language/culture contexts) and mistake it for a cry of jubilation or command to flee immediately is preposterous given the shared assumption about the command and the entire situation in which it is uttered. Does the one who makes the command in this case intend for someone to hear him and to stop? Of course he does? Does this mean that all who interpret him correctly do so by recognizing this intent in the expression? I claim that to claim such is not to grasp the entire picture of what occurs. Instead, I argue from the Gadamerian position that our shared historical understanding of the use of this phrase in these types of situations is virtually identical and thus when encountered with that of the speaker in this case, our collective horizons of interpretation overlap transparently with that of the speaker and what results is a meaning that is identical to his intended one. That does not mean that the fusion of horizons was not operative. It simply means that our assumptions about this situation were not apparently operative in the determination of meaning because they were identical to those of the speaker.\(^3\)

Another illustrative example of a non-problematized paradigm would be that of arithmetic for graduate level mathematicians. At this level of understanding of the rules

\(^3\) Imagine the bizarre situation in which the speaker was from another culture – one in which the exhortation, “Stop!!” meant something quite different. In this case, the problematization of the fusion would become apparent soon enough as what would be universally understood in one cultural context will be understood completely differently in the one described and the resultant activity will show this.
and nature of mathematics, the possible interpretive events or fusion of horizons in the interpretation of arithmetic expressions is quite limited. It is limited so much so that one and only one possible meaning could reasonably be expected by such interpreters – that meaning is what all competent interpreters take to be the correct meaning of the expression. Is this because the intended meaning of the expression is singularly determinate and transparent? The intentionalist might point to such agreement and conclude that this is the case. However, meaning is still the product of the background assumptions of the interpreter’s horizon fusing with that of the expression itself. It is just that in this case those assumptions that are operative in approaching the arithmetic expression are identical or virtually identical to those of all other experienced mathematics students. Regardless of what language one speaks or what particular cultural heritage one has, the fore-projected understandings of the interpretive situation regarding arithmetic are the same. And thus, even given vast differences in other areas of one’s interpretive background, one can apply assumptions to the mathematics paradigm and expressions in it that are identical to those of another interpreter from another part of the world. This illustrates perfectly the presence of a non-problematized horizon of interpretation and explains how one does not have to be an intentionalist to explain how such meaning is determined. It still requires an interpreter fusing her horizon with that of the given text.

Explaining further, we can be mistaken in non-problematized situations with one another – but only others with different assumptions can see this. Perhaps we could as well if it were pointed out to us. For example: two non-native speakers get the impression that an apple is in fact an orange and amongst one another call what native speakers
would describe as an apple, an orange. Their speech is effective in that they are able to work with “oranges” in discussion together even though native speakers would not understand their speech as correct interpretively. Yet, once one of these speakers encounters a native speaker, the assumption would have to be addressed as the two would not be referring to the same type of object and further investigation would have to be carried out in order to come to a mutual agreement about meaning as is the case in all problematized situations.4

I pause to add here that so much of learning is constructed in this very way. We come to a new subject with little or no determinate expectations as to the nature or meaning of the expressions we will encounter. As we begin to acquaint ourselves with the subject matter, basic background assumptions about it become ingrained for us and allow us to talk with one another about the topic from non-problematized perspectives. However, when we encounter new expressions whose meaning we do not immediately understand, our horizons become problematized once again, and we seek to clarify the necessary assumptions so that we can once again communicate from a non-problematized interpretive situation. I am thinking specifically once again here about the progression of learning in mathematics (but I think other learning could be described in this way as well). In mathematics, one learns different functions that set up a paradigm of basic expressions that serves to de-problematize interpretive assumptions and allows everyone to understand the multitude of expressions that can be derived from these basic relations. In this case, I admit freely that meaning appears to be determined exclusively by the

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4 Interestingly, my feeling is that Gadamer would not go so far as to say that amongst one another, their interpretation of apple as orange was wrong or untrue. It is understood differently.
expression itself—the meaning of the mathematical symbols and the relations denoted between them—much as the intentionalist would have us believe. However, even here, it is the shared assumptions about this mathematic interpretive situation in conjunction with the symbols themselves that give the expression meaning. It is just that in these very basic non-problematized interactions, the fact that everyone starts from the same basic assumptions about the interpretive event (in fact they strive to put themselves at the very same starting point!) makes the activity appear as though one is simply uniting with the determinate meaning of the expression alone.

Problematized events

Unlike non-problematized interpretive events, problematized events are characterized by interpretive horizons which are not identical with one another in significant ways and thus have the potential to produce meanings in the fusion of horizons that are divergent. So long as a divergent assumption is not operative in interpretation then the meaning interpreted may be roughly identical with intended meaning (and the interpretive horizons will appear as non-problematized). However, once the “distance” between the two horizons is operative, then the meaning will be divergent. In the context of historical interpretation, there can be no direct discussion of these divergent concepts and thus no ability to non-problematize the fusion. In simpler terms, the lack of access to an identical, non-problematized horizon of interpretation of the author or original event itself means that the present horizon and its assumptions must be the operative horizon of interpretation that fuse with the text or event. In still simpler terms, we affirm once again the Gadamerian thesis that rehearsal of authorial intent or
original meaning is impossible as interpretation requires a fusion of horizons – in this case an inherently problematized fusion.

Below, I consider several examples in which the divergence of background notions, the problematization of interpretive horizons, leads to divergent meaning in interpretation. The first example considered is the notion of democracy. There are several ways that one can easily diverge significantly on the meaning of this term and thus potentially problematize a discussion in which this term is significantly utilized. First consider a definition of democracy as an organizing principle of government in which citizens elect officials to represent them and their interests in a hierarchical governing body. Obviously, this is familiar to many citizens of modern western countries that utilize such concepts as a core political organizing principle. However, consider another definition of democracy as the direct governance of all social issues by direct vote of the citizens of a state. I am thinking here of specifically of the ancient Greek democracies but anyone who live in such a democracy would presumably have a different notion of that term than the first notion I described. The rub here is that without clarification, an interpreter assuming one notion as operative but encountering a meaning identical to the other will necessarily be frustrated to understand the usage of the term. Now, this problem is easily corrected in dialogue with a simple clarification but in understanding one another at a deeper level, I think the situation is more significant than merely understanding the usage of a term. For when I encounter a text from ancient Greece discussing democracy there, I can read about the basic features of this democracy and recognize its differences at a surface level to that of my own. However, my lived experience and understanding is only of the type that I understand today. And thus, even
my grasp of the features of that democracy must be filtered through my understanding of similar features of my contemporary system. I am not convinced that my horizon can completely bridge this gap even though the notion encountered is very similar to my own notion. Here I think it is clear that we can only experience such problematized horizons from our own historically situated one. We cannot simply leap into the understanding of an ancient Greek any more than we can borrow someone else’s perspective for other matters.

A further difficulty arises with the concept of democracy when one’s notion of either of the general definitions above also includes several other aspects as fundamental in potential contrast to others who think similarly about democracy in general, but not down to the specific tenets espoused by the individual. What I am thinking about here is a person whose notion of democracy contains very specific relationships within government itself and its interaction with the people as basic for democracy in a way that others perhaps do not. When this person discusses matters that reference the workings of these fundamental features, the potential for a disconnect with those whom she discusses with is great. The difference will clearly affect the understanding of texts and events that reference democracy. For instance, if my notion of American democracy requires a strong separation of government branches, then my comments made with respect to these branches that assume this notion may be misunderstood by another interpreter who does not share my background assumption about this feature of government. When I talk of democracy, I may load that term with these background assumptions not agreed to by my interlocutor. The result is a discussion that at times may be strained for understanding
even though we are discussing the same basic terms. The reason for this strain is that our horizons are problematized by a different conception of a basic term of the conversation.

One might protest here that this difficulty may be easily overcome with a recognition of this difference and a subsequent clarification by the speaker. And this would be a welcome solution where possible. However, it would not present a substantial criticism of Gadamerian hermeneutics nor of the problematized distinction itself. For, as I outline below, identification and clarification of potential problem terms is a general prescription for overcoming problematized interpretive situations. That a situation is problematized does not mean that it cannot be overcome. In fact, it is through the bridging of a problematized gap that one becomes more aware of one’s own historical horizon and the assumptions used in our interpretation of our experiences.

The second notion that I wish to consider as easily problematized in interpretive situations is that of family. As with the term ‘democracy’, this term may connote one of several widely divergent notions. In the general sense, family denotes the related members of some group to one another. In a social sense, family connotes parents, children, and potentially other individuals related genetically to one another as a more or less cohesive unit. If we speak of the “nuclear” or “extended” family in sociology or conventional terms we typically mean the people that are closest to us by ancestry and who usually support us significantly with love and care and are supported by us depending on the context and relation. In biology, “family” connotes specific categories of plants and animals related to one another as a class related to other similarly related organisms. Family can also mean a group of individuals connected by specific beliefs, convictions, or other affiliations. Church groups often refer to themselves as families of
members. In mathematics, families connote sets of related curves and lines. Finally, there is the colloquial expression for members of the Italian Mafioso which has its own specific meaning as well. As is readily apparent, the term family can connote quite a few distinct groups. While context clarifies specific meaning for most usages of this term, I argue that even if we focus on one general meaning of the term listed above, one can still differ significantly on specific meaning assumed and thus one’s interpretation of a specific issue dealing with a notion of family, *even when the general usage of the term is understood*, can be problematized. While the general context may be set, the relations that comprise a familial relationship may be quite divergent and thus the understood meanings of the individuals related in a family is quite different. Below I consider such an example.

Consider the difference between using the following two notions of family in a discussion about family as related ancestors. On the one hand, family may mean a nuclear unit in which father’s authority and supervision is primary while the mother is subordinate but the primary source of care and nurturing. Contrast this notion with one of an extended group in which the adult females of the clan provide authority and discipline while males are submissive and provide only the material means of subsistence. I would argue that two participants in a discussion with these divergent experiences of family will have vastly different understandings of the meaning of conversations with one another that have anything to do with this subject. Additionally, their respective interpretations of historical events and works will diverge as their historically effected interpretive positions will fuse uniquely with that of the particular conversation or text. Imagine a member of a group who held the latter notion of family described attempt to understand
the interpersonal dynamics of a patriarchal family situation. These situations are described numerous times in Western literature alone and one could enter more than a few households today that operate roughly along the lines of this model. How could one whose entire life knows women only in dominant, authority positions and males only as submissive to this authority understand the scene of a male figure disciplining a child for unwanted behavior? The specific notion for this individual of what it means to be a family and the relations required by this notion problematize interpretive situations in which a divergent notion of family is operative.

That such a case is only problematized for groups that only interact with one another in theory is belied by present reality. I note here that the current meaning of the term family is far from determined in contemporary usage. As has been witnessed recently in Texas, conflicts over notions of family can have significant practical consequences, as members of a polygamist sect certainly live under a different notion of family than most others in our culture. Given this understanding, it is difficult for members of the sect to relate to others who have vastly different notions of the fundamental concept of familial relations. This difficulty is apparent when the active notion allows relations among family members that are prohibited by law. While the apparent facts require that the state take prosecutorial action, most members of the set who only understand family in the way that they have been taught and have lived cannot comprehend why they are being accused or wrongdoing and why their traditional notions are prohibited by law. I think it is clear here that a problematization of horizons centers

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5 I reference here the recent legal cases brought against members of the FLDS sect of Mormonism in Western Texas whose alleged practices of forced teenage marriage and statutory rape, while seen with disgust by the outside world, are viewed as legitimate family practices and form a foundation for the sect’s way of life and most significant beliefs.
clearly on the understanding of family and familial relationships and this
problematization prevents sect members and society in general from relating to one
another on the issue, i.e., their interpretations of texts and experience that reference these
notions diverge precisely along these lines.

Additionally, there is the contemporary ongoing struggle in American culture to
define marriage and family with respect to homosexual relationships. While some
members of religious groups and those that think similarly fight to prevent marriage and
thus family from potentially being defined in a specific manner, those who support the
right of all human couples to form marriage bonds and thus to become family to one
another, advocate a different notion of both family and marriage. As a result,
conversations between individuals from these two camps are necessarily problematized.
Because the issue is specifically focused on the meaning of the terms marriage and
family, there is no confusion over why the two do not understand the issue in the same
way – the divergence in tradition and prejudice is apparent for all to see. However, the
fact remains that their respective interpretations and divergence with one another is
determined primarily by the historical commitments that each bring to an interpretation of
the issues surrounding the debate. Both this and the polygamist sect example illustrate
that divergent conceptions of significant terms are a reality and also how differing
traditional horizons can produce conflicting notions of meaning in the interpretation of a
singular basic human experience. Again, the distinction of problematized horizons helps
to explain how a single concept can produce two distinct (yet consistent within a certain
interpretive context) understandings of human experience from divergent background
assumptions about the nature of the terms in question.
The final term that I wish to consider that can easily be problematized by one’s unique historical horizon is that of “God”. Given the reality of global religious conflict both in the past and at the present time, the fact that “God” can have various meanings to different cultures almost goes without saying. However, I would like to consider two historically prominent views and discuss briefly how these might significantly alter one’s understanding of history, literature, and current discussions of religious matters. In considering only the God of the Christian faith, one can derive two entirely separate natures from the primary text of the faith. On reading certain books of the Bible, one would be lead to believe that God is a wrathful and vengeant deity whose tolerance for insubordination results in genocidal plagues, fires and floods. In other books, God is portrayed as a merciful and forgiving being whose tolerance for sin results in forgiveness and understanding for all who accept his existence as the divine creator and redeemer of all things.

As with the first two examples, I claim here again that clearly one whose notion of God as the former type of deity will read a “different” Bible than one whose tradition brings the latter notion to interpretive conversations. The books and the words can be identical. However, the understood meanings of the text and their relation to the other ideas contained within the belief structure will necessarily be divergent based on the problematization of their historical interpretive horizons. Such divergence, as we see occur in reality, appears problematized in a way that is not remedied by any amount of conversation and discussion of operative terms. While I could make a pass at the claim here that dogmatic belief in any one part of one’s traditional horizon would not be
sanctioned by Gadamerian hermeneutics, such a claim is outside of the general scope of my work.

I would like to consider another question that I have resisted thus far but that seems at least worth mentioning here given the nature of problematized situations such as those that occur when divergent religious beliefs strain our interpretations of others’ expressions. When faced with attempting to understand another whose particular notion of God or some other religious belief conflicts greatly with our own and whose understanding cannot be altered by our conversation, the question, “Which notion is correct? Which notion is true?” seems to be appropriate here. In our discussions thus far, the description of interpretation has not required a parallel conversation about the epistemic criterion for “true” interpretations. The main reason for this is that Gadamer tries at most turns to remain a descriptive philosopher – ironically, while his title mentions truth, one is hard pressed to find a definition of this concept. The very brief answer to the specific question however is that both understandings of the notion are true – both are understood consistently within a historical framework of ideas and beliefs that make up the horizon. This is perhaps not the case if one were to bring divergent notions of family to a reading of the *Grapes of Wrath* – only certain notions will fit consistently with the ideas presented in the work as a whole. A similar claim could be made about bringing competing notions of democracy to a reading of the Constitution. However, there are clearly certain notions like that of God, which can make sense of divine works consistently and yet still diverge with one another. The result is separate understandings of the text in question with little or no recourse to determine which one is the best interpretation. While the apparent undesirable answer here is that in some situations, both
interpretations are understood “correctly” in an interpretation, there is a silver lining—an invaluable product of what might be seen as an otherwise frustrating result. That product is self-awareness itself.\footnote{A further general comment should be made here with respect to elements that typically are problematized in human expression. While I have illustrated the distinction at work with respect to individual terms, the reality of the matter is that a host of ideas and assumptions are potentially problematized in all conversations in which we take part on a daily basis. However, the practice of communication remains so basic in most instances that it barely matters that one person know the exact nature of another’s horizon so as to check it against his own. My intuition here is that there are a great many things that remain outside of understanding between any two people that converse largely because it is simply not important for one to make these non-problematized in order to “get the gist” of the conversation and move forward effectively from it. I think these inevitable minor misunderstandings are apparent however when an idea one speaker takes as superfluous and thus reasonably ignored becomes less so to the other speaker and it becomes clear that the two speakers are not on the same page with respect to the meaning of the terms used in the conversation. Again however, this is an opportunity to align horizons via explanation of misunderstood terms and to move forward more closely together in non-problematized conversation.}

I want to conclude this section on the problematized distinction by noting that there is an extremely valuable product that results from encountering a problematized horizon. It is through the attempted fusion of problematized horizons that one raises to consciousness that which would not be apparent without the conflict: one’s historically effected consciousness – that which moves our focus and determines much of what we “see” from our historically situated perspective. Without the encounter with divergent fore-understandings of meaning that is the defining characteristic of the attempt to fuse problematized horizons, we would not encounter the fore-understandings and prejudices that so greatly influence what we look for in the world and how we assume our experience will be ordered. To use a metaphor, it is as if this encounter with the divergent horizon produces a film that makes an otherwise transparent lens apparent to us. Unless we encounter horizons different from our own, we cannot see this historical effective consciousness - the lens through which we understand our world. Once these are apparent to us, we can evaluate the merits of our presumptions and make amend them if necessary.
to restore consistency within a larger historical framework that we consider ourselves a part of. Some might criticize that tradition and prejudice play too deterministic a role in interpretive experience for Gadamer and that there is not enough room for criticism on his theory of ideas that form our historically effected consciousness. It seems to this author that recognizing certain interpretive fusions as problematized only makes it clearer that this is not the case for Gadamer. As others have noted⁷, there is enough room for criticism already described by Gadamer in *Truth and Method*. Adding the problematized distinction as a descriptive distinction for fusion of horizons aids in understanding how self awareness and criticism is not only possible but how it occurs.

A Sunday Drive

As an illustration of the general way in which interpreters from different or problematized horizons experience a unique text, I offer the following metaphor. The journey metaphor: How is driving to Chicago is like interpreting Hamlet? If one chooses to approach either from different starting points, the experience will be different. Both are a determinate place/thing and do not change regardless of which “route” we take to “it”. However, the experience/meaning that results may be determined greatly by the approach we take to each. In the case of driving to Chicago, whether one drives from Peoria or Milwaukee will have a great impact on the resultant experience encountered. The point of origin for the journey determines to a great degree what the experience is. Similarly,

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approaching Hamlet from two distinct literary traditions will produce two distinct experiences of the otherwise singular text.

What can this show us about the problematized distinction? First, that point of origin matters in the determination of the meaning of an experience. In the case of linguistic interpretation, the particular horizon or the assumptions and fore-understandings that one begins the inquiry with will play a determinate role in how the object of interpretation appears to us, i.e., it will play a role in the determination of meaning. I think this is very clear in the journey metaphor. One knows intuitively that the approach to a singular point from different spatial starting points will yield different experiences of the object. Does this mean that the object does not exist for us if we cannot perceive it wholly in all its perceptions or meanings at once? Of course not! It merely affirms that human experience is perspectival and limited in its ability to simultaneously perceive meaning or form from divergent vantage points.

Second, the metaphor includes the added implication that there are multiple routes (at least potentially) to the same unique point on the map. For linguistic interpretations this means that there are potentially multiple valid meanings of texts. Thinking in purely cultural terms, the interpretation of Hamlet from a Chinese perspective is bound to make sense of the whole in a way that is at least slightly different than a South African interpretation simply by virtue of the fact that the assumptions about the nature of the situations depicted in the play that one carries to the experience from one perspective are simply not the same as those from the other perspective. Compare this general situation to the number of thoroughfares into Chicago and you have an idea of how many potential
divergent interpretive experiences that are possible of Hamlet purely from the fact of differing cultural backgrounds.

One might be tempted here to worry that such an abundance of potential interpretive starting points will yield an overabundance of valid interpretations of the text. And while in theory this is possible, two features of the metaphor should ease some of thee concerns. First, just as there are only a handful of ways that one can approach Chicago directionally, there are truly only a handful of ways that one may approach Hamlet as well. While the number of actual routes into Chicago is quite numerous, many of these are only marginally different – they yield similar experiences of the city just as marginally different cultural perspectives will yield similar experiences of the text of Hamlet. Second, while there are hundreds of routes to Chicago from all possible directions, there are only a few that are used from each of these directions as the best. Given one’s goals and directional “perspective”, again there are only a handful of routes that are agreed upon as those that should be taken to “get to” Chicago. If we compare individual commutes from the suburbs to individual perspectives from different cultural perspectives, we can get an idea of how potentially numerous interpretations of a text are, in reality, not nearly as widely divergent as one might think initially. As commuters move in large numbers to the most viable arteries of urban transportation, interpreters too move largely to the tried and true perspectives and learned assumptions of their historical tradition in interpreting texts.

Finally, the metaphor shows that for some destinations, there is not one true route or journey. Just as no one can say that the drive from Milwaukee is more or less true or valid than that from Peoria, for a great number of our interpretations, there will not be
one which we call *the* meaning of the text. Instead, we will want to qualify it is as the meaning given a particular horizon as point of origin. At that point in a discussion of meaning, we can then discuss whether or not certain origins are better than others, but that will only be possible once we recognize that the meaning we come to is in fact determined significantly by the point from which we start. As we have seen in the previous chapter and will see again in the one to come, the contextual nature of the determination of meaning is not in fact acknowledged by certain prevalent interpretive philosophies and in some cases it is eschewed. Without this acknowledgment, the actual conversations that we need to have about problematized situations cannot occur.

Furthermore, texts with little or no possibility for divergent interpretations are like destinations in which there is only one accessible or possible approach “drive”—all others have been discredited, grown over, or discarded. Such situations exemplify what I characterize as non-problematized interpretive events. An ideal example here is the meaning of a mathematical phrase such as “2+2=4”. No matter what language one speaks and no matter what level of mathematical skill one has achieved, she understands the meaning of this phrase or she does not by her ability to drive one very narrow path to its meaning. This path is the one in which the symbols produce in an interpreter the concept of equivalence. To think differently of the meaning here is to be mistaken in a way that can only be corrected by conforming to the horizon that includes the accepted meanings of these symbols, i.e. it is to drive the wrong way toward “2+2=4 ville” in way that is only remedied by finding the single road that leads to it.8

8 Perhaps someone might object here that there are numerous ways to interpret this phrase of arithmetic in a problematized way, such as an element of modern art, and thus even the apparently non-problematized meaning could be seen as non-transparent fusion. However, such a text would require a problematized
I close this chapter on the problematized horizon distinction with a discussion of objectives for moving forward in discussion and interpretation once a problematized situation is apparent. As noted in Chapter 1, confrontation and discord between elements of distinct historical horizons are opportunities for us to understand more about ourselves. In fact, this is the central method by which we gain self knowledge and knowledge of the otherwise transparent views and expectations that we bring to our experiences in general. By confronting otherness in texts and conversations, we are forced to confront the historically effective horizon from which we experience the world. In what follows, I propose briefly a loose set of guidelines intended to instruct participants how in a problematized situation to resolve their differences in horizon and to thus non-problematize the situation. Admittedly, there is a certain irony and potential inconsistency in proposing such a guideline or method for engaging in conversation or interpretation from a Gadamerian perspective. Gadamer devotes a good deal of time in Truth and Method criticizing the historical methods of interpretation that precede his work and eschews methodological approaches to interpretation in general. To be clear, I am not proposing here a particular method for getting to the meaning of a text or utterance in itself. Instead, in acknowledging the productive event of interpretation described by Gadamer, I also acknowledge the reality of problematized situations in which meaning remains unclear. Thus, rather than setting out guidelines for determining how to attain meaning determined independent of the activity of interpretation itself, I propose here how best to navigate those situations in which horizons do not line up

context like that of an art museum in which we bring back into play many divergent expectations that we do not have given the universally accepted experience of 2+2=4 as a phrase in arithmetic.
seamlessly, preventing the product of meaning that occurs from that activity from taking form.

**Accept the hermeneutic situation.** Where possible, mutual acceptance that our perspective is in fact just that, a perspective, allows one to consider with greater ease possible meanings that otherwise may not occur to us as valid. Gadamer touts this as a general acceptance and openness to divergent meanings. This is not an issue if we encounter a historical text as the interaction and goals are one sided – the interpreter alone determines the course of the “conversation.” This can be more difficult in a contemporary conversation as one’s interlocutor may not share this understanding. When possible however, a general understanding of the hermeneutic situation will aid in the passing from problematized to non-problematized fusion of horizons.

**Identify the substantive difference in interpretation.** The first substantive step is always to determine where one’s interpreted notion differs from that which one attempts to understand in interpretation. Admittedly, this is somewhat easier in conversation with a speaker in real time than it is in the interpretation of texts not contemporary to the reader. For if there is a possible divergence, one may simply ask a contemporary interlocutor questions regarding the meanings of the terms discussed and simply locate the divergence. Yet, one can no longer ask Shakespeare or Emerson or Goethe which concepts and assumptions form the background of the meanings depicted within their texts. However, the determination of the particular notion that is at discord with that of the interpretive horizon encountered remains primary regardless of whether the discussion is between peers or between one encountering a historical text. Inquiry into
the location of this divergence, like pinpointing the epicenter of an earthquake, is a primary goal for problematized situations.

**Investigate why one might see these as different**, i.e., investigate possible sources of difference in horizon or background assumptions. While this is a notably vague prescription, I think it goes hand in hand with the first step. In many cases, recognizing how a specific concept differs requires one to focus on a more general set of assumptions that work together in support of the specific concept of divergence. As I claim in this project, this step and the next proposed one are those that produce the most self awareness as a more general investigation of one’s differences with the horizon encountered shine the most light on what our historically effected consciousness is composed of and how it affects the manner in which we view the world.

**Agree upon the most likely source of difference in horizon and/or background assumptions.** Given the nature of the subject interpreted, this could be any number of specific features of one’s background, some more obvious than others. Cultural differences are numerous and easy to spot in cases where problematization occurs in a fusion between culturally distinct horizons. For example, I know going into the act that I may understand differently the cultural symbols and meanings contained in Chinese folk literature than would one from that culture given the same task of interpretation. But this difference is readily apparent at the outset given my cultural distance to the horizon interpreted. Historical difference makes one on alert in a similar fashion. The difficulties occur when it is not readily apparent how one might differ, and the only real remedy in such a case is further discussion around the topic that appears to be the cause for concern. I interject here again that all the while, an understanding of the
hermeneutic situation that envelopes the activity aids greatly in the consideration of these differences. While not essential – one could always accidentally come to be aware of one’s perceptive – it is much more readily available if one is in fact looking for it in the interpretation.

Discuss critically the need for one or the other assumptions or sets of assumptions as pertains to the current interpretation; this is where the heavy lifting in the discussion occurs – the argument over background commitments. If one can agree on the divergent concept(s), then a discussion is possible over which should win the day in subsequent conversation of the general topic at hand. I do not wish to propose a rubric for determining this concept as nearly every interpretive situation would be different and thus require slightly different focus in weighing what would be important in determining the best notion for a consistent interpretation. I simply want to acknowledge this as an important step in managing a problematized situation.

Decide which interpretation must go forth for the sake of answering the questions of interpretation and discussion of all relevant elements. This step falls out of the previous one and is probably a subsection of it. And again, while there can be no rubric here, I note the step because of its necessity in moving forward with the interpretation.

If no consensus is possible, then agree to disagree and offer both products as potential interpretive candidates with greater understanding of the nature of the possibilities and of the relevant issues for the particular problematized horizons. Perhaps others can adjudicate more decisively from a more developed historical horizon in the future. Or perhaps democracy can decide which is more correct if that is truly necessary.
Finally, do not require a definitive meaning as if the text/expressions were non-problematized. If and when there is cultural consensus on the required background assumptions, then the meaning will be understood as such. Non-problematized horizons will dictate definitive meaning when such consensus is possible. Until then, meaning is at best a work in progress. Many of our most important human concepts are in fact understood in this way. Simply think of justice, love, truth, good, etc., and the philosophical discussion that has embraced these terms throughout intellectual history. In the context of legal interpretations, a definitive meaning may be necessary for judgment on a specific case. However, this is precisely why those contexts are decided by a group that must deliberate together rather than a singular individual left to just his own perspective. I will return to these guidelines again at the end of the project and apply them specifically to problematized legal interpretive events.

In the first two chapters, I have considered views on the nature of meaning determination and the interpretation of it. I have proposed a distinction for better understanding how interpretation works in practice and where we have difficulties when interpretation of meaning is difficult or breaks down. Additionally, I have explicated a set of guidelines for confronting the situations in which interpretation is difficult. In the next chapter, I will consider views of legal interpretation similar in kind to those disavowed earlier. This discussion will make possible an argument that some of those views are illegitimate given Gadamer’s philosophical hermeneutics and will make possible a suggestion of the types of legal interpretation that do lead us to meaning. Applying the distinction and guidelines of this chapter to the topic of legal interpretation, I will forward
modest suggestions for the interpretation of legal texts. I turn now to a discussion of legal originalism.
CHAPTER THREE

ORIGINALIST THEORIES OF LEGAL INTERPRETATION

The scholarly arguments against originalism are well worn and are accepted among a large sample of legal theorists. Paul Brest’s “you can’t discern the original intent”\(^1\) and H. Jefferson Powell’s “the original intent was that the constitution not necessarily be interpreted as the framers would have intended”\(^2\) were devastating to originalist apologists in the 1980’s, in academic circles at the very least. More recently, Sotirios Barber and James E. Fleming have written a book\(^3\) espousing a “philosophical” position consistent with Ronald Dworkin’s interpretive approach and claim that originalism in general “misconceives fidelity in constitutional interpretation.”\(^4\) So why give a philosophical argument against originalism anyway? Response: 1) because there are other forms of originalism and views like it that do not fall prey to the particular criticism listed above\(^5\), 2) others hold and use these views in the court today\(^6\), 3) the


\(^4\) ibid., 98.

\(^5\) For example, any that do not rely on original intent or specific meaning, but instead something related to these. These types are not covered by Brest’s or Powell’s criticism but can be covered by a hermeneutic argument.

\(^6\) As Randy E. Barnett claims, “Originalism is now the prevailing approach to constitutional interpretation. Even more remarkably, it has prevailed without anyone writing a definitive formulation of originalism or a refutation of its critics.” in “An Originalism for Nonoriginalists,” 613.
hermeneutic argument is more comprehensive than the Brest and Powell ones, 4) and such an argument will further illustrate what I mean by the problematized/non-problematized distinction and outline its use in contemporary discussions about interpretation.

The most cogent argument against originalism is one from the descriptive side of the interpretive experience – one that says interpretation is never correctly conceived fully as a grasping of historical meaning, but instead is a fusion of interpretive horizons that only coincides with historical meaning when the operative horizons are lined up in a transparent manner. In the cases of interpretive events of long past historical writings, this is almost certainly not going to be the case – the horizons are separated by far too much tradition and experience. Ironically for someone like Justice Antonin Scalia who invokes tradition first when meaning is not “originally” clear, it is the tradition that stands between himself and the text that is a roadblock to transparent uncovering of meaning.

In this chapter, I consider several types of originalist thought in legal jurisprudence and show how each falls prey to the error of the intentionalists discussed in Chapter 1. I begin with a brief discussion of terms from Brest, Barber and Fleming. After developing a general taxonomy for originalism, I propose an argument against originalism based on its general acceptance of IT. Next, I consider Justice Scalia’s approach in further detail as outlined in his scholarly writings and I critique his general view. Finally, I discuss a previously proposed analogy with respect to Constitutional interpretation and offer further critical insight into the limitations of originalism for correct legal interpretation.
Brest’s Taxonomy

The central goal of this chapter is to characterize several legal interpretive philosophies that might be characterized as intentionalist in nature or similar in kind to the intentionalist notion of textual meaning. Among these theories, original intent, original meaning, textualism, and strict constructionism are the most prominent.

In his “The Misconceived Quest for the Original Understanding,” Paul Brest set out to characterize previously uncategorized views described as originalist and sought to give arguments to support a non-originalist interpretive position as most tenable in constitutional interpretation. His main distinction is useful as we try to characterize the different views that qualify roughly as originalist. The central difference between an originalist and non-originalist in constitutional interpretation is the source of authority for the determination of meaning. The originalist holds that the original understood meaning or the original intentions of the framers of law is authoritative with respect to meaning. Thus, the goal of interpretation for an originalist is to discern original meaning or intention of the Constitution. Conversely, the non-originalist holds that something other than original meaning or intention is authoritative and thus looks to that for guidance in determining the meaning of constitutional phrases.\(^7\) While there are many flavors in

\(^7\) Gadamer is neither originalist nor non-originalist in his interpretive outlook. For Gadamer, the nature of the interpretive situation requires that we engage an “original” horizon associated with the text or speaker from which meaning is transmitted to us, but that we do so only by means of fusion with another “non-original” horizon, our own historically situated one. For the same reasons I reject nomenclature that describes Gadamer as non-intentionalist, I would similarly reject nomenclature that labels him a non-originalist.
constitutional interpretation, a vast majority can be categorized as lying somewhere on a continuum between these two poles.\(^8\)

Next, Brest distinguished between the two main types of originalism: strict and moderate. Strict originalism for Brest describes one of two general outlooks: it is a position that regards the meaning of the text of the Constitution as, a) precisely what it meant when it was written, or b) precisely what was intended for it to mean by those who wrote it.\(^9\) The first position is called strict textualism and the latter strict intentionalism. In practice, this means that a strict textualist would be one who believes that the meaning of the Eight Amendment can only be a prohibition against what one would have perceived cruel punishment to be at the time of the writing of the Constitution. And for the strict intentionalist, this Amendment can only mean what those who wrote it intended for it to mean. As I will discuss below, however, there is a difference between the strict conceptions meant or intended and the more general concepts outlined by their original meaning or intent. One might very well hold that the document outlines general concepts rather than specific conceptions and thus hold that the framers originally understood or intended concepts are primary in interpretation even if their specific conceptions are not.\(^{10}\) For now, it is only necessary to understand that for a strict originalist, the specific

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\(^{8}\) For our purposes here, I will only detail originalist perspectives in this section. Originalists as a general group accept some form (or parallel principle) of the intentionalist thesis which we discuss in Chapter 1.\(^{9}\) As we will see strict construction will seem very similar to this general notion of interpretation.\(^{10}\) The view that there is a difference between original conceptions and original concepts is proposed by Ronald Dworkin. Dworkin considers himself an originalist at least in the sense that he believes interpretations should be faithful to the originally intended concepts of those who wrote the document. However, his allowance of other factors to determine meaning make his view distinguishable from the strict original intentionalist and by Gadamerian standards ultimately more tenable. Dworkin says there is a “semantic originalism” (Comment in Antonin Scalia, *Matter of Interpretation*) that comes close to his view but is still not acceptable.
original meanings or intentions determine the meaning that we seek in interpreting the document today.

Brest’s second type of originalism is moderate originalism. While strict originalists require exact adherence to original meaning or intent for validity in interpretation, moderate originalists allow for the interpreted meaning of the document to be determined at the level of original purposes. The question: what purpose was originally meant or intended is the primary question from this point of view. For the moderate originalist, the text remains “authoritative”, but many of its provisions are treated as “inherently open-textured.” 11 This apparently means that while a moderate originalist might reject a call to strict adherence to the specific original understanding of meaning or intentions in constitutional phrasing, she still desires adherence to the original general purposes of the adopters in creating the language of the constitution as they did. Also, focusing purely upon original general purposes in the Constitution would appear to be more open to allowing different specific conceptions in interpretation than would focusing purely on original conceptions. While there might be several different notions that could equally preserve the original purpose of specific constitutional language, presumably only one original meaning or intention could exist for a single phrase or section.

Before Brest, there were no taxonomic analyses of originalism in the literature. One might legitimately ask here, if originalism is so crucial to correctly interpreting the Constitution, then why did it take over 200 years for someone to write a brief description of the general view? The answer lies in the fact that before Richard Nixon and Robert

11 Brest, “The Misconceived Quest for Original Understanding”, 205.
Bork criticized the Warren Court and campaigned for the nomination of “strict constructionist” judges in federal courts in the early 1970’s, the position had no verifiable adherents. While the discussion in the present work will discuss the shortcomings of originalist interpretive theory via its acceptance of the intentionalist thesis or some form of it, surely the fact that there were no originalists before the 1970’s is damaging to the theory as well in that this apparently means that almost 200 years of interpretation are invalid or at least very fortuitous in interpreting the constitution in the specific ways that it has been interpreted. If originalism is the only legitimate mode of interpretation, how have we gotten along all this time?

While Brest’s taxonomy is helpful in categorizing a large family of views that focus on the original meaning of constitutional phrasing as authoritative of interpretive meaning today, the general view has several distinct varieties today and thus a more

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12 Strict versus loose construction refers centrally to one’s interpretive philosophy with respect to the power of government to impose laws on the states. Strict constructionists generally seek to limit the interference of the federal government upon states rights unless such powers have been expressly granted to it by the constitution and its amendments. Contrastingly, loose constructionists allow for federal legislation not expressly forbidden by the constitution. In historical terms, Jefferson is typically thought of as a strict constructionist of sorts and Alexander Hamilton a loose constructionist. Typically, one who holds a strict constructionist view supports judicial restraint in limiting state legislation and a loose constructionist is said to be activist when her view allows for the limitation of states powers because no constitutional clause expressly prohibits it. Recently George W. Bush claimed that he would appoint strict constructionist judges like Rehnquist, Scalia, and Thomas if given the opportunity. Curiously, none of these judges consider themselves strict constructionists even though Rehnquist was generally considered the most prominent advocate for states rights in American jurisprudence up to his death on the court in 2006. Strict constructionism appears to be a view that relatively no one holds but that some prominent politicians think all should. Similarly, loose construction is generally an epithet used by the same politicians for judges who rule against state laws that they or their political constituents generally approve. Like strict constructionism, few if any call themselves loose constructionists.

13 Barber and Fleming assert, “Originalism is an ism, a conservative ideology that emerged in reaction against the Warren Court. Before Richard Nixon and Robert Bork launched their attacks on the Warren Court (and the right to privacy decisions of the early Burger Court), originalism as we know it did not exist. Constitutional interpretation in light of original understanding did exist, but original understanding was regarded as merely one source of constitutional meaning among several, not a general theory of constitutional interpretation, much less the exclusive legitimate theory.” Constitutional Interpretation, 110.

14 I think the implied answer here echoes Gadamer’s point at the beginning of Truth and Method. Regardless of what we think we do or say we should do, interpretation goes on over and above these thoughts.
contemporary taxonomy is needed. For this I now turn to Barber and Fleming’s work on constitutional interpretation.

Contemporary Originalisms

To begin their discussion of originalism, Barber and Fleming focus first on the interpretive theory of textualism. In its most basic sense, this is the view that takes the “plain words” of a text as authoritative in interpretation. The textualist attempts to view the words of the constitution as simple and transparent and considers theories to the contrary as erring from the plain meaning of the text. As an example of this view, Barber and Fleming consider the writings of Justice Hugo Black. In his dissent in *Griswold v. Connecticut*, Black claims in his dissent that unenumerated rights, i.e., those not included in the plain words of the text of the Constitution, simply do not exist and that the any interpretation that finds otherwise does not follow the plain meaning of the text. Further, he argues that the plain words of the Tenth Amendment (those requiring powers not granted explicitly to the federal government be reserved for the states) supersedes the text of the Ninth Amendment regarding the existence of unenumerated rights. However, his reasoning for this hierarchy of principles comes not from the plain words of the text but a general belief that “it’s undemocratic for unelected judges to invent rights against a majoritarian government beyond those rights specified in the text.” In fact, consistent with Gadamer’s claims about interpretation, Barber and Fleming claim that no textualist can make an interpretation of a controversial phrase without invoking a personal belief

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15 ibid., 69.
the justification of which lies outside the “plain words” of the text.\textsuperscript{16} As it turns out, “plain words” textualism never gets off the ground as a viable interpretive option because it is precisely those phrases of the constitution whose meaning is not readily determined by the plain meaning of the words that require interpretation.

I make note here that Justice Scalia considers himself a textualist in his writings. In considering the meaning of constitutional phrasing, the text alone is the primary authority and only when original meaning is ambiguous does one consider other features of interpretive tradition. However, he does not consider himself a “plain words” textualist in that he relies primarily on the historical understanding of the words when written. As will be detailed below, however, his notion of textualism is actually a form of originalism – it focuses on the original meaning of the words as determinate of interpreted meaning. Thus, it faces similar issues with respect to the determination of meaning without outside sources as does plain words textualism. And, like the other versions of originalism it will be judged illegitimate by the Gadamerian legal hermeneuticist. I turn now to consider the different forms of originalism detailed by Barber and Fleming.

Unlike Brest before them, Barber and Fleming do not note a definable difference between original intention and original meaning - they consider these two would-be views as different sides of the same coin that affirm the same general premise: a specific original feature of constitutional language is determinate of meaning\textsuperscript{17}. Another reason they appear to deny this distinction is that most originalists, as was the case with previous

\textsuperscript{16} A similar claim can be made of other originalists including Justice Scalia as will be shown below.

\textsuperscript{17} The authors explain in a note, “The distinction between intention and meaning is a refinement that cuts no ice with us. Everyday speakers of a language confound “meaning” with “intent” because speakers normally pick a word that conveys what the word is generally taken to mean. “What do you intend?” is thus often equivalent to “What do you mean?” see footnote on page 79.
noted intentionalists, deny original intentions as a viable option and instead favor original meanings of constitutional phrases as the only valid position. Barber and Fleming name this view *narrow* or *concrete originalism* and consider it a view that focuses on perceived original conceptions of the words of the text at the time of the writing of the constitution. I liken this view to Brest’s strict originalism and see no discernable difference that makes a difference between them.

Because this view is so similar to Brest’s previous definition, the main discussion regarding narrow originalism upon which I want to focus is the claims of contemporary authors of a “new originalism”. Rejecting intentionalism as unfeasible, these authors\(^\text{18}\) espouse a version of originalism that also rejects the ideological baggage of the “old” originalism, focusing upon the original meaning of the text and nothing more. Keith Whittington explains in “The New Originalism” that the desire to restrain the rulings of the perceived activist Warren and Berger courts brought about a parallel commitment to strict construction and judicial restraint for most originalist apologists which are not necessarily consistent with an original meaning reading of constitutional language. As I noted earlier, strict construction has more to do with a type of reading of the right of the federal government to interfere with the business of the states outside of its constitutional jurisdiction. An original meaning interpretation may or may not produce an answer consistent with this desire and thus the new originalism supposedly distances itself from a necessary wedding of the two views. Similarly, judicial restraint in expanding federal power via the courts was also a view that was espoused by many originalists in response

to what was perceived as an overreaching court in restricting state legislatures and expounding unenumerated personal rights. Further, restraint from ruling against state legislatures may or may not be validated by the original meaning of Constitutional phrases. Thus Whittington explains that it too should be jettisoned by new originalists. The new originalism, he explains,

“...is distinct from the old in that it is no longer primarily a critique of the Warren Court’s rights jurisprudence. The new originalism is more comprehensive and substantive than the old. It is more concerned with providing the basis for positive constitutional doctrine than the basis for subverting doctrine...the new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted.”

So what is different about the new originalism other than a dismissal of apparently superfluous ideological baggage? Barber and Fleming conclude that not much is in fact different. The new originalism suffers from the same flaws as the old – it relies on the background notion that original meaning is something that can be transferred to a contemporary interpreter without the utilization of a particular interpretive perspective. The authority of the text of the constitution is taken by originalists old and new to rid us of the possible stain of moral or philosophical choice in the interpretation of the Constitution. However, it is not clear how one can interpret the meaning, original or otherwise, without

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19 Whittington, “The New Originalism,” 116. In the sense that interpretation is focused on “public meaning”, Whittington seems to be describing the interpretive view of Justice Scalia. I discuss Scalia’s view below at greater length.
making reference to background assumptions about some of its most basic terms. I claim that this general criticism of originalism is one that is consistent with Gadamerian hermeneutics and that the latter can be utilized to better understand the types of interpretive approaches that are possible.

On the opposite end of the spectrum from narrow or concrete originalism is abstract originalism. On this view, the original meaning of the Constitution refers to general ideas or concepts in its more general phrasing. Thus, ideas such as “due process” do not refer to any one specific conception of due process but to the general idea of due process itself. The particular interpretation of this concept will require one to combine contemporary moral ideas of justice and fairness with the general concept of due process set up by the language of the Constitution. The idea here is that a legal document like the Constitution sets out the conceptual framework for which to infuse contemporary understanding of relevant notions in order to produce substantive meaning of the statutes. This view is consistent with the Dworkin claim that in order to respect the text of the Constitution as written in interpretation requires a “fusion of constitutional law and moral philosophy or political philosophy.”

I will consider this view in more detail in the next chapter.

The final type of originalism described by Barber and Fleming is broad originalism. The type of originalism is described as a middle ground between the strict reading of the narrow originalist and the critical response from the abstract originalist requiring a moral choice in interpreting the general terms of the document. Seeking to

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20 In particular, notions of what the constitution is, what democracy is, and what the purposes and structure of government is designed to accomplish.

remain faithful to the original understanding of the text at the time of its ratification, but also desiring not to allow for subjective elements to pollute an accurate historical reading of the text, this view prescribes a return to the history of the text to uncover the overarching meanings of the text as a whole. Such theorists argue that a more comprehensive view of the history of the text as a whole will lead one away from having to make the philosophic determinations that must be a part of the abstract originalist interpretations while also avoiding the particular specific interpretations claimed as authoritative by concrete originalists. The notion of “levels of abstraction” is used to justify the move between concrete and abstract.

In order to illustrate the use of levels of abstraction as a means of distinguishing broad from narrow originalism, Barber and Fleming consider the interpretive view of the notion of “person” in the Equal Protection Clause of the 14th Amendment from each originalist perspective. Considering only the original meaning of the words when they were written, the concrete originalist reading of this clause would only consider the person to include, in addition to those already considered as such, recently freed persons of African descent. This reading would recognize the addition as the attempt to prevent any state from denying rights and/or allowing violence against such persons. For this view, there is no level of abstraction beyond the perceived specific original meaning of persons added to protection of rights by the Amendment. Outside of these “new” persons, no others were guaranteed constitutional rights by the 14th Amendment and until further Amendments are made, no such rights should be conferred says this reading.

22 Akhil Reed Amar calls his originalism, intratextualism, and threads together meaning in the Constitution as a patchwork fabric determined by the terms of multiple founding documents working as a whole. See “Intratextualism” and America’s Constitution.
Contrastingly, an abstract originalist might consider the 14th Amendment’s equal protection guarantee as recognizing many more “new” persons than just those of African descent - as “a general protection against all discriminator practices and acts that deny equal concern and respect and that are not justifiable as good-faith efforts to serve the common good of the entire community.” On this reading, persons include not just those of African descent and those already considered such by the Constitution, but also any others who might have their guaranteed Constitutional rights infringed upon by members of another group. Women, homosexuals, unborn children, poor, handicapped, etc., could all be included under the abstract originalist notion of “persons” and thus not be denied equal protection of the laws. The level of abstraction on this lens is set at the most general notion one could conceive of as a person and applying the rights reconfirmed in the 14th to all who meet the appellation. In this way, while the original specific focus of the law might have been to insure that those of African descent were not discriminated against, a general protection for all those who might be similarly discriminated against in different situations is inferred and thus these individuals should also be understood to fall under the meaning of persons who are entitled to an equal protection from the law. “‘Person’ in the abstract could cover whatever our best scientific or moral theory of personhood indicated a person to be.”

23 Barber and Fleming, Constitutional Interpretation, 103.
24 This reading could be used to say that the 19th Amendment was not necessary in the sense that women could have argued that the 14th Amendment guaranteed them equal protection as a person and thus required that they were allowed granted the same voting rights as men. The fact that the 19th Amendment was created does not invalidate the abstract position, however. Instead it simply means that the interpreters of the Constitution in 1920 did not interpret the 14th with the same particular value judgments as would current abstract originalists.
25 ibid., p103.
others in situations similar to those African Americans of the 1870’s, the level of abstraction is at its widest or most general.

In between these two views is that of the broad originalist. On this view, the level of abstraction will allow for the inclusion of more than just those of African descent, but will not include person to include categories like unborn person or poor person. What is the justification for this judgment? The historical beliefs of most Americans would not tolerate equal protection rights for the unborn or the poor, but would for such groups as women and religious minorities. These latter groups and possible discrimination against them remind one symbolically of the discrimination against blacks after the civil war and thus are reasonably considered groups of persons as targeted by the 14th Amendment for equal protection. An initial critique of the broad originalist view asks whether or not one can legitimately allow for meanings other than the explicit original meaning of the term ‘person’ and disallow others without making some kind of value judgment about the best criterion for doing so? If this is the case, then the view is really no different in kind than the abstract position – one of the extremes the view initially hoped to avoid.26 Both make a value judgment that determines what focus lens to use when considering the meaning of the term ‘person’. Thus, the desire to avoid value judgments in interpretation seems unfulfilled and a true middle ground has not been forged. Instead one is left with a more

26 “Now from this it should be evident that the broad originalist must justify two things: why he takes the first step beyond the lowest level of abstraction and why, having taken that step, he doesn’t include all persons. If he can justify the first step beyond the framers’ concrete intentions, he recognizes the flaws of concrete originalism. But if he does recognize the flaws of concrete originalism, he has but one other option: abstract originalism...If he steps beyond the lowest level of abstraction, he has to justify his stopping point, and he can’t do so without a moral argument that his approach was supposed to avoid.” ibid., 108, italics mine.
exclusive reading that simply makes a different value judgment about the meaning of person than does the more inclusive abstract originalist.

A second reason to doubt this view is proposed by Barber and Fleming. It is the implied acceptance of the “originalist premise”, or “the assumption that some form of originalism just has to be the only approach to the Constitution that is truly faithful to it.”27 Stressing the regulatory nature and the binding authority of law, most originalists carry as an implied axiom that only an interpretive method that seeks primarily something fixed and stable, i.e., an original characteristic of the text, can legitimately produce an interpretation that will preserve this regulatory and binding nature. The problem is that this assumption is nowhere argued for – it is merely assumed as true. It is a central background assumption of prominent originalists, concrete (see Scalia) or broad (see Amar), and in Gadamerian terms it shows that even those who claim not to bring an interpretive perspective to their interpretations, nevertheless they in fact do. Beginning inquiry with the desideratum that one’s interpretive method maximize the legitimacy and authority of the answer produced is eerily similar to those theorists in the human sciences in the 1800’s who hoped to develop an interpretive method that would legitimize the answers of human science inquiry as on par with those of the natural sciences. As Gadamer notes in Truth and Method however, such desires cannot change the fact that all interpretive experience, not only in the human sciences but in the natural sciences as well, cannot escape the hermeneutic circle and the limitations on method that this situation entails. In inquiry, one is simply required to “propose” an answer in the form of a “question” and wait for a “response”. The concrete and broad originalists appear to call

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27 ibid., 104.
with the expectation that an interpretation can be legitimate only if its meaning emanates primarily from some original character of the expression interpreted. The response returns with a meaning not surprisingly that emanates primarily from these sources. In contrast, the abstract originalist recognizes the need of the interpreter to project some of her own learned judgments upon the original concepts of the text and questions the text not looking for an specific original meaning, but instead a conceptual framework within which to consistently merge her contemporary understandings with the perceived basic meanings of the text.

The Argument Against Originalism

Now that we have discussed the most prominent types of originalism and related interpretive theories, I offer an argument that shows them to be illegitimate given their dependence upon IT. Given their reliance upon this thesis of how meaning is determined, it is a relatively brief argument to show that such theories are correlativey illegitimate given Gadamer’s description of interpretation. The argument follows:

1. Originalism holds that original intent or meaning of a legal statute is the sole determiner of an expression’s meaning

2. On the originalist account, for an interpretation to be legitimate, it must rehearse this intent or meaning

3. Interpretation is not a task in which one rehearses original/authorial intention or meaning
4. Thus, the originalist prescription for a legitimate interpretation cannot be accomplished – it is not possible to interpret a work and come up with original intention or meaning

5. Therefore, Originalism is an illegitimate theory of legal interpretation

At first glance, it might seem that the conclusion that originalism is an illegitimate theory of interpretation is not warranted. For, perhaps all one can claim from the statements above is that originalism affirms a notion of what determines meaning that is not evidenced by a thorough investigation of experience. And thus while one with this kind of view does not understand the manner in which it comes to interpretive answers, nonetheless, originalism still remains an interpretive theory. It is just one that simply fails to recognize the prejudices that it brings to the experience of interpretation. I acknowledge that this weakens the conclusion of illegitimacy somewhat. However, if one adds a further premise that recognizing how one understands meaning is a significant aspect of understanding meaning itself, then originalism looks substantially more inferior if not completely illegitimate. A simple analogy should illustrate the point that understanding how interpretation occurs is an important aspect of understanding in general.

Imagine a scenario in which a child plays a schoolyard game with the other children in the neighborhood but fails to recognize the actual rules of the game and the meaning of them in context of game play. Such a “player” may move within the

28 The idea here is that awareness matters. David C. Hoy states the implied normative claim as follows. “Hermeneutic philosophy does not tell interpreters what to do, but it does imply that an understanding that tries to understand itself (including both its doctrinal and methodological commitments) is better than one that does not.” “Interpreting the Law: Hermeneutical and Poststructuralist Perspectives,” 157.
sanctioned action of the game without contradiction to such rules, but does not truly “play” the game unless these rules are understood. Similarly, the interpreter who rejects that prejudice and tradition are effective in interpretation, if not attempts in all cases to eliminate these, may move within the relative boundary of interpretive activity, but they are not playing the game of interpretation consciously. Unbeknownst to them, the game is going on around them without their input or awareness. The result is a situation in which the interpreter is said to be interpreting but is really only recognizing a part of the interpretive event in a similar manner in which the child is “on the field of play” but is not truly playing a part in the game. Again, by getting out there, an originalist puts her horizon of understanding and its prejudices in fusion with the texts and experiences of the past. It is just that she fails to recognize this fusion and thus interprets with the impossible goal of recovering that which is not recoverable – the non-mediated original object of past meaning. She is the child on the field who thinks she is playing the game but who does not realize that her actions are not sanctioned by the activity that she misunderstands at a basic level. As a case study of this type of behavior, I turn now to analyze the most prominent originalist of our time, Justice Antonin Scalia.

Justice Scalia’s Originalism

As one of the more outspoken Justices on interpretation in the history of the Supreme Court, Antonin Scalia would be an interesting study for our purposes regardless of the particular view that he espouses. However, the fact that he claims to focus primarily on the original meaning of the words of a statute at the time of their enactment additionally makes him an excellent case study in what occurs when one believes that
they interpret something of the original character of a document and also how they mistake this element as being unaffected by their own position as an interpreter of meaning. I begin my inquiry with Scalia’s comments on the issue in his text, *A Matter of Interpretation*.

On the road toward the exposition of his position, Scalia covers the presence of common law decisions in an increasing civil system, the nature of the democracy guaranteed by the constitution and its requirements, the lack of a prevailing method of constitutional interpretation, as well as the flawed notion of meaning as original intent. It is through this discussion that Scalia reveals several important background assumptions about the nature of the activity of interpretation that are key components of his own historical horizon that I will address briefly below. However, it is his comments about what he claims that he is doing when he interprets and the explicit claims that others should as well that are most interesting for the present work. He describes that to be a textualist, “[o]ne need only hold the belief that judges have no authority to pursue [the broader social purposes that a statute is designed] or write those new laws.”29 As an initial statement of what it means to agree with his interpretive perspective, this one is quite telling for two reasons. First, it does not focus specifically on what we look to in order to determine meaning. Instead it points to what judges should not be doing and claims that one who does not do this is a textualist. Second, it openly admits that the interpretive perspective is a “belief” about what judges *should* be up to. Now, it is not the position of this author that such an admission cannot be made. However, I would think that a textualist would first and foremost be someone who believed that meaning is

29 *Matter of Interpretation*, 23.
determined primarily by the text and not that judges should or should not be adjudicating in a certain way.

In his next formulation, Scalia distinguishes his view from the views of strict constructionism and literalism, adding that, “a text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.” It seems that Scalia’s view again is one that is not this view or that one, but instead one that is reasonable and inclusive of all fair meaning of a text. Again, this statement seems quite vague as an opening statement about a view that is supposed to be “formalistic” and the most clearly valid interpretive approach. Still desiring a statement about what it is precisely that determines meaning in a textual expression, we read on.

Considering the history of legislative intent, Scalia adds that his view is “that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law.” Here we draw closer to a definition, but there is still a great deal of ambiguity. Does the “objective indication of the words” refer to the specific conceptions that the legislators had in mind when the statutes were written? Does it mean the broader concepts that the laws embody generally through their expression? One can understand that Scalia denies original intent from his comments. However, it is still not clear what

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30 ibid., 23, emphasis mine.
31 ibid., 25.
32 ibid., 29.
33 Scalia denies intentionalism to the point of criticizing theorists (Matter of Interpretation, 16) and lawyers (Matter of Interpretation, 31) for attempting to rely on legislator’s perceived intent in constructing a statute in question. His first criticism is that if the legislature had intended a different meaning from what they affirmed by passing as law, then why would they not have included this meaning in the original document to begin with? This criticism seems most applicable for statutes whose meaning is relatively clear and is only questioned by someone who wants to review the language in light of further consideration of legislative documents. However, what about those laws whose meaning is simply not clear by the language of the statute alone – is there not a good reason to investigate legislative intent for laws that we cannot immediately grasp their specific meaning by the language of the text as written? The second criticism is
determines meaning specifically on Scalia’s textualism from the “objective indication” standard.

Alas, Scalia’s remaining text includes little more formulation concerning the actual determination of meaning for a textualist. Instead, I look to other writings for further guidance. In *Antonin Scalia’s Jurisprudence: Text and Tradition*, Ralph A. Rossum analyzes thoroughly Scalia’s interpretive philosophy and its application to key issues covered in the Constitution. Rossum cites the central tenet of Scalia’s philosophy as a focus on text and tradition. In doing so, he notes the tension between two perceived central aims of the Constitution: 1) democracy or majority rule, and 2) the protection of individual rights from the majority. Rossum claims that Scalia relies primarily on the text and its original meaning in order to balance these two conflicting goals. In a great majority of cases, the sphere of the majority and minority rights may be consistently upheld with no further guidance other than the original meaning of the text as Scalia perceives it. In most cases, the explicit rights of majority and minority are clear and not at odds with one another both would claim. However, if the original meaning cannot consistently protect both at the same time, then a judge must include the historical tradition of America for guidance and not the opinion of some judge or another. If an “area of life” has traditionally been protected from majority rule then that freedom can be objectively protected by the Constitution. Conversely, if the tradition has not explicitly

broader and focuses on such instances. The central concern for this criticism is the ability to discern legislative intent from a diverse body of thinkers and writers. For in truth, any possible law created by a body of legislators will affirm and deny many of the specific intentions of the legislators that write it. This means that rarely, if ever, is there a unified legislative intent that could be ascribed to the members of the body as a whole who drafted the particular statue. Thus, it is literally impossible to discern legislative or authorial intent in the case of legislative documents. And thus, the theory that would require this approach is inappropriate as a general approach to constitutional adjudication. So, on the issue of original intent, Scalia seems to be aligned with those that criticize originalism is general.
protected an individual liberty then it cannot be protected by the Constitution. For example, while the “cruel and unusual punishment” clause might prohibit certain specific modes of punishment, there is nothing in the tradition that prohibits that the punishment must be proportionate in some way to the crime. Thus, claims that certain punishments terms are excessive and thus “cruel and unusual” given the crime committed have no basis in constitutional law. In another example, while the establishment clause requires us to prohibit the establishment of a state or federal religion, the text and tradition together certainly do not prohibit the use of non-sectarian prayer in public school ceremonies. Therefore, laws made to this effect cannot be covered under the establishment clause and are thus unconstitutional.

Two comments follow this description of Scalia’s philosophy as following text and tradition. First, nothing has been said definitively on how one is to accurately determine what the original meaning of the text in fact is. The best answer offered is that a detailed researched inquiry of the historical terms should be used to produce the “most reasonable meaning” of the terms when written. Second, the inclusion of tradition as arbiter when the text is not clear enough opens up several more questions

1. How do we know when to invoke tradition?
2. What tradition do we consider?
3. How do we know that our interpretation of tradition is correct?

While other questions could be added here, I think these are substantial enough to ask whether or not Scalia’s interpretive philosophy is truly as fundamental as he would have one think? It seems to this author that without an argument championing the general intentionalism in meaning determination that underlies his philosophy, he does not have
an interpretive leg to stand on. The call to tradition as Rossum notes appears to bring more troubles than solutions. The only way to consider traditions in an interpretation is to choose which part of tradition one wants to follow as a tool for interpreting meaning. This determination will surely require a philosophical judgment that Scalia desperately hopes to reject from all interpretation. I think it is more likely that interpretation without such determinations is simply impossible – it is just not how we interpret meaning in human experience. If he does not see this in the act of supposedly recovering meaning from the text alone, he should in encountering tradition. Unfortunately, Scalia’s own interpretive horizon prevents him from acknowledging the existence of others. At least that is, others than can come to an understanding of meaning of the text. To Scalia, if one does not fuse her horizon with the meaning of the text, his perceived meaning, or one does not fuse her horizon with the tradition that determines Constitutional meaning, his perceived tradition, then she is simply wrong about meaning. It appears that he just cannot understand meaning that is not identical to his specific fusion of horizons in interpretation.34 And this apparently strengthens his resolve that his and only his approach is the correct one.

At this point, I want to recall the experiential metaphor from Chapter 2 of driving to Chicago from Peoria and doing so from Milwaukee – one “comes to” an understanding” of driving to Chicago either way. However, because one begins from a different point, the meaning of the experience inevitably is quite different for the two drivers. That does not mean that Chicago itself is any different in the two drives. It just

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34 This realization prompts me to wonder whether Scalia thinks other texts are similarly rigid. In reading interviews and speeches made, my intuition is that he would have to think Hamlet as having one meaning, that of Shakespeare’s intention or what one would have understood the words to mean at that time. The notion that we contribute to meaning through the interpretive act simply does not occur to him.
means that different approaches produce different experiences. Also, it is not the case that one experience is true and the other false. Instead, the different drives are different perspectives whose distinction is explained precisely by the difference in approach created by the distinct locales from which the drivers begin. Applying the metaphor to Scalia’s approach, his commitment to a certain form of democracy (rigid separation of governmental powers with no law making power to the Court\textsuperscript{35}), his disdain for common law readings of civil statutes\textsuperscript{36}, his desire for clear lines in statutory construction\textsuperscript{37}, and the desired ideal of objectivity in interpretation, one can see that his “drive” to constitutional meaning is colored by his perspectival approach to his destination and further, that his assumption that these elements are necessary for valid Constitutional interpretation is akin to claiming that there is and can be only one true drive to Chicago.

An anticipated response to my claim about the perspectival or horizon situated nature of interpretation is that we simply must pick one as being the best, most accurate, most valid, etc., if we are going to go on with the business of the day. While this response seems true – we must call one interpretation (“drive”) or the other the official meaning of the Constitution (Chicago) in order to get on with life – the fact that we have to choose one and that such a choice will require a value judgment of some kind should not make us afraid that suddenly all objectivity has been lost. Regardless of which we decide upon, we are still connected to the Constitution/Chicago and in the case of interpretation at the

\textsuperscript{35} Scalia, \textit{Matter of Interpretation}, 9-12. Compare this to Amar’s originalist contention (in \textit{America’s Constitution}) that our democracy allows regular citizens to change the Constitution if enough of them decide to do so outside the governmental framework developed within the text of the Constitution. Both claim to be originalists committed to democracy – why don’t they both agree? Answer: because they come to Chicago from different directions. To his credit, Scalia admits that there will be disagreement about particular meaning even among originalists. But, he claims they have a better chance of working out these differences out than do those who focus on ideas other than the original meaning of the text.

\textsuperscript{36} Scalia, \textit{Matter of Interpretation}, 12-14.

\textsuperscript{37} ibid., 40-41, 44-47.
Supreme Court, we must cultivate agreement about this drive meaning/drive amongst nine very talented adjudicators who were selected democratically by the citizens of our country. In reading Scalia’s concerns in allowing “judges [to] substitute their beliefs for society’s”\(^{38}\), it seems to this writer that Scalia has substituted his own views and fears in place of a) the framers who required judges to be appointed by elected officials from the legislative branch, and also b) those legislators who placed their faith in an evolving body of highly qualified judges to adjudicate these matters together. To require that all judges approve of his assumptions and approach in order to make a valid interpretation might seem to some to call into question the very process set up by the democracy that he purports to uphold.\(^{39}\) Admittedly, this charge is minor in comparison to the general misunderstanding that there is more than one way to “drive” to meaning in interpretation and it is a discussion about the values of differing starting points that is the focus of coming to agreement in interpreting controversial texts. Enter problematized horizons from Gadamer.

With the problematized distinction, we are allowed to see what is transparent in otherwise “easy” interpretive events. We can ascertain that important differences in starting points are going to yield different interpretive events and subsequent meanings. Rather than require that one or the other of many differing starting points be the only true or valid one for all interpretations, instead we take one step back and evaluate the particular commitments given the particular matter at hand.

\(^{38}\) Rossum, *Antonin Scalia’s Jurisprudence*, 27.

\(^{39}\) One might argue that some legislators’ outrage over the “unsatisfactory” opinions of judges they voted to confirm also serves to undermine the very notion of majoritarian democracy Scalia and those who agree with him about interpretative philosophy claim to tout with their judicial interpretations. I am thinking here of Senator Sam Brownback, et al., who call for legal action to impeach certain judges whose opinions they dislike.
Stepping back from the overall conversation and speaking very candidly, it appears to this author that the development of originalist theories of interpretation over the course of the 1980’s and into the present day is motivated primarily by those who show a concern that judges may make law of which they do not approve with their decisions and thus they seek an apparently objective method for interpretation that prevents this as much as possible. There is an implied fear, that judges will insert their own views if an explicit standard for interpretation is not set. I believe this last claim is a false dichotomy and should be seen as such. There have been over 200 years of Constitutional interpretation leading up to the present day, the vast majority of which Justice Scalia has no qualms with. And at no time during this period did we have to adopt the view of originalism, as it is vaguely understood here, as necessary in order to keep judgments from being arbitrary. Further, in conjunction with the first conjecture, it is more likely that the Justice instead is worried that some interpretations will be allowed to include readings that are conceptually at odds with his and others’ ideological views rather than that all interpretations are up for grabs without originalism. Even those who disagree with Scalia’s apparent ideological views seem in places to adopt originalism for similar reasons and fears. If one does not adopt a method, then another group can potentially interpret the Constitution differently in substance than we would have them do so. The answer for these thinkers: define originalism in a way that guarantees that most of

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40 I could add that an ideological disagreement over substantive political issues between the central players on the originalist side and those whose opinions expanded personal rights and curtailed the authority of the state is also operative.

the subsequent interpretations align with your background views about the nature of society and government. This occurs on both sides of the contemporary originalism debate and appears to me to be accurately described by the problematized horizon distinction that illustrates how theorists with different starting points can both agree and disagree about the nature of interpretation without being inconsistent. It can also explain how those with divergent theories of interpretation can sometimes come to an agreement about the meaning of a text – in these cases the most substantial background assumptions required to engage the text are identical (or nearly so) and thus their interpretive horizon is non-problematized.

Is v. Ought

At the heart of the issue in discussing the rejection of originalist interpretation of the constitution is a philosophical debate between is and ought. On the one side we have philosophical hermeneutics and its description of the interpretive act and the understanding that results from interpretation. On the other, we have prescriptive normative standards of interpretation such as originalist legal hermeneutics which prescribe certain methods or outlooks for our interpretations. As in other philosophical endeavors, the divergent goals of these two types of inquiries places them already at odds with one another. Yet, I would argue here that the descriptive account of interpretation should be primary and that prescriptions to follow must do so only in remaining consistent with what we can be seen to be doing in all interpretations. As Gadamer states in the second introduction to *Truth and Method*, he desires to uncover not we do or ought to do, but what happens to us over and above this is and ought.
Next, both originalist and non-originalist positions at times seem to accuse defenders of the other position of being too one sided in their approach, i.e., some originalists claim that non-originalists require one to throw out completely the meanings written into the constitution by its authors and conversely, some non-originalists claim that on an originalist account, no new understanding of the meaning of the constitution is valid unless is can be found explicitly in the constitution itself. In these extreme moments, neither position can be valid on Gadamer’s account. The fusion of horizons which accompanies all interpretive acts (even those where the interpreter and author share a horizon – non-problematized interpretation) is just that – a merging of both the horizon of the text and that of the interpreter.

Now what horizon means is very important here. Horizon is not just the words/symbols/stuff of an artifact to be interpreted. Nor is it merely the particular interpreter’s thoughts about his or her own experiences. It is these things as well as their respective historical context where I mean by this term, the elements of social and cultural practice that give rise to and sustain the meaning of their parts. For the artifact, it is the historical understanding of these elements within the framework of particular historical events/experiences. For the interpreter, it is the same, but obviously, from a different historical frame. Now, authors like Justice Scalia protest here that such “requirements” for interpretation are too high. Indeed, it is difficult enough to discern the horizon of the constitution itself and this task is often times not adequately fulfilled. What such authors like Scalia do not understand and/or accept is that such discerning only occurs from the horizon of the interpreter which itself is always operative. We cannot get away from this fusion even if we wanted to. All interpretation, even interpretation where
the historical horizons seem to be identical, remains a fusion of two elements together as one understanding.

I think Gadamer legitimately asks here: How could it be otherwise? From which other position might we inquire or interpret? From my perspective, Scalia and those like him, appear to suppose the position of what John Dewey in criticism has aptly named ‘the God’s eye view’. Such a position he claims has caused great difficulties in the tradition of philosophy and by my light appears to do the same in the field of legal theory. The desire for certainty is so alluring and the assumption that any one position from which to survey reality is the right is so tempting. Yet, if we find that it simply does not appear that such a position is possible, none of our wishings or pleadings will make it so. Just because I recognize how much simpler certain tasks would be if I were to fly through the air by my own power, this does not mean that I can be expected to actually accomplish this feat. There are many skills or accomplishments that human kind has recognized as desirable throughout the course of its history that nevertheless have been abandoned as possible given our particular attributes and experiences. That certain inquiries, i.e., all interpretive ones, would be limited by historical perspective and not knowable from some outside position is no different.

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42 See John Dewey, *The Quest for Certainty*. 
CHAPTER FOUR

GADAMER, DWORKIN, AND THE PROSPECTS FOR LEGAL HERMENEUTICS

In this final chapter of the project I hope to bring together the discussion of philosophical hermeneutics and that of legal interpretation developed thus far. In doing so, I will consider Gadamer’s specific discussions of legal hermeneutics, a field of interpretation he describes as “exemplary” of the nature of interpretation itself. Next, I consider briefly the legal interpretive philosophy of Ronald Dworkin, showing his affinities with Gadamer as well as his differences. I conclude the chapter and the project with discussion of the directions that I feel legal interpretation must move in order to adequately acknowledge the hermeneutic reality described by Gadamer.

I begin this final chapter with a discussion of Gadamer’s explicit comments on the nature of legal interpretation itself. A review of his comments in *Truth and Method* on our topic will further confirm the account of interpretation described thus far in this dissertation project as well as the claims made about the illegitimacy of legal originalism as a method of interpreting legal texts. In the background of his discussion of legal hermeneutics is the goal of bridging an apparent gap between what Gadamer calls *dogmatic* and *historical* reflection. The former task, exemplified by legal understanding, is perceived as an application of interpreted meaning to present events. This activity is contrasted to thinking that is perceived as pure interpretation of historical meaning with
no thought of application of this meaning to contemporary issues. Historical reflection is exemplified for Gadamer by contemporary theological inquiry. What one is supposed to glean from the juxtaposition here of legal and theological hermeneutics is that while such inquiries were previously viewed as separate types of interpretive activities – application of meaning and interpretation of it – given Gadamer’s description of interpretation, the two are not in fact distinct at all. For understanding a text is always already application of one’s own historically effected situation to the horizon of the text via the interpretive event. On Gadamer’s account, the separated goals of interpreting meaning and applying meaning are different aspects of the same activity – one cannot do the former without applying it to one’s own situation because interpretation simply is the fusion of one’s own horizon with that of the text. For theology and other inquiries one might be inclined to describe as purely historical tasks, this means that one is required to acknowledge the activity of historically effected consciousness that brings about an understanding of an historical text.

For legal hermeneutics itself, the task of the jurist and of the legal historian have been described by hermeneuticists before Gadamer as separate tasks – one applied and the other expository. In his description of the field of legal interpretation in general, Gadamer once again denies a rigid separation of the applied activated versus the historical one. He states, “In my view it would not be enough to say that the task of the historian was simply to “reconstruct the original meaning of the legal formula” and that of the jurist to “harmonize that meaning with the present living actuality.’’’1 Why does Gadamer claim this? Because both jurist and theorist must harmonize their present

historical horizon, i.e., apply it, to the horizon of the legal text in order to determine its meaning or apply its meaning to a present legal situation at all. Gadamer continues,

“The hermeneutical situation of both the historian and the jurist seems to me to be the same in that, when faced with any text, we have an immediate expectation of meaning. There can be no such thing as direct access to the historical object that would objectively reveal its historical value. The historian has to undertake the same reflection as the jurist.”

There is much claimed in this brief passage. First, Gadamer secures his claim that while the apparent goal of a jurist and a historian appear to be different, both bring a historically situated expectation to the activity that make them similar in kind. Their expectation of meaning is necessarily one rooted in their own historical situated horizon, i.e., the tradition and the historically effected consciousness through which this tradition reaches out to the past. Additionally, that there can be “no direct access to the historical object” denies in the most basic way the originalist requirement for valid legal interpretation – a rehearsal of a text’s originally intended or understood meaning. Here, Gadamer clearly denies the possibility of access to such meaning particularly with respect to legal interpretation. Joel Weinsheimer notes this too in his work on Gadamer’s legal hermeneutics. Given the perspectival nature of interpretive experience, we must bring our present meanings to our activity of interpretation of the past. Just as a

\[\text{\footnotesize ibid, 327.}\]
painter must have a canvas upon which to orchestrate the interweaving of color and texture, an interpreter must begin with a web of understood meanings within which to weave and interpretation of historical texts. Weinsheimer claims,

“There is absolutely no way to understand the difference between the past and the present that does not presume an understanding of the present from which the past is to be differentiated. There is no understanding whatsoever of the original meaning of a law in itself.”

Again, one should grasp that the hermeneutic position on original meaning is that it is not an object of interpretive experience. Meaning is always a mediated product of historical horizons.

I think it is important here to acknowledge that there is in fact original or authorial meaning of a text. The meaning of any text or utterance at the time of its origination is meaning that is interpreted at that historical moment in time by an interpreter or group. However, that this meaning once existed does not mean that this specific meaning is necessarily the exact object of our interpretive experience. It is toward the horizon of that text that we aim. But it is not that specific object which we hope to uncover with our activity. As has been made clear, legal originalists do in fact have this very object as a goal of interpretation. Like a pearl located in the clamshell at the bottom of a murky historical ocean, originalists seek to uncover this treasured object with their interpretive act as if the jewel even existed independently of their activity of “uncovering” it.

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3 Weinsheimer, Gadamer’s Hermeneutics, 193.
Gadamer does not deny the existence of the pearl of original meaning. Instead, he denies that we have access to that specific treasure. The product of our interpretations will be just that – the product of our historically effected consciousness with the horizon of the text.

Given the explicit comments described above, it should be transparent how Gadamer would respond to the proponents of legal originalism. But perhaps a brief hypothetical conversation would be illustrative. In *Matter of Interpretation*, Scalia claims, “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, and not what the original draftsman intended.”

Scalia’s central arguments against original intent are based primarily on that theory’s inconsistency with legal interpretation in practice. Primarily, he challenges whether or not one truly considers the subjective intentions of legislators rather than the plain meaning of the text as written in the interpretation of statutes. Instead, Scalia prefers the original plain meaning of the text as written and claims repeatedly that the most reasonable original understanding of the text is authoritative of meaning. How might Gadamer respond given the comments listed above? I think it is clear that he would contest that the original meaning of a text is only grasped in any form via the historical horizon of the present. Scalia complains repeatedly that proponents of a living constitution offer no formal criterion for determining how one should go about interpreting the constitution as an evolving set of principles. However, his requirement that such a formal criterion exists seems to blind him to the fact that all historical interpretation involves the imposition of present values and received tradition on a

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particular text. Scalia simply assumes what Gadamer explains is not possible – direct access to the original meaning of the text in question.

Further in the text Scalia claims the following: “Sometimes (though not very often) there will be disagreement regarding the original meaning; and sometimes there will be disagreement as to how that original meaning applies to new and unforeseen phenomena.” Does that sound familiar? The distinction between interpretation and application is what Gadamer explicitly denies in his discussion of legal hermeneutics. It was a traditional view of interpretation developed within the historical sciences that there are those activities that are interpretive and those that are applicative. Philosophical hermeneutics sought to clarify, among other things, that such a view of the nature of interpretation is not actual. When we interpret law, scripture, or literature we necessarily apply the meaning derived to our present context within the activity of interpretation itself. We cannot understand the meaning of the text without applying our historically effected meanings to the text. Thus, Scalia’s claim that there can be separate disagreement about the interpretation and its application involves a misunderstanding of the nature of the activity itself. Perhaps more importantly here, in order to explain how someone could be deceived about this situation as distinct operations requires only a nod to a historically effected tradition which supports this view and brings its assumption to all interpretations. 

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5 ibid, 45.
6 As an aside here, I cannot help but wonder how interesting this actual conversation would have been had it ever taken place. Both men exemplify the highest of theoretical abilities and I think only someone of such accomplished intellectual and verbal abilities as a Gadamer would be able to “debate” a Scalia and convince him of anything with regard to this issue. Let’s just say that Scalia’s horizon on his originalism is quite concretized.
Dworkin’s Legal Hermeneutics

In describing the nature of law and how it operates in practice, Ronald Dworkin commits himself to a picture of the activity of legal interpretation and adjudication most consistent with Gadamer’s philosophical hermeneutics. The picture presented is called “law as integrity” and touted as a description of what judges in fact do, explains that the legal activity is an enterprise governed by an overarching principle of maintaining a coherent notion of justice and fairness via the interpretation and application of legal rules to particular instances. In Law’s Empire, he states, “The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice as fairness.” This claim distinguishes his view clearly from originalists who would deny that “expressing a coherent conception of justice” is a goal of judicial activity. It is consistent with Gadamer’s view in that 1) it does not require a rehearsal of original meaning or intent for an interpretation to be correct, and 2) it allows for the merging of present understanding with historical understanding in interpretation. Dworkin makes both of these similarities explicit when he claims,

“Law as integrity, then begins, in the present and pursues the past only so far as and in the way its contemporary focus dictates. It does not aim to

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7 Dworkin notes his respect for Gadamer explicitly when he claims the following in his response to Scalia in Matter of Interpretation, “Justice Scalia has managed to give two lectures about meaning with no reference to Derrida or Gadamer or even the hermeneutic circle.” While he chidingly congratulates him for the feat of describing interpretation without reference to these theorists, the implication is that Scalia’s account is deficient at least in ways that could be remedied with some reflection upon them is clear.

8 Dworkin, Law’s Empire, 225.
recapture, even for present law, the ideals or practical purposes of the politicians who first created it. It aims rather to justify what they did…in an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to provide an honorable future.\(^9\)

Notice, Dworkin makes explicit the claim that the horizon of the present dictates the direction of interpretation and not the other way around as is claimed by originalists. Furthermore, far from merely recapturing original meaning, he goes much further and claims that even the overall purposes of those who created a law are not the aim of interpretation. Instead, interpretation has as its focus the making relevant of past interpreted meanings to present and future interpreters.

The notion of justifying or making relevant today what was meant by merging the meanings of the present with the text of the past is as clear a statement of difference with originalism and interpretive theories like it as Dworkin can make. For here he clearly acknowledges not only the presence of contemporary meanings in the interpretation of the past. But also, he makes explicit the role of these meanings in moving forward a continuing story of meaning that brings the past into the future. Dworkin’s notion of legal interpretation as the progression of a continual chain novel is an illustrative example for the legal paradigm to that of Gadamer’s historically effected consciousness.

Gregory Leyh, in his essay “Dworkin’s Hermeneutics,” acknowledges similar features of Dworkin’s view that align with Gadamer’s project. He highlights four

\(^9\) ibid., 228-29.
significant parallels between the two theories. First is the necessity of prejudice and tradition in the determination of meaning for both thinkers. Dworkin’s recognition in Chapter 2 of *Law’s Empire* that any theory of law must “identify and defend the antecedent conditions from which any jurisprudence is derived”\(^\text{10}\) is analogous to Gadamer’s recognition of and call to legitimate the workings of tradition and prejudice in interpretation. Both thinkers recognize the necessary activity of prejudgments in interpretation and recognize that a theory of interpretive activity is not complete without acknowledgment of this feature of the experience.

Second, the background conditions of interpretation are not fixed or determinate objects for both thinkers. While one may attempt to take a snapshot of a horizon in the particular moment of interpretation, neither the past nor present is closed for future interpretive events. Neither is limited by the present interpretive event. Just as past Supreme Court decisions may be re-appropriated in a different light by future interpretations, Gadamer notes that the horizons of understanding today may be viewed differently tomorrow. Historically effected consciousness is a constant work in progress. Thus, what is understood today as correct interpretation and understanding of an historical horizon may tomorrow be updated as it is appropriated in different ways by a different historical horizon.

Third, the present horizon necessarily influences the “reconstruction of the past” in both theories. One cannot have a particular fusion of historical horizons and maintain the past horizon free of present understandings and goals. If this were possible, then the intentionalists and originalists would have a plausible claim regarding how one should

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\(^{10}\) Leyh, “Dworkin’s Hermeneutics,” 858.
interpret texts. Dworkin’s recognition of this feature of interpretation is evidenced by his chain novel analogy for legal interpretation in which present interpretations of legal doctrine act as chapters in an ongoing legal “novel.” This novel is one produced by multiple authors (the parallel being a continuous series of fusions of horizon with the past entries) written continually from a present but always taking into account the claims made in past chapters so as to produce a coherent work that incorporates present understandings with the developing legal work as a whole. Present construction in law assumes a hermeneutic circle of completion with the other entries in the “novel” in a similar way that all interpretations for Gadamer assume such completion when understanding occurs in general. Leyh notes once more that, “[t]his example reveals that Dworkin regards legal interpretation as much more than assimilation or simple recovery of the past”\(^{11}\) It is a productive activity that fits within a framework of an ongoing whole.

Last, Dworkin’s judge Hermes’ failure to see that meaning in law is not a “determinate object fixed somewhere in the past”\(^{12}\) in the same manner that intentionalists and originalists do in their interpretations, is a final direct parallel to Gadamer’s hermeneutics. Try as he may, this fictional judge determined to uncover the speaker’s original meaning in interpreting the law finds the same difficulties noted above in the previous chapter of the present work. These endeavors inevitably carry with them judgments from the present about the determination of the interpreted meaning of the past. Once Hermes discovers that he cannot interpret free of his own traditionally motivated judgments, he is forced to look to theories that take these judgments into

\(^{11}\) ibid., 862.

\(^{12}\) ibid., 864.
account as a necessity of interpretation itself. Thus he is led back to law as integrity or a theory of legal interpretation that appears consistent with Gadamerian hermeneutics.

While Dworkin’s theory appears to be the most consistent with Gadamer’s hermeneutics as noted by several sources, there are specific differences between the two. The most notable of these occurs as a result of Dworkin’s “one right answer” thesis. In explicating how law as integrity would work in an ideal situation, Dworkin introduces his fictional judge, Hercules as an illustration of how a judge could come up with a correct interpretation on the law as integrity model. In this hypothetical situation, Hercules has all the time necessary to look at all relevant political, social and legal evidence and thus the idea is that given enough time, he would come to the one right answer about the matter at hand. He could give the best interpretive answer to the current legal question at issue. That one could give such an answer from a single, particular historical perspective or horizon is not denied by Gadamer. What is denied is that only one historical understanding can make sense of or understand the text correctly. Dworkin’s one right answer thesis implies this is the case and thus differs significantly from Gadamer at least at a theoretical level. David C. Hoy notes this when he claims, “Contrary to Dworkin, I think that an interpretation that identified principles that were deeply disharmonious could count as an interpretation. Dworkin’s view seems similar to entail that such an interpretation would be incomplete until it went on to explain how to reconcile the competing factors.”

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13 I qualify this as a highly theoretical difference because Dworkin’s Hercules is a purely hypothetical example not realized by any judge in reality. Dworkin’s comments about what occurs in judicial decisions remains consistent with Gadamer in practice if not completely in theory.

The central difference here between Gadamer and Dworkin on this issue is that
this is an epistemic discussion about interpretation. In response to the skeptic that
interpretive knowledge is not possible on his view of legal interpretation, Dworkin
effectively gives an account of how truth is possible – given adequate time, any
competent adjudicator could come to the one right answer that incorporates the correct
fusion of contemporary understanding and historical background and it is this answer
toward which a regular judge should strive. Gadamer, in contrast, does not give an
epistemic theory or criterion of what constitutes truth in interpretative acts but instead
describes merely the activity of interpretation and how understanding occurs when it
occurs. Understanding occurs in many varied ways regardless of whether skeptics doubt
that a particular theory of interpretation allows for there to be a correct answer.

A more specific difference here is that given his infinite amount of time for
adjudication, presumably Hercules might correct a previous interpretation, invalidating
the previous interpretation as erroneous in way that Gadamer would not. An
interpretation that diverges greatly in its fusion of horizons from another or a future
fusion would not be considered incorrect given its different understanding of an historical
text from a particular historically effected perspective. Now this is not to say that one
cannot make a mistake in interpreting a text. Someone who shares a particular historical
horizon, i.e., one whose horizon is non-problematized with another interpreter may very
well discuss the most warranted fusion of their horizon with a text fruitfully. However,
that one tradition and resultant fusion will be favored as the one correct answer is not
consistent with Gadamer’s general conception of understanding as any consistent fusion
of historical horizon with a text. Because Dworkin’s theory flirts here with an
epistemological claim about the nature of true interpretations, his account of legal
interpretation diverges from Gadamer’s. However, this general difference remains a
highly theoretical one, and as I return to below, the similarities in the described practice
of interpretation remain quite strong.

At this point, I want to recall briefly Barber and Fleming’s treatment of Dworkin
in their discussion of the possible approaches to Constitutional interpretation. For they
touted Dworkin’s philosophical approach as the most plausible of those discussed and
highlighted some of the very same themes as Leyh does without explicitly recognizing
the connections to Gadamer’s hermeneutics. Central to their illustration of Dworkin’s
theory is his recognition of documents such as the Constitution setting out general
principles for later interpreters to incorporate their own substantive meanings. Rather
than setting out specific conceptions of ideas like “due process” and “equal protection,"
the Constitution outlines general concepts within which a particular subsequent culture
can fuse with its own historical commitments, i.e. its interpretive horizon, in order to
produce the substantive meaning or conception of the general concept. Barber and
Fleming note Dworkin’s example of a father instructing his children to be fair to others as
an illustration of this type of general instruction that would require specific interpretation
in the future.¹⁵ Just as one cannot describe all the specific ways in which one should be
fair to others, this general prescription to one’s children sets the principle as basic for
their actions with the implied hope that they will insert appropriate specific conceptions
of fairness in future contexts in a similar way that the Constitution instructs us to follow

¹⁵ Dworkin, Taking Rights Seriously, 134.
certain general guidelines the specific conceptions of which must be inserted as the context for determining them present themselves in the future.

Furthermore, while a father surely instructs his children to treat others with fairness in order to teach them the general concepts that will help them prosper as adults rather than merely assert the authority of his own personal conception of fairness upon them, the Constitution asserts to us broad concepts not as an assertion of its authority to tell us what to do specifically, but as a suggestion of the means to the general goal of prosperity and freedom described within the texture of its words. To be sure, we are bound by the authority of these general concepts. However, just as a prudent father would not assume that he could enumerate all the potential conceptions of fairness one might need to know for future encounters in the world, the Constitution does not list for us an exhaustive enumeration of all rights authorized by the ideas contained in the text.¹⁶

A conclusion one like Dworkin takes from this illustration is that a good Constitution, like a good father, is one in which the specific conceptions of some of its prescribed principles are necessarily open-ended so as to make room for conceptions that fall under their command but that could not be expressed explicitly at the time of original transmission. The implied claim here is that the bad father or Constitution would be one whose claims are made more as an assertion of the authority of their conceptions – that the purpose of commanding is the assertion of and recognition of determinate authority by those who stand in such a position. Furthermore, one who views this kind of authority as a positive or necessary feature of a figurehead or founding document, will obviously

¹⁶ In fact, one of the central debates at the time of its drafting was whether or not it would be fruitful to add a Bill of Rights given the possibility that doing so might potentially limit future generations from affirming rights not contained specifically within their text.
look for this in their respective interpretations of situations. If preservation of this authority is a central assumption for an interpreter going into the activity of interpretation, then this will influence the outcome of that interpretation regardless of whether one realizes that it is operative. Further, even if rehearsal of the substance of this authority cannot be rehearsed, as has been shown to be the case with intentionalist and originalist perspectives of textual meaning, this fact will not prevent one from attempting a fusion of this historical horizon with that of a historical text, nor will it prevent one from producing meaning with that activity. The negative impact of not understanding the activity of one’s interpretive tradition in interpretation is that one is inclined to view divergent meanings as simply incorrect or erroneously derived rather than the result of a problematized fusion of horizons. Misunderstanding the nature of interpretation leads one to misjudge the appropriate focus of criticism for divergent interpretations. Rather than being able to confront the disagreement between interpretations that is not only a necessary feature of the activity itself, it is a tool for self-understanding, one is stuck making arguments that bark up the wrong tree. Rather than recognizing the need to justify one’s background assumptions that go into an interpretation, one unconsciously assumes those as true for all historical perspectives and thus misses the opportunity to come to agreement with others on important interpretive matters. As we note below, an interpretive perspective that short circuits the discussion of historical horizon and ultimately human self understanding itself, is one that we cannot afford to remain unchecked. The efficacy of our future interpretive collaborations on important social and political issues as well as our the overall understanding of our relation to each other and history hangs in the balance.
Barber and Fleming’s philosophic approach (or abstract originalism as noted in Chapter 2) is one that is consistent with Dworkin’s legal interpretive theory. But as I contend in this Chapter, in its most basic terms, it is also consistent with Gadamer’s philosophical hermeneutics. The description of legal interpretation as an inevitable fusion of legal history and moral judgment is akin to Gadamer’s claim that interpretation always occurs, not as a reconstruction of past meaning, but as a fusion of interpretive horizons that produces a meaning for the present. While each of the originalist legal theories described in Chapter 2 attempt in their own respective ways to deny the legitimacy of interpreter perspective in an interpretation, both Gadamer and Dworkin contend that the interaction of the present with the past is not only necessary for interpretation. But that even those theories that deny the legitimacy of such fusion, necessarily incorporate this very element in their own interpretations regardless of whether they recognize it or not. A common theme that emerges for both thinkers is the implied normative claim that it is better to understand how meaning is determined than not. If there is something to be gained by understanding more clearly how meaning is determined in interpretation, then one ought to attempt to gain such understanding.

Conclusions for Contemporary Legal Theory

In conclusion of this chapter and the project as a whole, I outline a general picture for a legal hermeneutics that incorporates the findings of the previous chapters and focuses specifically on how we should go forward with the knowledge proposed thus far. First, we must recognize originalist theories of meaning and those like them as what they are – a particular historical perspective filled with assumptions about the nature of human
experience and goals for it not unlike any other in the most general sense. While it cannot produce what it claims to offer, i.e., the “correct” meaning of an historical text, as shown by the argument against originalism, it is a historical perspective nonetheless and must be accepted as such. Given his specific commitments, an originalist interpreter will find meaning in historical texts that fuse consistently with these commitments just as another would from a different perspective. However, the self-deception in what is being accomplished as well as the loss of opportunity at self-understanding that occurs when interpreting from this perspective makes it clearly less desirable as a viable interpretive theory than one which is hermeneutically aware. One of the central goals of this work was to offer reasons to move away from originalisms and in future legal interpretive theories, this should be a primary move for us in general.

Second, we must take to heart what theorists such as Lehy, Hoy, Barber and Fleming, Dworkin and Gadamer claim about our interpretations that there is an implicit normative claim that lies beneath understanding how we interpret. Specifically, it is a productive good for understanding meaning in the world that we understand how we come to understand. If we attempt to deny elements of our historical being that will be operative in interpretations whether we acknowledge them or not, then a significant loss occurs and one can argue that an interpretation that does not acknowledge this is less aware or understands the situation interpreted with less clarity. This is as close to an epistemic claim that one can mine out of Gadamerian hermeneutics and those that espouse it generally. For all consistently fused horizons have legitimacy on some general level. However, if there is virtue in self understanding and in the fruit of the interpretation
that utilizes it, then it remains an implied claim that some interpretations would be more preferred or better than others.

What does this mean for legal interpretation? It means that we can both affirm the legitimacy of an originalist interpretative claim in the sense that it fuses an historical horizon of understanding with a text or event, and we can deny that this is the best interpretation that can be made because it does not do so with a complete awareness of how this interpretation occurs. If self awareness is a possible outcome of a fusion of horizons and this is realized by some but not all fusions, then one can legitimately say that interpretations that promote this awareness are in a very real sense better than those which do not. Therefore, we can move from a purely descriptive legal theory to a normative one, at least on a very broad level. By affirming merely the claim that self awareness is a general virtue, we can assert that not all legal interpretations are equal. Some are more valuable than others by virtue of their ability to produce self awareness for those that knowingly interpret hermeneutically. This means that while originalist interpretations are legitimate in a general sense, their failure to maintain “hermeneutical integrity”¹⁷ as Leyh calls it, prevents them from arriving at the best product possible for the interpretive situation. Only one that also produces historical self-awareness can produce this result, i.e., only one that is also hermeneutically aware.

Third, we must welcome problematized horizons as opportunities for self-awareness rather than as undesired conflicts to be overcome or defeated as soon as possible. Following up on the last claim, once we recognize self-awareness as a virtue attainable in interpretation only by those that recognize the hermeneutic nature of

interpretation, then we can tout those types of legal interpretation and those horizons that incorporate hermeneutic awareness. After successfully criticizing the weaknesses of originalism, we are prepared to point to those theories that are most promising in determining the meaning of legal texts and situations. As Gadamer, Dworkin, Barber and Fleming, and the others we have cited conclude, these theories generally will be those that note awareness of the historical effect of tradition and prejudice on our interpretations and understanding. I add here that the best theory also would be served well by noting my proposed distinction of problematized and non-problematized events and would utilize the conflict of horizons operative in a problematized situation to further the historical understanding of a text in the most effective manner possible. But also, she would use general guidelines for working within these problematized situations with the goal of increasing self awareness. Again, the originalist must see these situations as hindrances to the transmission of meaning – the hermeneutically aware interpreter views them as opportunities.

Finally, we should adopt general guidelines for navigating problematized situations that produce consensus of meaning when possible and also that foster the realization of self understanding that these unique situations afford us interpretively. I rehearse the guidelines mentioned in Chapter 2 below with a now more specific focus on legal hermeneutics.

Accept the hermeneutic situation. As with all other interpretive experience, this acceptance is assumed as crucial to coming to the best possible fusion of horizons with legal texts and for an awareness of our historical consciousness that we bring to interpretations of legal matters. And again, purely historical analysis of legal issues is not
as affected by this guideline. One will or will not bring this acceptance to textual interpretation and the struggle to understand the text either will or will not move forward with such acknowledgement of one’s historical perspective. Yet, conversation with a contemporary speaker about a legal matter potentially could be much more complex on the issue of acceptance of the hermeneutic nature of interpretation. For, even if one makes the commitment to approach these conversations from a hermeneutically informed horizon, one’s interlocutor could choose not to do the same, i.e., she could be an originalist or use some other non-hermeneutic interpretive theory. Perhaps becoming clear on the interpretive perspective of one’s interlocutor is a worthy corollary to this guideline. While it will not bridge the gap in a problematized interpretive event, it will set the landscape for an important overall difference in horizon that may help merge the substantive difference in interpretation.

**Identify the substantive difference in interpretation.** Not surprisingly, for a problematized interpretive legal event, this guideline should be fairly easy to accomplish. If disputes over interpretation of statutes were considered the paradigm case, the explicit recognition and argument over a substantive difference in meaning between two or more parties just is the nature of a problematized interpretative legal event. Thus, identification of the substantive difference between problematized horizons is nearly impossible to miss for most interpretive matters. Party P disagrees with party Q over the particular meaning of legal rule Z as it applies to the particular situation. If the perceived problematized situation occurs in the individual interpretation of a historically distant legal statute, the substantive difference still should be fairly certain. One or a group of issues simply does not make sense to the interpreter given his historical horizon from which he makes his
interpretation. From this general awareness of the issue one is able to investigate the potential causes of the divergence.

**Investigate why one might see these as different**, i.e., investigate possible sources of difference in horizon or background assumptions. From this point forward, the guidelines must be much vaguer as the particular details of the remaining steps will depend greatly upon the particular situation. If the problematization is between two competing interpreters, then a discussion of the issues surrounding the substantive conception in question should be up for investigation. Any divergence in notions of these related concepts or issues would be a likely candidate for source of problematization. As for textual interpretation itself, it would seem that historical study might possibly yield results that explain a potential difference in concepts. However, the similarity of this approach to the general prescription of the originalist with respect to interpretation makes results based solely upon this strategy somewhat suspect. Perhaps an historical study of the difference in key notions between past and present horizons *without the added desideratum of rehearsal of historical meaning* would produce fruitful results at this stage.

**Agree upon the most likely source of difference in horizon and/or background assumptions.** For the interpretation of legal texts, there will not necessarily be a clear answer here, but as noted in Chapter 2 with the interpretation of texts in general, a cultural difference will certainly be a good place to start. For legal interpretation, while one does not typically spend a great deal of time interpreting texts foreign to one’s own culture, the passage of 50 years is sometimes more than enough time to make a historical legal culture somewhat foreign to a contemporary interpreter.
Recognition of this and the central features of that culture that seem demonstrably different are certainly excellent places to look for a difference that might problematize the interpretation.

As for competing interpretations of a single legal document, uncovering the operative background assumptions once again emanates from the particular substantive disagreement itself. If one cannot come to an agreement on the application of the Due Process clause to a particular criminal act, a thorough discussion of one’s central commitments in understanding both Due Process and the particular circumstance in question is an excellent place to start. From this vantage point, one should be able to ascertain where a divergence originates and move on to the next stage of overcoming problematization.

**Discuss critically the need for one or the other assumptions or sets of assumptions as pertains to the current interpretation.** Once either the historical difference or personal horizon difference is pinpointed, a discussion of which historical understanding or horizon assumptions must win the day is necessary. As with the general problematized discussion guidelines, once again I do not wish to propose a rubric for determining which concept should go forward. Nearly every interpretive legal situation would be different and thus require slightly different focus in weighing what would be important in determining the best notion for a consistent interpretation. Discussion of a particular Constitutional issue between Justices and a prosecutor’s deliberations on the meaning of a 100 year old statute would present uniquely different “conversations” on the sets of assumptions that should win the day. The main thing to recognize is that this step must occur in order to come to a decision about the meaning of the legal text or issue.
at hand and that some commitment over and above those discussed substantively will most likely determine the outcome, i.e., those discussing will agree upon a higher shared principle that the “winning” interpretation affirms best in its determination.

**Decide which interpretation must go forth** for the sake of answering the questions of interpretation and discussion of all relevant elements. How we determine which interpretation goes forward will depend greatly on 1) the type of legal interpretation involved, 2) the specific basic assumptions we choose from our competing traditions to win the day on the issue, and 3) how these consensus assumptions line up specifically with the legal issue at hand. Having no determinate rubric for navigating this crucial step does not deny its importance in moving beyond problematization. It merely illustrates that the further into these basic guidelines we move, the more abstract or hypothetical this exercise becomes mostly as a function of the diverse ways in which a legal issue may be problematized.

**If no consensus is possible, then agree to disagree** and offer both products as potential interpretive candidates with greater understanding of the nature of the possibilities and of the relevant issues for the particular problematized horizons. Perhaps others can adjudicate more decisively from a more developed historical horizon in the future. Or perhaps democracy can decide which is more correct if that is truly necessary. For legal issues, while often a decision will in fact be made, the general consensus of a larger group of observers may mirror this step. Courts may have to decide on an interpretation even if no consensus on the most suitable principles or assumptions that support it is possible at the moment. The public at large engaged in the particular interpretation will keep the issue open until such determinations and agreements can be
made. As I stated earlier, courts that might encounter potentially problematized interpretations are typically set up with three or more members so that consensus is assured. Even though a verdict of consensus may be required for the issue at hand, the question may remain open for court members and others who might follow the issues in their own thoughts until consensus on the best suited principles or traditional assumptions can be determined.

Conclusions

I have shown in this project that the intentionalist theory of meaning is not a correct notion of how we come to an understanding of texts and other human expressions. In doing so, I have touted philosophical hermeneutics not only as the correct picture of the nature of interpretation, but in the sense that there is a real awareness of the self and our position in the flow of historical being to be attained by perceiving ourselves as hermeneutic beings, I have also argued implicitly for such awareness in our interpretive endeavors. Furthermore, the recognition of two different types of interpretive events that occur for a hermeneutic account, non-problematized and problematized, aid further in our attempt to better understand human expression and ourselves as interpreters.

Additionally, by applying these results to the discussion of legal interpretation, I have shown the legal theory of originalism to be a flawed theory of interpretation. As with intentionalism, originalism’s reliance on a metaphysically impossible notion of meaning determination denies the possibility of interpretive understanding via hermeneutic experience and thus we should move away from it as a viable legal theory of interpretation.
Finally, I have tried to end this section with a further explication of what a legal hermeneutic might look like. Such a hermeneutic steers between the theories of interpretation described by Gadamer and Dworkin and the very general moral claim that one ought to know how one interprets. This prescribed understanding enhances both one’s interpretations and one’s self understanding.
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Before his work at Purdue University, Ron Rowe received degrees in philosophy from the University of Alabama in Huntsville (BA-1999) and Baylor University (MA-2001). He has previously taught courses in philosophy at Purdue University and Ivy Tech Community College-Lafayette. In 2006, he began instructing online courses in the humanities for Kaplan University where he continues to teach today. Ron’s areas of specialization are hermeneutics and philosophy of law with areas of competency in ethics, American pragmatism, and 19th-20th century European philosophy.

In 2007, Ron was an intern at the Legal Aid Corporation of Tippecanoe Co. in Lafayette, IN and at the United States Department of State in Washington, DC. In August 2008, Ron will begin law school in Columbia, MO at the University of Missouri-Columbia School of Law where he will pursue a JD with a specialization in dispute resolution.